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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. DANIEL ABERGEL, Defendant and Appellant.	B285204 (Los Angeles County Super. Ct. No. MA002937)

APPEAL from an order of the Superior Court of Los Angeles County. Kathleen Blanchard, Judge. Affirmed.

Michael K. Mehr, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Steven D. Matthews and Kathy S. Pomerantz, Deputy Attorneys General, for Plaintiff and Respondent.

In 1991, Daniel Abergel, who is an Israeli citizen, pleaded no contest to one count of possession for sale of cocaine (Health & Saf. Code, § 11351).[1] Abergel was subsequently deported to Israel, but he returned to the United States in 1992. In 2017, federal immigration authorities initiated removal proceedings against Abergel. In response, he filed a motion in superior court to vacate the 1991 conviction on the basis that his counsel failed to advise him of the immigration consequences of the plea, failed to pursue an immigration-neutral plea deal, and had a conflict of interest. The superior court denied the motion, and Abergel appealed. We affirm the order.

FACTUAL AND PROCEDURAL BACKGROUND[2]

Abergel is an Israeli citizen. He grew up in Israel but had difficulty finding work after high school. In 1989, when he was around 21 years old, Abergel came to the United States to visit his uncle. Although not entirely clear from the record, it appears he lawfully entered the United States under a temporary visitor visa. Abergel began working at his uncle's shoe store.

In August 1991, Abergel, his cousin, and three others were charged by criminal complaint with sale or transportation of a controlled substance (§ 11352, subd. (a)), and conspiracy to commit a crime (Pen. Code, § 182). The complaint alleged that Abergel's co-defendant, Raffi Hadidian, met an undercover police

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[1] All future undesignated statutory references are to the Health and Safety Code.

[2] On our own motion, we take judicial notice of a July 14, 2008 unpublished opinion issued by a panel of this court in a related case involving Abergel (*People v. Abergel* (July 14, 2008, B194513) [nonpub. opn.]). (Evid. Code, §§ 452, subd. (d)(1); 459, subd. (a).)

officer at a restaurant and agreed to sell him a half kilogram of cocaine. Later that day, Abergel drove his cousin to a gym, where they met Hadidian and the other co-defendants. The cousin took a brown, kilogram-sized package out of the trunk of Abergel's car. Hadidian then returned to the restaurant and gave the officer a sample of cocaine. Abergel remained at the gym and placed the brown package in a striped bag. According to the police report, officers later recovered the brown package, which contained cocaine.

Abergel was represented in the criminal proceedings by Alex Kessel. Abergel and his co-defendants agreed to plead no contest to a charge of possession for sale of cocaine (§ 11351). In exchange, the prosecutor agreed to dismiss the sale/transportation and conspiracy counts. Kessel advised Abergel he would be sentenced to one year in jail but serve only six months.

The court held a plea hearing for Abergel and his co-defendants on August 23, 1991. Abergel was assisted by an interpreter. At the beginning of the hearing, the court noted that Abergel's cousin's counsel, James Blatt, would be standing in for Kessel. The court asked Abergel if he was agreeable to that, and Abergel replied that he was. The prosecutor then advised Abergel and his co-defendants of the consequences of their pleas, including the following: "If you are not a citizen of this country, by entering this plea it can result in your being deported, denied your citizenship, denied re-entry or affect any claim for amnesty." Abergel stated he understood the consequences, he had sufficient time to speak to his attorney concerning the case, and he had no questions for his attorney, the prosecutor, or the judge.

The court accepted Abergel's no contest plea and sentenced him to probation for five years and one year in county jail. After serving his time in jail, Abergel was detained by immigration officials and deported to Israel. The precise basis for the deportation is not apparent from the record.

Upon returning to Israel, Abergel obtained a new visitor visa and was admitted to the United States in March 1992. Abergel married a U.S. citizen in 1993, with whom he had three children. In 1999, he applied for permanent resident status based on his marriage. The application was denied, although the reason for the denial is not apparent from the record.

