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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

THE PEOPLE,

Plaintiff and Respondent,

v.

ALISON SARCENO,

Defendant and Appellant.

E053307

(Super.Ct.No. RIF094657)

OPINION

APPEAL from the Superior Court of Riverside County. James T. Warren, Judge.  
(Retired judge of the Riverside Super. Ct. assigned by the Chief Justice pursuant to art.  
VI, § 6 of the Cal. Const.) Affirmed.

Allison H. Ting, under appointment by the Court of Appeal, for Defendant and  
Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney  
General, Julie L. Garland, Assistant Attorney General, Garrett Beaumont, and Gil  
Gonzalez, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Alison Sarceno (defendant) appeals after she pleaded guilty to one count of second degree commercial burglary. Defendant filed a motion to vacate the judgment, asserting that her attorney failed to inform her of the actual immigration consequences of her plea. She argued that, under *Padilla v. Kentucky* (2010) \_\_\_ U.S. \_\_\_ [130 S.Ct. 1473, 176 L.Ed.2d 284], she should be entitled to withdraw her plea based on incompetence of counsel. The trial court denied defendant's motion to vacate the judgment. Defendant appeals, urging that the trial court failed to give proper accord to *Padilla*. We affirm.

#### FACTS AND PROCEDURAL HISTORY

In December 2000, defendant was charged in a felony complaint with presenting false documents to conceal her immigration status, and with second degree burglary for entering an office of the Department of Motor Vehicles with intent to commit theft or a felony. Initially, defendant pleaded not guilty, but changed her plea before the preliminary hearing. On December 20, 2000, defendant pleaded guilty to the burglary charge and the false document charge was dismissed. Defendant was granted probation for 36 months on terms and conditions, and advised that, if she successfully completed one year of probation, she could petition to have the conviction reduced to a misdemeanor under Penal Code section 17, subdivision (b).

At the change-of-plea hearing, defendant initialed provisions on the change-of-plea form, stating that, "If I am not a citizen of the United States, I understand that this conviction may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States."

Defendant also initialed a statement that “All the promises” made to her were “written on this form, or stated in open court,” that “No one has . . . placed any pressure of any kind on me in order to make me plead guilty,” and that she had “had an adequate time to discuss with my attorney (1) my constitutional rights, (2) the consequences of any guilty plea, and (3) any defenses I may have to the charges against me.” On the record in open court, the trial judge specifically advised defendant of the immigration consequences of her plea: “THE COURT: You understand if you’re not a citizen of the United States your guilty plea could result in deportation, exclusion from admission to the United States or denial of naturalization pursuant to the laws of the United States? [¶] THE DEFENDANT: Yes.” She also acknowledged that she had had time to talk over the plea with her attorney, and that the attorney had “explained to you what your rights are and what is going to happen because of your plea . . . .” Finally, the court asked, “THE COURT: Other than what’s been said here in court have any other promises been made to you about your case? THE DEFENDANT: No.” Defendant had no questions about her rights or about the consequences of her plea.

As a result of her guilty plea, on January 31, 2001, defendant was expelled from the United States by the Immigration and Naturalization Service; in March 2001, the probation department petitioned for a modification of defendant’s terms of probation to suspend the probation term that she report to the probation officer. The court ordered the suspension of that term for the period that defendant was excluded from the United States.

In February 2011, defendant filed a motion to vacate the judgment. Her motion made no reference to Penal Code section 1016.5, but purported to be brought pursuant to *Padilla v. Kentucky, supra*, \_\_\_ U.S. \_\_\_ [130 S.Ct. 1473, 176 L.Ed.2d 284]. Defendant alleged that her trial attorney at the time of her plea failed to advise her of the actual immigration consequences of her plea, or to advise her to consult an immigration attorney before entering her guilty plea. In addition, defendant claimed that her attorney had affirmatively given her incorrect advice about the immigration consequences of her plea. That is, as defendant states in her affidavit: “My defense attorney never talked with me about making a deal with the prosecutor to plead guilty to some other crime that would not hurt my immigration status. He also gave me incorrect advice when I asked him about the immigration warning given by the judge at the hearing where I agreed to plead guilty. That warning was translated by the court interpreter during the plea hearing and I immediately asked Mr. Contreras [defendant’s attorney] if I should plead not guilty, because I was worried about the warning and about being able to stay in the US. But Mr. Contreras (who spoke Spanish to me) said ‘Don’t worry about it, nothing bad will happen; just answer “yes” to all of the judge’s questions’ or words to that effect.” Defendant therefore responded as she did to the trial court’s inquiries, i.e., that she understood the immigration consequences of her plea, that she had had time to consult with her attorney, and that no one had promised her anything or otherwise coerced her to induce the plea.

