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SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF LOS ANGELES

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, vs. [redacted], Defendant.	CASE NO.: [redacted] **NOTICE OF MOTION AND MOTION TO VACATE CONVICTION UNDER CALIFORNIA PENAL CODE § 1473.7; MEMORANDUM OF POINTS AND AUTHORITIES; SUPPORTING DECLARATIONS AND EXHIBITS; [PROPOSED] ORDER LODGED CONCURRENTLY HEREWITH** Judge: [redacted] Dept.: [redacted]

TO: Los Angeles County District Attorney:

PLEASE TAKE NOTICE that on_____, at the hour of_____, or as soon thereafter as the matter may be heard in Department_____of the above-entitled Court, Defendant [redacted] by and through his attorneys, will move this Court to enter an order vacating his [redacted] 2012 conviction for Possession for Sale under Health & Safety Code § 11378 in Case No. [redacted]. This motion is being made pursuant to California Penal Code § 1473.7 based on prejudicial error on the part of [redacted]'s trial counsel damaging his ability to understand or defend against the adverse immigration consequences of his plea nolo contendore.

Defendant's motion is supported by the attached Memorandum of Points and Authorities, the Declaration of [redacted], the Declaration of [redacted], the Declaration of [redacted]

[redacted], the Declaration of Anne Lai, and associated exhibits, which are being filed concurrently herewith. This motion is also based on all pleadings and records on file herein and any other documentary or testimonial evidence that the Court decides to consider in this matter.

Dated: January 19, 2017

UC IRVINE SCHOOL OF LAW –
IMMIGRANT RIGHTS CLINIC

By:_____
Anne Lai, Esq.

On the Motion:
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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Pursuant to California Penal Code § 1473.7, Defendant [redacted] respectfully moves this Court to vacate his [redacted] 2012 conviction by plea nolo contendore in Case No. [redacted] for Possession for Sale in violation of Health & Safety Code § 11378.

[redacted] is citizen of [redacted] and a longtime legal permanent resident of the United States. He was brought to United States as a minor, went to high school in [redacted], and is part of a large, tight knit family living in the United States. In 2011, [redacted] was arrested and charged with violations of Health & Safety Code §§ 11378 and 11359. It was [redacted]'s first drug case and the District Attorney's office offered a plea to a violation of Health and Safety Code § 11378 with probation and credit for one day in jail. [redacted]'s criminal defense attorney at the time, [redacted]—concerned only with the direct punishment his client would receive—urged [redacted] to accept the plea. But while the plea deal offered by the District Attorney was favorable in terms of traditional criminal punishment, it was disasterous from an immigration law perspective. [redacted] utterly failed to advise [redacted] of the severe immigration consequences that his plea to a violation of Health & Safety Code § 11378 would carry. Nor did he take any steps to defend against the immigration consequences associated with such a conviction.

[redacted]'s conduct was inexcusable coming two years after the Supreme Court's decision in *Padilla v. Kentucky* (2010) 559 U.S. 356 [130 S.Ct. 1473], and a long line of California court cases establishing a Sixth Amendment duty on the part of defense counsel to advise of and defend against the immigration consequences of a criminal conviction. His failures were especially unfortunate since the District Attorney's office had a Collateral Consequences Policy in place at the time and would have likely agreed to an alternative plea deal that would avoided some of the worst immigration consequences had [redacted] attempted to negotiate one. Had [redacted] been appropriately advised about the immigration consequences of a Health & Safety Code § 11378 conviction in his case, given how much was at stake, he would have never accepted the plea and

would have directed [redacted] to seek an alternative disposition or prepare for trial instead.

While [redacted] has since been disbarred from practicing law in California, his neglect in [redacted]'s case continues to have deleterious effects today. [redacted] is currently in deportation proceedings, facing permanent exile from the country he has called home for the past 17 years and separation from his two U.S. citizen children and entire family. He has spent 18 months in ICE custody to date—far exceeding the jail time he's served for any criminal offense.

Effective January 1, 2017, California Penal Code § 1473.7 provides that "□a□ person no longer imprisoned or restrained may prosecute a motion to vacate a conviction" when "□t□he conviction . . . is legally invalid due to a prejudicial error damaging the moving party's ability to meaningfully understand, defend against, or knowingly accept the actual or potential adverse immigration consequences of a plea of guilty or nolo contendere." P.C. § 1473.7(a)(1). The section creates an avenue for a person no longer in custody to prosecute a motion to vacate so long as she or he files it with reasonable diligence after removal proceedings have commenced or a removal order becomes final based on the conviction being challenged. P.C. § 1473.7(b). [redacted]'s motion is timely; removal proceedings have been commenced against him but he has not yet received any final order. Further, the record overwhelmingly establishes, by a "preponderance of the evidence," P.C. § 1473.7(e)(1), that [redacted] performed deficiently and that his errors prejudicially damaged [redacted]'s ability to meaningfully understand and defend against the adverse immigration consequences of his plea. Accordingly, this Court should vacate [redacted] 2012 conviction for Possession for Sale under Health & Safety Code § 11378 and allow him the chance to seek an alternative disposition with a full understanding of the immigration consequences of any plea.

II. STATEMENT OF FACTS

A. Background

[redacted] is a citizen of [redacted] who immigrated to the United States about 17 years ago after his father successfully sought asylum in this country and brought [redacted] and other family members to live with him as derivative beneficiaries. (*See* Declaration of [redacted]

[hereinafter "[redacted] Decl."] ¶ 2).[1] He has been a legal permanent resident of the United States, also known as a "green card holder," for over 12 years. (*See* [redacted] Decl. ¶ 3; [redacted] Decl. ¶ 8; DHS Notice to Appear, Ex. A to the Declaration of Anne Lai [hereinafter "Lai Decl."], at 3).

