In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, **v.** **RON DOUGLAS PATTERSON,** Defendant and Appellant.	No. S225193 Related Appeal Supreme Court No. S225194 Court of Appeal No. E061436

Fourth Appellate District, Division Two, Case No. E060758
Riverside County Superior Court, Case No. RIF1201642
The Honorable Helios J. Hernandez, Judge

ANSWER BRIEF ON THE MERITS

KAMALA D. HARRIS
Attorney General of California
GERALD A. ENGLER
Chief Assistant Attorney General
JULIE L. GARLAND
Senior Assistant Attorney General
STEVE OETTING
Deputy Solicitor General
A. NATASHA CORTINA
Supervising Deputy Attorney General
MEAGAN J. BEALE
Deputy Attorney General
State Bar No. 103642
600 West Broadway, Suite 1800
San Diego, CA 92101
P.O. Box 85266
San Diego, CA 92186-5266
Telephone: (619) 645-2225
Fax: (619) 645-2191
E-mail: Meagan.Beale@doj.ca.gov
Attorneys for Plaintiff and Respondent

TABLE OF CONTENTS

Page

Introduction 1

Statement of Case and Facts 3

A. Appellant evaded the police by driving with willful and wanton disregard for the safety of persons and property, and had multiple controlled substances in his car 3

B. Appellant agreed to a favorable negotiated disposition 4

C. Appellant moved to withdraw his plea and the trial court denied the motion 6

D. The superior court denied collateral relief and the appellate court denied direct and collateral relief 9

Argument 11

An intelligent and voluntary plea does not require knowledge of the certainty of deportation as a result of the plea 11

A. Appellant showed no good cause for withdrawal of the valid admission of guilt 11

B. Appellant entered a free and knowledgeable plea 12

C. *Padilla v. Kentucky* did not change the due process, judicial and statutory standards for an intelligent and voluntary plea 14

D. This appeal presents only the issue of the knowing and voluntary nature of the plea 19

E. Due process does not require that a defendant know the degree of risk of deportation specific to him for a plea to be intelligent and voluntary 22

F. "Liberal Construction" of Penal Code section 1018 does not require withdrawal of a plea when the defendant has not accurately assessed the consequences of his plea 23

TABLE OF CONTENTS
(continued)

Page

G. Appellant has not proved prejudice 29

Conclusion 33

TABLE OF AUTHORITIES

Page

CASES

Blackledge v. Allison
(1977) 431 U.S. 63 24

Boykin v. Alabama
(1969) 395 U.S. 238 13

Brady v. United States
(1970) 397 U.S. 742 ..... 13, 17, 24

Bunnell v. Superior Court
(1975) 13 Cal.3d 592 13

Campos v. State
(Minn. 2012) 816 N.W.2d 480 21

Campos v. State
(Minn.Ct.App. 2011) 798 N.W.2d 565 21

Commonwealth v. DeJesus
(Mass. 2014) 9 N.E.3d 789 21

Hill v. Lockhart
(1985) 474 U.S. 52 16

In re Alvernaz
(1992) 2 Cal.4th 924 ..... 29, 30

In re Resendiz
(2001) 25 Cal.4th 230 ..... passim

In re Tahl
(1969) 1 Cal.3d 122 13

Nollette v. State
(Nev. 2002) 46 P.3d 87 13

Ortega-Araiza v. State
(Wyo. 2014) 331 P.3d 1189 21

TABLE OF AUTHORITIES
(continued)

Page

Padilla v. Kentucky
(2010) 559 U.S. 356 ..... passim

People v. Aguilar
(2014) 227 Cal.App.4th 60 14

People v. Archer
(2014) 230 Cal.App.4th 693 ..... 12, 21, 24, 29

People v. Arriaga
(2014) 58 Cal.4th 950 14

People v. Breslin
(2012) 205 Cal.App.4th 1409 ..... 12, 22, 24, 29

People v. Castaneda
(1995) 37 Cal.App.4th 1612 ..... 25, 26

People v. Chien
(2008) 159 Cal.App.4th 1283 16

People v. Dena
(1972) 25 Cal.App.3d 1001 28

People v. Fairbank
(1997) 16 Cal.4th 1223 ..... 12, 23

People v. Flores
(1974) 38 Cal.App.3d 484 ..... 25, 26

People v. Gurule
(2002) 28 Cal.4th 557 13

People v. Howard
(1992) 1 Cal.4th 1132 13

People v. Hunt
(1985) 174 Cal.App.3d 95 25

TABLE OF AUTHORITIES
(continued)

Page

People v. Martinez
(2013) 57 Cal.4th 555 ..... 14, 29, 30, 32

People v. McGarvy
(1943) 61 Cal.App.2d 557 28

People v. Peque
(N.Y.Ct.App. 2013) 3 N.E.3d 617 19

People v. Perez
(2015) 233 Cal.App.4th 736 ..... 26, 27

People v. Quesada
(1991) 230 Cal.App.3d 525 ..... 25, 26

People v. Ramirez
(1999) 71 Cal.App.4th 519 13

People v. Ramirez
(2006) 141 Cal.App.4th 1501 28

People v. Ravaux
(2006) 142 Cal.App.4th 914 30

People v. Shokur
(2012) 205 Cal.App.4th 1398 ..... 14, 21

People v. Simmons
(2015) 233 Cal.App.4th 1458 25

People v. Superior Court (*Giron*)
(1974) 11 Cal.3d 793 ..... passim

People v. Superior Court (*Zamudio*)
(2000) 23 Cal.4th 183 ..... 13, 19

People v. Villa
(2009) 45 Cal.4th 1063 14

TABLE OF AUTHORITIES
(continued)

Page

Rabess v. State
(Fla.Ct.App. 2013) 115 So.3d 1079 21

Smith v. State
(Ga. 2010) 697 S.E.2d 177 19

State v. Kostyuchenko
(Ohio Ct.App. 2014) 8 N.E.3d 353 21

State v. Nunez-Valdez
(N.J. 2009) 975 A.2d 418 21

State v. Ortiz
(N.H. 2012) 44 A.3d 425 19

State v. Yuma
(Neb. 2013) 835 N.W.2d 679 21

United States v. Adoh
(9th Cir. 2012) 496 Fed.Appx. 731 13

United States v. Bonilla
(9th Cir. 2011) 637 F.3d 980 21

United States v. Delgado-Ramos
(9th Cir. 2011) 635 F.3d 1237 ..... 16, 17, 18, 22

United States v. Nicholson
(4th Cir. 2012) 676 F.3d 376 18

United States v. Rodriguez-Vega
(9th Cir. 2015) 797 F.3d 781 21

United States v. Urias-Marrufo
(5th Cir. 2014) 744 F.3d 361 21

TABLE OF AUTHORITIES
(continued)

Page

STATUTES

8 U.S.C.
§ 1227(a) 14
§ 1229b(a) 20
§ 1229b(b) 20

4 Witkin, Cal. Crim. Law (4th ed. 2012) Pretrial
§ 326 24
§ 328 ..... 23, 24

Penal Code
§ 1016.5 ..... 15, 16
§ 1016.5, subd. (a) 11, 12, 13, 22
§ 1018 ..... passim

CONSTITUTIONAL PROVISIONS

United States Constitution
Fifth Amendment 15
Sixth Amendment ..... passim
Fourteenth Amendment 15

COURT RULES

Federal Rules of Criminal Procedure
rule 11 18
rule 11(b)(1)(O) 18

OTHER AUTHORITIES

Report of the Advisory Committee on Criminal Rules
(Dec. 8, 2010) 17

INTRODUCTION

This court granted review on three issues: (1) an attorney's duty to advise a defendant on the certainty of adverse immigration consequences; (2) the factors for a trial court to consider when determining whether a defendant has adequately shown that he would have rejected the plea if he had had different advice; and (3) whether advising a noncitizen defendant that he "may" have adverse immigration consequences is good cause for withdrawal of a plea when the defendant discovers that he "will" be deported as a result of his plea.[1]

---

[1] Appellant framed his Issues Presented as follows:

> 1. Whether counsel representing a noncitizen criminal defendant in plea negotiations has a duty to investigate the immigration consequences of a proposed plea and to advise the defendant of those consequences when they are clear and readily discerned.
>
> 2. Whether, in determining whether a noncitizen defendant has shown that a decision to reject a given plea bargain "would have been rational under the circumstances" the court must consider: (a) the impact that adverse immigration consequences would have on the defendant's life; (b) whether the defendant had good reason to believe that he or she had a "triable case"; (c) whether there was an alternative "immigration-safe disposition available that carried the same penal weight and sentence; and (d) whether, by later challenging the validity of the plea, the defendant has demonstrated that he or she is willing to forego the benefit of the plea bargain and face the same risks she or he initially confronted.
>
> 3. Whether the fact that a noncitizen defendant has been advised of the possibility that a guilty plea "may" have adverse immigration consequences necessarily bars the defendant from withdrawing that plea, pursuant to Penal Code § 1018, when he or she discovers that disastrous immigration consequences will certainly and unavoidably result from the plea.