After her conviction, as noted above, defendant had been deported on January 13, 2001. Defendant was represented on the motion to vacate by her immigration attorney,

who advised the court that defendant had “last entered the United States on February 2, 2001,” just a few days after her deportation. From the declaration of the immigration attorney, we infer that defendant had remained in the United States since that time, residing with her husband, a lawful permanent resident, a permanent resident son, and a United States citizen daughter. Defendant first contacted her immigration attorney in June 2010. On May 7, 2010, the Board of Immigration Appeals had dismissed defendant’s appeal from a determination (entered May 19, 2009) of the immigration judge, ordering her deported. The Ninth Circuit Court of Appeals granted a temporary stay of removal pending her petition for review in that court.

Defendant also pursued relief in the state court, in the instant proceeding. The United States Supreme Court decided *Padilla v. Kentucky, supra*, on March 31, 2010. Less than one year later, defendant filed the present motion to vacate the judgment (filed Feb. 7, 2011).

The trial court apparently treated defendant’s motion to vacate as one under Penal Code section 1016.5 (hereafter, section 1016.5) and denied the motion, on the ground that defendant’s initials on the waiver form showed that she had been properly informed by the court of the risk of deportation, or other immigration consequences of her plea.

Defendant filed a notice of appeal, challenging the validity of her plea, and obtained a certificate of probable cause from the trial court. (See *People v. Placencia* (2011) 194 Cal.App.4th 489, 494.) She contends that the trial court failed to give proper consideration to the principles of *Padilla*, i.e., that her attorney’s erroneous advice

constituted ineffective assistance of counsel, quite apart from the trial court's duty to inform a criminal defendant of possible immigration consequences of a guilty plea.

## ANALYSIS

### I. The Trial Court Properly Denied the Motion to Vacate the Judgment

Defendant filed the instant proceeding as a motion to vacate the judgment. Such a postjudgment motion is available by statute, under section 1016.5. That provision requires the court to administer an advisement of the immigration consequences of a guilty plea in a criminal case.<sup>1</sup> It also provides a remedy by a postjudgment motion to vacate, if the trial court fails to give the proper immigration advisement. The denial of a section 1016.5 postjudgment motion to vacate is appealable, upon the securing of a certificate of probable cause. (*People v. Placentia, supra*, 194 Cal.App.4th 489, 494.)

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<sup>1</sup> Penal Code section 1016.5 provides in pertinent part:

“(a) Prior to acceptance of a plea of guilty or nolo contendere to any offense punishable as a crime under state law, except offenses designated as infractions under state law, the court shall administer the following advisement on the record to the defendant:

“If you are not a citizen, you are hereby advised that conviction of the offense for which you have been charged may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States.

“(b) Upon request, the court shall allow the defendant additional time to consider the appropriateness of the plea in light of the advisement as described in this section. If, after January 1, 1978, the court fails to advise the defendant as required by this section and the defendant shows that conviction of the offense to which defendant pleaded guilty or nolo contendere may have the consequences for the defendant of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States, the court, on defendant's motion, shall vacate the judgment and permit the defendant to withdraw the plea of guilty or nolo contendere, and enter a plea of not guilty. Absent a record that the court provided the advisement required by this section, the defendant shall be presumed not to have received the required advisement.”

“An appeal from a denial of a section 1016.5 motion is technically from an ‘order made after judgment’ ([Pen. Code,] § 1237, subd. (b)) and not ‘from a judgment of conviction upon a plea’ of guilty or nolo contendere ([Pen. Code,] § 1237.5). But, a section 1016.5 motion follows a claimed failure by the trial court to advise the defendant of the immigration consequences of a plea of guilty or nolo contendere which necessarily precedes the entry of the plea and affects the validity of the plea.” (*Ibid.*) Thus, the *Placencia* court concluded that a certificate of probable cause is required. (*Ibid.*)

“An order denying a section 1016.5 motion will withstand appellate review unless the record shows a clear abuse of discretion. [Citations.] An exercise of a court’s discretion in an arbitrary, capricious, or patently absurd manner that results in a manifest miscarriage of justice constitutes an abuse of discretion. [Citation.]” (*People v. Limon* (2009) 179 Cal.App.4th 1514, 1517-1518.) Here, the record shows without question that the trial court did orally admonish defendant of the immigration consequences of her plea during the hearing. Defendant also initialed the specific provision on the change-of-plea form, in the same language as the court’s oral admonition. The court did not fail in its duty under section 1016.5. Of necessity, therefore, any statutory claim for relief under section 1016.5 is meritless, and the court consequently did not abuse its discretion in denying relief pursuant to section 1016.5.