As a young man, [redacted] attended [redacted] High School in [redacted], and developed an interest in food service working for [redacted]. ([redacted] Decl. ¶ 6). He maintained regular employment until his arrest in 2011, working for [redacted] from 2003 to 2007, and then for a catering company called [redacted]. (*Id.* ¶ 7). His employer at [redacted] described him as a good worker who takes his responsibilities seriously. (Letter from [redacted], Ex. B to Lai Decl.).

[redacted] is the father of [redacted] U.S. citizen children, [redacted], age 7, and [redacted], age 5. ([redacted] *see also* Certificates of Live Birth, Ex. C to Lai Decl.). He became their primary [redacted] after he and their mother were no longer together. ([redacted] Decl. ¶ 4). He remains close with his family in the United States, which includes his parents and seven siblings, all of whom are U.S. citizens or legal permanent residents. (*Id.* ¶ 5; *see also* Letter from [redacted], Ex. D to Lai Decl.).

B. [redacted]'s Arrest and Conviction

On [redacted] 2011, officers from the Los Angeles Police Department ("LAPD"), armed with a search warrant, forced entry through a locked front door to gain access to the apartment where [redacted] had been a tenant and conducted a search of the premises. (LAPD Property Report DR# [redacted], Ex. E to Lai Decl.; [redacted] Decl. ¶ 8). [redacted] was not present at the apartment at the time of the search. ([redacted] Decl. ¶ 8). Indeed, the police never saw [redacted] at the apartment. (Transcript of [redacted]/11 Preliminary Hearing [hereinafter "[redacted]/11 Hearing Tr."], Ex. F to Lai Decl., at 11:18-12:10, 14:26-15:21). [redacted] learned of the search from his girlfriend who returned to the apartment before [redacted] and found the door broken and open. ([redacted] Decl. ¶ 8). She also provided [redacted] with a copy of the search warrant she found in the apartment. (*Id.*). [redacted] contacted the LAPD and was informed that they searched

[1] *See* 8 U.S.C. 1158(b)(3)(A) (providing that spouses and children of those granted asylum may be granted the same status if accompanying or following to join the principal asylee). (*See also* Declaration of [redacted] [hereinafter "[redacted] Decl."] ¶ 8).

the apartment based on an anonymous tip [redacted]. (*Id.* ¶ 9; *see also* [redacted]/11 Hearing Tr., Ex. F to Lai Decl., at 11:3-17). The LAPD asked [redacted] to go to the police station. ([redacted] Decl. ¶ 9).

At the time, [redacted] was providing landscaping services to a man named [redacted], who referred [redacted] to criminal defense attorney [redacted]. (*Id.* ¶ 10). [redacted] and [redacted] met in parking lot where [redacted] provided a copy of the search [redacted] retained [redacted] to represent him. (*Id.*). [redacted] mself i[redacted]ies. (*Id.* ¶ 11). He was charged with Possession for [redacted]ation of Health & Safety Code § 11378 and Possession for Sale in violation of Health & Safety Code § 11359. (Felony Complaint and Information, Ex. G to Lai Decl.).

[redacted] and [redacted]'s attorney-client relationship lasted about two years from 2011 to 2013. ([redacted] Decl. ¶ 10). [redacted] was eventually disbarred from practicing law in California for misappropriating client funds. (State Bar Court Decision and Order [redacted] and Supreme Court of California Order [redacted], Ex. H to Lai Decl.).[2,3] At no time while [redacted]'s case was pending did [redacted] ask [redacted] was a U.S. citizen or what his immigration status was. (*Id.* ¶ 16).[4] They never met in a formal setting to discuss the case. (*Id.* ¶ 12). Their conversations took place in a parking lot, and on the way to, or at, the courthouse just before scheduled court appearances. (*Id.*). [redacted] did not get the impression that [redacted] was

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[2] [redacted] had been disciplined on two prior occasions as well for failing to respond to reasonable inquiries of a client and for failing to refund unearned fees. (*Id.* at 3-4). The incident for which he was disbarred occurred in the summer of 2011, just before [redacted] began working on [redacted]'s case. (Notice of Disciplinary Charges, Ex. H to Lai Decl., at 2-3). The State Bar of California opened its investigation four days after [redacted] was sentenced, on [redacted] 2012. (*Id.*).

[3] Undersigned counsel have made several attempts to contact [redacted] in connection with this case by mail and email, but have not been successful. (Lai Decl. ¶ 10).

[4] Although [redacted] did not inquire of [redacted]'s citizenship or immigration status, there is reason to believe that [redacted] knew that [redacted] was not a citizen. In connection with a subsequent arrest for possession of controlled substance in violation of Health & Safety Code § [redacted] told him that if he remained in jail for 30 days or more he could face "immigration consequences." (*Id.*) This information was a misrepresentation of immigration law, and [redacted] never explained to [redacted] why he would face immigration consequences or what those consequences might be. (*Id.* ¶ 18). But the statement suggested that [redacted] had either learned from [redacted] that [redacted] was from [redacted], guessed that [redacted] was not a citizen from his appearance and accent, or found out about his citizenship or immigration status some other way. (*Id.* ¶ 19).

preparing his case for a trial or was negotiating possible plea deals with the District Attorney's office. (*Id.*). Finally, on [redacted] 2012, one year after the search of the apartment, [redacted] and [redacted] appeared at the Los Angeles County Superior Court for a scheduled hearing. (*Id.* ¶ 13). After speaking with the prosecutor and the judge, [redacted] informed [redacted] that he had been offered a deal to plea no contest to Possession for Sale in violation of Health & Safety Code § 11378 with three years probation and credit for one day and no additional time in jail. (*Id.* ¶ 13). At no time prior to [redacted] 2012 did [redacted] inform [redacted] of any other plea offers. (*Id.* ¶ 14). [redacted] told [redacted] that if he did not accept the plea, he would be facing a long sentence exposure at trial and would have to pay significant additional attorney's fees. (*Id.* ¶ 13).

