S260270

No. S_____

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

vs.

ROBERT LANDEROS VIVAR,

Defendant, Appellant, and Petitioner.

After a Decision by the Court of Appeal
Fourth Appellate District, Division Two
(Case No. E070926)

Appeal from the Superior Court of the County of Riverside
The Honorable Bambi J. Moyer
(Case No. RIF101988)

PETITION FOR REVIEW

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Defendant/Appellant/Petitioner Robert Landeros Vivar ("Petitioner") respectfully petitions this Court to review the December 12, 2019 opinion ("Opn.") of the Court of Appeal in this case. The opinion is attached as Exhibit A. No petition for rehearing was filed.

ISSUES PRESENTED

1. Penal Code section 1473.7 allows non-citizens to challenge old, unlawful convictions based on guilty pleas with unanticipated immigration consequences, on the basis of ineffective assistance of counsel, when a defendant can show that he would have not entered the guilty plea if he were properly advised. Courts of Appeal routinely rely on contextual evidence (e.g., the defendant's family ties to the United States or lack of connection to the country of deportation, pre-plea statements of concern about immigration, or post-plea conduct indicating confusion about the plea), in deciding whether the defendant was prejudiced by the error. The Court of Appeal here acknowledged the existence of such contextual evidence but concluded that Petitioner offered "no contemporaneous evidence" supporting his claim of prejudice. Did the Court of Appeal err in adopting a novel per se rule rejecting contextual evidence when evaluating prejudice under Penal Code section 1473.7?

2. California appellate courts have held that a trial court's factual findings relating to prejudice do not warrant deference when based only on written or documentary evidence. Without reaching the issue of prejudice

here, the trial court observed that Petitioner "was more willing to rely on his experiences than he was on his counsel's advice." This observation was predicated not on witness testimony, but rather on a cold record of written and documentary evidence alone, most of which was over a decade old. The Court of Appeal nonetheless deferred to the trial court observation in finding that, even though Petitioner suffered ineffective assistance of counsel, he was not prejudiced by that deficiency. Did the Court of Appeal err in deferring to the trial court's factual findings, which were based solely on written and documentary evidence?

INTRODUCTION

This case presents fundamental and recurring questions concerning how to evaluate prejudice under Penal Code section 1473.7—an important new California law that this Court has yet to address. That statute, effective in January 2017, allows non-citizens to challenge old, unlawful convictions that subject them to adverse immigration consequences, including on the basis of ineffective assistance of counsel. Petitioner brought a motion under Penal Code section 1473.7 asserting ineffective assistance, which the trial court denied. The Court of Appeal, by contrast, found that Petitioner received ineffective assistance, but concluded that Petitioner was not prejudiced by the error.

Petitioner came to the United States from Mexico as a legal permanent resident when he was six years old, and then over the next forty years, built

a family and fulfilling life in California. In 2002, he was arrested for shoplifting cold medication from a grocery store. Facing multiple felony charges, Petitioner informed his defense counsel that he was concerned about the immigration consequences of a guilty plea. His wife, children, and grandchildren were all in the United States, he had no family or friends in Mexico, and did not even speak Spanish natively.

Petitioner's defense counsel advised him that immigration consequences were generically possible, but did not alert him to the actual immigration effects that would result from pleading guilty. Petitioner therefore resorted to his own experiences and judgment, suspecting that he could obtain a misdemeanor reduction by completing a court-recommended drug treatment program, thereby shielding him from adverse immigration consequences of a felony plea. His defense counsel, however, did not correct Petitioner's erroneous belief, and advised him to plead to the drug charge, which immediately triggered an immigration hold. For months following his conviction, while in custody, Petitioner implored the Court to reopen the case in light of his confusion, but his pleas for mercy went unanswered. Petitioner was deported and remains exiled from his family to this day.

In the decision below, the Court of Appeal acknowledged that Petitioner's defense counsel provided ineffective assistance by failing to advise him that his guilty plea would subject him to mandatory deportation. But the court denied relief, on the ground that counsel's deficient

performance did not prejudice Petitioner. According to the Court of Appeal, Petitioner would have entered the same guilty plea even if he had known that it would trigger mandatory deportation.

In so holding, the Court of Appeal acknowledged Petitioner's strong ties to this country and lack of any connection to Mexico, the concerns that Petitioner raised about immigration consequences before accepting his guilty plea, and his letter-writing campaign to the trial court shortly after his plea seeking to reopen the matter after discovering that his plea triggered an unforeseen immigration hold. While this contextual evidence supports (and indeed compels) an inference that Petitioner would have rejected the guilty plea had he been properly advised, the Court of Appeal nonetheless held that Petitioner offered "no contemporaneous evidence" corroborating his claim. (Opn. 19–20.)

In multiple respects, the Court of Appeal's unprecedented prejudice analysis creates multiple splits of authority on important issues of law affecting a large class of Californians. Review by this Court is therefore warranted.

First and foremost, the Court of Appeal departed from other California appellate precedents by rejecting the entire category of contextual evidence as relevant to the prejudice inquiry under Penal Code section 1473.7. Contrary to other reported decisions, the Court of Appeal here effectively held that contextual evidence—e.g., family ties to the United States and lack

of connection to Mexico, pre-plea statements of concern about immigration consequences, and post-plea letters explaining the confusion—has no bearing on whether a defendant would have opted for a different plea if properly advised. The Court of Appeal's per se rule rejecting contextual evidence is not only out of step with other authority (because the weight of authority holds that this kind of evidence can be determinative), it is also fundamentally inconsistent with section 1473.7. After all, the kind of contextual evidence the Court of Appeal disregarded is often the *only* evidence available to defendants seeking to prove what they would have done if properly advised.

Review is also warranted for the additional reason that the Court of Appeal split with other California authorities regarding the standard of review applicable to factual findings predicated on written and documentary evidence alone. The trial court here considered only a cold record of written and documentary evidence, a task to which the Court of Appeal was equally suited. Rather than independently review the documentary record, however, the Court of Appeal deferred to the trial court's factual determinations and found that Petitioner was not prejudiced—even though the trial court did not itself reach the prejudice issue in its analysis. Given that a significant number of Penal Code section 1473.7 motions may turn on inferences drawn from documentary (rather than testimonial) evidence, either because witnesses will not or cannot testify about events many years ago, parties and courts

need clarity on the standard of review applicable to this type of factual finding.

Because this case, which squarely presents two fundamental questions under an important new Californian law, creates multiple splits of authority, the petition for review should be granted.

STATEMENT OF THE CASE

I. Factual Background

A. Petitioner's 41 Years in the United States

In 1962, when Petitioner was six years old, his family entered the United States from Mexico as legal permanent residents and settled in Lake Elsinore, California. (I CT 136.) Petitioner was a legal resident of California for the following 41 years. (I CT 139.)

In 1969, Petitioner's family moved to Corona, California, where he attended Lincoln and Garretson Elementary Schools, Corona Junior High School, and Corona High School. (I CT 136.) In high school, Petitioner helped establish Corona Junior High's ROTC program, which still exists today. (*Ibid.*)

After graduation, Petitioner worked for an airline, which eventually promoted him to a management position that required him to work both a night shift at the airport and a day shift in the office. (I CT 137.) Because his job demanded he work day and night, Petitioner slept only three to four

hours per day. (*Ibid.*) Petitioner turned to amphetamines in order to stay awake and ultimately became addicted. (*Ibid.*)

In 1998 or 1999, Petitioner first entered drug treatment, participating in a Residential Substance Abuse Treatment ("RSAT") program. (I CT 138.) He successfully completed the program and remained clean for two or three years, until he relapsed in fall 2001. (*Ibid.*)

B. Petitioner's Arrest

On February 16, 2002, Petitioner was arrested at Albertson's grocery store in Corona, California, while attempting to shoplift twelve boxes of Sudafed cold medication, which he planned to trade for methamphetamine. (I CT 76–77.) Based on that arrest, on February 20, 2002, Petitioner was charged in a two-count complaint. (I CT 4.) The charges were (1) felony violation of Health and Safety Code section 11383, subdivision (c) (possession of methamphetamine precursors with intent to manufacture),[1] and (2) felony violation of Penal Code section 666 (petty theft with a prior). (*Ibid.*)

[1] This section was amended in 2006; Petitioner's conviction today would be charged under Health and Safety Code section 11383.5 (See 2006 Cal. Legis. Serv. Ch. 646 (Sept. 29, 2006) S.B. 1299.)

C. Petitioner Rejects a Plea to Penal Code, § 459, and Instead Accepts a Plea to Health and Safety Code, § 11383

Petitioner was appointed counsel, "Jennifer D." of the Riverside County Public Defender's office, and met with her twice, each time for no more than ten minutes, before accepting his plea. (I CT 138.)

During the first meeting, Petitioner recalls counsel conveying an offer for a felony plea, which Petitioner rejected because he mistakenly believed that, as a non-citizen, a felony plea would result in his deportation. (I CT 138–139.) Counsel did not correct Petitioner's erroneous view of the law when he raised his immigration concerns. (*Ibid.*)

During their second meeting, counsel conveyed a plea offer, which Petitioner ultimately accepted. That offer required that Petitioner plead guilty to Health and Safety Code section 11383, subdivision (c) in exchange for (a) a 365-day county jail sentence; (b) a recommendation from the court that he be admitted to the RSAT (drug treatment) program; and (c) a stipulation that he receive a low-term, two-year suspended sentence to be imposed if he failed to complete the RSAT program. (I CT 139; 9.) Counsel further informed Petitioner that if he completed RSAT, he could petition the court to reduce his conviction from a felony to a misdemeanor. (I CT 139; see also Pen. Code, § 17, subd. (b) [providing reduction of felony offenses to misdemeanor classification under certain conditions].)

