

**Introduced by Senator Ashburn**February 22, 2008

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An act to amend Section 1016.5 of the Penal Code, relating to criminal procedure.

## LEGISLATIVE COUNSEL'S DIGEST

SB 1566, as introduced, Ashburn. Criminal procedure: pleas: aliens: advisement.

Existing law requires the court, prior to accepting a guilty or nolo contendere plea to a felony or misdemeanor, to advise the defendant that deportation, exclusion from admission to the United States, or denial of naturalization may result from conviction. If the court fails to so advise the defendant and the defendant shows that conviction of the offense to which he or she pleaded guilty or nolo contendere may have the consequence for the defendant of deportation, exclusion from admission to the United States, or denial of naturalization, the court, on the defendant's motion, is required to vacate the judgment and permit the defendant to withdraw the plea of guilty or nolo contendere and enter a plea of not guilty.

This bill would require a defendant to bring a motion to vacate the judgment under these provisions within 5 years of the date of the plea and would specify findings that a court would be required to make in order to grant this motion to vacate the judgment and permit a change of plea. The bill would provide that the required court advisement does not impose any obligation on defendant's counsel and that the failure of a court to provide the required advisement shall not be used to raise a claim of ineffective assistance of counsel or any other claim of error occurring at the time of the plea. The bill would require the court to require every defendant who enters a plea of guilty or nolo contendere

to sign a document, before or at the time the plea is entered, that contains specified information, and would require that document to be maintained for 5 years from the date of the plea, unless another law requires a longer period of time. The bill would make that document, a transcript of the plea, or a minute order memorializing the advisement conclusive proof of the adequacy of the advisement. The bill would require those materials, to the extent they are available in the superior court file, and specified immigration documents to be attached to a defendant’s motion to vacate the judgment.

Vote: majority. Appropriation: no. Fiscal committee: yes.  
 State-mandated local program: no.

*The people of the State of California do enact as follows:*

1 SECTION 1. Section 1016.5 of the Penal Code is amended to  
 2 read:  
 3 1016.5. (a) Prior to acceptance of a plea of guilty or nolo  
 4 contendere to any offense punishable as a crime under state law,  
 5 except offenses designated as infractions under state law, the court  
 6 shall administer the following advisement on the record to the  
 7 defendant:  
 8 If you are not a citizen, you are hereby advised that conviction  
 9 of the offense for which you have been charged may have the  
 10 consequences of deportation, exclusion from admission to the  
 11 United States, or denial of naturalization pursuant to the laws of  
 12 the United States.  
 13 (b) (1) Upon request, the court shall allow the defendant  
 14 additional time to consider the appropriateness of the plea in light  
 15 of the advisement as described in this section. If, after January 1,  
 16 1978, the court fails to advise the defendant as required by this  
 17 section and the defendant shows that conviction of the offense to  
 18 which defendant pleaded guilty or nolo contendere may have the  
 19 consequences for the defendant of deportation, exclusion from  
 20 admission to the United States, or denial of naturalization pursuant  
 21 to the laws of the United States, *and the defendant brings the*  
 22 *motion within five years of the date on which the plea of guilty or*  
 23 *nolo contendere was entered*, the court, on defendant’s motion,  
 24 shall vacate the judgment and permit the defendant to withdraw  
 25 the plea of guilty or nolo contendere, and enter a plea of not guilty.  
 26 Absent a record that the court provided the advisement required

1 by this section, the defendant shall be presumed not to have  
2 received the required advisement.

3 (2) *The remedy provided in paragraph (1) shall only be granted*  
4 *when the court finds that the defendant has met his or her burden*  
5 *of proof on all of the following:*

6 (A) *The court failed to provide an adequate advisement before*  
7 *the plea.*

8 (B) *The defendant demonstrates prejudice, that he or she would*  
9 *not have pled guilty or nolo contendere if he or she had been*  
10 *adequately advised.*

11 (C) *The defendant demonstrates that there exists, at the time of*  
12 *the motion, more than a remote possibility that the conviction will*  
13 *have one or more of the enumerated adverse immigration*  
14 *consequences.*

15 (D) *The defendant demonstrates reasonable diligence in*  
16 *bringing the motion.*

17 (E) *The motion was brought within five years of the date on*  
18 *which the plea of guilty or nolo contendere was entered.*

19 (3) *Prejudice to a defendant is not to be presumed from a*  
20 *defective advisement.*

21 (c) With respect to pleas accepted prior to January 1, 1978, it  
22 is not the intent of the Legislature that a court's failure to provide  
23 the advisement required by subdivision (a) ~~of Section 1016.5~~  
24 should require the vacation of judgment and withdrawal of the  
25 plea or constitute grounds for finding a prior conviction invalid.  
26 Nothing in this section, however, shall be deemed to inhibit a court,  
27 in the sound exercise of its discretion, from vacating a judgment  
28 and permitting a defendant to withdraw a plea.