## II. The Issue Is Not Cognizable on a Nonstatutory Motion to Vacate, Treated as a Writ of

### *Error Coram Nobis*

Defendant did not, however, purport to file her motion pursuant to section 1016.5. Rather, she referred solely to *Padilla v. Kentucky, supra*, \_\_\_ U.S. \_\_\_ [130 S.Ct. 1473,

176 L.Ed.2d 284]. The United States Supreme Court’s decision in *Padilla* holds that a defense attorney’s failure to give correct and specific advice (where the consequences are clear) on immigration consequences of a plea may constitute ineffective assistance of counsel; defendant further points out that the court so held despite the existence of a court’s written advisement form. Counsel thus has a duty to perform competently, independent of the court’s duty to advise the defendant of immigration consequences. However, the motion under section 1016.5 does not encompass a claim of ineffective assistance of counsel. (*People v. Limon, supra*, 179 Cal.App.4th 1514, 1519; see also *People v. Kim* (2009) 45 Cal.4th 1078, 1107, fn. 20.) The courts do not have the authority to expand the scope of the statutory motion to include constitutional theories of relief. (*People v. Kim, supra*, 45 Cal.4th 1078, 1107, fn. 20; accord, *People v. Limon, supra*, 179 Cal.App.4th 1514, 1519.)

There may exist “[n]onstatutory requests to vacate or set aside judgments,” but such nonstatutory motions to vacate, “essentially duplicate *coram nobis*, and are normally treated as such. (See *People v. Griggs* (1967) 67 Cal.2d 314, 316 [61 Cal.Rptr. 641, 431 P.2d 225]; *People v. Miranda* (2004) 123 Cal.App.4th 1124, 1132, fn. 6 [20 Cal.Rptr.3d 610].)” (*People v. Vasilyan* (2009) 174 Cal.App.4th 443, 460 (dis. opn. of O’Neill, J.).) A writ of error *coram nobis* applies ““where a *fact* unknown to the parties and the court existed at the time of judgment that, if known, would have prevented rendition of the judgment.”” (*Id.* at p. 453 (lead opn. of Flier, J.), citing *People v. Kim, supra*, 45 Cal.4th 1078, 1093.) Here, the claim of ineffective assistance of counsel is a mixed question of law and fact (*In re Resendiz* (2001) 25 Cal.4th 230, 248-249), but to the extent facts are

involved, defendant did know the essential facts at the time of her plea. *Coram nobis* is thus not appropriate. To the extent the claim of ineffective assistance involves an error or mistake of law, it is not cognizable on *coram nobis*. (*People v. Kim, supra*, 45 Cal.4th 1078, 1093; *People v. Vasilyan, supra*, 174 Cal.App.4th 443, 453.) Again, *coram nobis* relief is unavailable.

“For better or worse, the terms ‘motion to vacate’ and ‘petition for writ of error *coram nobis*’ are often used interchangeably and the two procedures are similar in scope and effect. (Prickett, *The Writ of Error Coram Nobis in California* (1990) 30 Santa Clara L.Rev. 1, 19-20 & fn. 80 (Prickett).) However, courts have applied more precise rules for appeals from denials of petitions for writ of error *coram nobis*. Denial of a defendant’s request for *coram nobis* relief is appealable [citation] unless the petition failed to state a prima facie case for relief [citation] or the petition merely duplicated issues which had or could have been resolved in other proceedings [citations]. [¶] *Coram nobis* will not issue to vacate a plea of guilty solely on the ground that it was induced by misstatements of counsel (*People v. Rodriguez* (1956) 143 Cal.App.2d 506, 508 [299 P.2d 1057]) or where the claim is that the defendant did not receive effective assistance from counsel (*People v. Ibanez* (1999) 76 Cal.App.4th 537, 546, fn. 13 [90 Cal.Rptr.2d 536]; *People v. Soriano* (1987) 194 Cal.App.3d 1470, 1477 [240 Cal.Rptr. 328, 65 A.L.R.4th 705]). Where *coram nobis* raises only such grounds, an appeal from the superior court’s ruling may be dismissed as frivolous. [Citations.]” (*People v. Gallardo* (2000) 77 Cal.App.4th 971, 982-983, fn. omitted.)