During the course of defense counsel's representation, at a felony settlement conference, she relayed to Petitioner an offer to plead guilty to Penal Code section 459 (burglary) with a "low term" sentence. (I CT 173.) While that plea would have been immigration-safe, Petitioner declined that option—without knowledge of its immigration safety—in favor of the Health and Safety Code section 11383, subdivision (c) plea, which resulted in his swift deportation and exile from his family to Mexico.

In email correspondence with pro bono counsel from the undersigned law firm, defense counsel did not initially recall Petitioner's case fourteen years earlier, but stated that her general practice at the time of Petitioner's plea was simply to give defendants the standard *Tahl* warning of possible immigration consequences. (I CT 165.) Later, after pro bono counsel pressed for additional information, defense counsel supplemented her answer. She stated by email that, after Petitioner requested an immigration-safe plea, she returned with an offer to plead to Health and Safety Code section 11383, subdivision (c), but informed Petitioner that, to the best of her knowledge, completion of RSAT would not determine whether he was deportable and, if he had further questions, Petitioner should contact an immigration attorney. (I CT 162.) When asked by pro bono counsel for a declaration to support these statements, defense counsel refused. (I CT 128.)

After Petitioner accepted his plea to Health and Safety Code section 11383, subdivision (c), which he believed was immigration-safe, he expected

to be transferred into the RSAT program, which he understood to be the central aspect of his plea bargain. (I CT 138.) Petitioner soon learned, however, that he was ineligible for RSAT due to an immigration hold. (*Ibid.*)

Starting one month after his guilty plea, Petitioner began sending numerous ex parte letters to the court explaining his confusion about the immigration consequences and asking for assistance to be admitted into the RSAT program—still not understanding, at that point, that he would be deported regardless of whether he completed the RSAT program. (I CT 86–91; 118–119.) He specifically wrote: "Your honor, If I would have been made aware of these facts I would never have plead [sic] Guilty to this Charge." (I CT 91.) His pleas for mercy went unanswered.

Although Petitioner lived with his family in the United Sates for 41 years, raised his immigration concerns pre-plea, and wrote multiple post-plea letters to the court concerning his unexpected immigration hold, Petitioner was deported in January 2003, following seven months of immigration detention. (I CT 139.)

II. Procedural Background

A. California Legislature Enacts Penal Code, § 1473.7

Penal Code section 1473.7 (effective January 2017) allows a "person no longer imprisoned or restrained" to "prosecute a motion to vacate a conviction or sentence" that 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." (Pen. Code, § 1473.7, subd. (a)(1).)

Before the enactment of Penal Code section 1473.7, California law did not provide any way for individuals no longer in custody to challenge their convictions based on ineffective assistance of counsel. (See Sen. Public Safety Com., analysis of Assem. Bill No. 813 (2015–2016 Reg. Sess.) p. 6.) Although Californians who had served their custodial sentences were traditionally able to challenge the constitutionality of their convictions by pursuing *coram nobis* relief, this Court's decision in *People v. Kim* (2009) 45 Cal.4th 1078 eliminated that option for claims predicated on ineffective assistance of counsel, but noted that the Legislature was "free to enact" a "statutory" "postcustody remedy." (*Id.* at p. 1107.)

Recognizing this gap in California law, the Legislature stepped in and passed Penal Code section 1473.7. The purpose of the statute was to create a post-custodial mechanism for non-citizen Californians to vacate their convictions if they did not meaningfully understand the adverse immigration consequences. (Legis. Counsel's Dig., Assem. Bill No. 813 (2015-2016 Reg. Sess.).)

This procedural vehicle was viewed by the Legislature as extremely important to California's non-citizen community. (Sen. Pub. Safety Com., analysis of Assem. Bill No. 813 (2015–2016 Reg. Sess.) pp. 4–5. ["California lags far behind the rest of the country in its failure to provide its residents

with a means of challenging unlawful convictions after their criminal sentences have been served.") Penal Code section 1473.7 thus fixes a procedural omission that has done serious harm to non-citizen Californians and opens a much needed avenue to relief.

B. Petitioner Challenges His Plea Due to Ineffective Assistance of Trial Counsel

On January 3, 2018, Petitioner filed a motion to vacate his conviction under Penal Code section 1473.7 on the ground that his defense counsel failed to advise him of the immigration consequences of his plea, i.e., that the plea would subject him to mandatory removal under federal immigration law. Although Petitioner raised his immigration concerns with counsel, she merely provided a generic *Tahl* warning that immigration consequences were possible—an advisement given to all non-citizen defendants—and advised him to consult an immigration attorney for further questions. (I CT 162.) Petitioner asserted that these pro forma cautions did not constitute adequate advice under *People v. Soriano* (1987) 194 Cal.App.3d 1470, among other authorities.

C. The Trial Court Denies Petitioner's Motion Because He Failed to Prove "Affirmative Misadvice"

In denying the motion, the trial court reasoned that claims for ineffective assistance based on "nonadvisement" do not qualify as ineffective assistance under Supreme Court precedent. (I RT 31–32.) Because

Petitioner's evidence did not prove "affirmative misadvisement," the trial court concluded, then Petitioner failed to show ineffective assistance.

In particular, the trial court evaluated defense counsel's advice to consult an immigration attorney if Petitioner had further questions about immigration risk. The trial court found that "[i]n the structure of what was considered appropriate legal advice, that's not misadvice. That's actually good advice." (I RT 32–33.) However, because the trial court examined only whether defense counsel gave Petitioner "affirmative misadvice," it did not analyze whether her advice was insufficient under *Soriano*. (*Soriano*, *supra*, 194 Cal.App.3d at pp. 1481–1482.) In defending counsel's advice as not affirmatively wrong on its face, the trial court additionally remarked that it had "the distinct impression and dr[e]w the conclusion and finding that Mr. Vivar was more willing to rely on his experiences than he was on his counsel's advice." (I RT 33.)

The trial court did not reach the question of prejudice.

D. The Court of Appeal Holds Defense Counsel Was Deficient But Affirms the Denial of Petitioner's Motion Based on A Purported Lack of Prejudice

The Court of Appeal disagreed with the trial court and concluded that defense counsel rendered ineffective assistance. When Petitioner raised his immigration concerns to counsel, the Court of Appeal reasoned, defense counsel offered only a general caution about *possible* immigration consequences resulting from the plea and advised Petitioner to contact an

immigration attorney with further questions. (Opn. 13–16.) The Court of Appeal noted this pro forma warning was nearly identical to the inadequate advice given by counsel in *Soriano*. (Opn. 16.)

The Court of Appeal nevertheless affirmed the denial of Petitioner's motion, holding that he failed to establish that he would not have accepted the plea deal had he known it would result in his mandatory removal. (Opn. 18–20.) Deferring to the trial court, the Court of Appeal's principal logic was that Petitioner rejected an immigration-safe plea, Penal Code section 459 (burglary), which was sufficient to support a conclusion that he did not prioritize immigration safety during the plea process. (Opn. 18–19 ["[D]efendant was offered and rejected a plea agreement that would have completely avoided any immigration consequences [which] . . . demonstrate[s] that immigration consequences were not defendant's primary consideration in accepting or rejecting any plea offer, and that further advice on this front was not reasonably probable to change his decisionmaking."].) But it is not disputed that Petitioner was unaware that this was an immigration-safe plea; in fact, the Court of Appeal ruled that Petitioner's counsel failed to tell him about the adverse immigration consequences of potential pleas, including the one he actually took. The Court of Appeal therefore relied on what Petitioner did *without* constitutionally adequate advice about immigration consequences, in order to determine what Petitioner would have done if he were properly advised.

Additionally, notwithstanding the Court of Appeal's factual recitation of Petitioner's overwhelming ties to this country and lack of any connection to Mexico, his post-plea letters to the trial court imploring it to unwind the conviction after learning of its immigration effect, and his question to defense counsel about the immigration consequences of a plea, the Court of Appeal concluded that "[d]efendant points to no contemporaneous evidence in the record that corroborates the claims in his declaration." (Opn. 19–20.)

Finally, the Court of Appeal deferred to the trial court's observation, predicated on written and documentary evidence alone, that Petitioner "was more willing to rely on his experiences than he was on his counsel's advice." (Opn. 19.) Relying on this statement, which the trial court made without even addressing or analyzing the prejudice inquiry, the Court of Appeal concluded it was "not reasonably probable that further advice would have induced [Petitioner] to change his mind about his plea." (Opn. 19.) The Court of Appeal thus affirmed the denial of Petitioner's motion to vacate his conviction.

REASONS WHY REVIEW SHOULD BE GRANTED

I. The Court of Appeal's Legally Flawed Prejudice Analysis Creates Multiple Splits of Authority Warranting This Court's Review

In multiple respects, the Court of Appeal's prejudice analysis conflicts with the decisions of this Court and of other Courts of Appeal on important

issues of law affecting a considerable number of Californians. (Cal. Rules of Court, rule 8.500(b)(1).)