(Petn. Rev. 3-4.) The court granted review on all issues.

Appellant changed the issues presented for review in his Opening Brief on the Merits. Recognizing that he specifically disavowed ineffective assistance of counsel as a basis for relief in the trial court and on appeal (CT 26, 30; AOB at 2, fn.2), appellant changed the first issue and collapsed the first and second issues into a single issue: whether good cause exists for withdrawal of a plea when a defendant was not informed that his conviction would result in mandatory deportation and the defendant has purportedly shown that he would have rejected the plea if so informed. He renumbered issue (3) as (2).[2]

Also, throughout his opening brief appellant discusses the collateral consequences of the conviction on his nursing license. He did not ask the court to consider, and the court did not grant review on, the effect of his plea on his professional license. Respondent has not addressed the collateral consequences of the conviction on appellant's professional license because this court did not grant review on that question. Appellant raised the collateral effect on his professional license in his motion to

---

[2] The Issues Presented for Review as stated in Appellant's Opening Brief on the Merits are:

> 1. Whether a noncitizen defendant who has entered a guilty plea that will clearly and certainly result in mandatory deportation, whose counsel neither discerned that fact nor informed the defendant of it, and who has demonstrated a reasonable probability that she or he would not have accepted the plea had he been properly informed, should be permitted to withdraw that plea pursuant to Penal Code § 1018.
>
> 2. Whether the fact that a noncitizen defendant has been advised of the possibility that a guilty plea "may" have adverse immigration consequences necessarily bars the defendant from withdrawing that plea, pursuant to Penal Code § 1018, when he or she discovers that disastrous immigration consequences will certainly and unavoidably result from the plea.

(AOBM 3.)

withdraw his plea in the trial court and in his direct appeal, but did not present that issue in his Petition for Review.

The only issue raised both in the trial court and on review in this court is whether appellant's claimed lack of knowledge of the certainty of deportation was good cause for withdrawal of his guilty plea because he did not know the actual immigration consequence that would result from his plea. But a free and voluntary plea has never required notice of the certainty of adverse collateral consequences under due process, judicial and statutory law—the only bases for appellant's motion.

Due process does not require a state court to advise a defendant about the specific consequences that the defendant will face in areas outside of the state court's dominion for a plea to be knowing and voluntary. Appellant sought leave to withdraw his plea because he claimed he had insufficient information to enter a free and voluntary plea, and thus only principles applicable to free and voluntary pleas are implicated. Appellant disavowed ineffective assistance of counsel in his motion and on appeal, so Sixth Amendment standards are not applicable here. Appellant has raised ineffective assistance of counsel in his petition for writ of habeas corpus, *In re Patterson*, S225194.

Because appellant failed to demonstrate that his free judgment was overborne, the trial court did not abuse its discretion.

STATEMENT OF CASE AND FACTS

A. Appellant Evaded the Police by Driving with Willful and Wanton Disregard for the Safety of Persons and Property, and Had Multiple Controlled Substances in his Car

Appellant admitted that he evaded the police by driving with willful and wanton disregard for the safety of persons and property, causing a collision, and that he possessed MDMA, a controlled substance. (RT 1-2;

CT 22.) These were the only facts before the trial court when it accepted appellant's guilty plea. Appellant entered his plea before a preliminary hearing was held and no probation report was prepared.

Appellant attached as an exhibit to his petition for review a police officer's declaration in support of a warrant, even though that document was not before the trial court or appellate court in this case. (Petn. Rev., Exh. C.) The declaration provides more details, which are stated here as further background.

On July 19, 2011, appellant was "weaving badly between the car pool lane and the west #1 lane" while driving westbound on the 60 freeway. A CHP officer in a marked patrol vehicle activated his lights and drove behind appellant to try to stop him. Appellant failed to stop. The officer activated his siren. Instead of yielding, appellant drove erratically across all lanes and the shoulder of the freeway. He exited the freeway at Pedley Road and drove through two stop signs without stopping. He crossed into the opposite lane of traffic and sideswiped a car. Appellant left the scene of the collision without stopping and continued to drive away from the officer for another quarter of a mile before finally stopping on a dirt shoulder. (Petn. Rev., Exh. C.)

Officers called for an ambulance. Emergency personnel examined appellant and tested him for low blood sugar. The test was negative. A later blood test found no controlled substances in appellant's blood. A tin container on the right front seat of appellant's car contained several baggies with an assortment of drugs: cocaine, morphine, Ecstasy (MDMA), methamphetamine and PCP. (Petn. Rev., Exh. C.)

B. Appellant Agreed to a Favorable Negotiated Disposition

The District Attorney of Riverside County filed a felony complaint on May 1, 2012. (CT 1-2.) After an amended complaint was filed and three

charges were dismissed on motion of the People, appellant was charged with the following counts:

> (1) eluding a police officer by driving with willful or wanton disregard for the safety of persons or property (Veh. Code, § 2800.2);
>
> (2) transportation or sale of methamphetamine (Health & Saf. Code, § 11379, subd. (a));
>
> (6) possession of MDMA (Health & Saf. Code, § 11377, subd. (a));
>
> (7) possession of methamphetamine (Health & Saf. Code, § 11377, subd. (a)); and
>
> (8) possession of PCP (Health & Saf. Code, § 11377, subd. (a)).

(CT 7-8.) Appellant's total exposure on these counts was six years and eight months.

On March 13, 2013, the parties negotiated a favorable disposition of the charges. Appellant agreed to plead guilty to evading the police by driving with willful and wanton disregard for safety and to possession of MDMA, in return for a reduced sentence of three years of probation, 180 days of custody to be served on weekends or on work release, and dismissal of six of the eight pending charges. (CT 21-22.)

With his defense attorney's assistance and advice, appellant read, initialed and signed a felony plea form. (CT 21-22.) Appellant specifically initialed the sentence on the written change-of-plea form that advised him that he could face adverse immigration consequences as a result of his plea. (CT 21.) He agreed that he committed the acts stated in the charges that he was admitting. (CT 22.) Appellant signed the statement that he had read and understood the entire document, and defense counsel affirmed that appellant had had adequate time to discuss the plea with counsel, that

appellant understood the rights he was giving up and the consequences of his plea. (CT 21-22.)

In open court, appellant told the trial court that he had read over the plea form with his attorney; he understood everything on the form and had no questions; and he had initialed and signed the plea form. (RT 1.) Appellant pleaded guilty to felony evading the police by driving with willful or wanton disregard for the safety of persons or property and to one count of felony possession of a controlled substance, MDMA. He admitted that he committed the crimes charged against him. (RT 1-2; CT 22.) The trial court found that appellant knew and understood the rights he was giving up and that he knew the consequences of his plea. (RT 1-2.) It found that the plea was knowing and voluntary and approved the plea bargain. (RT 1-2.)

Appellant was sentenced immediately. In accordance with the negotiated plea, the trial court suspended imposition of sentence and placed appellant on probation for three years, on the condition that he complete 180 days in custody, to be served in a work release program. The remaining counts were dismissed. (RT 2-3; CT 18-20.)

