



June 11, 2020

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Presiding Justice Arthur Gilbert and Associate Justices
Second Appellate District
Division Six
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200 East Santa Clara Street
Ventura, CA 93001

Re: Request for Modification of Opinion (Rule of Court, Rule 8.264)

People v. Josefina Ruiz

Case No. B296742, filed and certified for publication on February June 5, 2020

Dear Honorable Presiding Justice Gilbert and Associate Justices:

We, the lead drafters of Cal. Pen. C. § 1473.7 and appellant Josefina Ruiz’s attorney, write to respectfully request that this Court modify the above-referenced decision. Our suggestions will help avoid any ambiguity as to the fact that it is the criminal defense attorney, not the court, who has the obligation to advise that a plea “will” rather than “may” have adverse immigration consequences.

We applaud this decision which faithfully tracks the California Legislature’s intent in passing Cal. Pen. C. § 1473.7 and its 2019 amendments. This decision will undoubtedly help courts, attorneys, and the moving parties implement the law and its amendments.

There is no question that there is indeed a significant difference between being advised that an offense “will” versus “might” carry immigration consequences. We are concerned, however, that the decision is already confusing litigants as to whether the obligation to advise falls on the courts or on defense counsel.

A close reading of the decision within the context of governing statutory and case law makes clear that defense counsel, not the court, carries the obligation of providing case-specific advice about the mandatory immigration consequence of a conviction. (*See, e.g., In re Reyna Perez Hernandez* (2019) 33 Cal.App.5th 530 (holding that the Cal. Pen. C. § 1016.5 advisement “is not designed, nor does it operate, as a substitute for such advice’ of defense counsel regarding the applicable immigration consequences in a given case” (citing *People v. Patterson* (2017) 2 Cal.5th 885, 889); Cal. Pen C. § 1016.5(a); and Judicial Council’s CR

101 model plea form 3.i. (“I understand that if I am not a citizen of the United States, my plea of guilty or no contest *may* result in my deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws the United States.”) *available at* <https://www.courts.ca.gov/documents/cr101.pdf> (last accessed June 11, 2020)).

But for those less familiar with the established case law, the opening paragraphs of the decision could cause some confusion. This confusion could easily be rectified by inserting a single qualifying noun, “attorney,” into certain critical sentences.

For purposes of clarity we respectfully suggest the following minor edits, which do not change the result or substance of the decision:

- 1) At Slip Op. 1, the first paragraph states: “Assume a defendant wishes to plead guilty to a crime. She is an immigrant and is told: 1) her plea of guilty *may* make her ineligible to become a U.S. citizen; or 2) her plea of guilty *will* make her ineligible to become a U.S. citizen.” We suggest inserting in the second sentence the italicized words: “She is an immigrant and is told *by her attorney*: 1) her plea of guilty *may* make her ineligible”
- 2) At Slip Op. 1-2, after the first citation to *People v. Patterson* (2017) 2 Cal.5th 885, 889, 895, we suggest you include the following quote from *Patterson* in parentheses: (“[R]eceipt of the section 1016.5 advisement does not bar a criminal defendant from challenging his conviction on the ground that his counsel was ineffective in failing to adequately advise him about the immigration consequences of entering a guilty plea”).
- 3) At Slip Op. 3, the last sentence of the first paragraph states: “The trial court denied the 2017 motion because the record showed that she was advised her conviction ‘*may* have’ negative immigration consequences.” We suggest inserting “she was advised, *by the court*, that her conviction ‘*may* have’”
- 4) Slip Op. 4, third paragraph, states: “The California Supreme Court has held, however, that the words ‘may have’ in a section 1016.5 immigration advisement are not an adequate immigration advisement for defendants charged with serious controlled substance offenses. (*People v. Patterson, supra*, 2 Cal.5th at pp. 889, 895.).” We suggest inserting “are not an adequate *substitute for defense counsel’s case-specific* immigration advisement for defendants charged with serious controlled substance offenses.”
- 5) Slip Op. 4, third paragraph, states: “Defendants must be advised that they *will be* deported, excluded, and denied naturalization as a *mandatory* consequence of the conviction.” We suggest inserting: “Defendants must be advised *by their attorney* that they”

These suggestions clarify that it is the *attorney's* responsibility to advise the defendant of the specific immigration consequences. This is consistent with existing case law and statutory requirements.