A. The Court of Appeal's Per Se Rule Rejecting Contextual Evidence as Relevant to the Prejudice Analysis Contravenes Decisions of Other Courts of Appeal, This Court and the United States Supreme Court

The Court of Appeal's primary error in its prejudice analysis was its refusal to consider contextual evidence (e.g., the defendant's family ties to the United States and lack of connection to the country of deportation, pre-plea statements of concern about immigration, or post-plea conduct indicating confusion about the plea) as relevant to corroborate a post-conviction assertion by Petitioner that, if properly advised, he would have rejected the guilty plea that he entered. This categorical rejection of contextual evidence, in effect, requires defendants to present evidence of a contemporaneous statement (i.e., at the time of their plea) that they would not enter into any agreement with immigration consequences. Apart from erecting an evidentiary standard that is exceedingly difficult to meet, this rigid, bright-line rule directly conflicts with California appellate and United States Supreme Court precedent.

Under Penal Code section 1473.7, the prejudice inquiry takes place in a counterfactual world where the defendant was aware of the immigration consequences of entering into a plea. (*Lee v. United States* (2017) 137 S.Ct. 1958, 1964 [holding that a defendant can show prejudice by demonstrating

"a reasonable probability that, but for counsel's errors, he would not have pleaded guilty"].)[2] The only relevant question is "what the defendant would have done" absent counsel's deficient performance, i.e., assuming the defendant was properly advised. (*People v. Martinez* (2013) 57 Cal.4th 555, 559, italics omitted [describing the prejudice inquiry in the context of the plea bargaining process].)

As this Court has already held, the test for prejudice in connection with a guilty plea diverges from the usual test for prejudice under *Strickland*, which focuses on whether there was a reasonable probability of a *different outcome* in the original proceeding absent error. (*Strickland v. Washington* (1984) 466 U.S. 668, 694.) Instead, under Penal Code section 1473.7, the defendant may show prejudice by "convinc[ing] the court [that he] would have chosen to lose the benefits of the plea bargain despite the possibility or probability deportation would nonetheless follow." (*Martinez, supra*, 57 Cal.4th at p. 565.) Because this test focuses on whether the defendant would have *chosen* differently, rather than on whether the *outcome* would have been different, the universe of evidence relevant to establishing prejudice is considerably broader. Unsurprisingly, direct evidence of what a defendant

[2] California courts have treated the prejudice inquiry under Penal Code section 1473.7 as the same as the test for prejudice for ineffective assistance claims in the plea bargaining process.

himself would have done in a counterfactual world is hard to uncover, which means courts must often rely on contextual evidence (as illustrated below).

Moreover, plea deals that involve immigration consequences drastically alter the usual calculus of defendants concerning whether to accept or reject a plea, placing even greater emphasis on a case-by-case analysis of *all* the available evidence. Even a slim chance of avoiding deportation may cause a defendant to reject a plea because "a deported alien who cannot return 'loses his job, his friends, his home, and maybe even his children, who must choose between their [parent] and their native country.'" (*People v. Superior Court* (*Zamudio*) (2000) 23 Cal.4th 183, 209, citing *Galvan v. Press* (1954) 347 U.S. 522, 533 (dis. opn. of Black, J.).) Indeed, "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." (*In re Resendiz* (2001) 25 Cal.4th 230, 253, abrogated by *Padilla v. Kentucky* (2010) 559 U.S. 356, italics added.) Therefore, it may be reasonably probable that a defendant "would have rejected any plea leading to deportation—even if it shaved off prison time—in favor of throwing a 'Hail Mary,'" where "avoiding deportation was *the* determinative factor for [the defendant]." (*Lee*, *supra*, 137 S.Ct. at p. 1967.)

The roadmap this Court has laid out for evaluating prejudice for ineffective assistance claims focuses heavily on context and reasonable

inferences. First, a defendant "must provide a declaration or testimony stating that he or she would not have entered into the plea bargain if properly advised." (*Martinez*, *supra*, 57 Cal.4th at p. 565.) Then, "[i]t is up to the trial court to determine whether the defendant's assertion is credible." (*Ibid.*) In evaluating the defendant's declaration, the court looks to "other corroborating circumstances" in the record. (*Ibid.*) These corroborating circumstances are almost always contextual. Although not exhaustive, "pertinent factors to be considered include: whether counsel actually and accurately communicated the offer to the defendant; the advice, if any, given by counsel; the disparity between the terms of the proposed plea bargain and the probable consequences of proceeding to trial, as viewed at the time of the offer; and whether the defendant indicated he or she was amenable to negotiating a plea bargain." (*In re Resendiz*, *supra*, 25 Cal.4th at p. 253.) Another important factor is whether the defendant "had strong connections to this country and no other." (*Lee*, *supra*, 137 S.Ct. at pp. 1968–1969.) Crucially, the prejudice inquiry "demands a 'case-by-case examination' of the 'totality of the evidence,'" which means "categorical rules are ill suited to [this] inquiry." (*Id.* at p. 1966, citing *Williams v. Taylor* (2000) 529 U.S. 362, 391.)

Following direction from this Court and the United States Supreme Court, California Courts of Appeal have consistently held that contextual evidence is not only relevant to establish prejudice, but often determinative.

In *People v. Camacho* (2019) 32 Cal.App.5th 998, for example, the Court of Appeal relied *exclusively* on the defendant's ties to the United States in concluding that he established prejudice under Penal Code section 1473.7: He "was brought to the United States over 30 years ago at the age of two, has never left this country, and attended elementary, middle, and high school in Los Angeles county. Defendant is, and at the time of his plea was, married to a United States citizen with an American citizen son, and now also an American citizen daughter. At the time of his plea, defendant was employed building pallets and now works as a tow truck driver." The Court of Appeal held that the defendant's strong connections to this country corroborated his declaration and served as "compelling" evidence of prejudice. (*Id.* at p. 1011.)

In *People v. Espinoza* (2018) 27 Cal.App.5th 908, the Court of Appeal also held that the defendant had established prejudice based *solely* on his strong connections to this country: "Because defendant resided in the United States since he was four years old as a lawful permanent resident, his family resided in the United States, and he was employed as a maintenance supervisor at a Holiday Inn, it could be reasonably probable that defendant would have rejected any plea that would have mandated deportation. [Citation.] Based on this evidence, we find the defendant has established prejudice." (*Id.* at p. 917.)

In *People v. Mejia* (2019) 36 Cal.App.5th 859, the Court of Appeal considered two types of contextual evidence in evaluating prejudice under Penal Code section 1473.7. First, as in *Camacho* and *Espinoza*, the Court of Appeal concluded that the defendant's significant connections to this country substantiated his claim that he would not have pleaded guilty had he known about the mandatory immigration consequences. (*Id.* at p. 872.) Second, because the defendant was out on bail and his plea was a "straight up" plea directly with the court, the Court of Appeal concluded there was not significant risk in rejecting the plea deal of three years of probation with a 120-day jail sentence. (*Id*. at pp. 872–873.) The Court of Appeal held that "it is simply not realistic to imagine that the court would have then imposed the maximum prison sentence (six years, four months)." (*Id.* at p. 873.) Based on the defendant's country connections and "the mandatory immigration consequences of his guilty pleas . . . versus the potential risks and rewards of going to trial," the Court of Appeal held "it is reasonably probable that he would not have pleaded guilty." (*Ibid.*)

Similarly, in *People v. Ogunmowo* (2018) 23 Cal.App.5th 67, the Court of Appeal relied on two types of contextual evidence in concluding the defendant established prejudice. Apart from the defendant's country ties, the Court of Appeal noted that the defendant had asked his counsel about the immigration consequences of a plea, which, according to the Court of Appeal, corroborated that the defendant would not have entered a plea had

he been aware of those consequences. (*Id.* at p. 79 ["His immigration status was such an important factor to him that he affirmatively sought his attorney's counsel about immigration consequences before entering his guilty plea."].)

Finally, in *In re Hernandez* (2019) 33 Cal.App.5th 530, the Court of Appeal, after noting that the defendant had strong ties to this country, focused on the defendant's statements and behavior following her realization that her plea would result in her deportation. (*Id*. at pp. 547–548.) The Court of Appeal stated: "[I]t is undisputed that a short time after she pleaded guilty, Hernandez chose to remain in federal custody to fight deportation. Her conduct constitutes contemporaneous evidence of her strong preference to remain in this country . . . . Hernandez served 43 days in jail following the hearing at which she entered her guilty plea and was sentenced to probation when, to her surprise, she was immediately taken into custody by immigration officials. About 43 days after she signed the *Tahl* form, she refused to sign the form authorizing her deportation, determined to fight her deportation from and exclusion from admission to the United States." (*Ibid*.) The *Hernandez* court therefore recognized that post-plea conduct in custody can be powerful evidence of what a defendant would have done if properly advised.

The Court of Appeal's prejudice analysis in this case sharply departs from this California precedent. Instead of evaluating the totality of the

evidence, the Court of Appeal categorically excluded from consideration the exact same kind of contextual evidence that was relied upon by other Courts of Appeal—often exclusively—to support a finding of prejudice. This conclusion is obvious from the record, which contained considerable evidence corroborating that Petitioner would not have entered in a plea deal that mandated his permanent deportation.

First, like the defendants in *Camacho*, *Espinoza*, *Mejia*, *Ogunmowo*, and *Hernandez*, Petitioner had longstanding ties to this country and no ties to Mexico. Petitioner immigrated legally to the United States at the age of six (I CT 136); lived in California for *41* years, from 1962 until his deportation in 2003; founded the Corona High School ROTC (*ibid.*); and has a large family in Riverside County, including his grandchildren and son, an active-duty service member stationed at March Air Reserve Base. (I CT 137.) His wife, who was seriously ill with a thyroid condition at the time of Petitioner's plea, is buried in California. (*Ibid.*) In contrast, Petitioner had virtually no ties to Mexico, and he does not even speak Spanish natively. (Opn. 3.)