C. Appellant Moved to Withdraw His Plea and the Trial Court Denied the Motion

Appellant filed a motion to withdraw his plea to count 6, pursuant to Penal Code section 1018, on September 13, 2013. (CT 25-77, 86-88, 90-92.) At that time, the Board of Registered Nursing had filed an accusation against appellant, but he had not suffered any adverse immigration consequences in the six months since he pleaded guilty.[3] (CT 38; 67-77.) Appellant contended that his plea was "not entered knowingly,

[3] Immigration and Customs Enforcement (ICE) took no action against appellant until April 13, 2015, more than two years after he pleaded guilty. (AOBM 11.)

intelligently, or voluntarily, in violation of the Fifth and Fourteenth Amendments to the U.S. Constitution, and parallel provisions of the California Constitution." (CT 26; see CT 25-77, 86-88, 90-92.) Appellant argued that although he knew about the risk of deportation, his plea was not knowing and voluntary because he did not know the exact degree of the risk, and he did not know that his nursing license would be revoked as a result of the conviction. (CT 25-35.) Appellant specifically said that ineffective assistance of counsel was not the basis for his motion: "[Appellant] is not raising a claim of ineffective assistance of counsel, because it is unnecessary to do so; instead, he is raising a *Giron* claim that at the time of plea, he was unaware of the mandatory detention and mandatory deportation consequences of the plea." (CT 30-31; see *People v. Superior Court* (*Giron*) (1974) 11 Cal.3d 793, 797 (*Giron*).)

Appellant submitted a declaration stating that his defense counsel told him that "she was not an immigration lawyer, and was not aware of the actual immigration consequences of the plea bargain." Appellant "tried to get in touch with [his] immigration lawyer, but had no success." (CT 37-38.) He did not know of the possible consequences for his professional license. (CT 38.) Appellant decided to accept the negotiated plea bargain, knowing that there could be deportation consequences, but without obtaining advice from his immigration attorney. He said that he was "forced" to decide on the plea bargain without immigration advice because he was informed that the offer would be withdrawn if not accepted that day. (CT 38.) But the criminal case had been pending for eight months, and apparently appellant never consulted his retained immigration attorney throughout that time about the immigration consequences of a conviction.

Appellant also provided a declaration and letters from an attorney versed in federal immigration law describing the adverse immigration consequences of a conviction for possession of a controlled substance. (CT

41-42, 87-88, 91-92.) The immigration attorney stated that the conviction for possession of a controlled substance "triggers" deportation, inadmissibility, and mandatory immigration detention during removal proceedings, from which the immigration judge had no authority to release the defendant. There was no waiver available for these consequences for immigrants who did not have permanent resident status. (CT 41.)

The trial court that accepted appellant's guilty plea denied the motion to withdraw after listening to argument from both sides. (RT 4-11; CT 93.) The trial court found that appellant was aware of adverse immigration consequences when he entered his plea. The court relied on appellant's statements at the time of the plea that he understood everything and he had no questions about the plea. Appellant's statements in court were the best evidence of the knowing and voluntary nature of his plea. (RT 10.) The trial court said, "There's a point where you have to treat an adult as an adult and just accept their answers for what they are." (RT 10.) After-the-fact claims about what appellant knew or what he would have done were unreliable. (RT 8.) Appellant had substantial counseling about the terms of the plea. He was not rushed into the plea. The court said, "[T]his is not a fly by night, a slap/dash plea. This is a case where he hired a private attorney, and there was a substantial amount of negotiation between the defense attorney and DA." (RT 7.) There was no misunderstanding of fact. Appellant and defense counsel were well aware that appellant was not a United States citizen. As part of his plea agreement, appellant had initialed and signed an acknowledgment that if he were not a citizen of the United States, "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." (RT 8, 10; see CT 21.) When entering the plea, appellant said he understood everything and had no

questions. (RT 1, 10.) The court denied the motion, finding that appellant did not show good cause for withdrawal of his plea. (RT 10.)

D. The Superior Court Denied Collateral Relief and the Appellate Court Denied Direct and Collateral Relief

Appellant filed a petition for writ of habeas corpus in the superior court. The superior court denied the petition on May 29, 2014, finding that appellant was advised of the immigration consequences of his plea; he had not established that he would have rejected the bargain because it was very favorable and he had little likelihood of success if he chose to go to trial; he entered his plea knowingly and voluntarily; and he "had every opportunity" to reject the plea. (Petn. Rev., Exh. E.)

Appellant filed a direct appeal (E060758) and a petition for writ of habeas corpus (E061436) in the appellate court. The appellate court affirmed the conviction and denied the petition for writ of habeas corpus. (Opn.; Petn. Rev., Exh. B.) In the direct appeal, the appellate court found that appellant had not shown good cause by clear and convincing evidence. "Good cause is shown by mistake, ignorance, inadvertence, or '"any other factor overreaching defendant's free and clear judgment."'" (Opn. at 10, quoting *Giron*, *supra*, 11 Cal.3d at p. 797.) The appellate court found that appellant was well aware of adverse immigration consequences, based on his initialing and signing of the plea form, his declaration, and especially his attempt to contact his immigration attorney before entering the plea. He tried to contact his immigration attorney because he was well aware that his guilty plea would have significant impacts on his immigration status. Knowing that the risk was significant and that he had incomplete information about the risk, he was willing to gamble on the likelihood of the risk in order to take advantage of the benefits offered by the plea bargain. (Opn. 11-12.) Appellant's knowledge of the possibility of adverse immigration consequences was sufficient to make his plea voluntary and

intelligent. The trial court did not abuse its discretion. (Opn. 12-13.) Finding no error, the appellate court did not evaluate prejudice. (Opn. 10-15.)

On the habeas petition, the appellate court found that defense counsel's performance was not deficient. Defense counsel ensured that appellant knew there could be adverse immigration consequences and appellant "made a calculated decision to take the plea—knowing there could be immigration consequences—without first consulting with his immigration counsel." Defense counsel gave appellant correct advice of the risk of deportation, in accordance with *Padilla v. Kentucky* (2010) 559 U.S. 356, at page 374 (*Padilla*). (Opn. 4-6.) Defense counsel knew that appellant had separate immigration counsel and relied on the expert attorney to provide more specific advice to appellant. Appellant decided that the benefits of the plea bargain were so great that he was willing to accept a non-quantified risk of adverse immigration consequences. Defense counsel was not deficient because appellant had separate immigration counsel. (Opn. 8.) The appellate court held that appellant did not support his claim that he would have rejected the plea bargain with more information. Appellant presented no evidence that the prosecutor would have been amenable to allowing appellant to plead guilty to a different charge for the purpose of avoiding adverse federal consequences. Nor did he provide any other evidence independently corroborating his claim that he would have rejected the bargain if he had other advice. (Opn. 9-10.)

Appellant filed petitions for review of the direct appeal (this case) and of the petition for writ of habeas corpus in this court (S225194). The petition for review of the habeas was refiled as an original petition for writ of habeas corpus and respondent has filed a return. According to appellant's current counsel, appellant was arrested by federal immigration

officers on April 13, 2015, and was subsequently released on bond. (AOBM 11.)

ARGUMENT

AN INTELLIGENT AND VOLUNTARY PLEA DOES NOT REQUIRE KNOWLEDGE OF THE CERTAINTY OF DEPORTATION AS A RESULT OF THE PLEA

Appellant made an informed, voluntary decision to plead no contest at an early stage to obtain a very favorable disposition. The trial court did not abuse its discretion when it denied appellant's motion to withdraw his plea. The trial court found that appellant entered his plea freely and knowingly, with knowledge of the risks of adverse immigration consequences. Lack of knowledge of the certainty of those consequences was not good cause for permitting withdrawal of an intelligent, freely entered guilty plea. Because appellant did not base his motion on ineffective assistance of counsel, standards applicable to that constitutional right are not applicable here. Contrary to appellant's contentions, *Padilla v. Kentucky*, which found that defense counsel may be incompetent when they fail to provide correct advice about deportation consequences, is not applicable here. (*Padilla v. Kentucky*, *supra*, 559 U.S. 356.)