29 (d) The Legislature finds and declares that in many instances  
30 involving an individual who is not a citizen of the United States  
31 charged with an offense punishable as a crime under state law, a  
32 plea of guilty or nolo contendere is entered without the defendant  
33 knowing that a conviction of such offense is grounds for  
34 deportation, exclusion from admission to the United States, or  
35 denial of naturalization pursuant to the laws of the United States.  
36 Therefore, it is the intent of the Legislature in enacting this section  
37 to promote fairness to such accused individuals by requiring in  
38 such cases that acceptance of a guilty plea or plea of nolo  
39 contendere be preceded by an appropriate warning *from the court*  
40 of the special consequences for such a defendant which may result

1 from the plea. It is also the intent of the Legislature that the court  
2 in such cases shall grant the defendant a reasonable amount of  
3 time to negotiate with the prosecuting agency in the event the  
4 defendant or the defendant's counsel was unaware of the possibility  
5 of deportation, exclusion from admission to the United States, or  
6 denial of naturalization as a result of conviction. *However, it is*  
7 *the intent of the Legislature that each person before the court,*  
8 *whether a citizen of the United States or not, shall be treated*  
9 *equally, and this section is not intended as authority to provide a*  
10 *more advantageous or different plea bargain to a noncitizen or to*  
11 *authorize a plea bargain to a charge not supported by the evidence.*  
12 It is further the intent of the Legislature that, at the time of the  
13 plea, no defendant shall be required to disclose his or her legal  
14 status to the court.

15 (e) *The advisement required to be administered by a court*  
16 *pursuant to subdivision (a) shall not impose any obligation on*  
17 *counsel for the defendant. The failure of a court to provide the*  
18 *advisement required by subdivision (a) shall not be used to raise*  
19 *a claim of ineffective assistance of counsel or any other claim of*  
20 *error occurring at the time of the plea.*

21 (f) (1) *The court shall require every defendant who enters a*  
22 *plea of guilty or nolo contendere to sign a document, before or at*  
23 *the time the plea of guilty or nolo contendere is entered, that*  
24 *contains at a minimum all of the following information:*

25 (A) *The full name of the defendant, case number, and date.*

26 (B) *The advisement required by subdivision (a).*

27 (C) *A statement that the defendant has read and understood the*  
28 *advisement required by subdivision (a).*

29 (D) *The signature of the defendant.*

30 (E) *If an interpreter is used to assist the defendant in*  
31 *understanding the advisement required by subdivision (a), the*  
32 *interpreter shall sign a statement that he or she is a court certified*  
33 *or court-appointed interpreter fluent in the native language of the*  
34 *defendant and that he or she has accurately translated the*  
35 *advisement required by subdivision (a).*

36 (2) *The document required pursuant to paragraph (1) shall be*  
37 *maintained in the official court file for no less than five years from*  
38 *the date of the plea of guilty or nolo contendere, unless another*  
39 *provision of law requires the record to be maintained for a longer*  
40 *period of time.*

1     (3) *An official transcript of the advisement, a signed, written*  
2 *record of the advisement that complies with paragraph (1), or a*  
3 *notation in the official court docket or minute order memorializing*  
4 *that the advisement required by subdivision (a) was given, shall*  
5 *be conclusive proof of the adequacy of the advisement.*

6     (4) *The defendant shall have the burden of producing a copy of*  
7 *the official transcript of the plea, the signed, written record of the*  
8 *advisement that complies with paragraph (1), and the court docket*  
9 *or minute order, to the extent that these are available in the*  
10 *superior court file, and attaching them to the motion filed pursuant*  
11 *to subdivision (b).*

12     (5) *A defendant who claims that he or she is facing actual*  
13 *immigration consequences as a result of the conviction, shall*  
14 *produce certified copies of his or her relevant and material*  
15 *immigration documents, including the first notification of the*  
16 *consequence, that document the actual immigration consequence*  
17 *from the United States Department of Homeland Security,*  
18 *Immigration and Customs Enforcement, and attach them to the*  
19 *motion filed pursuant to subdivision (b).*