In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

VICTOR D. ARRIAGA,

Defendant and Appellant.

Case No. S199339

Second Appellate District, Division Two, Case No. B225443
Los Angeles County Superior Court, Case No. A537388
The Honorable Steven D. Blades, Judge

RESPONDENT'S REPLY BRIEF

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ARGUMENT

As set forth in the Opening Brief on the Merits, appellant's motion to withdraw his plea pursuant to Penal Code section 1016.5 directly challenged the validity of his plea, and as such, he needed to secure a certificate of probable cause in order to appeal pursuant to Penal Code section 1237.5. As a result, the Court of Appeal incorrectly found appellant was not required to secure a certificate, a decision that flies in the face of this Court's well-settled authority that the determinative factor under section 1237.5 is whether the challenge amounts in substance to a challenge to the plea, regardless when the motion was made.

In any event, the Court of Appeal correctly determined appellant's claim concerning application of an incorrect burden of proof was procedurally barred because he expressly agreed at trial that the People's burden to overcome the presumption that the advisements were not given was by a preponderance of the evidence. And on the merits, the Court of Appeal correctly determined that the appropriate standard was a preponderance of the evidence as it reflected the appropriate balancing of the defendant's interests and the public's interest in the finality of judgments resulting from guilty pleas. And the Court of Appeal correctly found that the People met this burden as there was substantial evidence that the advisements were in fact given, based on the clerk's transcript that reflected this, and the prosecutor's testimony that it was his longtime practice to always give these advisements.

Nevertheless, appellant argues a certificate of probable cause was not required because his motion was brought post-judgment, and that in any event, a certificate requirement should not be applied retroactively, and should not required because the record was prepared and counsel appointed. Appellant further argues: that the Court of Appeal incorrectly applied the preponderance of evidence standard to rebut the presumption that the

advisements were not given because of the importance of the right in question; that the appropriate burden is clear and convincing evidence because of the importance of the right at issue; that the People failed to meet the clear and convincing burden; and that appellant adequately demonstrated prejudice.

Appellant's arguments are all unavailing. Labeling the motion "post-judgment" does not remove it from the reach of section 1237.5, and the certificate requirement can and should be strictly and retroactively applied. Further, despite appellant's characterization of the right as too important to leave to a preponderance standard, that standard is dictated due to the countervailing important value of protecting final judgments, particularly resulting from plea agreements, from unending assaults. Moreover, the People met their burden, whether by preponderance of the evidence or by clear and convincing evidence, and appellant failed to demonstrate prejudice.

I. APPELLANT'S ATTEMPT TO CIRCUMVENT THE REQUIREMENTS OF PENAL CODE SECTION 1237.5 BY LABELING HIS APPEAL "POSTJUDGMENT" HAS BEEN, AND SHOULD BE, REJECTED

Appellant first argues in his Answer Brief that he did not need to obtain a certificate of probable cause because the statutory language of Penal Code section 1237.5 only applies to an appeal "from a judgment of conviction upon a plea of guilty or nolo contendere" and "not for appeals taken from [Penal Code] section 1016.5 denial orders." (Answer Brief at pp. 7-13.) Respondent's response is simple and precisely to the contrary: Any attempt to circumvent the requirements of Penal Code section 1237.5 by labeling his appeal "postjudgment" should be rejected by this Court.

Despite the literal language of Penal Code section 1237.5, it has been consistently construed as "intended to apply to a situation in which a

defendant claimed that his plea of guilty was invalid." (*People v. Ribero* (1971) 4 Cal.3d 55, 61.) "The determinative factor is when the claims upon which the motion was based arose and not when the motion to withdraw [the plea] was denied." (*People v. Kaanehe* (1977) 19 Cal.3d 1, 8 [certificate of probable cause was required to challenge the alleged failure of the trial court to warn the defendant of the effect of a guilty plea on his right of appeal and on the refusal of the trial court to grant a continuance as these "are clearly matters occurring before the entry of the plea and affecting the validity of the plea"].)