A. Appellant Showed No Good Cause for Withdrawal of the Valid Admission of Guilt

Appellant contends that his plea was not knowledgeable, and therefore not voluntary, because he did not have adequate knowledge of the certainty of deportation as a result of the plea. (AOBM 1-29.) This contention lacks merit. California statutorily requires that a noncitizen defendant be advised of the possibility of adverse immigration consequences, and appellant received that advisement. (Pen. Code, §

1016.5, subd. (a);[4] CT 21.) There is no other requirement for advisement on collateral consequences for an intelligent and voluntary plea. Appellant's plea was intelligent and voluntary. There was no good cause for withdrawal.

Penal Code section 1018 permits a defendant to withdraw a guilty plea if he shows good cause.[5] "'To establish good cause to withdraw a guilty plea, the defendant must show by clear and convincing evidence that he or she was operating under mistake, ignorance, or any other factor overcoming the exercise of his or her free judgment, including inadvertence, fraud, or duress.'" (*People v. Archer* (2014) 230 Cal.App.4th 693, 702 (*Archer*) (citations omitted); *Giron*, *supra*, 11 Cal.3d at p. 797; *People v. Breslin* (2012) 205 Cal.App.4th 1409, 1415-1416 (*Breslin*).) A trial court's ruling on a motion to withdraw a plea is reviewed for an abuse of discretion. Only if the court's ruling was outside the bounds of reason should the court's ruling be set aside. (*People v. Fairbank* (1997) 16 Cal.4th 1223, 1254 (*Fairbank*); *Breslin*, at p. 1416.)

B. Appellant Entered a Free and Knowledgeable Plea

The federal and California Constitutions require that before a criminal defendant enters a guilty plea, he must be advised of the constitutional

---

[4] Penal Code section 1016.5, subdivision (a), requires that before acceptance of a guilty plea, "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."

Appellant received this admonition. (CT 21.)

[5] Section 1018 provides in pertinent part: "On application of the defendant ... within six months after an order granting probation is made if entry of judgment is suspended, the court may ... for a good cause shown, permit the plea of guilty to be withdrawn and a plea of not guilty substituted."

rights that he is forfeiting. The trial court must ensure that the plea is knowing and voluntary under the totality of the circumstances. (*Boykin v. Alabama* (1969) 395 U.S. 238, 243-244; *In re Tahl* (1969) 1 Cal.3d 122; *People v. Howard* (1992) 1 Cal.4th 1132, 1175.) Trial courts must advise defendants of the direct consequences of their pleas as a matter of judicial law. (*Brady v. United States* (1970) 397 U.S. 742, 755 (*Brady*); *Bunnell v. Superior Court* (1975) 13 Cal.3d 592, 605; see *People v. Gurule* (2002) 28 Cal.4th 557, 634 (*Gurule*).)

Generally, a trial court need not advise defendants about collateral consequences.[6] (*Gurule*, supra, 28 Cal.4th at p. 634.) Immigration consequences are collateral to a criminal conviction. (*In re Resendiz* (2001) 25 Cal.4th 230, 242; *People v. Superior Court* (*Zamudio*) (2000) 23 Cal.4th 183, 198.) Appellant has not challenged that ruling. In 1977, California created a statutory exception to the general rule for immigration consequences, requiring a trial court to advise a defendant before he pleads guilty that there may be adverse immigration consequences it he is not a citizen. (Pen. Code, § 1016.5, subd. (a).) Appellant received and acknowledged this warning. (CT 21.) The written warning satisfied the statutory requirement for the trial court to advise appellant of the possibility of adverse immigration consequences. (*People v. Ramirez* (1999) 71 Cal.App.4th 519, 522.)

---

[6] Although appellant discusses the effect on his professional license as well (AOBM 1, 8, 13), that was not raised in his petition for review and is not before the court. Notably, appellant does not contend that the effect on his professional license was a direct consequence of his plea. (See *Nollette v. State* (Nev. 2002) 46 P.3d 87, 91 ["Like other jurisdictions that have considered the issue, we hold that the loss of a professional license or employment is not a direct consequence of a guilty plea." (Footnotes and citations omitted); see also *United States v. Adoh* (9th Cir. 2012) 496 Fed.Appx. 731, 732 [exclusion from one form of employment did not make plea unknowing].)

C. *Padilla v. Kentucky* Did Not Change the Due Process, Judicial and Statutory Standards for an Intelligent and Voluntary Plea

Appellant contends that *Padilla* changed the requirements for a knowing and voluntary plea by requiring that a defendant convicted of a deportable offense be told that deportation will certainly result.[7] (AOBM 20-29, citing *Padilla v. Kentucky, supra,* 559 U.S. 356.) *Padilla* requires defense attorneys to provide correct advice to noncitizen defendants of the risk of adverse immigration proceedings that result from criminal convictions. (*Id.* at pp. 367, 374.)

Padilla is not applicable here because its ruling is based on the Sixth Amendment right to effective assistance of counsel. The Supreme Court specifically noted that it had "never applied a distinction between direct and collateral consequences" to delineate the Sixth Amendment right to

---

[7] As respondent argued in its Return to the Petition for Writ of Habeas Corpus, at pages 22-23 (*In re Patterson*, S225194), deportation is never certain. This court has said, "Indeed, the deportation consequences of a conviction are not 'inexorable' in that deportation 'can be instituted only "upon the order of the Attorney General" (8 U.S.C. § 1227(a)) of the United States, who retains discretion not to institute such proceedings.'" (*Resendiz, supra*, 25 Cal.4th at pp. 242-243.) Also, the noncitizen must first come into contact with ICE. Here, for example, ICE did not contact appellant for more than two years after his conviction. (See AOBM 11; see also *People v. Arriaga* (2014) 58 Cal.4th 950, 955-956 [deportation proceedings not initiated for "some two decades" after guilty plea]; *People v. Martinez* (2013) 57 Cal.4th 555, 559-560 [guilty plea to sale or transportation of marijuana in 1992; removal proceedings initiated 16 to 17 years later]; *People v. Villa* (2009) 45 Cal.4th 1063, 1066-1067 [defendant pleaded guilty to possession of cocaine for sale in 1989; removal proceedings not initiated until 2005]; *People v. Shokur* (2012) 205 Cal.App.4th 1398, 1402 [guilty plea to possession of marijuana for sale in 2005; removal proceedings in 2011, after defendant had been convicted of other crimes and spent a year in local custody]; *People v. Aguilar* (2014) 227 Cal.App.4th 60, 64-65 [plea in 2005, apparently was not arrested by ICE until 2013].)

counsel, and it declined to do so there. (*Padilla, supra,* 559 U.S. at p. 365.) This appeal does not encompass the Sixth Amendment right to effective counsel. In his motion to withdraw, appellant said that he "is not raising a claim of ineffective assistance of counsel, because it is unnecessary to do so; instead, he is raising a *Giron* claim that at the time of plea, he was unaware of the mandatory detention and mandatory deportation consequences of the plea."[8] (CT 30-31; *Giron*, *supra*, 11 Cal.3d 793; see also CT 26 [motion raised under Fifth and Fourteenth Amendments to the U.S. Constitution, and parallel provisions of the California Constitution].) On direct appeal, he reiterated that he was not presenting the specific issue of ineffectiveness of counsel, but theorized that *Padilla* provided "invaluable illumination regarding the core issue in this case": whether the lack of knowledge of his own actual certainty of deportation was sufficient good cause to require withdrawal of his plea. (AOB at 2, fn. 2.)

This appeal raises only the question whether appellant's supposed ignorance of the certainty of deportation provided good cause for withdrawal of an otherwise free and knowledgeable plea. It did not.

It is wrong to conflate the *Padilla* opinion on effective representation of counsel with the separate issue of intelligent and voluntary knowledge

---

[8] In *People v. Superior Court* (*Giron*), decided before enactment of Penal Code section 1016.5, requiring the trial court to warn a pleading defendant of possible adverse immigration consequences, this court found that noncitizen defendants were not entitled as a matter of right to be advised of collateral immigration consequences before pleading guilty. (*Giron*, *supra*, 11 Cal.3d at p. 797.) Because trial courts have discretion in deciding whether to permit withdrawal of a plea, the trial court did not abuse its discretion in permitting withdrawal of plea when the defendant had no notice at all of adverse immigration consequences before pleading to a minor crime that made him deportable. But denial of the motion would not have been an abuse of discretion, either. In that situation, the trial court had discretion to rule either way. (*Id.* at pp. 797-798.)

for a plea because the duties of defense counsel to their noncitizen clients under the Sixth Amendment are markedly different from a trial court's duty to ensure that a defendant's guilty plea is voluntary and intelligent under the Fifth and Fourteenth Amendments. (*Resendiz*, *supra*, 25 Cal.4th at p. 246; *United States v. Delgado-Ramos* (9th Cir. 2011) 635 F.3d 1237 (*Delgado-Ramos*).