While [redacted] had explained to [redacted] the custody aspects of his plea deal, he did not mention anything about the severe immigration consequences associated with the plea. (*Id.* ¶¶ 13, 16). For example, he did not inform [redacted] that a conviction under Health & Safety Code § 11378 would lead to virtually certain deportation from the United States, disqualification from major forms of immigration relief, separation from his children and family, and a permanent bar on return. ([redacted] Decl. ¶¶ 11-16). [redacted] did receive an advisal about immigration consequences from the Court during his plea colloquy, (Transcript of [redacted]/12 Plea Colloquy [hereinafter "[redacted]/12 Plea Tr."], Ex. I to Lai Decl., at 4:11-13), but he took the advisal to be a general warning that the Court had to give everyone. ([redacted] Decl. ¶ 15). He did not understand it to have applied to him as a legal permanent resident who was in the United States legally and [redacted] had failed to tell him otherwise. (*Id.* ¶¶ 15-16).

At the time, [redacted]'s greatest worry was being away from his children (who were two-and-a-half and eight months old at the time) and his family. ([redacted] Decl. ¶ 24). It was his first experience with the court system and he trusted [redacted]. (*Id.* ¶ 13). Thus, relying on [redacted]'s recommendation, [redacted] accepted the plea to Possession for Sale in violation of Health & Safety Code § 11378. (*Id.*).

C. Subsequent Immigration Proceedings

[redacted] was not immediately taken into federal custody. However, he was eventually transferred to ICE custody after serving a sentence for possession of controlled substance in violation of

Health & Safety Code § 11377(A) in 2014. (*Id.* ¶¶ 20-22). He had been scheduled to be released in connection with that case in [redacted] of that year, but when he asked jail officials about the anticipated date of his release, he was told he had an immigration hold and would not be going home. (*Id.* ¶ 21). This was the first time [redacted] learned that he was facing very serious immigration consequences. (*Id.*)

On [redacted] 2014, federal authorities initiated removal proceedings [redacted]. (DHS Notice to Appear, Ex. A to Lai Decl.) They charged him as deportable on grounds that he had committed, *inter alia*, a "drug trafficking" aggravated felony offense. (*Id.* at 3; *see also* [redacted] Decl. ¶ 10). He is being detained pending his removal proceedings at the [redacted] Detention Facility. ([redacted] Decl. ¶ 22). He has spent nearly 18 months in immigration detention to date. (*Id.*) His next immigration court hearing is on [redacted] 2017. (Lai Decl. ¶ 12).

[redacted] faces deportation to a country he has not stepped foot in for 17 years, a country he and his famiy fled because of persecution and where he has no more ties. ([redacted] Decl. ¶¶ 2-5, 25; [redacted] Decl. ¶ 10). Unless his conviction is vacated, he will likely lose his residency status and be barred from becoming a citizen or ever returning to the United States again. ([redacted] Decl. ¶¶ 10, 16). In [redacted]'s words, his "life will be destroyed." ([redacted] Decl. ¶ 25).

III. ARGUMENT

The right to counsel, secured by the Sixth and Fourteenth Amendments to the U.S. Constitution and article I, section 15 of the California Constitution, includes the guarantee that the defendant will receive effective representation. *People v. Soriano* (1984) 194 Cal. App. 3d 1470, 1478 [240 Cal.Rptr. 328] "The severity of deportation—'the equivalent of banishment or exile'— . . . underscores how critical it is for counsel to inform her noncitizen client that he faces a risk of deportation." *Padilla*, 559 U.S. at 374-75 (internal citation omitted).

Success on ineffective assistance of counsel claim ("IAC") requires showing that (1) defendant's legal counsel's performance was deficient, and that (2) a defendant's defense was prejudiced by counsel's deficient performance. *Strickland v. Washington* (1984) 466 U.S. 668, 686 [104 S.Ct. 2052]. Whether counsel's performance is constitutionally deficient "is necessarily linked to the practice and expectations of the legal community: '□t□he proper measure of attorney

performance remains simply reasonableness under prevailing professional norms.'" *Padilla* 559 U.S. at 366 (quoting *Strickland*, 466 U.S. at 688). To establish prejudice, the defense must show a "reasonable probability □ of prejudice□ . . . sufficient to undermine confidence in the outcome." *People v. Ledesma* (1987) 43 Cal.3d 171, 217 [233 Cal.Rptr. 404] (citing *Strickland*, 466 U.S. at 693-94). [redacted] was deprived of effective assistance of counsel because [redacted]'s failure to investigate and advise [redacted] about the disasterous immigration consequences of his plea and failure to defend against such consequences by attempting to negotiate a less harmful alternative plea fell below the standards of reasonable conduct for defense counsel. [redacted]e's defense was prejudiced by his counsel's deficient performance. If [redacted] had known about the immigration consequences of a plea to Health & Safety Code § 11378 or understood that there were alternatives, he would have never accepted such a plea and would have directed [redacted] to continue to seek an acceptable alternative or prepare for trial instead.

A. Defense Counsel's Performance was Deficient

Supreme Court precedent makes clear that defendants are entitled to "effective assistance of competent counsel," and that such right extends to the plea-bargaining process. *Lafler v. Cooper* (2012) 132 St. Ct. 1376, 1384 (internal citation omitted). *See also Missouri v. Frye* (2012) 132 S. Ct. 1399, 1408-09 (holding that "□a□nything less . . . might deny a defendant effective representation by counsel at the only stage when legal aid and advice would help him") (citing *Messiah v. United States* (1964) 377 U.S. 201, 204 [84 S.Ct. 1199]). Defense attorneys' duties with respect to immigration consequences are two-fold at this stage. First, they have an affirmative duty to investigate what impact a guilty plea would have on a noncitizen client's immigration status and inform the client of such impact. *See, e.g., Padilla*, 559 U.S. at 363; *People v. Soriano* (1987) 194 Cal.App.3d 1479, 1479-80 [240 Cal. Rptr. 328]. Second, defense attorneys are required to try to defend against the negative immigration consequences of a guilty plea by exploring alternative dispositions that can mitigate the harm. *See, e.g., People v. Bautista* (2004) 115 Cal. App. 4th 229, 240-42 [8 Cal.Rptr.3d 862]. [redacted] failed to fulfill either duty.