Second, like the defendant *Ogunmowo*, Petitioner raised his immigration concerns in his initial meetings with counsel, but was never properly advised about the immigration consequences of his plea. (Opn. 15–16.) Emails from trial counsel confirmed that Petitioner was concerned about the immigration consequences of a plea and raised those concerns with

counsel. (*Ibid.*) In fact, the Court of Appeal held that trial counsel provided ineffective assistance based on her failure to advise Petitioner about immigration consequences after he had raised his concerns. (Opn. 16.)

Third, as in *Mejia*, the mandatory immigration consequences of Petitioner's plea dwarfed the potential risks of rejecting the plea. Petitioner's case was actually far stronger than that of the defendant's in *Mejia* because Petitioner was offered an immigration-safe plea. (I CT 148.) Thus, the choice for Petitioner was not between the mandatory immigration consequences of the plea and the potential to avoid those consequences at trial. Instead, the choice was between being deported and not being deported. Even if Petitioner had proceeded to trial, he had a viable defense to the charge contained in his plea deal because there was no evidence whatsoever that Petitioner planned to *personally* participate in the manufacture of methamphetamine. (See Health & Saf. Code, § 11383, subd. (c) [requiring "intent to manufacture]; I CT 72–78 [police report indicating that Petitioner intended to trade, not manufacture]; *People v. Perez* (2005) 35 Cal.4th 1219, 1231 ["absent proof of intent to personally participate in manufacturing, [defendant] could not be convicted as a direct violator of section 11383(c)(2)"].)

Fourth, similar to the defendant in *Hernandez*, as soon as Petitioner accepted the plea and learned of the immigration consequences, he sent multiple letters to the trial court while in custody, explaining his confusion

and begging for "mercy" from deportation, and imploring the court to allow him to enter RSAT, which he mistakenly believed would save him from deportation. (I CT 87, 91.) As in *Hernandez*, which considered post-plea conduct in custody to be powerful evidence of prejudice, it is hard to imagine evidence more "contemporaneous" than Petitioner's own words shortly after he entered his plea. In other words, the best evidence of what Petitioner would have done if properly advised is what he *actually did* once he learned the immigration consequences of his plea—attempt, albeit ineffectively, to withdraw the plea that had created them.

Despite Petitioner's country ties, his question to trial counsel about the immigration consequences of a plea, the concrete possibility of avoiding deportation, and his letters to the court concerning his immigration hold, the Court of Appeal nevertheless stated in no uncertain terms that "[d]efendant points to *no contemporaneous evidence in the record that corroborates the claims in his declaration*." (Opn. 19–20, italics added.) This categorical rejection of contextual evidence contravenes the standards this Court and the United States Supreme Court have established to evaluate prejudice. The Court of Appeal's decision is also directly at odds with *Camacho*, *Espinoza*, *Mejia*, *Ogunmowo*, and *Hernandez*, causing a significant lack of uniformity among the Courts of Appeal.

Finally, the Court of Appeal's per se rule rejecting contextual evidence as relevant to prejudice under Penal Code section 1473.7 turns the

intent of the Legislature on its head. It is virtually impossible to muster contemporaneous evidence of prejudice in post-conviction proceedings. That difficulty is compounded where the proceedings are not only post-conviction but post-*custodial* and thus may take place, as here, many years after the conviction is initially entered and often after the defendant has been deported. If contextual evidence is barred from consideration in the prejudice inquiry under Penal Code section 1473.7, the standard will be impossible to meet in all but the rarest cases. This would render the promise of Penal Code section 1473.7 illusory for the many individuals who continue to suffer from the devastating immigration consequences of their unlawful convictions. The Court's review is warranted in this case.

B. The Court of Appeal's Deference to the Trial Court on a Cold Record Contravenes Decisions of This Court and Creates a Split of Authority Among the Courts of Appeal

The Court of Appeal's decision to defer to the factual findings of the trial court here—which were predicated on written and documentary evidence alone—is inconsistent with decisions of other California appellate courts. Even were trial court's isolated statements construed as factual findings (the trial court did not reach the question of prejudice), the Court of Appeal's deference was inappropriate because the factual findings were based only on a cold record of written and documentary evidence, which an appellate court is equally suited to review. The Court of Appeal's deferential

review in these circumstances directly conflicts with decisions of this Court and disrupts uniformity among the Courts of Appeal.[3]

Courts of Appeal have held that deference to a trial court's factual determinations is inappropriate on a cold record, including on motions to vacate convictions under Penal Code section 1473.7. In *Ogunmowo*, the defendant moved for relief under Penal Code section 1473.7, and the trial court considered only documentary evidence: a declaration from the defendant and an affidavit from trial counsel. (23 Cal.App.5th at p. 70.) Although the Court of Appeal recognized that the trial court's factual findings are generally accorded deference if supported by substantial evidence in the record, the Court of Appeal nonetheless did not defer to the trial court. (*Ibid.*) Instead, the Court of Appeal held that the factual findings of the trial court were "*not entitled to our deference*" because "the trial court's conclusion was drawn from statements in [the defendant's] declaration and [trial counsel's] affidavit. The trial court and this court are

[3] The Court of Appeal also decided, for the first time, that where a motion under Penal Code section 1473.7 is not based on ineffective assistance of counsel, the overall standard of review is abuse of discretion rather than de novo review. (Opn. 21.) Reviewing this decision could present an opportunity to consider the validity of that rule, which Petitioner submits is inconsistent with the manner in which such motions have been reviewed by other Courts of Appeal. (See *Mejia, supra*, 36 Cal.App.5th 859 [reversing denial of Penal Code section 1473.7 motion that was not predicated on ineffective assistance of counsel, without any indication of deference to trial court]; *Camacho, supra*, 32 Cal.App.5th 998 [same].) Because the Court of Appeal's order here did not turn on that novel rule, it is not offered as a principal basis for review in this petition.

in the same position in interpreting written declarations." (*Id.* at p. 79, italics added.) Other Courts of Appeal have applied the same rule in the context of habeas review. (*In re Tripp* (2007) 150 Cal.App.4th 306, 313 ["If we were reviewing a trial court's habeas findings based on documentary evidence without an evidentiary hearing, we would independently review the record."].)

That rule is consistent with this Court's decision in *Resendiz*. In that case, this Court noted that factual determinations made by the lower court "are entitled to great weight . . . when supported by the record, particularly with respect to questions of or depending upon the credibility of witnesses the [lower court] heard and observed." (25 Cal.4th at p. 249.) This Court was careful to explain, however, that where the factual determination "is not based on the credibility of live testimony, *such deference is inappropriate*." (*Ibid*., italics added.) Indeed, this Court has repeatedly held that appellate deference is inappropriate where factual findings made below are based solely on written or documentary evidence. (*People v. Thompson* (2010) 49 Cal.4th 79, 100 ["But such deference is unwarranted when, as here, the trial court's ruling is based solely on the 'cold record.'"]; *In re Rosenkrantz* (2002) 29 Cal.4th 616, 677 ["Because the trial court's findings were based solely upon documentary evidence, we independently review the record."]; *In re Cudjo* (1999) 20 Cal.4th 673, 688 [reviewing the factual record "independently" because "deference is arguably inappropriate" where

"factual findings are based entirely on documentary evidence"]; *Marcus & Millichap Real Estate Inv. Brokerage Co. v. Hock Inv. Co.* (1998) 68 Cal.App.4th 83, 89 ["Since the extrinsic evidence in this case consists entirely of written declarations, we review this issue de novo."].)

There is no way to square the Court of Appeal's deferential review here with the decisions of this Court or the decisions of other Courts of Appeal.[4] The Court of Appeal's decision in this case is in direct conflict with *Ogunmowo*, creating the potential for dual lines of cases to develop. Given the nature of Penal Code section 1473.7, particularly that most defendants will have already been deported at the time of their hearings, it is likely that many cases will involve only documentary evidence, and thus the question of whether to defer to a cold record will surely recur. This split among Courts of Appeal warrants this Court's review.

II. The Court of Appeal's Decision is Wrong

Rather than grapple with what Petitioner would have done if properly advised, the Court of Appeal conducted its prejudice analysis by simply reviewing the record as if Petitioner received adequate advice—even though

[4] The Court of Appeal's deferential review of the factual record in this case was particularly troubling because the trial court based its factual findings on two dubious sources: (1) unsworn out-of-court statements from Petitioner's former defense counsel, which were contained in an email exchange that defense counsel refused to substantiate by sworn declaration; and (2) defense counsel's written case notes, which were shorthand and unaccompanied by explanation. (Opn. 6–8.)

the Court of Appeal also held that Petitioner *did not* receive constitutionally adequate advice of counsel. Indeed, the Court of Appeal rested its prejudice decision on two observations: (1) Petitioner rejected an immigration-safe plea; and (2) the trial court stated Petitioner was more willing to rely on his own experiences than the advice of his counsel. But the Court of Appeal's reliance on both observations is misplaced, because these observations are not relevant to what Petitioner *would have done*, in a counterfactual world, if properly advised.

First, the Court of Appeal relied on the fact that Petitioner was offered and rejected an immigration-neutral plea to Penal Code section 459 (burglary), which suggested that he did not prioritize immigration safety during the plea process. (Opn. 18–19 ["[D]efendant was offered and rejected a plea agreement that would have completely avoided any immigration consequences. These actions demonstrate that immigration consequences were not defendant's primary consideration in accepting or rejecting any plea offer, and that further advice on this front was not reasonably probable to change his decisionmaking."].)