In *Resendiz*, this court discussed the differences between the knowledge necessary for a voluntary plea and the information that a competent attorney is expected to provide to his client. (*Resendiz*, *supra*, 25 Cal.4th at pp. 242-248; see also *People v. Chien* (2008) 159 Cal.App.4th 1283, 1290 [advice necessary for Pen. Code, §1016.5 different from advice necessary for competent counsel]; *Hill v. Lockhart* (1985) 474 U.S. 52, 56 [distinguishing between the information necessary for a voluntary and intelligent plea and the information competent counsel should provide].) This court in *Resendiz* explained that the right to be notified about the consequences of a plea derives from the due process requirement that pleas must be voluntarily given. The right to effective assistance of counsel, on the other hand, is based on the Sixth Amendment right to competent counsel. (*Resendiz*, at p. 243.)

Critically, "Defense counsel clearly has far greater duties toward the defendant than has the court taking a plea." (*Resendiz*, *supra*, 25 Cal.4th at p. 246.) This court noted that "'The longstanding test for determining the validity of a guilty plea is "whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant."'" (*Resendiz*, at pp. 244-245, quoting *Hill v. Lockhart*, *supra*, 474 U.S. at p. 56.)

The difference between due process requirements for a voluntary plea and the Sixth Amendment requirements for competent counsel in the aftermath of *Padilla* was discussed in *United States v. Delgado-Ramos*.

The Ninth Circuit concluded, as respondent contends, that the Supreme Court's decision in *Padilla v. Kentucky* did not affect the voluntariness of a plea in the absence of incompetent representation. A plea is knowledgeable and voluntary even if the noncitizen defendant was not advised of possible immigration consequences before he entered his plea. (*Id.* at pp. at 1240-1241.)

The defendant in *Delgado-Ramos* pleaded guilty in federal court before the Supreme Court issued its decision in *Padilla v. Kentucky*. After *Padilla*, the defendant sought to vacate his conviction on the ground that it was not voluntary and knowledgeable because the district court did not inform him of possible adverse immigration consequences that might result from his plea. The Ninth Circuit, like this court in *Resendiz*, noted that different standards are applied to assess whether a guilty plea is voluntary under due process principles and whether counsel performed deficiently under Sixth Amendment standards. (*Delgado-Ramos*, 635 F.3d at p. 1239; *Resendiz*, *supra*, 25 Cal.4th at pp. 242-248.) Due process requires that a defendant's plea be voluntary and intelligent. "A guilty plea can be voluntary even 'if the defendant did not correctly assess every relevant factor entering into his decision.'" (*Delgado-Ramos*, at p. 1239, quoting *Brady v. United States*, *supra*, 397 U.S. at p. 757.) The court recognized that changes to federal law in 1996 made deportation virtually certain for noncitizen defendants convicted of aggravated felonies. (*Delgado-Ramos*, at p. 1239.) Deportation required action by the federal immigration agency, however, wholly independent of the sentencing court. (*Ibid.*; compare *Resendiz*, *supra*, 25 Cal.4th at p. 242 ["[T]he deportation consequences of a conviction are not 'inexorable' in that deportation 'can be instituted only "upon the order of the Attorney General" of the United States, who retains discretion not to institute such proceedings.'" (citations omitted)].) Also, the defendant must come into contact with ICE in order for deportation

proceedings to be considered. Even though deportation was "virtually certain" for the defendant in *Delgado-Ramos*, neither due process nor Federal Rules of Criminal Procedure, rule 11, required a noncitizen defendant to be informed of adverse immigration consequences in order to enter a free and knowing plea. (*Delgado-Ramos,* at p. 1239.)

Padilla did not change that rule because the defendant in *Padilla* claimed ineffective assistance of counsel, not a violation of due process. (*Id.* at p. 1240, citing *Padilla, supra*, 559 U.S. at p. 359.) *Padilla* held that professional norms required counsel to advise noncitizen defendants of the risk of deportation as a result of pleading guilty to criminal charges. (*Padilla*, at p. 374.) The *Padilla* opinion did not consider or rule on the voluntary nature of a plea under due process norms. (See *Delgado-Ramos,* at pp. 1240-1241.)

Similarly, when the federal rules on accepting a guilty plea were amended in 2013 in response to *Padilla*, the Advisory Committee on Criminal Rules echoed *Delgado-Ramos*, stating that, "*Padilla* was based solely on the constitutional duty of defense counsel, and it does not speak to the duty of judges." (Report of the Advisory Committee on Criminal Rules (Dec. 8, 2010); see *United States v. Nicholson* (4th Cir. 2012) 676 F.3d 376, 381-382, fn. 3.) The committee made it "clear that the court should give a general statement that there *may* be immigration consequences, not specific advice concerning a defendant's individual situation." (Advisory Committee Notes to 2013 Amendment (emphasis added.) After *Padilla*, federal courts are now required by rule to advise pleading defendants "that, if convicted, a defendant who is not a United States citizen *may* be removed from the United States, denied citizenship, and denied admission to the United States in the future." (Fed. Rules Crim.Proc., rule 11(b)(1)(O) (emphasis added).) Federal courts are under the direct supervision of the

Supreme Court and likely have more noncitizen defendants and deportable offenses nationwide than California has.

In addition to other federal courts following the Federal Rules of Criminal Procedure, the states of New Hampshire and Georgia have reached the same conclusion that due process does not require notice of even the possibility of adverse immigration consequences for a guilty plea to be knowing and voluntary, finding *Padilla* inapposite because it was based on the broader right to the effective assistance of counsel. (*State v. Ortiz* (N.H. 2012) 44 A.3d 425, 431; *Smith v. State* (Ga. 2010) 697 S.E.2d 177, 183-185.) New York's highest court, on the other hand, held that due process requires a trial court to inform a defendant that, if the defendant is not a citizen of this country, he *may* be deported as a result of the plea—the same warning that California has statutorily required trial courts to give since 1977. (*People v. Peque* (N.Y.Ct.App. 2013) 3 N.E.3d 617, 635.)

D. This Appeal Presents Only the Issue of the Knowing and Voluntary Nature of the Plea

It may seem that respondent's argument that *Padilla* does not apply in this appeal is elevating form over substance, because a defendant may base his motion to withdraw his plea on his counsel's deficient performance in failing to advise him of the likelihood or certainty of deportation. In fact, appellant appropriately raised that claim in a collateral challenge in which additional evidence could be added to the record. (See *In re Patterson*, S225194.) But the distinction between the trial court's duty to ensure a voluntary and intelligent plea and counsel's duty to provide competent advice is critical to the orderly administration of justice.

Appellant has never challenged the *Resendiz's* and *Zamudio's* rule that immigration consequences are collateral to the conviction, and he has not challenged or discussed those cases in this appeal. (See *Resendiz*, *supra*, 25 Cal.4th at p. 242; *Zamudio*, *supra*, 23 Cal.4th at p.198.)

Expanding the duty to ensure a defendant is aware of actual collateral consequences is demonstrated here, where appellant complains that his plea was not intelligent because he did not know the effect that the plea would have on his nursing license. A trial court cannot ensure that a defendant is adequately informed about ramifications on his job or career without delving into the defendant's personal life and any number of employment statutes and regulations. Similarly, in order to provide accurate advice to a defendant about the actual immigration consequences he faces would require the trial court to inquire about his immigration status, as permanent residents are treated differently under federal immigration law from nonpermanent residents. (CT 41; see 8 U.S.C. §§ 1229b(a), 1229b(b).) And a noncitizen with no lawful status is certainly deportable regardless of his criminal convictions.