1. [redacted] *Failed to Provide* [redacted] *Informed, Accurate Immigration Advice About His Plea, or Any Advice* at All

At the time of [redacted]'s plea, established standards of professional conduct required defense attorneys to investigate and advise noncitizen clients about the immigration consequences of potential plea offers. As criminal law expert [redacted] explains, [redacted] commenced representation of [redacted] just over a year after the Supreme Court decided *Padilla v. Kentucky*, which held that defense counsel had an affirmative Sixth Amendment duty to provide noncitizen clients with correct advice about the risk of deportation. 559 U.S. at 367-69. (*See* Declaration of [redacted] [hereinafter "[redacted] Decl."] ¶¶ 8-9, 12). At that time there would have been a heightened awareness among criminal defense practitioners about the immigration consequences of criminal dispositions. ([redacted] Decl. ¶ 12). In addition, long before *Padilla*, California courts had found that defense counsel were required to research the immigration consequences of a plea and advise their clients about those consequences, and that failure to do so could give rise to a claim of ineffective assistance of counsel. *See, e.g.*, *Soriano*, 194 Cal. App. 3d at 1482. (*See* Pullara Decl. ¶ 7).[5]

The duty that existed at the time of [redacted]'s plea required [redacted] to not only warn [redacted] that his conviction "may carry a risk of adverse immigration consequences," *Padilla*, 669 U.S. at 369, but to investigate and advise [redacted] of the *actual* immigration consequences of his plea. The *Padilla* Court held that "□w□hen the law is not succinct and straightforward," defense counsel must at a minimum inform clients that deportation is a possibility. *Id.* But when "the deportation consequence is *truly clear* . . . the duty to give correct advice is equally clear." *Id*. (emphasis added). *See also Soriano*, 194 Cal. App. 3d at 1481-82 (finding that counsel's warning that there "might be immigration consequences" inadequate and establishing a duty to research and provide specific advice about immigration consequences); ([redacted] Decl. ¶ 8).

Like in *Padilla*, [redacted]'s plea to a violation of Health & Safety Code § 11378 carried

[5] See also ABA Standards for Criminal Justice, Pleas of Guilty, 14-3.2(f) (1999) ("Defense counsel should not recommend to a defendant acceptance of a plea unless appropriate investigation and study

of the case has been completed."). As far back as 1995, the National Legal Aid and Defender Association's *Performance Guidelines for Criminal Representation* had stated that "[i]n order to develop an overall negotiation plan, counsel should be fully aware of, and make sure the client is fully aware of . . . other consequences of conviction such as deportation." *Id.* ¶ 6.2(23)(B) (1995).

a deportation consequence that is "truly clear." As immigration law expert [redacted] explains, according to the federal immigration statute, [redacted]'s conviction, as a "drug trafficking" aggravated felony and a controlled substance offense, subjects [redacted] to deportability, despite his legal permanent resident status. ([redacted] Decl. ¶ 12 (citing 8 U.S.C. § 1227(a)(2)(A)(iii) and 8 U.S.C. § 1227(a)(2)(B)(i))); *see also Padilla*, 559 U.S. at 368-69 (characterizing the deportation consequence of Padilla's conviction for transportation of marijuana as "succinct, clear and explicit," something that his counsel could have determined "from reading the text of the statute"). Like in *Padilla*, [redacted]'s plea also disqualified him from nearly all forms of relief from removal. ([redacted] Decl. ¶¶ 13-15) (describing impact of [redacted]'s conviction on his eligibility for cancellation of removal, asylum and withholding of removal); *Padilla*, 559 U.S. at 368 (discussing the impact of criminal convictions on the possibility of discretionary relief from deportation and noting that preserving such possibility can be "one of the principal benefits sought by defendants deciding whether or not to accept a plea offer or instead proceed to trial" (internal citation omitted)). In fact, as an aggravated felony, [redacted]'s plea carried "the worst of all possible immigration consequences." ([redacted] Decl. ¶ 12). It triggered presumptively mandatory deportation and precludes any immigration judge from even considering his lenthy residency in the United States or the hardship his removal may have on his U.S. citizen children or other family members. (*Id.* ¶¶ 12, 14). After [redacted] is deported, as a result of his conviction, he will never be allowed to return to the United States again; if he does, he will be subject to more severe criminal penalties—up to 20 years of imprisonment. (Id. ¶ 16). It also operates as a permanent bar to naturalization. (*Id.*).

It would have been easy for [redacted] to discover the very serious immigration consequences of a plea to Health & Safety Code § 11378. ([redacted] Decl. ¶ 12). Even a cursory review of *Padilla* and relevant California court decisions such as *Bautista* would have made it clear just how devastating such a conviction could be. In addition, at the time of [redacted]'s representation of [redacted], there were numerous resources and guides that would have put him on notice of the immigration consequences of such a conviction. After *Padilla* was decided in 2010, various trainings, CLEs and materials were made available to defense attorneys in California like [redacted], such as: LOS ANGELES CRIMES & IMMIGRATION SEMINAR (Fall 2010) and DIP WEBINAR: THE PADILLA