In *People v. Camacho* (2019) 32 Cal.App.5th 998, the Appellate Court reversed the denial of a Cal. Pen. C. § 1473.7(a)(1) motion and granted relief based on the failure of defense counsel to advise about mandatory deportation, notwithstanding the *court's* advisement that the plea “will result” in deportation. *Id.* at 1009. In *In re Reyna Perez Hernandez* (2019) 33 Cal.App.5th 530, 545, the Court held that “the ‘generic’ advisement required of the court under Penal Code section 1016.5, subdivision (a) addressed in *Patterson*, . . . ‘is not designed, or does it operate, as a substitute for such advice’ of defense counsel regarding the applicable immigration consequences in a given case.” (quoting *People v. Patterson* (2017) 2 Cal.5th 885, 898.).

Of course, the California Supreme Court also addressed this issue directly in *People v. Patterson* (2017) 2 Cal.5th 885, where it discussed at length the distinction between the court’s section 1016.5 obligations and defense counsel’s duties. *Patterson* held that a properly administered 1016.5 admonishment did not bar Mr. Patterson from moving to withdraw a plea based on defense counsel’s failure to advise about the immigration consequences of a guilty plea. *Id.* at 896-897. The Court reasoned that “[i]f anything, [section 1016.5] contemplates an enhanced, not a diminished role for counsel.” *Id.* at 897. “One of the purposes of the section 1016.5 advisement is to enable the defendant to seek advice from counsel about the actual risk of adverse immigration consequences. . . . [T]his purpose is reflected in the requirement” of section 1016.5(b) to request additional time to consider the appropriateness of the plea in light of the advisement and in the intent of section 1016.5(d) to allow time for the defendant to negotiate with the prosecuting agency and consult with defense counsel. (*People v. Patterson* (2017) 2 Cal.5th 885, 897).

The court’s immigration advisal in § 1016.5(a) can play a useful role in stimulating a conversation about immigration consequences between the defendant and his attorney, but it cannot substitute for competent counsel advice. A defendant will rely on his own counsel rather than the court’s boilerplate which does not address the defendant’s individual circumstances. This was, in essence, one of the deciding factors in the *Ruiz* case, where the court issued its required advisal, but *Ruiz* nevertheless failed to understand the immigration consequences. In *In re Resendiz*, the Attorney General suggested that the Court construe § 1016.5 as a categorical bar to immigration-based ineffective assistance claims, but the Court rejected this suggestion since this “would deny defendants [who prove deficient performance and prejudice] a remedy for the specific constitutional deprivation suffered” under the Sixth Amendment and the corresponding California Constitutional provision. (*In re Resendiz* (2001) 25 Cal. 4th 230, 242 quoting *In re Alvernaz* (1992) 2 Cal.4th 924, 936.)

Critically, Cal. Pen. C. § 1016.5(a) itself states that the court “shall” advise that an offense “*may*” rather than “*will*” carry certain immigration consequences. The CR 101 model plea form produced by Judicial Council reflects this, see 3.i “I understand that if I am not a citizen of the United States, my plea of guilty or no contest *may* result in my deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws the United States.” available at <https://www.courts.ca.gov/documents/cr101.pdf> (last accessed

June 11, 2020). It is, in fact, inappropriate for a judge to change the statutorily required section 1016.5(a) advisement to state that a defendant “will” be deported, excluded, and denied naturalization since the statute states that the court “shall” advise that the defendant “may” suffer these adverse immigration consequences. This could be misleading and incorrect: not all offenses lead to mandatory deportation or inadmissibility. As the Supreme Court stated in *Padilla v. Kentucky* (2010) 559 U.S. 356, 373 “[A] criminal episode may provide the basis for multiple charges, of which only a subset mandate deportation following conviction.” (See ILRC, Public Facing Chart: Selected Immigration Defenses for Selected California Crimes, https://www.ilrc.org/sites/default/files/resources/pub_facing_ca_chart-20190312v2.pdf).

The distinction between the general immigration advisement required of courts and the specific advisement required of defense counsel is important. Courts will rarely have the case-specific information necessary to make an informed advisement about immigration consequences. Accurate advice requires knowledge of a defendant’s exact immigration status (e.g., undocumented, permanent resident, temporary protected status, DACA, H1-b, etc.) date of admission, prior convictions, if any, and a myriad other factual and legal issues. Defense counsel alone will possess sufficient information to provide the “will” advisement, which is why the U.S. Supreme Court has placed a special duty on defense counsel to defend and advise of the case specific and mandatory immigration consequences. (*Padilla v. Kentucky* (2010) 559 U. S.at 368).

As the drafters and advocates of Cal. Pen. C. § 1473.7, and close followers of its implementation, we believe that the suggested edits will clarify the Court’s decision and help avoid confusion.

Sincerely,

/s/ Rose Cahn
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Immigrant Legal Resource Center

/s/ Michael Mehr
Of Counsel
Immigrant Legal Resource Center

/s/ Gary Finn
Attorney at Law
Counsel for Defendant/Appellant, Josefina Ruiz