In *People v. Johnson* (2009) 47 Cal.4th 668 (*Johnson*), this Court held that a certificate of probable cause was required to appeal from a claim that the defendant was denied his right to the assistance of counsel at the hearing on his motion to withdraw his plea. In doing so, this Court again recognized what is now well-established: "A defendant must obtain a certificate of probable cause in order to appeal from the denial of a motion to withdraw a guilty plea, even though such a motion involves a proceeding that occurs after the guilty plea." (*Id.* at p. 679.) "Whether the appeal seeks a ruling by the appellate court that the guilty plea was invalid, or merely seeks an order for further proceedings aimed at obtaining a ruling by the trial court that the plea was invalid, the primary purpose of section 1237.5 is met by requiring a certificate of probable cause for an appeal whose purpose is, ultimately, to invalidate a plea of guilty or no contest." (*Id.* at p. 682.) "'If a defendant challenges the validity of his plea by way of a motion to withdraw the plea, he cannot avoid the requirements of section 1237.5 by labeling the denial of the motion as an error in a proceeding subsequent to the plea.' [Citation.] Likewise, a defendant should not be able to avoid the requirements of section 1237.5 and pursue a frivolous appeal by labeling counsel's conduct at the hearing as an error in a proceeding conducted subsequent to the plea." (*Ibid.*)

If a defendant could circumvent the requirements of Penal Code section 1237.5 merely by placing a different label on his or her motion, the purpose of section 1237.5 would be undermined. "[T]he crucial issue is what the defendant is challenging, not the time or manner in which the challenge is made." (*People v. Ribero*, *supra*, 4 Cal.3d at p. 63.) For example, appellate review of a denial of a motion to withdraw the plea requires compliance with Penal Code section 1237.5. The substance of the appeal is a challenge to the validity of the plea, even though appellate review rests on a record made after the entry of the plea. (*People v. Stubbs* (1998) 61 Cal.App.4th 243, 245; *People v. Manriquez* (1993) 18 Cal.App.4th 1167, 1170.)

An appeal from the denial of a section 1016.5 motion is a challenge to the validity of a plea of guilty or nolo contendere—it is ultimately an attempt to appeal from the denial of a motion to withdraw a plea. As this Court noted in *People v. Panizzon* (1996) 13 Cal.4th 68: "In determining whether section 1237.5 applies to a challenge of a sentence imposed after a plea of guilty or no contest, courts must look to the substance of the appeal: 'the crucial issue is what the defendant is challenging, not the time or manner in which the challenge is made.' [Citation.] Hence, the critical inquiry is whether a challenge to the sentence is in substance a challenge to the validity of the plea, thus rendering the appeal subject to the requirements of section 1237.5." (*Id.* at p. 76; see also *People v. French* (2008) 43 Cal.4th 36, 44; *People v. Buttram* (2003) 30 Cal.4th 773, 781.) "It has long been established that issues going to the validity of a plea require compliance with section 1237.5. [Citation.] Thus, for example, a certificate must be obtained when a defendant claims that a plea was induced by misrepresentations of a fundamental nature [citation] or that the plea was entered at a time when the defendant was mentally incompetent [citation]. Similarly, a certificate is required when a defendant claims that

warnings regarding the effect of a guilty plea on the right to appeal were inadequate. [Citation.]" (*Panizzon*, *supra*, 13 Cal.4th at p. 76; *Buttram*, *supra*, 30 Cal.4th at p. 781.) "[T]he primary purpose of section 1237.5 is met by requiring a certificate of probable cause for an appeal whose purpose is, ultimately, to invalidate a plea of guilty or no contest." (*Johnson*, *supra*, 47 Cal.4th at p. 682.)

This Court has found no indication that "the Legislature, when enacting section 1016.5, intended to depart from the normal rules . . . governing withdrawal of a plea for misadvisement regarding collateral consequences." (*People v. Superior Court (Zamudio)* (2000) 23 Cal.4th 183, 198.) The screening process of section 1237.5 is a "normal rule" governing challenges to a plea for nonadvisement error claims. And, as noted by this Court, section 1237.5 should be "applied in a strict manner," and "should *not* be applied in a relaxed one." (*People v. Mendez* (1999) 19 Cal.4th 1094, 1098, italics in original.) Further, "[b]ecause the special procedures applicable in the case of an appeal from a judgment of conviction following a plea of guilty or no contest are intended to promote judicial economy by screening out wholly frivolous appeals prior to the commitment of economic and legal resources to such matters [citations], such an appeal should be accorded *less* leniency than other appeals, rather than more, when we consider possible exemption from a procedural requirement. If the special procedures applicable to such an appeal are intended to promote finality of judgment, granting relief from procedural deadlines is even less appropriate in these cases." (*In re Chavez* (2003) 30 Cal.4th 643, 653-654, emphasis added.)