ADVISORY: DUTY OF CRIMINAL DEFENSE COUNSEL TO ADVISE CLIENTS OF IMMIGRATION CONSEQUENCES (May 12, 2010), available at https://defendingimmigrants.org/trainings; and IMMIGRATION CONSEQUENCES OF DRUG OFFENSES (Jan 31, 2012), available at https://www.nacdl.org/ResourceCenter.aspx?id=21195. Since 2002, the website of the Defending Immigrants Partnership (DIP) has provided criminal defense attorneys with free online resources on how to understand and fulfill their duty to immigrant clients. *See, e.g.*, A *Defending Immigrants Partnership* Practice Advisory, http://immdefense.org/wp-content/uploads/2012/01/Padilla_Practice_Advisory_011712FINAL.pdf (2010) (providing, in Appendix A, a summary checklist of immigration consequences of crimes, and, in Appendix B, national, regional, and state-specific resources "to assist defense lawyers in complying with their ethical duties to investigate and give correct advise on the immigration consequences of criminal convictions"). Furthermore, the Immigrant Legal Resource Center (ILRC) based in San Francisco, CA, has for many years put out a chart for criminal defense attorneys of the immigration consequences of most California offenses, including violations of Health & Safety Code § 11378. *See* https://www.ilrc.org/crimes. Finally, the California Continuing Education of the Bar book on CALIFORNIA CRIMINAL LAW PROCEDURE AND PRACTICE in 2012 contained an entire chapter on "Representing the Noncitizen Criminal Defendant," including a discussion about the immigration consequences of drug offenses. ("2012 CEB Criminal Law Book," Ex. J to Lai Decl., § 52). If [redacted] did not want to consult these sources himself, he could have made a quick phone call to any criminal defense or immigration attorney with experience in these matters to discover the immigration consequences of [redacted]'s plea. ([redacted] Decl. ¶ 12); *see also* Cal. R. Prof. Conduct 3-110 (providing, under the section titled "Failing to Act Comptently," that any member of the bar who does not have sufficient learning and skill when legal service is undertaken may "associat[e] with or . . . professionally consult[] another lawyer reasonably believed to be competent").

Instead of doing any of the above, it appears that [redacted] "did not make it □his□ business to discover" what impact a plea to Health & Safety Code § 11378 would have on [redacted]'s immigration status. *Soriano*, 194 Cal. App. 3d at 1480. As a result, [redacted] was

deprived of this critical information when deciding whether or not to accept the plea offer made by the proseuction. Indeed, [redacted] did not discuss immigration consequences with [redacted] *at all*. ([redacted] Decl. ¶ 16). [redacted] was misled into believing that the relevant considerations were limited to the the custody aspects of proposed plea, which were relatively favorable, and the expense of going to trial. (*Id.* ¶ 13). Relying on his lawyer's recommendation, [redacted] therefore took the plea. (*Id.*).

Under such circumstances, it is "not [] hard . . . to find deficiency." *Padilla*, 559 U.S. at 368. The Court should determine that [redacted]'s failure to investigate and advise [redacted] of the devastating immigration consequences of his plea fell below the standards for professional conduct and "clearly satisfies the first prong of the *Strickland* analysis.'" *Id.* at 371 (quoting *Hill v. Lockhart* (1985) 474 U.S. 52, 62 [106 S.Ct. 366]).

2. [redacted] *Failed to Defend Against the Immigration Consequences by Seeking a Less Harmful Alternative Plea*

The immigration consequences [redacted] is facing today could have been avoided had [redacted] simply attempted to seek an alternative plea disposition that would be less harmful to [redacted]'s immigration status. But just as [redacted] failed in his duty to investigate and advise his client of the specific immigration consequences of the District Attorney's plea offer, [redacted] failed in this latter duty as well.

At the time of [redacted]'s plea, California law required defense attorneys to look into how the deportation consequence associated with a certain criminal conviction might be mitigated, for example, by pursuing a judicial recommendation against deportation (or "RAD," before that mechanism was repealed) or by pleading to an alternative offense. *See People v. Barocio* (1989) 216 Cal. App. 3d 99, 108-09 [264 Cal.Rptr. 573]; *Bautista*, 115 Cal.App.4th at 237-40. The reason for this is simple. To make an informed decision about whether or not to accept a plea, a defendant must know about—and be able to meaningfully choose between—all the different alternatives. *Bautista*, 115 Cal.App.4th at 240. The Supreme Court's decision in *Padilla* endorsed this role of defense counsel when it remarked that "[c]ounsel who possess the most rudimentary understanding of the deportation consequences of a particular criminal offense may be able to plea bargain creatively with

the prosecutor in order to craft a conviction and sentence that will reduce the likelihood of deportation, as by avoiding a conviction for an offense that automatically triggers the removal consequence." *Padilla*, 559 U.S. at 1486.

To uncover alternative dispositions that could have mitigated the immigration consequences in [redacted]'s case, [redacted], again, could have turned to any number of readily available resources and guides discussing the immigration consequences of criminal convictions. For example, the ILRC chart on the immigration consequences of California offenses that had been posted on the organization's website starting in 2010 instructed criminal defense attorneys to "[a]void consequences by not identifying specific CS on the ROC, or better by pleading to transportation or offering in 11379 and not ID'ing specific CS." ("2010 ILRC Crimes Chart," Ex. K to Lai Decl.). Further, the California Continuing Education of the Bar book on CALIFORNIA CRIMINAL LAW PROCEDURE AND PRACTICE in 2012 contained several pages pertaining to "[s]trategy" regarding controlled substance offenses, both to prevent the person from being "deportable and inadmissible," or if that is not possible, to "avoid aggravated felon status." (2012 CEB Criminal Law Book, Ex. J to Lai Decl., § 52.34). These would have put [redacted] on notice not only of available alternatives but that failure to "actively attempt to avoid unfavorable [immigration] consequences" would "constitute[] ineffective assistance of counsel." (*Id.* § 52.1 at 1716). That the duty to try to defend against unfavorable immigration conequences was reflected in professional guides provides further support that [redacted]'s conduct was unreasonable and departed from prevailing professional norms.