In 2005, the superior court reduced Abergel's conviction to a misdemeanor, and then set aside his plea and dismissed the case pursuant to Penal Code section 1203.4. The dismissal apparently did not eliminate the immigration consequences of the conviction. (See *Ramirez-Castro v. I.N.S.* (9th Cir. 2002) 287 F.3d 1172, 1174.) Accordingly, in July 2006, Abergel filed a petition for writ of error coram nobis to set aside his plea and the judgment of conviction. Abergel argued he entered the plea without knowledge of its immigration consequences, his counsel was ineffective in failing to inform him of those consequences, and he was never asked if he needed an interpreter for any of the criminal proceedings.

The superior court denied Abergel's motion, which a panel of this court affirmed in an unpublished opinion (*People v. Abergel, supra*, B194513). In doing so, we held the advisements Abergel received at the plea hearing were sufficient. We also explained that Abergel's appeal was not the proper vehicle to assert a claim for ineffective assistance of counsel. Nonetheless, we noted that his "position appears insufficient on the merits.

First, notwithstanding appellant's legal argument, there is no factual showing Kessel either advised appellant he would not be deported, or otherwise affirmatively misadvised him. Second, appellant has not shown that his attorney was responsible for any claimed failure by appellant to comprehend the consequences of his plea at the time it was taken. The record reflects that appellant was fully advised of those consequences, and that he twice stated that he understood them. As to the requirement that a defendant claiming ineffective assistance of counsel must also show prejudice [citation], there is nothing presented in appellant's argument that suggests appellant would have received a more favorable result if he had taken the case to trial." (*People v. Abergel, supra*, B194513, at p. 8.)

In February 2017, immigration authorities initiated removal proceedings against Abergel on the basis that he remained in the United States beyond the period of time authorized by his visitor visa. According to Abergel, the federal government has taken the position that he is ineligible to adjust his status to permanent resident because of his 1991 conviction. As a result, he is likely to be deported.

In response to the new immigration proceedings, Abergel filed in superior court a motion to vacate his conviction pursuant to Penal Code section 1473.7. Abergel asserted the conviction should be set aside because his attorneys failed to advise him of the actual and possible immigration consequences of his plea or pursue an immigration-neutral plea deal. Abergel further asserted Blatt should not have represented him at the plea hearing because he had an undisclosed conflict of interest.

In support of his motion, Abergel submitted a declaration in which he asserted Kessel did not ask him about his immigration status and did not inform him that, if he pleaded no contest, he would likely be detained by immigration officials and barred from obtaining permanent resident status in the United States. Abergel asserted that, had he known such information, he would not have entered the plea. He explained that, at the time, he did not want to return to Israel because he had no real prospects for employment or financial security there. Moreover, he had been dating a U.S. citizen for a year, with whom he had discussed marriage. Abergel asserted he was aware that if he married a U.S. citizen, he could apply for permanent resident status. In a supplemental declaration, Abergel claimed that Blatt never advised him of the immigration consequences of his plea, did not disclose that he had a conflict of interest, and did not request permission to represent him at the plea hearing.

Abergel also submitted two declarations from Kessel. Kessel stated he did not remember the specifics of Abergel's case, but his general custom and practice in 1991 was to advise clients in a manner consistent with the language of Penal Code section 1016.5, which requires courts to give the following admonition prior to accepting a plea: "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." (Pen. Code, § 1016.5, subd. (a).) Kessel further indicated that, in 1991, he believed from experience that "immigration would not categorically subject[] individuals with convictions to deportation proceedings."

Abergel additionally submitted portions of the criminal file related to the 1991 incident. The file appears to contain two separate narrative reports from investigating officers. Abergel provided 10 of 11 pages of one report, which was written by the undercover officer who negotiated the sale with Hadidian. Abergel provided only 2 of 11 pages of the other report, which appears to have been written by an officer who was monitoring Abergel and the other co-defendants while they were at the gym.