Under this Court's longstanding interpretation of Penal Code section 1237.5, the Court of Appeal in *People v. Rodriguez* (2012) ___ Cal.App.4th ___ [2012 WL 3573909], and *People v. Placencia* (2011) 194 Cal.App.4th 489, 492, 494, correctly held that a defendant is required to obtain a

certificate of probable cause in order to appeal from the denial of his motion to vacate the judgment. Because an appeal from the denial of a section 1016.5 motion is in fact a direct challenge to the validity of the plea, it falls within the requirements for obtaining a certificate of probable cause pursuant to Penal Code section 1237.5.

II. THE REQUIREMENT OF A CERTIFICATE OF PROBABLE CAUSE MAY BE RETROACTIVELY APPLIED

Appellant next argues that even if a certificate of probable cause was required to appeal, "this rule should operate prospectively only and not apply to appellant and others whose time to request a certificate had run when [*People v.*] *Placencia* [(2011) 194 Cal.App.4th 489] became final." (Answer Brief at pp. 14-16.)

Appellant cites *People v. Germany* (1974) 42 Cal.App.3d 414, 421, which cited the retroactivity criteria from *In re Tahl* (1969) 1 Cal.3d 122, 134, and which held that to determine whether a new rule of criminal procedure applies retroactively, a court looks to the purpose of the new rule, the extent of reliance upon the old rule, and the effect retroactive application would have upon the administration of justice. (Answer Brief at p. 14.)

First, as set forth above and in the Opening Brief on the Merits, to impose a requirement of a certificate of probable cause under the circumstances of the instant case is not a "new rule of criminal procedure," as it has long been held by this Court that whatever label a defendant may put on his or her motion, if it is a challenge to the validity of his or her plea, a certificate of probable cause is required. (See *Johnson*, *supra*, 47 Cal.4th at p. 682; *Panizzon*, *supra*, 13 Cal.4th at p. 76; *Buttram*, *supra*, 30 Cal.4th at p. 781.) Indeed, even in *People v. Totari* (2002) 28 Cal.4th 876—the case upon which the Court of Appeal and appellant used to support the

conclusion that no certificate was required—the defendant in fact sought and obtained a certificate of probable cause. (*Id.* at p. 880.)[1]

Second, appellant and other similarly situated defendants will not be harmed by the application of section 1237.5 to appeals from the denial of section 1016.5 motions. Section 1237.5 "concerns only the procedure for perfecting an appeal from a judgment based on a plea of guilty or nolo contendere; it does not limit the grounds upon which an appeal may be taken." (*People v. Placencia, supra*, 194 Cal.App.3d at p. 495.) "'Section 1237.5 does not limit the scope of review of the denial of a motion to withdraw a plea of guilty when that error is properly before the court on appeal. It merely sets forth a procedure for precluding frivolous appeals by requiring the defendant to set forth grounds for appeal and, if he does so, by requiring the trial court to rule on the issue of probable cause.' The trial court must issue the certificate if the defendant's statement under section 1237.5 presents 'any cognizable issue for appeal which is not clearly frivolous and vexatious. . . .' The defendant's statement need not list every potential issue; if the trial court issues the certificate based on even a single nonfrivolous claim, the defendant may raise all of his or her claims on appeal—those that require a certificate as well as those that do not—even if they were not identified in the statement filed with the trial court. If the trial court wrongfully refuses to issue a certificate, the defendant may seek a writ of mandate from the appellate court." (*People v. Johnson, supra*, 47 Cal.4th at p. 676, citations omitted.)

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[1] Appellant cites a number of unpublished opinions to support his assertion that prior to the opinion in *People v. Placencia, supra,* 194 Cal.App.4th 489, courts consistently held that no certificate of probable cause was required. (Answer Brief at p. 15, fn. 4.) Respondent does not address these unpublished opinions as citation to them is prohibited by rule 8.115(a) of the California Rules of Court.