As [redacted] explains, the alternative dispositions that [redacted] could have pursued are multiple. For example, [redacted] could have tried to obtain a plea to simple possession, either with or without deferred entry of judgment. ([redacted] Decl. ¶ 18). If he had been successful, [redacted] would, at the very least, not be categorically ineligible for virtually every form of relief from removal today. (*Id.*). If such a plea was not possible, [redacted] could have pled his client up to offer to sell or transportation under Health & Safety Code § 11379. (*Id.* ¶ 19). This also would have had the effect of preserving [redacted]'s eligibility for relief from removal. (*Id.*). Finally, a third option might have been to plead [redacted] to the offense of accessory after the fact under

Penal Code § 32. (*Id*. ¶ 20). This likely would have saved [redacted] from the possibility of deportation entirely. (*Id.*).

In *Bautista*, the defendant had filed a petition for a writ of habeas corpus alleging, among other things, that his defense attorney provided ineffective assistance of counsel by failing to "attempt to negotiate a plea bargain to a nonaggravated felony such as offering to sell marijuana." 115 Cal.App.4th at 238. His defense attorney acknowledged that he "did not attempt to 'plead upward,' that is, pursue a negotiated plea for a violation of a greater but nonaggravated offense" because "'the possibility . . . never entered [his] mind[.]'" *Id.* at 238; *see also id.* at 241. The court, relying on expert witness testimony, found that, indeed, "[o]ne technique the attorney could have used was to plead to a different but related offense. Another was to 'plead up' to a nonaggravated felony even if the penalty was stiffer." *Id.* at 240. Because the prosecution was likely to have accepted such a plea and the defendant had strong ties to the United States that would have made deportation undesirable, the court granted an evidentiary hearing on the grounds that the defendant may well have been prejudiced by his attorney's "failure to investigate, advise, and utilize defense alternatives to a plea of guilty to an 'aggravated felony.'" *Id.* at 242.

If [redacted] had proposed or received any alternative plea offer from the District Attorney's office, the rules would have required him to convey this to his client. *See* Cal. R. Prof. Conduct 3-500 (Communication), 3-510 (Communication of Settlement Offer). But [redacted] only ever spoke with [redacted] about a single plea offer—to Health and Safety Code § 11378. ([redacted] Decl. ¶¶ 13-14; *see also id.* ¶ 12). Like the defense attorney in *Bautista*, it seems the idea of pursuing a negotiated plea to an alternative offense that could mitigate the immigration consequences appears to have "'never entered [his] mind[.]'" 115 Cal.App.4th at 238. This would not be surprising given that he did not seem to be aware of the immigration consequences of a plea to Health & Safety Code § 1137 at all.

As the court explained in *Barocio*, [redacted]'s failure to pursue a different, less harmful disposition could not be considered a "strategic" one. 216 Cal.App.3d at 109. Under prevailing professional norms, then, his failure to defend against the immigration consequences of [redacted]'s conviction separately "render[ed] his assistance constitutionally inadequate." *Id.* (*See*

also [redacted] Decl. ¶¶ 9, 12-14 (referring to the Supreme Court's decision in *Padilla* where it stated that "preserving the client's right to remain in the United States may be more important to the client than any potential jail sentence," 559 U.S. at 368, and concluding that [redacted]'s fell below the standards for reasonable assistance of counsel).

B. Defense Counsel's Deficient Performance Prejudiced [redacted]'s Case

A defendant may show that he was prejudiced by his defense attorney's failure to investigate and advise him of the immigration consequences of his plea by establishing that, had he understood the consequences, "a decision to reject the plea bargain would have been rational under the circumstances." *Padilla*, 559 U.S. at 372; *see also Strickland*, 466 U.S. at 687-88. Under California law, a defendant may establish prejudice in the plea context by demonstrating that "it is reasonably probable he would not have pleaded guilty if properly advised." *People v. Martinez* (2013) 57 Cal.4th 555, 562 [160 Cal.Rptr.3d 67] (internal citation omitted). A defendant need not establish that he "would have achieved a more favorable outcome" had he decided not to plea guilty. *Id.* at 559. Rather, the focus of the inquiry is on "what the defendant would have done." *Id.* at 559, 564. Additionally, there is no requirement to show that the defendant would "have insisted [instead] on going to trial." *Id.* at 566-67. In the case where there is evidence that would have caused the defendant to "expect or hope a different bargain would or could have been negotiated," the defendant can establish prejudice if he can show he would have rejected the plea offer in the hope that he "might thereby negotiate a different bargain, or failing in that, go to trial." *Id.* at 567.

In this case, there is little question that [redacted] was prejudiced by [redacted]'s deficient performance. If [redacted] had taken the time to investigate and explain the severe immigration consequences of a plea to Health and Safety Code § 11378 and the available alternatives to [redacted], he would have learned that [redacted]—as a longtime legal resident with deep roots in the United States—would have prioritized remaining in this country. As the court recognized in *Martinez*, a defendant's decision to "accept or reject a plea bargain can be profoundly influenced by the knowledge, or lack of knowledge, that a conviction in accordance with the plea will have immigration consequences." *Id.* at 564. If a defendant asserts he "would not have entered into the plea bargain if properly advised," then he must provide either a declaration or testimony to this

effect. *Id.* at 565. It is then up to this Court to "determine whether the defendant's testimony is credible." *Id.* (noting that the Court may reject an assertion where "it is not supported by an explanation or other corroborating circumstances").

[redacted] has submitted a declaration to this Court attesting that he would not have accepted his defense attorney's recommendation to plea to a violation of Health and Safety Code § 11378 had he known it would lead to deportation with no ability to return to the United States. ([redacted] Decl. ¶ 24). He explains that, at the time of his plea, his greatest concern was "being separated from [his] children and family." (*Id.*). While he benefitted from not serving more jail time, had he understood that his plea could lead to the very thing he was trying to avoid, he would have made a different choice and even "agreed to a longer jail sentence." (*Id.*).