The superior court denied the motion to vacate, finding "[n]o prejudicial error occurred which damaged [Abergel's] ability to knowingly accept the actual or potential adverse immigration consequences of his plea." The court noted it was undisputed that Abergel's counsel generally advised him that his conviction could have immigration consequences, which the court found to be sufficient given the actual consequences of the plea were unclear or uncertain. The court also noted that the prosecutor gave a similar admonition at the plea hearing, after which Abergel indicated he had no questions and understood the consequences of his plea.

Abergel timely appealed.

DISCUSSION

Abergel contends his conviction must be vacated because his counsel failed to advise him of the actual immigration consequences of his plea, failed to defend against such immigration consequences by pursuing an immigration-neutral plea deal, and had an undisclosed conflict of interest. We find no merit to these arguments.

I. Legal Principles

Penal Code section 1473.7 provides, in pertinent part: "A person no longer imprisoned or restrained may prosecute a

motion to vacate a conviction or sentence [if] . . . [t]he conviction or sentence 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." (Pen. Code, § 1473.7, subd. (a)(1).) The statute "allows a defendant, who is no longer in custody, to challenge his or her conviction based on a mistake of law regarding the immigration consequences of a guilty plea or ineffective assistance of counsel in properly advising the defendant of the consequences when the defendant learns of the error postcustody." (*People v. Perez* (2018) 19 Cal.App.5th 818, 828.) The burden is on the moving party to show, by a preponderance of the evidence, that he or she is entitled to relief. (*Id*. at p. 829.)

Abergel seeks relief under Penal Code section 1473.7 on the basis that he received ineffective assistance of counsel. To prevail on such a claim, a defendant generally must establish two elements: (1) counsel's representation fell below an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's errors or omissions, a determination more favorable to the defendant would have resulted. (*Strickland v. Washington* (1984) 466 U.S. 668, 690, 694; see *People v. Holt* (1997) 15 Cal.4th 619, 703.) The fact that a defendant received advisements pursuant to Penal Code section 1016.5 does not foreclose a claim for ineffective assistance of counsel. (*In re Resendiz* (2001) 25 Cal.4th 230, 241, abrogated on other grounds by *Padilla v. Kentucky* (2010) 559 U.S. 356; *People v. Patterson* (2017) 2 Cal.5th 885, 896.)

A defendant's claim that he was deprived the constitutional right to effective assistance of counsel presents a mixed question of fact and law.[3] (*People v. Ogunmowo* (2018) 23 Cal.App.5th 67, 76 (*Ogunmowo*); *In re Resendiz, supra*, 25 Cal.4th at pp. 248–249.) As a result, "[w]e accord deference to the trial court's factual determinations if supported by substantial evidence in the record, but exercise our independent judgment in deciding whether the facts demonstrate trial counsel's deficient

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[3] The parties initially urged us to review the order for abuse of discretion, which is the standard of review for orders denying motions to withdraw pleas under Penal Code sections 1016.5 and 1018. (See *People v. Superior Court (Zamudio)* (2000) 23 Cal.4th 183, 192; *People v. Patterson, supra*, 2 Cal.5th at p. 894.) At the time Abergel filed his opening brief, no court had considered the proper standard of review of an order on a motion brought under Penal Code section 1473.7 and premised on a claim of ineffective assistance of counsel. While this appeal was pending, an appellate court in this district concluded the proper standard of review is de novo, reasoning that such a claim presents a mixed question of fact and law that implicates a defendant's constitutional right. (See *Ogunmowo, supra*, 23 Cal.App.5th at p. 76.) The court clarified, however, that it would give deference to the trial court's factual determinations if supported by substantial evidence. (*Ibid*.) Subsequently, an appellate court in the Fourth District disagreed with *Ogunmowo* and concluded abuse of discretion is the correct standard. (*People v. Gonzalez* (Sept. 27, 2018, D073436) __Cal.App.5th__ [2018 WL 4625691, at *5].) We agree with the court's reasoning in *Ogunmowo*. (See *People v. Cromer* (2001) 24 Cal.4th 889, 901 [mixed question determinations affecting constitutional rights are typically subject to independent review].) In any event, we would affirm the trial court's order even if we were to review it for abuse of discretion.

performance and resulting prejudice to the defendant." (*Ogunmowo, supra*, 23 Cal.App.5th at p. 76.)