Third and finally, appellant argues that the "evil sought to be avoided by section 1237.5" is the "the record preparation and appointment of counsel where the appeal turns out to be frivolous," and thus the Court should entertain the appeal despite the failure to obtain a certificate of probable cause because counsel has been appointed and the appellate record has been prepared. (Answer Brief at pp. 15-16.) However, as this Court has noted, "[e]ven when the record has mistakenly been prepared and briefs filed, the appellant should have no expectation that the inoperative appeal will be heard on its merits." (*People v. Jones* (1995) 10 Cal.4th 1102, 1108, fn. omitted, overruled on a different point by *In re Chavez, supra,* 30 Cal.4th at p. 656.)

III. THE BURDEN TO OVERCOME THE PRESUMPTION THAT IMMIGRATION ADVISEMENTS WERE NOT GIVEN IS A PREPONDERANCE OF THE EVIDENCE

Appellant argues the proper burden of proof is "clear and convincing evidence" to overcome the statutory presumption that a defendant was not advised of the immigration consequences of his plea pursuant to Penal Code section 1016.5. (Answer Brief at pp. 16-41.) Appellant suggests this higher burden of proof is required because of the importance of the right at issue—"to protect one party—the non-citizen defendant—from entering into a plea without being informed of what is to him probably the most important consequence of all, his ability to remain in the United States"—and that the protection of this right, and the "harshness of immigration law," outweighs the State's interest in the finality of pleas. (Answer Brief at pp. 19-20.) Appellant believes the clear and convincing burden of proof should be applied because the preponderance of evidence standard is "not difficult to meet." (Answer Brief at pp. 21-32.)

As noted in the Opening Brief on the Merits, despite the admitted value of this right to a noncitizen defendant, this Court has emphasized the

countervailing important value of preserving final judgments from unending assaults, even if some meritorious claims are turned away as a result. (*People v. Kim* (2009) 45 Cal.4th 1078, 1107.) In *Kim*, the defendant, a noncitizen for more than two decades, was subject to federal removal proceedings because of state felony convictions. (*Id.* at p. 1078.) The defendant thereafter filed in the trial court a "motion to vacate judgment (coram nobis)" and a "non-statutory motion and motion to vacate judgment." (*Id.* at p. 1089.) This Court in *Kim* declined the defendant's invitation to expand the writ of error coram nobis to include a claim that counsel was ineffective for failing to advise the defendant of the immigration consequences of his plea, rejecting the argument "that the interest in the finality of judgments predominates only if the judgment is just and error free," holding: "Endless litigation, in which nothing was ever finally determined, would be worse than occasional miscarriages of justice" (*ibid.*), and even when the lost remedy "'accrued without fault or negligence on his part'" (*id.* at p. 1099).

Likewise, this Court has recognized the countervailing and essential value of plea bargains. (*People v. Segura* (2008) 44 Cal.4th 921, 930; *In re Alvernaz* (1992) 2 Cal.4th 924, 933; see also *Blackledge v. Allison* (1977) 431 U.S. 63 [97 S.Ct. 1621, 52 L.Ed.2d 736].)

Appellant nevertheless argues that the Court of Appeal somehow ignored that while Evidence Code section 115 provides that a "presumption is rebuttable by a preponderance of the evidence 'except as otherwise provided by law,'" the "'law' within the meaning of section 115 is not limited to statutory law; it includes decisional law." (Answer Brief at p. 37.)

Respondent disagrees. There is nothing in the record which suggests that the Court of Appeal was unaware of the law. Indeed, the Court of Appeal specifically addressed the issue of the standard of proof, looking

both at the importance of the right to the defendant and the important public interests in the finality of judgments, particularly final judgments rendered on plea bargains. The Court of Appeal thus properly determined that the importance of finality of guilty pleas, coupled with the significant difficulties in addressing such claims years and decades after the plea has been entered, records have been destroyed and memories faded, clearly weighed in favor of a preponderance of the evidence standard in rebutting the presumption that the Penal Code section 1016.5 advisements were not given. (Opn. at p. 8.)