Appellant claims that permitting withdrawal of a plea for ignorance of the certainty of deportation does not require trial courts to ascertain the actual immigration consequence specific to the defendant and to so inform the defendant before entry of a guilty plea. (AOBM 26.) Appellant contends he is only asking that the trial court set aside a valid plea of guilty when the court learns that the defendant did not receive specific advice that deportation was mandatory. But if a trial court has the duty to set aside a validly entered plea for this lack of knowledge, in the absence of proof of incompetence of counsel, then the trial court would be obliged to ensure that the noncitizen defendant had knowledge of his individualized risk of deportation before accepting the plea. If fairness and justice—the essence of due process—required information on the specific likelihood of a known risk, then due process would require the trial court to ascertain the likelihood of each defendant's actual, individual consequences and so inform him before entry of plea in order to ensure an intelligent and voluntary plea. Such a requirement would be unworkable.

The distinction between this case, which raises only the issue of the voluntary and intelligent nature of the plea, and appellant's habeas petition alleging ineffective assistance of counsel, is critical to the trial court's obligation to ensure that a guilty plea is voluntary and intelligent. For this reason, appellant is not aided by the out-of-state cases that he cites as support for his theory that the *Padilla* standard of ineffective assistance of counsel applies to a case such as this, which relies on the constitutional, judicial and statutory guidelines for entry of an intelligent and voluntary plea. (See AOBM 23-24.) Those cases raise a *Padilla* claim by a variety of different procedures, based on the age of the plea and the jurisdiction's procedural rules. (See *People v. Shokur, supra,* 205 Cal.App.4th 1398 [discussing the different procedures for raising a *Padilla* claim in California].) Some of the cases cited by appellant involve motions to withdraw a plea, as here, but unlike here, the defendant in each of those cases raised ineffective assistance of counsel as the basis for their petitions and motions. (*United States v. Rodriguez-Vega* (9th Cir. 2015) 797 F.3d 781, 785; *United States v. Urias-Marrufo* (5th Cir. 2014) 744 F.3d 361, 363; *United States v. Bonilla* (9th Cir. 2011) 637 F.3d 980, 982-983; *Ortega-Araiza v. State* (Wyo. 2014) 331 P.3d 1189, 1191; *Commonwealth v. DeJesus* (Mass. 2014) 9 N.E.3d 789, 791; *State v. Kostyuchenko* (Ohio Ct.App. 2014) 8 N.E.3d 353, 354; *State v. Yuma* (Neb. 2013) 835 N.W.2d 679, 681; *Rabess v. State* (Fla.Ct.App. 2013) 115 So.3d 1079, 1080; *Campos v. State* (Minn.Ct.App. 2011) 798 N.W.2d 565, 566, reversed by *Campos v. State* (Minn. 2012) 816 N.W.2d 480 [*Padilla* is not retroactive]; *State v. Nunez-Valdez* (N.J. 2009) 975 A.2d 418, 420.)

Unlike those cases, the good cause alleged as a reason to withdraw the plea here was only appellant's claim that his free judgment was overcome by mistake, ignorance, inadvertence, fraud, or duress. (CT 30 [motion based on *Giron*, not on ineffective assistance of counsel]; see *Archer*,

supra, 230 Cal.App.4th at p. 702; *Breslin*, *supra*, 205 Cal.App.4th at pp. 1415-1416.) This appeal involves only the trial court's finding of no good cause for withdrawal because appellant entered his plea knowingly and freely under the applicable due process, judicial and statutory standards. Ineffective assistance of counsel and the application of *Padilla* were raised in appellant's petition for writ of habeas corpus and respondent has addressed those issues there. (*In re Patterson*, No. S225194.)

E. Due Process Does Not Require That a Defendant Know the Degree of Risk of Deportation Specific to Him for a Plea to Be Intelligent and Voluntary

Appellant argues that the trial court abused its discretion in ruling on his motion because the trial court did not examine appellant's subjective understanding of the severity of the risk of deportation. (AOBM 12-20.) Not so. The trial court did not abuse its discretion because appellant's subjective level of understanding of the risk specific to him was not relevant to the voluntary and intelligent nature of his guilty plea. An intelligent and voluntary plea does not require that appellant know the degree of certainty of the risk specific to him in the absence of ineffective counsel. Appellant was fully informed of the possibility of adverse immigration consequences pursuant to California statutory law, and due process required no more. (Pen. Code, § 1016.5, subd. (a); *Delgado-Ramos*, *supra*, 635 F.3d at pp. 1239-1241; *Resendiz*, *supra*, 25 Cal.4th at pp. 242-248.)

The trial court here found that appellant was credible when he entered his plea in March 2013. Appellant said that he had read everything on the plea form, that he understood the rights and consequences spelled out there, he had no questions about those matters, and he wanted to plead guilty because he was guilty. (RT 1-2, 10; CT 21-22.) Appellant knew there was a risk of adverse immigration consequences and decided to gamble on that

risk in order to accept the benefits of the lenient plea bargain. There is no evidence that appellant received any incorrect advice that negated the warning contained in the plea form. At this stage of proceedings, there is no information contesting appellant's lack of knowledge of supposed certain deportation. If appellant claimed ineffective assistance of counsel, the trial court could have examined appellant's defense counsel and other witnesses for insight into appellant's state of mind when he agreed to plead guilty. In the absence of extrinsic evidence, the credibility finding of the trial judge who examined appellant and his demeanor when he accepted appellant's guilty plea is the best evidence of the voluntary nature of the plea. The trial court's observations and credibility determination support its finding that appellant showed no good cause for withdrawal because he entered his plea knowingly and voluntarily. (*Fairbank*, *supra*, 16 Cal.4th at p. 1254.) The lack of evidence from other participants to assess error is another reason why the voluntary and intelligent nature of a plea has different standards from the standards applicable to ineffective assistance of counsel. Incompetent advice from counsel might lead to vacation of a conviction, but the lack of knowledge of certain deportation, alone, is not good cause to set aside a valid plea of conviction.

F. "Liberal Construction" of Penal Code Section 1018 Does Not Require Withdrawal of a Plea When the Defendant Has Not Accurately Assessed the Consequences of His Plea

Appellant contends that Penal Code section 1018 must be liberally construed to permit withdrawals of plea and throws himself on the mercy of the court (AOBM 11-17), but case law does not bear him out. He quotes Witkin's statement that Penal Code section 1018 "must be liberally construed to effect those objects [to protect the defendant's opportunity for a fair hearing] and to promote justice." (AOB 13, quoting 4 Witkin, Cal. Crim. Law (4th ed. 2012) Pretrial, § 328, p. 608.) But that statement

concludes, "some of the sweeping pronouncements are not readily reconcilable with the requirement of a strong showing by clear and convincing evidence." (*Ibid.*) Witkin then refers the reader to a closely-related section of his treatise that states, "The language in P[enal] C[ode] 1018 ... 'for a good cause shown' recognizes the long-established rule that leave to withdraw a plea, with its resulting inconvenience and waste of time and effort of courts and prosecuting officers, should not be lightly granted." (*Id.* at Pretrial, § 326, p. 606.)

The courts and the People have an interest in preserving valid convictions, including those gained from intelligent and voluntary admissions of guilt. '"Guilty pleas resulting from a bargain should not be set aside lightly and finality of proceedings should be encouraged.'" (*People v. Archer*, *supra*, 230 Cal.App.4th at p. 702 (citations omitted); *Blackledge v. Allison* (1977) 431 U.S. 63, 71-72.) The fundamental consideration in granting or denying a motion to withdraw a plea is whether the defendant exercised his free judgment in entering into the plea. (*Breslin*, *supra*, 205 Cal.App.4th at p. 1416; *Archer*, *supra*, at p. 702.)