II. Analysis

A. Abergel Has Not Shown He Received Ineffective Assistance of Counsel by Virtue of His Attorney's Alleged Failures to Sufficiently Advise Him of the Immigration Consequences of His Plea and Defend Against Such Consequences

Abergel does not dispute that Kessel generally advised him his plea could have adverse immigration consequences, including deportation and exclusion from the United States. He insists, however, that this warning was insufficient. Specifically, he contends that because it was clear his plea would actually cause him to be deported and excluded from the United States—which would also amount to a life-long bar to obtaining permanent resident status—his counsel had an affirmative duty to provide more than a pro forma warning. (See *People v. Soriano* (1987) 194 Cal.App.3d 1470, 1482 [counsel's pro forma warning regarding immigration consequences of plea were insufficient where a conviction would make the defendant deportable]; *People v. Barocio* (1989) 216 Cal.App.3d 99, 109 [counsel's failure to advise client he could seek a judicial recommendation against deportation constituted ineffective assistance].) He also contends that counsel was required to defend against such consequences by pursuing an immigration-neutral plea deal. (See *People v. Bautista* (2004) 115 Cal.App.4th 229, 242.)

The Attorney General responds that, as of 1991, defense counsel had no affirmative duty to advise clients of the immigration consequences of their pleas. (See *In re Resendiz, supra*, 25 Cal.4th at pp. 249–250 ["We are not persuaded that the

Sixth Amendment imposes a blanket obligation on defense counsel, when advising pleading defendants, to investigate immigration consequences or research immigration law."]; *U.S. v. Fry* (9th Cir. 2003) 322 F.3d 1198, 1200 ["counsel's failure to advise a defendant of collateral immigration consequences of the criminal process does not violate the Sixth Amendment right to effective assistance of counsel"].) We need not decide that issue because, even assuming such a duty existed in 1991, Abergel has failed to show his counsel's advisement was insufficient or that he suffered any prejudice.

Initially, we are not persuaded that the immigration consequences of Abergel's plea were sufficiently clear such that his counsel was required to provide more than a pro forma warning. As the California Supreme Court has observed, "the immigration consequences of a guilty plea are often unclear, and it may be difficult to know with certainty at the time a noncitizen defendant enters a guilty plea whether the defendant will in fact face specific immigration consequences." (*People v. Patterson, supra*, 2 Cal.5th at pp. 897–898.) In such cases, even if the attorney has an affirmative obligation to accurately advise the defendant of the immigration consequence of a plea, the "attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences." (*Padilla v. Kentucky, supra*, 559 U.S. at p. 369, fn. omitted; see *People v. Patterson, supra*, 2 Cal.5th at p. 898 ["there are indeed some cases in which the most that can reasonably be said is that the conviction 'may' have adverse immigration consequences"].)

Here, Abergel insists the immigration consequences of his plea were succinct, straightforward, and explicit such that Kessel's generic advisement was insufficient. In support, he cites provisions of the Immigration and Nationality Act providing that a noncitizen convicted of a controlled substance offense is deportable and inadmissible. (See 8 U.S.C. §§ 1182(a)(2)(A)(i)(II); 1227(a)(2)(B)(i).) He also points to a provision of the act that precludes an inadmissible noncitizen from adjusting to permanent resident status. (8 U.S.C. § 1255, subd. (a).)

Although these statutory provisions seem to suggest that Abergel's conviction for violating section 11351 rendered him inadmissible—and therefore ineligible for an adjustment to permanent resident status—it is undisputed that he was admitted to the United States after suffering the conviction. Abergel failed to address this apparent contradiction before the superior court or in his opening brief on appeal. For the first time in his reply brief, he suggests the Immigration and Naturalization Service simply made a mistake in admitting him. Although this is a plausible explanation, there is no evidence in the record to support it. Moreover, while we are aware the U.S. Attorney General may have had some discretion to grant waivers to otherwise inadmissible noncitizens seeking temporary visas, (see 8 U.S.C. § 1182(d)(3)), Abergel does not contend he obtained such a waiver.