Appellant further contends that a clear and convincing burden of proof should be required "to resolve factual issues involving conflicting oral testimony based on memories of long past events, where the consequences flowing from the factual determination have severe consequences to the criminal defendant," citing this Court's opinion in *People v. Jiminez* (1978) 21 Cal.3d 595, 606. (Answer Brief at p. 31.) Appellant recognizes that *Jiminez* was abrogated by Proposition 8, and that the People's burden to establish the voluntariness of a confession is by a preponderance of the evidence. (Answer Brief at p. 32; see also *People v. Nelson* (2012) 54 Cal.4th 367, 374-375 ["To establish a valid waiver of *Miranda* rights, the prosecution must show by a preponderance of the evidence that the waiver was knowing, intelligent, and voluntary"]; *Lego v. Twomey* (1972) 404 U.S. 477, 489 [92 S.Ct. 619, 30 L.Ed.2d 618] ["the prosecution must prove at least by a preponderance of the evidence that the confession was voluntary," because the defendant is "entitled to a reliable and clear-cut determination that the confession was in fact voluntarily rendered"].) Appellant nevertheless argues California's preference for a clear and convincing burden of proof still "applies with equal force to the resolution of the standard of proof in a section 1016.5 motion." (Answer Brief at p. 32.) But appellant's argument is unconvincing, as there is no

sound reason or supporting authority that the People should be held to a higher burden of proof to show that a defendant was advised of the immigration consequences of his plea than the People's burden to establish the voluntariness of a defendant's confession.

Appellant also argues that based on *Padilla v. Kentucky* (2010) ___ U.S. ___ [130 S.Ct. 1473, 176 L.Ed.2d 284] (*Padilla*), the Court of Appeal incorrectly concluded that "[t]he outcome of this proceeding would not and did not result in the deprivation of a liberty or property interest." (Answer Brief at pp. 38-39.) The Court in *Padilla* addressed "whether, as a matter of federal law, trial counsel had an obligation to advise a defendant that the offense to which he was pleading guilty would result in his removal from this country." (*Padilla, supra*, 130 S.Ct. at p. 1478.) Citing its "longstanding Sixth Amendment precedents, the seriousness of deportation as a consequence of a criminal plea, and the concomitant impact of deportation on families living lawfully in this country" the *Padilla* Court concluded that "counsel must inform [his or] her client whether his [or her] plea carries a risk of deportation." (*Id.* at p. 1486.) Despite the Court's broad language in *Padilla* about the perils of criminal convictions to non-citizen defendants, however, it did not ultimately resolve "[t]he disagreement over how to apply the direct/collateral [consequences] distinction." (*Id.* at p. 1481, fn 8.)

The Court in *Padilla* rather accepted as true the defendant's assertion that his attorney not merely failed to inform him of the risk of deportation, but that his attorney had, in fact, "provided him false assurance that his conviction would not result in his removal from this country," and the Court determined that this was "not a hard case in which to find deficiency." (*Padilla, supra*, 130 S.Ct. at pp. 1478, 1483.) Counsel in *Padilla* specifically told the defendant that he "did not have to worry about immigration status since he had been in the country so long." (*Id.* at pp.

1475-1476.) On these facts, the Court concluded that the defendant had "sufficiently alleged constitutional deficiency to satisfy the first prong of *Strickland*." (*Id.* at p. 1483.)

That the Supreme Court in *Padilla* held that an attorney performed deficiently pursuant to *Strickland v. Washington* (1984) 466 U.S. 668 [104 S.Ct. 2052, 80 L.Ed.2d 674] when he affirmatively misled his client about the risks of deportation—a claim not raised in the instant proceeding—does not now, as appellant argues, "close the door" on the proposition that the denial of a section 1016.5 motion results in a deprivation of a liberty interest. The denial of a defendant's fundamental right to the effective assistance of counsel at trial, a right guaranteed by the Sixth Amendment, is not akin to the denial of a statutory motion pursuant to section 1016.5.

Moreover, although the *Padilla* opinion states the issue arose during postconviction proceedings, it does not appear that Padilla waited several years to initiate these proceedings (*Padilla, supra,* 130 S.Ct. at pp. 1477-1478, 1585-1486), which significantly distinguishes it from the instant case where appellant's plea was taken in 1986, and where he waited more than 24 years before filing his motion to withdraw his plea pursuant to section 1016.5. Also, the Court in *Padilla*, as appellant recognizes, "was not called upon to decide, and did not decide, whether the changing landscape of immigration law gave rise to a due process right in having the court advise a noncitizen defendant of the possible immigration consequences of a plea." (Answer Brief at p. 38.) Indeed, the *Padilla* Court also did not consider issues such as timeliness, and pleading and proof requirements. Cases are not authority for propositions not considered, and this Court should decline to read *Padilla* for more than it narrowly holds on its unique facts. (See *People v. Brown* (2012) 54 Cal.4th 314, 330.)