[redacted]'s statements are corroborated by his circumstances. The defendant immigrated to the United States when he was a teenager after his family escaped persecution in [redacted]. ([redacted] Decl. ¶ 2). He has been a legal resident for his entire adult life. (*Id.* ¶ 3). He went to high school in the United States, has developed an interest in food service here, has two U.S. citizen chidren and his entire family—including his parents and seven siblings, all of whom are U.S. citizens or legal residents—here. (*Id.* ¶¶ 4-7). He has not been back to [redacted] since he was a teenager and "is afraid of what will happen if [he] is deported." (*Id.* ¶ 25). It would have been entirely rational for someone in [redacted]'s position to reject any plea offer that would forclose his ability to remain in the United States and keep his family intact. *See In re Resendiz* (2001) 25 Cal.4th 230, 253 [105 Cal.Rptr.2d 431] ("[A] noncitizen defendant with family residing legally in the United States understandably may view immigration consequences as the only ones that could affect his calculations regarding the advisability of pleading guilty to criminal charges.").

If [redacted] had researched and inquired with the District Attorney's office about alternative plea deals to mitigate the immigration consequences, there is a reasonable probability that he would have been able to obtain an alternative offer, which he could have in turn communicated to [redacted] to inform his decisionmaking. *Cf. Martinez*, 57 Cal.4th at 568 (noting that one factor to be considered in assessing defendant's credibility is whether "defendant had reason to believe the charges would allow an immigration-neutral bargain"). The sentence [redacted] received for his

plea to a violation of Health and Safety Code § 11378 was one day in jail (with credit for time served) and three years of probation. As [redacted] explains, this is quite a favorable sentence for the offense and suggests "the District Attorney's office may have had proof problems with its case or was sympathetic towards [redacted]" and "would have been amenable to an alternative plea agreement." ([redacted] Decl. ¶ 16). [redacted] could have attempted to secure a plea to possession (given that it was [redacted]'s first offense) or to accessory after the fact, both of which would have been substantially more favorable from an immigration perspective. ([redacted] Decl. ¶ 17; [redacted] Decl. ¶¶ 18, 20). If these were not obtainable, [redacted] could have attempted to "plead up" to transportation or one of the solicitation offenses in Health and Safety Code § 11379, which still would have been substantially better than the plea he accepted. ([redacted] Decl. ¶ 17; [redacted] Decl. ¶ 19). As [redacted] notes, the District Attorney would not have objected to a plea to transportation under Health and Safety Code § 11379, as it is a more serious offense carrying a greater maximum term of punishment. (Pullara Decl. ¶ 19). Indeed, he has been able to successfully substitute a conviction for sales with a conviction for transportation in his own cases. (*Id.*); *see Bautista*, 115 Cal.App.4th at 240 (finding similar testimony from defendant's expert witness to be persuasive in that case). Any of these alternative pleas are likely to have been accepted by the court so long as they were freely and voluntarily made. *See* Penal Code § 1192.5.[6]

Properly counseled, [redacted] would not have pled nolo contendore to a violation of Health and Safety Code § 11378. He would instead have asked [redacted] to seek an alternative plea that would not have such serious immigration consequences or prepare his case for trial. ([redacted] Decl. ¶ 24). That [redacted] would have been willing to agree to a longer jail sentence then—and is coming forward to seek relief from this Court now notwithstanding the "risks attending withdrawal of [his] plea" now—is compelling evidence of the veracity of his statement that he would have rejected the plea. *Martinez*, 57 Cal.4th at 566 (noting that "in those cases where relief is potentially available and the risks . . . do not dissuade the defendant from seeking it, the court

[6] [redacted] may well have also been able to obtain a plea disposition with an unspecified control substance, which would have been even more favorable from an immigration perspective. (See 2012 CEB Criminal Law Book, Ex. J to Lai Decl., § 52.34 at 1760-61); *People v. Holmes* (2004) 32 Cal.4th 432, 441-42 [9 Cal.Rptr.3d 678] (recognizing that court may find factual basis for a plea based on stipulation to complaint or plea agreement).

should give careful consideration to the defendant's claim that he or she would not have entered the plea" had he understood its true consequences). Indeed, [redacted] has shown he is willing to endure 18 months in immigration detention on the hope that he may be able to avoid removal. ([redacted] Decl. ¶ 22). Under such circumstances, the Court should find that he has demonstrated prejudice as a result of his defense attorney's failure to investigate, advise and defend against the immigration consequences of a conviction under Health and Safety Code § 11378 in his case.

C. A *§ 1016.5(a) Warning by the Court Does Not Preclude Relief*

[redacted] should be granted relief notwithstanding the Pen. Code § 1016.5 warning he received from the judge during the plea hearing. As the California Supreme Court has explained, "[d]efense counsel clearly has far greater duties toward the defendant than has the court taking a plea." *In re Resendiz* (2001) 25 Cal. 4th 230, 246 [105 Cal.Rptr.2d 431], *abrogated on other grounds by Padilla*, 559 U.S. 356. To "construe section 1016.5 as a categorical bar to immigration-based ineffective assistance claims 'would deny defendants [who prove incompetence and prejudice] a remedy for the specific constitutional deprivation suffered." *Id.* 241-42 (rejecting the State's suggestion that a § 1016.5 warning should shield pleas from collateral attack).