That logic, however, is fundamentally at odds with the Court of Appeal's separate holding that he did not receive effective assistance of counsel with respect to advice regarding immigration consequences. Had Petitioner been properly advised, and been made aware of the immigration risks of the pleas available to him, then there is at least a reasonable

probability that he would have rejected the Health and Safety Code section 11383, subdivision (c) plea—which was nearly certain to result in immediate exile from his family and home forever to a land he barely knew—in favor of the immigration-safe plea to Penal Code section 459, which he rejected after deficient advice. Contrary to the Court of Appeal's decision, Petitioner's rejection of a plea based on inadequate advice does not demonstrate what he would have done if he were properly advised.

Second, the Court of Appeal relied on an isolated statement from the trial court, which did not even reach the question of prejudice, that Petitioner "was more willing to rely on his experiences than he was on his counsel's advice." (Opn. 19; *ibid.* ["Accepting the trial court's factual finding that [Petitioner] was apparently unwilling to listen to the advice of counsel, it is not reasonably probable that further advice would have induced him to change his mind about his plea."].) The trial court made this statement, however, after incorrectly holding that defense counsel provided effective assistance. Thus, the trial court evaluated only whether Petitioner listened to counsel's *incomplete* and *constitutionally deficient* advice. That is not the law. Instead, the prejudice inquiry turns on what Petitioner would have done if properly advised. The trial court's factual finding related to a different, legally irrelevant question is of no moment. (See *People v. Manning* (1973) 33 Cal.App.3d 586, 603 [trial court's determination is not owed deference

when it is "based upon an erroneous legal theory absent which it is unlikely that it would have reached the conclusion it did"].)

Moreover, even if Petitioner chose to "rely on his experiences" over counsel's incomplete and misleading advice, such a finding does not imply that he would not have listened to constitutionally effective advice from counsel. This is particularly true where the disparity between adequate and inadequate advice is great. Here, Petitioner received only a general *Tahl* warning about *possible* immigration consequences and a suggestion from trial counsel to contact an immigration attorney if he had further questions. Faced with that constitutionally inadequate advice, it is no surprise that Petitioner fell back on his own experiences as a source of information. The fact is, however, that adequate advice would have informed Petitioner that accepting the plea would subject him to mandatory deportation. Given that Petitioner placed primary importance on avoiding deportation and on getting into a drug treatment program, it is inconceivable that he would knowingly choose a bargain that denied both of his priorities if properly advised. At a minimum, he raised a reasonable probability that he would have rejected the Health and Safety Code section 11383, subdivision (c) plea had he understood its immigration effect.

The Court of Appeal failed to evaluate prejudice in the counterfactual world where Petitioner received effective assistance. In so doing, it not only categorically excluded contextual evidence from the prejudice inquiry, but

also gave inappropriate deference to the trial court's factual findings which rested solely on documentary evidence. Due to these errors, the Court of Appeal did not conduct a proper prejudice analysis in this case.

III. This Case Presents an Ideal Vehicle for This Court to Address the Prejudice Inquiry Under Penal Code, § 1473.7

This case is an ideal vehicle to review the prejudice inquiry under Penal Code section 1473.7 for four reasons.

First, this case cleanly presents the prejudice inquiry. It is undisputed that, even after Petitioner raised his immigration concerns with defense counsel, she provided only a general *Tahl* warning about possible immigration consequences and advised Petitioner to contact an immigration attorney if he had further questions. As the Court of Appeal below concluded, this performance was plainly deficient under settled law at that time. Thus, the only question at issue on review is whether Petitioner established prejudice.

Second, the two questions presented in this case are of considerable importance to a broad class of Californians, and the answers to these questions will offer guidance to both trial and appellate courts. The first question concerns the underlying standard to evaluate prejudice in the trial court—what evidence counts as corroborating, and what evidence does not. The second question concerns what standard of review applies in the appellate court when reviewing decisions of the trial court regarding that

evidence. Both questions are squarely presented, and the answers will matter in most—if not almost all—adjudications of Penal Code section 1473.7 motions.

Third, the Court of Appeal's decision creates multiple splits of authority. There is no way to reconcile the prejudice analysis in this case with *Camacho*, *Espinoza*, *Mejia*, *Ogunmowo*, and *Hernandez*. Moreover, the Court of Appeal's deferential review of a cold record departs from the decisions of this Court and other Courts of Appeal. In the context of Penal Code section 1473.7, this lack of uniformity means that the state will point to one line of cases to defend its position, and defendants will point to a contrary line of cases. Absent guidance from this Court, trial courts will be left to guess about what kind of evidence matters for the prejudice inquiry, and appellate courts will be in the dark about the proper standard of review of factual determinations based on documentary evidence alone.

Finally, the proper implementation of Penal Code section 1473.7 is important to California's large immigrant community and to the Legislature. Ineffective assistance of counsel in connection with plea bargaining can be life-altering for California's non-citizens, because many criminal convictions result in mandatory deportation and, as the Legislature has acknowledged, can devastate California families. (See *In re Resendiz*, *supra*, 25 Cal.4th at p. 251 ["'To banish [noncitizens] from home, family, and adopted country is

punishment of the most drastic kind . . . .'"] citing *Lehmann v. U.S. ex rel. Carson* (1957) 353 U.S. 685, 691, (conc. opn. of Black, J.).)

The Legislature enacted Penal Code section 1473.7 to provide a critical avenue to relief for non-citizen Californians to remedy convictions entered as a result of ineffective assistance. In fact, this relief is of such importance that the Legislature amended the law only two years after it became effective to ensure that California courts complied with legislative intent. (Stats. 2018, ch. 825, § 1(b) [Legislature stated that its intent was to "to provide clarification to the courts regarding Section 1473.7 . . . to ensure uniformity throughout the state and efficiency in the statute's implementation."]; *id.* § 1(c) ["This measure shall be interpreted in the interests of justice . . . ."]; *id.* § 1(d) ["The State of California has an interest in ensuring that a person prosecuted in state court does not suffer penalties or adverse consequences as a result of a legally invalid conviction."].) Despite the Legislature's effort to correct course in the face of multiple appellate decisions narrowly interpreting Penal Code section 1473.7, Courts of Appeal (as evidenced by this case) have continued to disagree about the proper application of California's new statute for non-citizen defendants.[5]

[5] This Court has never addressed Penal Code section 1473.7. Instead, this Court has de-published multiple decisions by the Courts of Appeal. (See *People v. Chen* (2019) 36 Cal.App.5th 1052 [ordered de-published on Oct. 9, 2019]; *People v. Novoa* (2019) 34 Cal.App.5th 564 [ordered de-published on July 24, 2019]; *People v. Gonzalez* (2018) 27 Cal.App.5th 738

The time to take up the issue is now, and in this case.

CONCLUSION

The Petition for Review should be granted.

DATED: Jan. 21, 2020 Respectfully submitted,

MUNGER, TOLLES & OLSON LLP

By: /s/ Joseph D. Lee
Joseph D. Lee

Attorney for /Defendant/Appellant/Petitioner
Petitioner is ROBERT LANDEROS VIVAR

[ordered de-published on Jan. 23, 2019]; *People v. Landaverde* (2018) 20 Cal.App.5th 287 [ordered de-published on May 16, 2018].)

CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies, pursuant to Rule 8.504(d)(1) of the California Rules of Court, that the enclosed Petition for Review is produced using 13-point Roman type including footnotes and contains approximately 8,313 words, which is less than the 8,400 words permitted by this rule. Counsel relies on the word count of the computer program used to prepare this brief.

Jan. 21, 2020 MUNGER, TOLLES & OLSON LLP

By: /s/ Joseph D. Lee
Joseph D. Lee

Attorney for Defendant/Appellant/Petitioner
Petitioner is ROBERT LANDEROS VIVAR

EXHIBIT A

CERTIFIED FOR PUBLICATON

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. ROBERT LANDEROS VIVAR, Defendant and Appellant.	E070926 (Super.Ct.No. RIF101988) OPINION

APPEAL from the Superior Court of Riverside County. Bambi J. Moyer, Judge. Affirmed.

Munger, Tolles & Olson, Joseph D. Lee, William Larsen and Dane Shikman for Defendant and Appellant.

Gibson, Dunn & Crutcher, Kahn A. Scolnick, Daniel R. Adler and Jason S. Kim for Alyssa Bell, Reuven Cohen, Ingrid V. Early, Gilbert Garcetti, Meline Mkrtichian, Ronald J. Nessim, Gabriel Pardo, Jennifer Resnik and David J. Sutton as Amici Curiae on behalf of Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, and Melissa Mandel and Adrian R. Contreras, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

Defendant and appellant, Robert Landeros Vivar, pled guilty to possession of materials with the intent to manufacture methamphetamine. (Health & Saf. Code, former § 11383, subd. (c).) Defendant was placed on probation for three years, and as a condition of probation was to serve one year in county jail. He also received a referral to the Residential Substance Abuse Treatment (RSAT) program. Shortly after his release, defendant was removed from the country as a consequence of his plea. Over a decade later, defendant filed a motion to vacate his conviction pursuant to Penal Code section 1473.7. The trial court denied defendant's motion.

On appeal, defendant argues the trial court erred in denying his motion to vacate his guilty plea because his trial counsel was ineffective in failing to investigate and advise defendant of the immigration consequences of his plea and for failing to defend or mitigate the judgment. Defendant also argues that his plea must be vacated because it was legally invalid. We affirm.