Finally, appellant argues the Court of Appeal incorrectly concluded that a higher burden of proof was required only when the government

deprives an individual of a liberty or property interest. (Answer Brief at pp. 38-41.) The Court of Appeal did not so conclude, but instead held that a higher standard of proof was required by due process where the government deprives an individual of a liberty or property interest—not that these were the *only* circumstances in which a different or higher burden or proof was required. (Opn. at p. 8.)

In sum, the Court of Appeal correctly concluded that a preponderance of the evidence burden of proof did not violate a defendant's due process rights after balancing the defendant's interests with the important public interest in the finality of judgments, particularly those judgments rendered on guilty pleas. (Opening Brief at pp. 13-15.)

IV. HAD A "CLEAR AND CONVINCING" BURDEN OF PROOF APPLIED AND BEEN USED BY THE COURT, IT WOULD NOT HAVE CHANGED THE RESULT

Appellant speculates that if the trial court had required the People to meet their burden using a clear and convincing standard, it is reasonably probable the result would have been different because there was no "objective evidence" to support the prosecutor's custom and habit testimony. (Answer Brief at pp. 41-44.) Appellant denigrates the prosecuting attorney's testimony at the hearing as to his custom and habit because it was based primarily upon his memory, rather than notes in the file, and "[m]emories, of course, fail." (Answer Brief at p. 43.)

Respondent disagrees. At the hearing on appellant's motion to withdraw his plea pursuant to Penal Code section 1016.5, the prosecuting attorney that took appellant's 1986 plea testified he always took the pleas in that courtroom, that it was his practice in that courtroom to always advise a defendant of the immigration consequences of his or her plea, that it was his habit whenever he took a plea to advise every defendant of the immigration consequences, that he had a reputation for taking long pleas

because he never wanted to be reversed, that he never rushed though a plea, that when taking a plea, he always explained the rights first to insure that the defendant understood what was transpiring, and that in his 37 years as a deputy district attorney, it had never been brought to his attention that he had ever erred in advising a defendant of the immigration consequences of his or her plea. (1RT 4-5, 10, 12.)

This testimony was corroborated by the minute order which shows appellant was advised of "possible effects of plea on any alien or citizenship/probation or parole status." (1CT 4, 81; see, e.g., *People v. Dubon* (2011) 90 Cal.App.4th 944, 955 ["the court's minute order, while in this case not a sufficient record standing alone, nonetheless provided significant evidence rebutting the statutory presumption"].) Thus, for example, in *People v. Pride* (1992) 3 Cal.4th 195 (*Pride*), a reporter's transcript of the plea hearing was not available, and the minute order, while stating that the defendant "'waived trial/jury,'" did not reflect "any other '*Boykin-Tahl* ' advisements or waivers." (*Id.* at p. 255.) The defendant testified that he "'did not remember'" being advised of his constitutional rights before pleading guilty. (*Ibid.*) Although neither of the attorneys who were present when the plea was actually entered recalled the specific circumstances of the plea, both attorneys testified the judge who took the plea always took a personal waiver on each constitutional right from every defendant, and "always insisted on a 'perfect record.'" (*Id.* at pp. 255-256.) This Court in *Pride* held that such "'habit and custom' evidence duly admitted at the evidentiary hearing," may constitute "[s]ubstantial evidence . . . [of] the constitutional validity of the prior conviction." (*Id.* at p. 256.)

This is nearly precisely what occurred below, and appellant has offered nothing but pure speculation and his ipse dixit to support his argument that the prosecuting attorney's custom and habit testimony, coupled with the minute order, has not or cannot constitute clear and

convincing evidence rebutting the presumption that an advisement was given.

V. APPELLANT FAILS TO DEMONSTRATE PREJUDICE

Finally, appellant argues that because he was in removal proceedings at the time he filed his motion to withdraw his plea, he has necessarily shown prejudice, particularly due to his long residence in and significant ties to this country. (Answer Brief at pp. 44-45.) As set forth in the Opening Brief on the Merits, respondent submits that appellant failed to demonstrate that he would not have entered into the plea had he been differently advised of the immigration consequences of his plea.