In *People v. Kim, supra*, 45 Cal.4th 1078, the California Supreme Court held that, “Although an attorney has a constitutional duty at least not to affirmatively *misadvise* his or her client as to the immigration consequences of a plea (*In re Resendiz*[, *supra*,] 25 Cal.4th 230, 235, 240 [105 Cal.Rptr.2d 431, 19 P.3d 1171] (plur. opn. of Werdegar, J.); *id.* at p. 255 (conc. & dis. opn. of Mosk, J.)), any violation in this regard should be raised in a motion for a new trial or in a petition for a writ of habeas corpus.” (*Id.* at p. 1104.)

### III. The Motion Cannot Be Treated as a Petition for Writ of Habeas Corpus

We cannot consider defendant’s motion to vacate the judgment as if it were a petition for habeas corpus. For one thing, the key prerequisite to habeas corpus relief is a petitioner’s custody. (*People v. Villa* (2009) 45 Cal.4th 1063, 1069.) Here, defendant has long since served her sentence and completed any actual or constructive custody in connection with her conviction. “By contrast, collateral consequences of a criminal conviction—even those that can later form the basis of a new criminal conviction—do not of themselves constitute constructive custody.” (*Id.* at p. 1070.) “[P]ersons like defendant, who have completely served their sentence and also completed their probation or parole period, may not challenge their underlying conviction in a petition for a writ of habeas corpus because they are in neither actual nor constructive custody for state habeas corpus purposes.” (*People v. Kim, supra*, 45 Cal.4th 1078, 1108.)

For another thing, denial of a petition for writ of habeas corpus is not appealable. (*In re Clark* (1993) 5 Cal.4th 750, 767, fn. 7; *In re Hochberg* (1970) 2 Cal.3d 870, 876; *People v. Garrett* (1998) 67 Cal.App.4th 1419, 1421-1423.) Instead, the petitioner must file a new habeas corpus petition in the reviewing court. (*In re Clark, supra*, 5 Cal.4th

750, 767, fn. 7; *People v. Gallardo*, *supra*, 77 Cal.App.4th 971, 983; *People v. Garrett*, *supra*, 67 Cal.App.4th 1419, 1421-1423.)

We recognize that our ruling “is likely to leave defendant without a remedy; a claim of ineffective assistance of counsel generally is not a proper basis for a petition for writ of error *coram nobis*, the time for appeal of the judgment has long since passed, and defendant is no longer in custody for purposes of a writ of habeas corpus. [Fn. omitted.] (See *People v. Gallardo*[, *supra*,] 77 Cal.App.4th 971, 987 [92 Cal.Rptr.2d 161] [‘A claim that the defendant was deprived of effective representation of counsel is not an appropriate basis for relief by writ of *coram nobis* and must be raised on appeal or by petition for writ of habeas corpus instead.’]; see also *People v. Soriano*[, *supra*,] 194 Cal.App.3d 1470, 1482 [240 Cal.Rptr. 328] [affirming denial of petition for writ of *coram nobis* but granting writ of habeas corpus based on attorney’s failure to adequately advise the defendant of the immigration consequences of his plea].) Although unfortunate, the lack of an available remedy is not a sufficient basis to extend the applicability of an express statutory remedy.” (*People v. Chien* (2008) 159 Cal.App.4th 1283, 1290-1291.)

DISPOSITION

To the extent that defendant’s petition to vacate the judgment was brought under section 1016.5, the trial court properly denied the motion. The trial court fulfilled its statutory duty to warn defendant of the immigration consequences of her plea. To the extent that defendant’s petition sought to expand the statutory grounds to include review of a claim of ineffective assistance of counsel, rather than the failure of the court to perform its duty, the statute cannot be so expanded. To the extent defendant relies on a nonstatutory motion, treated as a writ of error *coram nobis*, the claim of ineffective assistance of counsel is not cognizable. A claim of ineffective assistance might be cognizable on a petition for writ of habeas corpus, but defendant’s motion cannot be so treated, as the denial of a habeas corpus petition is not appealable. The trial court ruled properly on the motion, if treated as a statutory one; defendant proceeded improperly, if the motion was not under the statute. For these reasons, the trial court’s ruling is affirmed.

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MCKINSTER  
Acting P.J.

We concur:

RICHLI J.  
MILLER J.