II. FACTUAL AND PROCEDURAL BACKGROUND[1]

Defendant immigrated from Mexico in 1962 when he was six years old. He lived in the United States for 41 years until his removal in 2003. He does not speak Spanish natively. He has two United States citizen children and six United States citizen grandchildren residing in California. At the time of the relevant offense, defendant had lawful immigration status.

Defendant became addicted to amphetamines in the mid-1990's. Defendant entered RSAT and successfully completed drug treatment in 1998 or 1999. However, he began using amphetamines again in the fall of 2001.

During the evening of February 16, 2002, defendant entered a grocery store in Corona. A loss prevention employee in the store saw defendant take 12 boxes of Sudafed and hide them in his jacket. After defendant paid for other items and attempted to leave, the employee detained him until police arrived. While detained, defendant told the employee that he was going to give the Sudafed to someone else, who was going to use the Sudafed to manufacture methamphetamine. In exchange, this person was to give defendant methamphetamine. Defendant repeated this story when questioned by the police. The responding officer then arrested defendant.

The Riverside County District Attorney charged defendant by complaint with possession of materials with the intent to manufacture methamphetamine (Health & Saf.

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[1] The facts concerning defendant's underlying offense are taken from the police report and the declarations filed in support of and in opposition to defendant's motion to vacate.

Code, former § 11383, subd. (c)) and petty theft with a prior conviction (Pen. Code, § 666).[2]

After his charge, defendant was represented by Jennifer D. of the Riverside County Public Defender's Office. On March 6, 2002, defendant pled guilty to possession of materials with the intent to manufacture methamphetamine.

Before entering this plea, defendant signed a felony plea form. This form required defendant to initial 17 separate paragraphs acknowledging that he understood the potential consequences of his plea. This included a paragraph stating: "If I am not a citizen of the United States, I understand that this conviction 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." Defendant also initialed a paragraph acknowledging: "I have had an adequate time to discuss with my attorney (1) my constitutional rights, (2) the consequences of any guilty plea, and (3) any defenses I may have to the charges against me." Jennifer D. also signed the form, stating that she believed defendant understood his rights and understood he was waiving those rights, that defendant had had enough time to consult with Jennifer D. before entering the plea, and that he understood the consequences of the plea.

The trial court accepted defendant's plea and incorporated the "Advisement of Rights form." As a result of the plea agreement, the People dismissed the second count against defendant. The trial court sentenced defendant to two years, but suspended

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[2] All further statutory references are to the Penal Code unless otherwise indicated.

execution of this sentence and placed defendant on probation for three years. As a condition of probation, defendant was required to serve one year in county jail. He was also recommended to RSAT, and the parties stipulated that the suspended sentence would be executed if defendant failed to complete the program after being admitted to it.[3]

Defendant was returned to custody after his plea. "After a few days of waiting," defendant contacted the RSAT program to inquire about when he would be admitted. Defendant was informed that he could not be admitted to the RSAT program "due to an 'immigration hold.'" Defendant sent ex parte letters to the trial court on April 7, 2002, July 13, 2002, and October 28, 2002, expressing confusion about his sentence, requesting assistance to be admitted to the RSAT program, and making other legally improper requests to reduce his sentence and ameliorate its immigration consequences.

On May 16, 2002, the Immigration and Naturalization Service (INS) sent defendant a notice to appear indicating that he was subject to removal due to his conviction under former section 11383, subdivision (c) of the Health and Safety Code. Defendant was deported seven months later, in January 2003. Defendant re-entered the United States in May 2003.

On January 3, 2018, defendant filed a motion to vacate his conviction under section 1473.7. In support of this motion, defendant submitted a declaration on his own behalf. In that declaration, defendant noted that he only met with Jennifer D. twice, each time for less than 10 minutes. According to defendant, Jennifer D. "*never* asked about

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[3] The transcript of the change of plea hearing was not provided to the trial court and is not included in the record on appeal.

[his] citizenship or immigration status, and . . . *never* explained any of the actual immigration consequences that would result from [his] conviction." Defendant said he affirmatively told Jennifer D. that he "was very worried about possible deportation," but that she "never discussed the immigration consequences of [his] plea options." (Underlining omitted.) Defendant admitted he was under the mistaken impression that he "could not be deported for a misdemeanor, and . . . assumed that all felonies resulted in deportation." This misunderstanding led him to reject a three-year prison sentence offer from the People; instead, he requested that Jennifer D. attempt to obtain a plea deal which included drug treatment and could be reduced to a misdemeanor. Defendant claimed that Jennifer D. never attempted to correct his mistaken understanding of the law. He accepted the ultimate plea deal because he wanted to participate in drug treatment and believed that if he completed RSAT he would be able to reduce his conviction to a misdemeanor and avoid immigration consequences. According to defendant, if he had known his plea would make him deportable he would not have entered it, and would have requested Jennifer D. seek an immigration-neutral plea even if it came with a harsher sentence.

Alongside this declaration, defendant also submitted correspondence between his current counsel and Jennifer D., as well as records from the Riverside County Public Defender's Office regarding defendant's case. These records included Jennifer D.'s

handwritten notes.[4] In the correspondence between defendant's current counsel and Jennifer D., Jennifer D. claimed that all her "non-citizen clients were routinely advised that deportation was a possible consequence of a felony conviction, which is consistent with the language used in the approved *Tahl*[5] form . . . ." Jennifer D. also stated that "in addition to the *Tahl* advisement, he was specifically cautioned that, in spite of his experience on the prior [Health and Safety Code section] 11377 case . . . an RSAT term of sentencing on his new case would NOT determine whether or not he would be deported on the new offense, and that if he had any questions about that, he should consult an immigration attorney for clarification."

Jennifer D.'s contemporaneous notes corroborate this, stating "[defendant] was fully advised of consequences of plea to [Health and Safety Code section] 11383[, subdivision] (c)." These notes also reveal that "[defendant] declined alternative of

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[4] Jennifer D. apparently refused to provide a declaration to defendant's counsel. Nevertheless, the trial court considered these e-mails, stating, "with respect to [Jennifer D.'s] emails, even though they were not—no statements were presented in declaration form, they were not objected to," and concluding, "[s]o I'm considering them." The trial court also considered and entered into the record the proffered case notes from Jennifer D. and obtained from the Riverside County Public Defender's Office without comment or objection. No parties object to the consideration of this evidence here or at the trial court level; indeed, the People relied on Jennifer D.'s case notes both at oral argument below and in their brief here. Nor does ignorance or inadvertence explain a failure to object, as defendant did successfully object to a declaration offered by the People. We therefore consider this evidence on appeal.

[5] The plea form is known as a *Tahl* form because it reflects the constitutional advisements mandated under *In re Tahl* (1969) 1 Cal.3d 122 (*Tahl*), disavowed on other grounds in *Mills v. Municipal Court* (1973) 10 Cal.3d 288 and *Boykin v. Alabama* (1969) 395 U.S. 238.

pleading to [Penal Code section] 459 w/ LT[6] state prison + parol [*sic*]. Wants help w/ drug problem; RSAT."

The People opposed defendant's motion. The court held a hearing on the motion. Prior to the on-the-record hearing, the court held a chambers conference with the attorneys and gave an oral tentative ruling. The court then heard argument from both parties. During defendant's argument, the court noted that there was some disagreement between defendant's declaration and Jennifer D.'s e-mails. Defendant's counsel stated that "if Your Honor has factual concerns about that . . . it might make sense to subpoena [Jennifer D.] to appear here and to testify about her recollection." However, defendant's counsel then stated: "[I]f Your Honor is able to credit her email, then I don't know it's necessary." Jennifer D. was not subpoenaed to appear.

After hearing argument the court denied defendant's motion. In coming to this conclusion, the court made the factual determination that Jennifer D. did advise defendant exactly as her e-mails claimed. The court also found the fact that the final sentence included only a recommendation for RSAT, rather than a referral, indicated that Jennifer D. was not certain defendant would even be admitted to RSAT.

Defendant timely appealed this denial.

III. DISCUSSION

Defendant argues his motion to vacate should have been granted because he was ineffectively assisted by his counsel, Jennifer D. Specifically, defendant claims that

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[6] We assume, as the trial court did, that this is referring to the "low term" for a violation of section 459, which criminalizes burglary.

Jennifer D.'s assistance did not meet either the Sixth Amendment standard for assistance of counsel nor the standard under section 1473.7 because she failed to advise defendant of the near certainty that defendant's guilty plea would result in his deportation and failed to defend against or mitigate the immigration consequences of his plea. Defendant also argues that even if his attorney's representation was not ineffective, he should be allowed to vacate his plea as legally invalid because it was premised on an impossible condition.

A. *Standard of Review*

Review of a motion to vacate a plea based on alleged ineffective assistance of counsel implicates a constitutional right and is therefore a mixed question of fact and law. (*People v. Olvera* (2018) 24 Cal.App.5th 1112, 1116.) Under these circumstances, "[w]e independently review the order denying the motion to vacate . . . ." (*Ibid.*) This standard requires that "[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 performance and resulting prejudice to the defendant." (*People v. Ogunmowo* (2018) 23 Cal.App.5th 67, 76.)[7]

However, "[t]o the extent the motion [under section 1473.7] asserts statutory error or a deprivation of statutory rights, the denial is reviewed for an abuse of discretion." (*People v. Rodriguez* (2019) 38 Cal.App.5th 971, 977; see, also *People v. Patterson*

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[7] Because we review the trial court's application of the law de novo, it is not necessary to decide whether the trial court improperly considered the harm to Jennifer D. that might result as a consequence of determining that she ineffectively assisted defendant. We do not consider such harm in our decision.