California Penal Code § 1016.5(a) requires that "[p]rior to acceptance of a plea of guilty or nolo contendere to any offense punishable as a crime under state law . . . the court shall administer . . . [an] advisement on the record" about immigration consequences to the defendant. In this case, the judge who took Mr. [redacted]'s plea stated, after administering various other advisals, "If you're not a citizen, a conviction of this offense will lead to deportation, denial of naturalization and exclusion from the United States." ([redacted]/12 Plea Tr., Ex. I to Lai Decl., at 4:11-13). Because [redacted] had never discussed immigration consequences with his client, [redacted] took the warning to be a general one that the court had to give everyone who pleads guilty. ([redacted] Decl. ¶ 15). He did not understand it to have applied to him as a legal permanent resident who was in the United States legally. (*Id.*).

If the information had come from his own attorney—someone who he held in a position of trust and whose job it was to look out for his interests—it would have likely had a different effect. Indeed, [redacted]'s duty was not to provide his client with a general warning. He had a

responsibility to research the immigration consequences in the defendant's *specific* case and relay what he had found to the defendant. *See supra* Pt. III.A.1. *See also Resendiz*, 25 Cal.4th at 246 (explaining that defense counsel has an obligation to "assist the defendant," after conducting a reasonable investigation, and "owes the client a duty of loyalty," whereas the court does not); *Soriano*, 194 Cal.App.3d at 1479 (noting that "a defendant may reasonably expect that before counsel undertakes to act at all he will make a rational and informed decision on strategy and tactics founded on adequate investigation and preparation").

Instead of coming from his attorney, at a stage in the plea bargaining process when he could have used the information, the warning came only after [redacted] had decided to plea guilty. He had no reference point for the comments made by the judge, and the warning was effectively a post-hoc formality for a bargain that had already been struck. The § 1016.5 warning was also immediately followed by the question: "Has anyone made any threats or promises to get you to plead guilty?" to which [redacted] answered "No[.]" (*Id.* at 4:14-16). [redacted] therefore never responded to the § 1016.5 advisal, nor did the judge did not inquire into whether he had discussed immigration consequences with his defense attorney or wanted additional time to do so.

The California Legislature did not intend, with § 1016.5, to replace the role of a defense attorney. *Resendiz*, 25 Cal.4th at 242 ("Nothing . . . suggests that the drafters of section 1016.5 intended either to narrow defendants' relationships with their attorneys or to shield incompetent legal advisers."). In fact, "[b]oth commentary and statute are concerned with the self-evident proposition that a defendant's in-court responses to rights advisement should not be made 'off-the-cuff.' Instead, they should reflect informed decisions he has reached *after* meaningful consultation with his attorney." *Soriano*, 194 Cal.App.3d at 1481 (emphasis added). "[T]hat a defendant may have received [a] valid section 1016.5 advisement[] from the court does not entail that he has received effective assistance of counsel in evaluating or responding to such advisements." *Resendiz*, 25 Cal.4th at 241.

Moreover, as discussed in *supra* Pt. III.A.2, [redacted] had a duty not only to investigate and advise his client about the immigration consequences of his plea, but to explore alternative plea dispositions that might have mitigated those consequences, and communicated those to [redacted]

[redacted]. *§ 1016.5 does not touch on this important role of defense counsel at all.* It certainly cannot mitigate or cure any prejudice resulting from [redacted]'s failure to fulfill this duty.

Perhaps for these reasons, California courts have considered immigrants' claims of ineffective assistance of counsel claims even where they were provided with the required § 1016.5 warning. *See, e.g.*, *Resendiz*, 25 Cal. App. 3d 1470; *Soriano*, 194 Cal. App. 3d 1470 (granting habeas petition for ineffective assistance of counsel despite adequate § 1016.5 warning); *Bautista*, 115 Cal. App. 229 (granting evidentiary hearing after finding ineffective assistance due to counsel in the absence of any allegation that court had failed to provide § 1016.5 warning). *See also Padilla*, 559 U.S. 356 (granting remand based on ineffective assistance of counsel despite noting that Kentucky courts provided notice of possible immigration consequences on its standard plea form). The Second District Court of Appeal has affirmed that "a defendant can pursue a claim for relief for ineffective assistance of counsel . . . notwithstanding that the trial court had properly advised the defendant under section 1016.5." *People v. Aguilar* (2014) 227 Cal.App.4th 60, 72 [173 Cal.Rptr.3d 473].

Decisions from other states serve as further persuasive authority on this issue. For example, the Supreme Court of Washington, sitting en banc, rejected the notion that a warning about immigration consequences in a guilty plea statement (as required by state statute) could negate defense counsel's ineffective assistance. *State v. Sandoval* (Wash. 2011) 249 P.3d 1015, 1020-21 (rather, plea form warnings underscored "how critical it is for *counsel* to inform her noncitizen client that he faces a risk of deportation") (quoting *Padilla*, 559 U.S. at 373-74) (emphasis in original). *See also People v. Kazadi* (Colo. App. 2011) 284 P.3d 70, 71–72, 74–75, *aff'd*, 2012 CO 73 [291 P.3d 16] (holding that plea form advisal was inadequate to cure prejudice resulting from criminal defense counsel's failure to give specific advice about immigration consequences).

To be clear, the issue is not whether [redacted]'s plea was entered into knowingly and voluntarily under the Due Process Clause. *See Resendiz*, 25 Cal.4th at 243-44. The issue is whether [redacted] received ineffective assistance of counsel under his *Sixth Amendment* rights. *Id.* The Supreme Court has, as *Resendiz* recognized, "never equated these two sets of obligations." *Id.* at 442.

In sum, the Court has full authority to grant [redacted]'s motion notwithstanding that he received a § 1016.5 warning.

IV. CONCLUSION

[redacted] has established, by a preponderance of the evidence, that his criminal defense attorney provided ineffective assistance of counsel damaging his ability to meaningfully understand and defend against the immigration consequences of his plea. Pursuant to P.C. § 1473.7, the Court should grant the motion to vacate his [redacted] 2012 conviction for Possession for Sale in violation of Health & Safety Code § 11378.

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Dated: January 19, 2017

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IMMIGRANT RIGHTS CLINIC

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