Courts have long held that a defendant's miscalculation of the consequences of the plea is not cause for withdrawal of a guilty plea, absent evidence of deficient performance by counsel. (*Breslin*, *supra*, 205 Cal.App.4th at p. 1417; *Brady v. United States*, *supra*, 397 U.S. at pp. 756-757; see also *Giron*, *supra*, 11 Cal.3d at pp. 797-798.) Balancing the risks and benefits of a plea offer """"frequently present[s] imponderable questions for which there are no certain answers; judgments may be made that in the light of later events seem improvident, although they were perfectly sensible at the time. The rule that a plea must be intelligently made to be valid does not require that a plea be vulnerable to later attack if the defendant did not correctly assess every relevant factor entering his [or her] decision."""" (*Breslin*, at p. 1417, quoting *Brady*, at pp. 756-757; see also

People v. Simmons (2015) 233 Cal.App.4th 1458, 1466; *People v. Hunt* (1985) 174 Cal.App.3d 95, 103-104.)

This court has indicated that the failure to accurately assess the risk of adverse immigration consequences is not good cause for withdrawal of a plea. In *Giron*, this court stated that trial courts had the discretion to either grant or deny a motion to withdraw a plea when the defendant had no notice at all of the possibility of adverse immigration consequences, but that withdrawal would not be permissible when the defendant knew of the risk but failed to accurately assess it. (*Giron*, *supra*, 11 Cal.3d at p. 797.) *Giron* arose before enactment of the statutory requirement for courts to warn noncitizen defendants of the possibility of adverse immigration consequences. The trial court had vacated a guilty plea because culpability was minor and the defendant had no notice at all of adverse immigration consequences. (*Id.* at pp. 795-796.) This court determined that either a grant or a denial of the motion to vacate would not have been an abuse of discretion. (*Id.* at pp. 797-798.) The court distinguished the facts of the case from the common situation where the defendant was aware of the risk and decided to "gambl[e] on the severity of possible penalties." Withdrawal of the plea would be an abuse of discretion in that latter case. (*Id.* at pp. 797-798.) The complete lack of knowledge of the immigration consequence could leave room for withdrawal of a plea; failure to accurately assess known consequences does not. (*Ibid.*)

Denial of a motion to withdraw is not an abuse of discretion when the defendant was aware of the possibility of adverse immigration consequences but did not evaluate that risk accurately. In *People v. Castaneda*, *People v. Quesada* and *People v. Flores*, the defendants moved to withdraw their pleas on the ground that they were not adequately advised of adverse immigration consequences. The appellate courts all held that denial of the motions was proper because the defendants had actual notice

that adverse immigration consequences were possible. (*People v. Castaneda* (1995) 37 Cal.App.4th 1612, 1619; *People v. Quesada* (1991) 230 Cal.App.3d 525, 533, 538-539; *People v. Flores* (1974) 38 Cal.App.3d 484, 488.) In *People v. Flores*, as here, the defendant was aware of the possibility of deportation but did not accurately assess the risk of actually being deported. The appellate court found no abuse of discretion in denying his motion to withdraw the plea for alleged lack of knowledge. (*People v. Flores*, *supra*, 38 Cal.App.3d at p. 488; *People v. Quesada*, *supra*, 230 Cal.App.3d at p. 539 [same].)

Here, appellant, like the defendants in *Castaneda*, *Quesada* and *Flores*, knew that adverse immigration consequences were possible, yet he apparently never consulted his retained immigration attorney for advice for the eight months that the case was pending. Failing to reach his immigration attorney on the spur of the moment from the courthouse, appellant decided to gamble on the risk of immigration consequences for the benefit of accepting the favorable offer. His failure to accurately assess the risk of adverse immigration consequences was not good cause for vacating his voluntary and intelligent plea. (*People v. Castaneda*, *supra*, 37 Cal.App.4th at p. 1619; *People v. Quesada*, *supra*, 230 Cal.App.3d at pp. 538-539; *People v. Flores*, *supra*, 38 Cal.App.3d at p. 488.)

The cases relied on by appellant do not require a different result. (See AOBM 12-17.) Denial of a motion to withdraw a plea was found to be an abuse of discretion in *People v. Perez*, but not for the defendant's lack of knowledge about specific risk of immigration consequences. (*People v. Perez* (2015) 233 Cal.App.4th 736 (*Perez*).) In *Perez*, the defendant had pleaded guilty to drug and weapon charges that made him deportable. (*Id.* at p. 738.) The defendant alleged that his defense attorney had represented himself as knowledgeable about immigration law, but had given defendant incorrect advice that the defendant would not be deported and that he could

resolve any immigration problems that arose. (*Id.* at pp. 739-741.) The record contained no evidence to the contrary. The plea form contained an immigration warning, but the attorney's specific, wrong advice would negate the general written warning. (*Id.* at p. 742.) The trial court denied the motion to withdraw the plea without stating any reasons for its ruling even though the evidence supporting the defendant was not contested. (*Id.* at p. 740.) The appellate court was careful to say that a trial court need not always explain its ruling. If the record had contained conflicting evidence, the appellate court would have credited the evidence supporting the ruling. (*Id.* at pp. 738-739, 742.) If the trial court had found the defendant's declarations not credible, the appellate court would have relied on that credibility finding. (*Id.* at p. 738.) But the evidence was one-sided in support of the motion and the record contained no reasonable basis, or any basis, for rejecting the evidence and denying the motion. (*Id.* at p. 742.) The appellate court reversed the denial of the motion to withdraw, but made clear that the defendant was not necessarily entitled to withdrawal of his plea. The trial court was free to exercise its discretion on remand, as long as the record contained some reason for the appellate court to find the ruling not arbitrary. (*Id.* at pp. 739, 742.)

Here, in contrast, the trial court found that appellant was credible when he entered his plea and not credible when he later said he would have rejected it. (RT 8, 10.) Appellant acknowledged that he knew there could be adverse immigration consequences but he did not know the specific risk that he was assuming. He tried to contact his immigration attorney for more information about the risk of adverse consequences, and chose to enter the plea without more accurate information about the extent of the risk. Unlike *Perez*, there was no incorrect advice by defense counsel that could have negated the written warning. (*Perez*, *supra*, 233 Cal.App.4th at p. 742.) *Perez* is not applicable here.

In *People v. McGarvy*, *People v. Ramirez* and *People v. Dena*, abuse of discretion was found because the fundamental rights of the defendants were neglected or were the result of extrinsic causes. (*People v. McGarvy* (1943) 61 Cal.App.2d 557, 564-565 (*McGarvy*); *People v. Ramirez* (2006) 141 Cal.App.4th 1501, 1506 (*Ramirez*); *People v. Dena* (1972) 25 Cal.App.3d 1001, 1007-1009 (*Dena*).) In *McGarvy*, the defendant essentially had no counsel when he entered his guilty plea. (*McGarvy*, at pp. 558-559.) The district attorney asked an attorney to "at least talk to" the defendant. (*Id.* at p. 560.) The defendant talked with the attorney for only 20 to 30 minutes, then pleaded guilty on the attorney's advice. (*Id.* at pp. 559-560.) The appellate court found that the "ends of justice" demanded withdrawal of the plea because the defendant was not counseled and had only a "token appearance of an attorney," who was brought in by the district attorney. (*Id.* at pp. 564-565.)

Appellant's knowledge and free judgment here, where he had both a criminal defense attorney and an immigration attorney, were far afield from the knowledge and free judgment of the defendant in *McGarvy*, who had essentially no legal advice. In both *Ramirez* and *Dena*, the prosecutors had exculpatory evidence and withheld it from the defendants before the defendants entered their pleas. In *Ramirez*, the prosecutor had a supplemental police report containing exculpatory material but did not provide it to the defendant before he entered his plea. (*Ramirez*, *supra*, 141 Cal.App.4th at p. 1506.) In *Dena*, the defendant entered a plea of guilty without having access to material exculpatory evidence that the prosecution had withheld before entry of plea. (*Dena*, *supra*, 25 Cal.App.3d at pp. 1007-1009.) In both cases, the defendants' free judgment was overcome by the prosecution's suppression of favorable evidence. Extrinsic causes deprived the defendants of critical knowledge. (*Ramirez*, at p. 1506; *Dena*, at p. 1009.) In those cases, there was not a miscalculation of known risks,

as appellant made here, but a lack of information caused by an extrinsic source, the prosecution. Appellant's lack of information here was due to his own failure to talk with his immigration attorney, knowing that his criminal defense counsel was not proficient in that field. (See CT 38.)