(2017) 2 Cal.5th 885, 894 ["A trial court's decision whether to permit a defendant to withdraw a guilty plea under section 1018 is reviewed for abuse of discretion."]; *People v. Superior Court (Zamudio)* (2000) 23 Cal.4th 183, 192 [noting that a decision to grant or deny a motion to vacate a conviction under section 1016.5 is reviewed under abuse of discretion]; *People v. Chien* (2008) 159 Cal.App.4th 1283, 1288; *People v. Fairbank* (1997) 16 Cal.4th 1223, 1254 ["A decision to deny a motion to withdraw a guilty plea ""rests in the sound discretion of the court"' . . . ."].) As we discuss below, because defendant fails to establish that reversal is necessary under the less deferential mixed question of law and fact standard, it is unnecessary to review his claims under the abuse of discretion standard.

B. *Defendant Did Not Meet His Burden to Prove Ineffective Assistance of Counsel and Prejudicial Error Under Section 1473.7*

Section 1473.7, subdivision (a)(1) allows anyone not in criminal custody to file a motion to vacate a conviction if "[t]he conviction or sentence is legally invalid due to 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 . . . ." "Ineffective assistance of counsel . . . is the type of error that entitles the defendant to relief under section 1473.7." (*People v. Ogunmowo*, *supra*, 23 Cal.App.5th at p. 75.)

"The Sixth Amendment guarantees a defendant the effective assistance of counsel at 'critical stages of a criminal proceeding,' including when he enters a guilty plea." (*Lee*

v. United States (2017) 582 U.S. __, __ [137 S.Ct. 1958, 1964].) """In order to establish a claim of ineffective assistance of counsel, defendant bears the burden of demonstrating . . . that counsel's performance was deficient because it 'fell below an objective standard of reasonableness [¶] . . . under prevailing professional norms.'"""" (*People v. Salcido* (2008) 44 Cal.4th 93, 170.) Prevailing professional norms at the time of a plea can be determined in part by looking to "norms of practice as reflected in American Bar Association standards," and other contemporaneous sources demonstrating what the standard of practice was at the relevant time. (*Strickland v. Washington* (1984) 466 U.S. 668, 688.) """If a defendant meets the burden of establishing that counsel's performance was deficient, he or she also must show that counsel's deficiencies resulted in prejudice. . . ."""" (*People v. Salcido*, *supra*, at p. 170.)

The burden of proof the defendant must meet in order to establish his entitlement to relief under section 1473.7 is a preponderance of the evidence. (§ 1473.7, subd. (e)(1).)

1. Defendant's Trial Counsel Provided Ineffective Assistance

Defendant argues he has proven his counsel's representation was deficient under either the Sixth Amendment or section 1473.7 because the record indicates that his counsel did not affirmatively advise him that his plea would result in deportation and because his counsel did not attempt to negotiate an immigration-neutral plea.

Though relatively recent changes in the law have established that failure to advise about the immigration consequences of a plea can constitute ineffective assistance of

counsel, defendant's conviction predates this case law and is not entitled to its benefits. Namely, the 2010 United States Supreme Court decision in *Padilla* held that criminal defense attorneys have an affirmative duty under the Sixth Amendment to advise their clients of the potential deportation consequences of any plea. (*Padilla v. Kentucky* (2010) 559 U.S. 356, 374 ["[C]ounsel must inform her client whether his plea carries a risk of deportation."].) Prior to this decision, including at the time of defendant's plea, the "collateral consequences" doctrine stated that failure to advise a defendant about the immigration consequences of a plea did not necessarily constitute ineffective assistance of counsel under the Sixth Amendment. (*Chaidez v. United States* (2013) 568 U.S. 342, 350-352.) As the United States Supreme Court recognized, this meant that *Padilla* "answered a question about the Sixth Amendment[']s reach that we had left open, in a way that altered the law of most jurisdictions . . . ." (*Chaidez v. United States*, *supra*, at p. 352.) *Padilla* thus announced a "new rule," and therefore "defendants whose convictions became final prior to *Padilla* . . . cannot benefit from its holding." (*Chaidez v. United States*, *supra*, at p. 358.)

However, though this doctrine was in place federally, "the California Supreme Court disavowed the collateral-direct consequences distinction in 2001 (nine years before *Padilla*), and expressly reserved the question whether there was at that time an affirmative duty to advise . . . ." (*People v. Olvera*, *supra*, 24 Cal.App.5th at p. 1117.) Thus, even before *Padilla*, California recognized that immigration consequences were not collateral and that pleas could be challenged on the basis that counsel ineffectively

assisted their client in advising or failing to advise them about the immigration consequences of a plea under certain circumstances.

Nevertheless, prior to *Padilla*, it remained an open question in California whether defense counsel had an affirmative duty to advise about immigration consequences of a plea. Earlier cases provide limited guidance on what types of advice or lack thereof rose to the level of ineffective assistance under California law prior to *Padilla*. While it is clear that affirmative misadvice satisfies the performance prong of an ineffective assistance claim (*In re Resendiz* (2001) 25 Cal.4th 230, 253), it is less clear whether a failure to provide comprehensive advice might qualify.

For instance, in *People v. Soriano* (1987) 194 Cal.App.3d 1470, the court considered an ineffective assistance of counsel claim based on alleged misadvice from counsel regarding the immigration consequences of a plea. The defendant averred that he asked his trial counsel directly whether his plea would have immigration consequences multiple times, and each time his counsel informed him it would not. (*Id.* at p. 1479.) On the other hand, counsel "testified that she had never told defendant he would not be deported if he entered a guilty plea, and that she had warned him that deportation 'could' result. She also testified that she had advised him 'in a general sense, that is, the same language that is used in the admonition I used in court, that such a plea could have consequences on his immigration status, his naturalization, deportation and exclusion from admission.'" (*Ibid.*)

Despite the conflicting evidence over whether counsel misadvised the defendant, it was "uncontested . . . that counsel, knowing defendant was an alien . . . did not make it her business to discover what impact his negotiated sentence would have on his deportability." (*People v. Soriano*, *supra*, 194 Cal.App.3d at p. 1480.) The court held that "[e]ven assuming counsel's version of events is the correct one, her response to defendant's immigration questions was insufficient," because "she merely warned defendant that his plea might have immigration consequences," and that further research would have revealed that his sentence made him deportable. (*Id.* at p. 1482.) In deciding that counsel had such a duty, the court pointed to a contemporaneous American Bar Association standard, which stated that "'[where] the defendant raises a specific question concerning collateral consequences (as where the defendant inquires about the possibility of deportation), counsel should fully advise the defendant of these consequences.'" (*Id.* at p. 1481, citing 3 ABA Standards for Criminal Justice. std. 14–3.2 (2d ed. 1980) p. 75.) On this basis, the court found the defendant's counsel had ineffectively assisted him and granted his habeas corpus petition. (*People v. Soriano*, *supra*, at p. 1481.)

Other courts interpreting *Soriano* have proposed two possible readings of the duty apparently outlined therein. "Construed broadly, *Soriano* requires defense counsel to: (1) research the specific immigration consequences of the alien defendant's guilty plea, [and] (2) attempt to negotiate a plea which takes the defendant out of the deportable class

of convicts . . . ." (*People v. Barocio* (1989) 216 Cal.App.3d 99, 107.)[8] "On the other hand, *Soriano* can be limited to its facts, i.e., a situation where the defendant may have been misinformed of the deportation consequences of his plea and where he avers he would not have entered the plea if he had known he would be deported as a result of the plea." (*People v. Barocio*, *supra*, at p. 107.) This narrow reading suggests that *Soriano* only required an attorney to research and apprise their client of the immigration consequences of a plea if that client asked a "specific question" on the subject. (See, e.g., *People v. Olvera*, *supra*, 24 Cal.App.5th at p. 1117 [noting that *Soriano*'s decision was "based on an ABA standard that: '"[W]here the defendant raises a specific question concerning collateral consequences (as where the defendant inquires about the possibility of deportation), counsel should fully advise the defendant of these consequences."'"].)

However, given the factual similarities between *Soriano* and this case, we are persuaded that even under a narrow reading, defendant has demonstrated Jennifer D.'s performance fell below an objective standard of reasonableness under prevailing professional norms at the time of his conviction. Defendant avers that he discussed his concerns about immigration with Jennifer D., and particularly his legal misunderstanding that if he had been permitted to complete the RSAT program and reduce his conviction to a misdemeanor he could have avoided deportation. Jennifer D.'s e-mails corroborate that

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[8] While the court in *Barocio* also states that a broad reading of *Soriano* requires counsel to "request a judicial [recommendation against deportation] if appropriate or at least inform the defendant of the availability of the motion" (*People v. Barocio*, *supra*, 216 Cal.App.3d at p. 107), such recommendations were eliminated in 1990, and so were not available to defendant. (See Immigration Act of 1990, Pub.L. No. 101-649 (Nov. 29, 1990) 104 Stat. 4978, 5050, § 505(a).)

this conversation occurred, as she claims she specifically attempted to correct this misconception by "caution[ing] that, in spite of his experience . . . an RSAT term of sentencing on his new case would NOT determine whether or not he would be deported . . . ." This demonstrates that defendant asked Jennifer D. a specific question about deportation, which at least triggered the narrow interpretation of the duty set out in *Soriano*.

