

Filed 8/8/02

**IN THE SUPREME COURT OF CALIFORNIA**

THE PEOPLE,

Plaintiff and Respondent,

v.

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S091459

Ct.App. 6 H019719



plea hearing had been destroyed, as authorized under Government Code section 68152.

The prosecutor opposed the motion to vacate and argued, among other things, that defendant's section 1016.5 motion to vacate was not the appropriate motion because it could only be made before judgment is imposed. He further argued that, even if a section 1016.5 motion may be made postjudgment, the 13-year delay between defendant's pleas and his motions to vacate was unreasonable. Defendant knew, before the sentencing hearing in 1985, that an immigration hold had been placed on him by the INS as a result of the convictions. The probation reports, that had been prepared before sentencing on the 1985 convictions, reflected that a hold had been placed on ult of thvr15dt, ffficials The proba113d

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## **DISCUSSION**

Section 1016.5, subdivision (a), requires that: “Prior to acceptance of a

immigration consequences, at or before sentencing, does not necessarily waive the alleged error. (*Zamudio, supra*, 23 Cal.4th at p. 203.) Our conclusion was consistent with the plain language of section 1016.5, which contains no provision

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judgment is an adequate remedy; allowance of an appeal from the order denying the motion to vacate would virtually give defendant two appeals from the same ruling and, since there is no time limit[] within which the motion may be made, would in effect indefinitely extend the time for appeal from the judgment.

[Citation.] The considerations are the same whether the matters sought to be presented by motion to vacate actually were presented to the trial court prior to judgment of conviction, or whether such matters should have been but were not so presented.” (*Ibid.*)

have been raised in an appeal from that action. Defendant may not wait for 13 years to take an appeal from the 1985 judgments.”

Thus, the Court of Appeal found that the general rule of nonappealability applied and that defendant should have raised the issue on an appeal from the initial judgments of conviction. The Attorney General echoes the Court of Appeal’s reasoning, arguing that defendant “could and should have raised the issue of inadequate advisements under section 1016.5 when he still had a right to pursue a direct appeal from the judgment.” Unlike the Court of Appeal, which failed to cite *Zamudio, supra*, 23 Cal.4th 183, the Attorney General recognizes that, under *Zamudio (id.*

In *Zamudio*,







The Attorney General's reliance on *Thomas* is not persuasive. Although the defendant in *Thomas*, as in this case, appealed from a postjudgment order

301), *Thomas* deemed, within this court's discretion, that the denial order was an appealable order and *then* determined the merits against defendant (no jurisdictional defect). We cautioned that, "our action in this regard is not to be considered general authority for the appealability of an order which denies a



*See next page for addresses and telephone numbers for counsel who argued in Supreme Court.*

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**Counsel who argued in Supreme Court (not intended for publication with opinion):**

Norton Tooby  
Law Offices of Norton Tooby  
6333 Telegraph Avenue, Suite 200  
Oakland, CA 94609  
(510) 601-1300

Sharon G. Birenbaum  
Deputy Attorney General  
455 Golden Gate Avenue, Suite 11000  
San Francisco, CA 94102-7004  
(415) 703-5896