The law is clear that a self-serving declaration from a defendant that he would not have entered into the plea if he had been advised of the immigration consequences is insufficient by itself to demonstrate prejudice without independent corroboration by objective evidence. (See, e.g., *In re Resendiz* (2001) 25 Cal.4th 230, 253; *In re Alvernaz, supra,* 2 Cal.4th at p., 938.) This Court in *Resendiz* noted that the petitioner's declaration failed to show how he may have avoided a conviction or what specific defenses might have been available to him at trial. (*Id.* at p. 254.)

As set forth in the Opening Brief on the Merits, the record failed to adequately demonstrate prejudice. Appellant indicated he did not recall whether he was advised of the immigration consequences of his plea—not that he was not in fact advised of them. Moreover, by his plea, appellant avoided any incarceration, and appellant offered no indication below and made no attempt to do so in his appeal of how he could possibly have avoided a conviction at trial, which would have resulted in the same immigration consequences appellant now faces. No evidence was offered relating to possible defenses to the charged offense or to excuse appellant's inability to do so. In sum, there was no convincing evidence that appellant

would not have pleaded guilty and would have proceeded to trial if he had been advised pursuant to the precise wording of Penal Code section 1016.5. Appellant therefore failed to demonstrate the prejudice required for a successful motion to vacate his guilty plea.

CONCLUSION

The appeal should be dismissed for appellant's failure to secure a certificate of probable cause pursuant to Penal Code section 1237.5. If this Court disagrees, it should uphold the Court of Appeal's judgment affirming the conviction.

Dated: September 6, 2012

Respectfully submitted,

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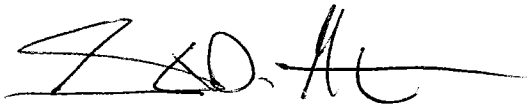

STEVEN D. MATTHEWS
Supervising Deputy Attorney General
Attorneys for Respondent

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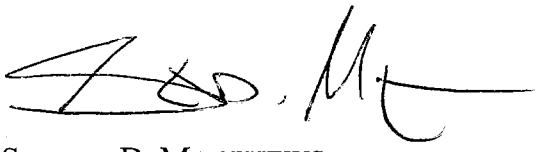
CERTIFICATE OF COMPLIANCE

I certify that the attached **RESPONDENT'S REPLY BRIEF** uses a 13 point Times New Roman font and contains 4,960 words.

Dated: September 6, 2012

KAMALA D. HARRIS
Attorney General of California



STEVEN D. MATTHEWS
Supervising Deputy Attorney General
Attorneys for Respondent

DECLARATION OF SERVICE

Case Name: ***People v. Victor D. Arriaga***
No.: **S199339**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On September 6, 2012, I served the attached **Respondent's Reply Brief** by placing a true copy thereof enclosed in a sealed envelope in the internal mail system of the Office of the Attorney General at 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, addressed as follows:

Joanna Rehm
Attorney at Law
Rehm & Rogari
12121 Wilshire Boulevard, Suite 600
Los Angeles, CA 90025
(Counsel for Appellant Arriaga)

Hon. Steve Cooley, District Attorney
Los Angeles District Attorney's Office
Attn.: Bobby Zoumberakis, Deputy DA
210 West Temple Street, Suite 18000
Los Angeles, CA 90012-3210

CAP - LA
California Appellate Project (LA)
520 S. Grand Ave., 4th Floor
Los Angeles, CA 90071-2600

John A. Clarke
Clerk of the Court
Los Angeles County Superior Court
111 N. Hill Street
Los Angeles, CA 90012
To be delivered to:
Hon. Steven D. Blades, Judge

Court of Appeal of the State of California
Second Appellate District, Division Two
300 South Spring Street, 2nd Floor, North
Los Angeles, CA 90013

On September 6, 2012, I caused 13 copies of the **Respondent's Reply Brief** in this case to be delivered to the California Supreme Court at 350 McAllister Street, San Francisco, California 94102-4797 by FedEx Priority Overnight, tracking number 800360326769.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on September 6, 2012, at Los Angeles, California.

M. O. Legaspi
Declarant

Signature

SDM:mol
LA2012603088 / 60848788.doc