The trial court here considered all relevant information and concluded that appellant was credible when he entered his plea. (RT 10.) Appellant provided a declaration stating his understanding—and alleged lack of understanding—at the time of the plea. (CT 37-39.) The trial court considered it and determined that it was not credible. (RT 8.) Appellant made his statement after mulling over and reconsidering his plea for six months. It was self-serving and not corroborated by independent, objective evidence. (*People v. Martinez* (2013) 57 Cal.4th 555, 565 (*Martinez*); *In re Alvernaz* (1992) 2 Cal.4th 924, 938 [defendant's declaration "must be corroborated independently by objective evidence"].) Appellant provided no declaration from his defense attorney stating what she told appellant and what appellant told her when considering whether or not to accept the plea. This court should accept the trial court's finding of credibility. (*Martinez*, at p. 565.) The trial court's finding of no good cause for withdrawal of the valid plea was not an abuse of discretion.

G. Appellant Has Not Proved Prejudice

Even if appellant has shown that the trial court's decision was outside the bounds of reason, he has not shown by clear and convincing evidence that he would have rejected the very favorable plea. The burden is on appellant to show that he would not have accepted the plea if he had been advised differently. (*Martinez*, *supra*, 57 Cal.4th at pp. 558, 564; *Archer*, *supra*, 230 Cal.App.4th at p. 706; see *Breslin, supra*, 205 Cal.App.4th at p. 1416.) He need not show that he would have received a more favorable result as a result of rejecting the plea, but only that he would not have accepted this plea deal if he had been properly advised. (*Martinez*, at pp.

562-563.) The likelihood of a more favorable result either through trial or further negotiation does not determine prejudice but it is a factor to be considered in determining appellant's credibility that he would have rejected the plea. (*Id.* at pp. 564, 567.)

A defendant's statement that he would have rejected the plea if he knew the immigration consequences is necessary but not sufficient to show prejudice. (*Martinez*, *supra*, 57 Cal.4th at p. 565.) It is up to the trial court to determine if that statement is credible. (*Ibid.*) A defendant's statement may be biased in favor of his self-interest, so it must be independently corroborated by objective evidence. (*Ibid.*; *Alvernaz*, *supra*, 2 Cal.4th at p. 938; *People v. Ravaux* (2006) 142 Cal.App.4th 914, 918.) In addition to the likelihood of a more favorable result, factors useful for determining the credibility of a defendant's claim that he would have rejected the plea include: "the presence or absence of other plea offers, the seriousness of the charges in relation to the plea bargain, the defendant's criminal record, the defendant's priorities in plea bargaining, the defendant's aversion to immigration consequences, and whether the defendant had reason to believe that the charges would allow an immigration-neutral bargain that a court would accept." (*Martinez*, *supra*, 57 Cal.4th at p. 568.)

Appellant engaged in extended negotiations with the prosecutor. (RT 7.) The bargain he finally agreed to was very favorable and must have been the best deal available. In fact, appellant bettered the bargain that he earlier proposed. (See CT 44-46.) Appellant avoided the most serious charge of transportation or sale of methamphetamine, and had three out of four drug charges dismissed. He was concerned about immigration consequences, but not to the point of refusing the deal. He was aware that there were adverse immigration consequences but decided to risk those consequences without consulting his immigration attorney. The plea bargain allowed him to serve his custody time in a work-release program instead of in county

jail, avoiding attracting the attention of ICE. He has demonstrated no likelihood of a plea that would avoid both the professional and immigration consequences. There was damning video evidence of his wantonly and willfully dangerous driving, making the likelihood of an acquittal low. His theory of hypoglycemia did not exonerate him. Appellant was not charged with driving under the influence, he was charged with eluding the police by driving with willful and wanton disregard of the safety of people and property. He was not so unconscious as to lack intent for his lengthy evasion of the police, ignoring their lights and sirens and continuing to drive along the freeway, off-ramp and surface streets without regard for the safety of people and property. With regard to the controlled substances, the defense that "the other dude did it" is rarely successful without testimony from "the other dude." Defense counsel likely advised appellant of the minimal likelihood of prevailing at trial—though without testimony from defense counsel the extent of her advice is not known.

Appellant claims that adverse immigration consequences were the most important consideration for him, but he never discussed such consequences with his immigration attorney in the months that the charges were pending, and he decided to accept the deal even though his last-ditch effort to consult with his immigration attorney was not successful. Moreover, the facts suggest it was not the threat of deportation, but rather the loss of his professional license that motivated appellant to seek withdrawal of his plea. Notably, there had been no adverse immigration consequences when he filed his motion to withdraw, but the Nursing Board had filed an accusation to revoke his license. (CT 67-77.) The circumstances show that appellant received a very favorable resolution but later had buyer's remorse and is now trying to better his bargain. The relevant factors support the trial court's finding that appellant was not

credible when he said that with different advice he would have rejected the plea bargain.

Appellant tries to play on the sympathy of this court by describing the dire consequences of deportation in general and as applied to him. (See AOBM 1, 14-16.) He quotes at length from this court's opinion in *Martinez*, describing the impact of deportation on noncitizen defendants who do not have permanent lawful status. (AOBM 14-15, quoting *Martinez*, *supra*, 57 Cal.4th at pp. 563-564.) In *Martinez*, however, there was no evidence that the defendant had any notice of adverse immigration consequences, unlike here, where appellant knew about adverse immigration consequences and decided to plead guilty without consulting his immigration attorney. (*Martinez*, at p. 560.) After clarifying the factors to be considered in determining prejudice, this court remanded the matter for the lower court to determine prejudice. (*Id.* at p. 569.) *Martinez* informs the applicable standard of prejudice to be applied when reviewing a motion to withdraw a plea, but does not otherwise help appellant because appellant, unlike the defendant in *Martinez*, was aware of the risk of deportation and made a calculated decision to go forward with the plea.

Appellant has not borne his burden of proving by clear and convincing evidence that he would have rejected this beneficial offer. Even if this court discounts the trial court's findings of credibility, and determines that the trial court's decision was arbitrary and capricious, the conviction should be affirmed for failure to demonstrate prejudice.

CONCLUSION

Appellant has not shown that the trial court's action was arbitrary or capricious. Respondent respectfully requests this court to affirm the trial court's ruling and appellant's conviction.

Dated: December 4, 2015 Respectfully submitted,

KAMALA D. HARRIS
Attorney General of California
GERALD A. ENGLER
Chief Assistant Attorney General
JULIE L. GARLAND
Senior Assistant Attorney General
STEVE OETTING
Deputy Solicitor General
A. NATASHA CORTINA
Supervising Deputy Attorney General

MEAGAN J. BEALE
Deputy Attorney General
Attorneys for Plaintiff and Respondent

SD2015801430
81211437.doc

CERTIFICATE OF COMPLIANCE

I certify that the attached ANSWER BRIEF ON THE MERITS uses a 13-point Times New Roman font and contains 10,209 words.

Dated: December 4, 2015

KAMALA D. HARRIS
Attorney General of California

MEAGAN J. BEALE
Deputy Attorney General
Attorneys for Plaintiff and Respondent

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Ron Douglas Patterson** No.: **S225193**

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; my business address is 600 West Broadway, Suite 1800, P.O. Box 85266, San Diego, CA 92186-5266.

On December 4, 2015, I served the attached **ANSWER BRIEF ON THE MERITS** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Mail at San Diego, California, addressed as follows:

A.J. Kitchins Attorney at Law P.O. Box 5138 Berkeley, CA 94705 *Attorney for Appellant Ron Douglas Patterson, 2 copies*	W. Samuel Hamrick, Jr. Court Executive Officer Riverside County Superior Court Deliver to: The Hon. Helios J. Hernandez, Judge 4100 Main Street Riverside, CA 92501
The Honorable Michael Hastrin District Attorney-Riverside Western Division, Main Office 3960 Orange Street Riverside, CA 92501	Kevin J. Lane Clerk/Administrator California Court of Appeal Fourth Appellate District, Division Two 3389 Twelfth Street Riverside, CA 92501

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 December 4, 2015, at San Diego, California.

C. Pasquali
Declarant

C. Pasquali
Signature

SD2015801430
81096370.doc