The apparent contradiction between the immigration statutes and the treatment Abergel actually received suggests the immigration consequences of his conviction were more complicated than he represents. As a result, based on the record before us, we cannot say Kessel's general advisement was inadequate, at least with respect to Abergel's admissibility and

eligibility for permanent resident status. (See *Padilla v. Kentucky, supra*, 559 U.S. at p. 369; *People v. Patterson, supra*, 2 Cal.5th at p. 898.)

Even if counsel's advisement was insufficient, Abergel's claims would fail because he has not shown prejudice.[4] "[W]hen a defendant claims that his counsel's deficient performance deprived him of a trial by causing him to accept a plea, the defendant can show prejudice by demonstrating a 'reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.' [Citation.]" (*Lee v. U.S.* (2017) 137 S.Ct. 1958, 1965.) A defendant's assertion that he would not have pleaded but for counsel's deficiencies is not sufficient. (*Id.* at p. 1967.) There must also be "contemporaneous evidence to substantiate a defendant's expressed preferences." (*Ibid.*)

Among the many factors the court may consider are "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

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[4] Abergel contends the superior court did not reach the issue of prejudice and urges us to remand the case. We do not agree that the court failed to consider the prejudice issue. The court twice stated in its decision it found no "*prejudicial* error." It also indicated that its decision was based, at least in part, on the prosecutor's admonition at the plea hearing, which is relevant only to the issue of prejudice. Although the court did not expressly discuss other relevant factors, we uphold lower court orders " 'if they are correct for any reason, "regardless of the correctness of the grounds upon which the court reached its conclusion." ' [Citation.]" (*Howard v. Thrifty Drug & Discount Stores* (1995) 10 Cal.4th 424, 443.)

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." (*People v. Martinez* (2013) 57 Cal.4th 555, 568.) The defendant's probability of success at trial also informs this inquiry, as a defendant who is highly likely to be convicted at trial will be less likely to insist on going to trial. (See *Lee v. U.S., supra*, 137 S.Ct. at p. 1966.) We may also consider the likely consequences of a conviction after trial as compared to the consequences from the plea. (*Ibid*.)

Abergel maintains he would not have entered the plea if he had been advised he would be taken into custody by immigration officials and deported. It appears likely, however, that Abergel would have been deported regardless of whether he was convicted. Indeed, Abergel concedes he had overstayed his visa by the time he entered his plea, which would have independently subjected him to deportation. (See 8 U.S.C. § 1227(a)(1)(C)(i) [nonimmigrant alien who fails to maintain status in which the alien was admitted is deportatable and shall be removed].) While it is possible that the conviction made deportation more likely, Abergel presented no evidence or authority to suggest that was the case. Because Abergel was already subject to deportation, we find highly suspect his assertion that he would not have entered the plea had he known a conviction would also subject him to deportation. (See *U.S. v. Batamula* (5th Cir. 2016) 823 F.3d 237, 242 [rejecting defendant's argument that he would have proceeded to trial had he been advised that conviction would result in deportation, where defendant was otherwise subject to deportation for overstaying his visa].)

We also find unconvincing Abergel's insistence that he would not have entered the plea had he been advised a conviction would bar him from obtaining permanent resident status in the United States. At the time of his plea, Abergel's ties to the United States were not strong. He had come to the United States as an adult under a temporary visa only two years earlier, and his only familial connections were an uncle and cousin. Although Abergel contends he dated a U.S. citizen for a year and they had discussed marriage, there is no evidence they were ever engaged. Nor is there evidence that they resumed their relationship when Abergel returned to the United States only a few months after he was deported. This suggests their relationship was not particularly serious.

We are also not persuaded by Abergel's contention that the risks of going to trial were minimal. Abergel suggests he was likely to prevail at trial based on a defense that he was unaware a drug transaction was taking place. Although he insists there is nothing in the police reports to indicate otherwise, substantial portions of the reports—including portions that appear to focus on Abergel—are missing from the record. Moreover, we find Abergel's defense highly suspect given he does not directly dispute handling the brown package, which contained a substantial amount of cocaine.

Further, contrary to Abergel's claims, there was a significant disparity between the sentence he received through his plea and the sentence he should have expected to receive had he been convicted at trial. If convicted at trial, Abergel faced a term in state prison ranging from three to five years. (§ 11352, subd. (a).) Nonetheless, he insists he could have reasonably expected to be sentenced to probation given his lack of a criminal

record, his relative youth, and the fact that the crime was not violent. However, because of the significant quantity of cocaine involved in the offense, we think it significantly more likely that Abergel would have been sentenced to at least three years in prison. In contrast, after his plea, Abergel was sentenced to probation and one year in jail.

Finally, we find no merit to Abergel's assertion that it was reasonable to expect he could have pleaded to an alternative, immigration-neutral offense. Abergel insists his counsel could have pushed for a plea to simple possession (§ 11350) or accessory after the fact (Pen. Code, § 32), which can be immigration-neutral under certain circumstances. Abergel, however, presented no evidence indicating the prosecutor would have considered such a deal, or that the court would have accepted it. In fact, we find such a scenario unlikely given the large quantity of cocaine involved and the complete lack of allegations or evidence suggesting Abergel acted as an accessory after the fact. For the same reasons, Abergel has failed to show he was prejudiced by his counsel's failure to pursue alternative plea deals.

Because Abergel failed to show his counsel's performance was deficient, or that he suffered any resulting prejudice, the superior court properly rejected his ineffective assistance claims.

B. Abergel Has Not Shown His Counsel Had an Actual Conflict of Interest

Abergel contends his conviction should be vacated because Blatt had a conflict of interest caused by his simultaneous representation of a co-defendant at the plea hearing. Abergel asserts that, because of the dual-representation, Blatt had no incentive to inform him of the immigration consequences of the

plea, as it might have disrupted what was likely a "package deal" for all the co-defendants. We are not persuaded.

Claims that defense counsel had a conflict of interest are a category of ineffective assistance of counsel. (See *Strickland v. Washington, supra*, 466 U.S. at p. 692.) "In the context of a conflict of interest claim, deficient performance is demonstrated by a showing that defense counsel labored under an actual conflict of interest 'that affected counsel's performance—as opposed to a mere theoretical division of loyalties.' [Citations.] '[I]nquiry into actual conflict [does not require] something separate and apart from adverse effect.' [Citation.] 'An "actual conflict," for Sixth Amendment purposes, is a conflict of interest that adversely affects counsel's performance.' [Citation.]" (*People v. Doolin* (2009) 45 Cal.4th 390, 417–418, italics omitted.) Where the defendant contends the conflict caused his attorney not to do something, we must " ' "examine the record to determine (i) whether arguments or actions omitted would likely have been made by counsel who did not have a conflict of interest, and (ii) whether there may have been a tactical reason (other than the asserted conflict of interest) that might have caused any such omission." ' " (*People v. Rices* (2017) 4 Cal.5th 49, 65.)

Here, there is nothing in the record to suggest that Blatt's performance was adversely affected by a conflict of interest. Abergel's only complaint is that Blatt did not inform him of the immigration consequences of his plea. However, it does not appear that Blatt should have advised Abergel of such consequences at any point during the plea hearing. Indeed, Abergel discussed the consequences of his plea with Kessel prior to the hearing, and Abergel expressly stated at the hearing that he had no questions for his attorney regarding such

consequences. Under these circumstances, we do not think it likely Blatt would have advised Abergel of the immigration consequences of his plea absent the alleged conflict of interest. Accordingly, Abergel has failed to show an actual conflict of interest that would warrant vacating the conviction.

DISPOSITION

The order is affirmed.

BIGELOW, P. J.

We concur:

GRIMES, J.

DUNNING, J.*

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* Judge of the Orange Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.