Nevertheless, Jennifer D. only provided the same advisement as contained in the *Tahl* form, namely, that "this conviction *may* have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization . . . ." (Italics added.) This is nearly identical to the advisement given by counsel in *Soriano*, where defense counsel also advised the defendant using the same language as the admonitions used in court, "that such a plea *could* have consequences on his immigration status." (*People v. Soriano*, *supra*, 194 Cal.App.3d at p. 1479, italics added.) Just as in *Soriano*, counsel here "[b]y her own admission . . . merely warned defendant that his plea might have immigration consequences." (*Id.* at p. 1482.) Such a failure to further warn or otherwise advise defendant of the certain immigration consequences of his plea fit the standard laid out in *Soriano*.

Accordingly, defendant has demonstrated by a preponderance of the evidence that his trial counsel's representation was constitutionally deficient.[9]

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[9] Defendant also argues that his counsel ineffectively assisted him by failing to seek out potential immigration-neutral plea deals. Because we find that Jennifer D.'s representation was deficient on another basis, we do not address that contention here.

2. Defense Counsel's Error Was Not Prejudicial

Though we find that defendant does meet his burden to show ineffective assistance of counsel, even "'"[i]f a defendant meets the burden of establishing that counsel's performance was deficient, he or she also must show that counsel's deficiencies resulted in prejudice . . . ."'" (*People v. Salcido*, *supra*, 44 Cal.4th at p. 170.) "To establish prejudice, a 'defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" (*People v. Ogunmowo*, *supra*, 23 Cal.App.5th at p. 78.) A defendant establishes prejudice where he shows that "'"it is 'reasonably probable' the defendant would not have pleaded guilty if properly advised."'" (*People v. Martinez* (2013) 57 Cal.4th 555, 562, quoting *People v. Superior Court (Zamudio)* (2000) 23 Cal.4th 183, 210.)

"[T]he test for prejudice considers what the defendant would have done, not what the effect of that decision would have been . . . ." (*People v. Martinez*, *supra*, 57 Cal.4th at p. 564.) Indeed, a court can find it reasonably probable a defendant would have rejected a plea even if his only other option was a slim chance of victory at trial. (*Lee v. United States*, *supra*, 582 U.S. at p. ___ [137 S.Ct. at p. 1967] [finding prejudice where it was reasonably probable defendant "would have rejected any plea leading to

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However, we note that the record does contain evidence that Jennifer D. communicated a potential immigration-neutral plea deal to defendant, which he rejected. Though defendant argues this demonstrates that Jennifer D. advised defendant to reject the offer, there is no corroborating evidence for this supposition and the trial court explicitly rejected it, stating that the note states defendant rejected it and "[n]ot that she advised him not to take [it], or didn't relay it . . . ."

deportation—even if it shaved off prison time—in favor of throwing a 'Hail Mary' at trial."].)

In order to satisfy his burden to prove prejudice, "the defendant must provide a declaration or testimony stating that he or she would not have entered into the plea bargain if properly advised. It is up to the trial court to determine whether the defendant's assertion is credible, and the court may reject an assertion that is not supported by an explanation or other corroborating circumstances." (*People v. Martinez*, *supra*, 57 Cal.4th at p. 565.) In determining whether a defendant meets this burden "[c]ourts should not upset a plea solely because of *post hoc* assertions from a defendant about how he would have pleaded but for his attorney's deficiencies. [Rather, they] should instead look to contemporaneous evidence to substantiate a defendant's expressed preferences." (*Lee v. United States*, *supra*, 582 U.S. at p. __ [137 S.Ct. at p. 1967].)

Defendant did not satisfy this burden here. The record contains sufficient evidence to conclude that defendant prioritized drug treatment over potential immigration-neutral pleas, and therefore it is not reasonably probable that he would have rejected the plea but for his counsel's failure to properly advise him. In particular, Jennifer D.'s notes state that defendant "declined [the] alternative of pleading to [section] 459 w/ LT state prison + parol [*sic*]," and immediately thereafter notes that he "[w]ants help w/ [his] drug problem." Defendant's own putative expert acknowledged that a plea to a violation of section 459 "would have been an excellent immigration-neutral disposition for [defendant]." In other words, defendant was offered and rejected a plea

agreement that would have completely avoided any immigration consequences. These actions demonstrate that immigration consequences were not defendant's primary consideration in accepting or rejecting any plea offer, and that further advice on this front was not reasonably probable to change his decisionmaking.

The trial court came to the same conclusion. In considering this evidence, the trial court stated that defendant's rejection of a plea to a violation of section 459 caused it to "draw the conclusion and finding that [defendant] was more willing to rely on his experiences than he was on his counsel's advice." This was a factual inference the trial court was entitled to draw, and under a mixed question of law and fact review "[w]e accord deference to the trial court's factual determinations if supported by substantial evidence in the record . . . ." (*People v. Ogunmowo*, *supra*, 23 Cal.App.5th at p. 76.) Accepting the trial court's factual finding that defendant was apparently unwilling to listen to the advice of counsel, it is not reasonably probable that further advice would have induced him to change his mind about his plea.

The only evidence defendant did not understand his plea and would not have taken the plea had he understood it is his own declaration and his letters to the court sent after accepting the plea. However, "a defendant's self-serving statement—after trial, conviction, and sentence—that with competent advice he or she *would* have accepted [or rejected] a proffered plea bargain, is insufficient in and of itself to sustain the defendant's burden of proof as to prejudice, and must be corroborated independently by objective evidence." (*In re Alvernaz* (1992) 2 Cal.4th 924, 938.) Defendant points to no

contemporaneous evidence in the record that corroborates the claims in his declaration. Indeed, much of the contemporaneous evidence, as well as defendant's own testimony, indicate that no amount of additional advice would have caused him to act otherwise.

Defendant argues that recently published cases have interpreted section 1473.7 to require that defendant need only demonstrate that he misunderstood his plea, regardless of whether counsel's ineffective assistance created that misunderstanding, so long as counsel's error failed to correct it. Defendant points in particular to *People v. Camacho* (2019) 32 Cal.App.5th 998 and *People v. Mejia* (2019) 36 Cal.App.5th 859. Both *Camacho* and *Mejia* held that where a party moves to vacate their conviction under section 1473.7 "even if the motion is based upon errors by counsel, the moving party need not also establish a Sixth Amendment violation," and is "required only to show that one or more of the established errors were prejudicial and damaged his 'ability to meaningfully understand, defend against, or knowingly accept the actual or potential adverse immigration consequences of [his] plea . . . .'" (*People v. Camacho, supra, at pp.* 1008-1009.) According to these cases, a court should vacate a defendant's plea if "the defendant simply proves by a preponderance of the evidence 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.'" (*People v. Mejia*, *supra*, 36 Cal.App.5th at p. 871.) "[A] 'prejudicial error' occurs under section 1473.7 when there is a *reasonable probability*

that the person would not have pleaded guilty . . . had the person known that the guilty plea would result in mandatory and dire immigration consequences." (*Ibid.*)

We agree with *Camacho* and *Mejia*'s conclusion that prevailing under section 1473.7 does not require a defendant to prove a violation of his constitutional rights, and only requires contemporaneous evidence demonstrating a reasonable probability that but for the alleged error defendant would not have entered a guilty plea. However, we disagree that these cases counsel a different result here.

To begin with, neither *Camacho* nor *Mejia* discuss the appropriate standard of review for a decision based solely on section 1473.7. As discussed above, where a constitutional right is implicated, as in a claim of ineffective assistance of counsel, the mixed question of law and fact standard is the appropriate standard of review. (*People v. Olvera, supra,* 24 Cal.App.5th at p. 1116.) However, where the decision is based solely on a statutory right, abuse of discretion is the standard. (*People v. Rodriguez, supra,* 38 Cal.App.5th at p. 977.) Thus, though a defendant may prevail on a motion under section 1473.7 without showing constitutionally deficient representation, the trial court's denial of such a motion would be accorded much greater deference than we are required to show in this case. Given this, *Camacho* and *Mejia*'s analysis is of limited utility here. Moreover, even under an expansive reading of *Camacho* and *Mejia* we still conclude that defendant failed to meet his burden to show that there is a reasonable probability that but for the error defendant would not have entered his plea. As discussed above, the trial court found that even assuming he subjectively misunderstood his plea, no amount of

additional advice was reasonably probable to induce a different action. The trial court's factual findings on these points must be accorded deference under any applicable standard.

Because defendant has not proven by a preponderance of the evidence that he was prejudiced by his counsel's alleged errors, he is not entitled to relief.

C. *The Trial Court Did Not Abuse Its Discretion in Declining to Find Defendant's Plea Legally Invalid*

Defendant also argues that his conviction is "legally invalid due to prejudicial error" under section 1473.7, subdivision (a)(1), because the plea contained conditions that were impossible for defendant to meet. Specifically, that the plea required him to complete the RSAT program, or else the stayed low term sentence would be executed. Defendant argues he could not meet this condition because his conviction initiated an immigration hold that made it impossible for him to be admitted to RSAT.

What constitutes legal invalidity under section 1473.7, subdivision (a)(1) is a question of statutory interpretation. "We review statutory interpretation issues de novo." (*People v. Morales* (2018) 25 Cal.App.5th 502, 509.)

To begin with, there is no evidence in the record before us that admission to or completion of RSAT was a condition of probation. Though the plea form states that the parties have a "[s]tipulation that defendant will receive LT (2 years) custody if he fails to complete RSAT after being admitted to the program," this stipulation is not reflected in the court's sentence. The court's sentencing minute order merely states that the "[c]ourt

recommends Residential Substance Abuse Treatment Program," and does not make completion a condition of probation. This is consistent with another section of the plea form which states that "[t]he custody term will be 365 days County jail with RSAT recommendation." (Bolding & underlining omitted.) In considering defendant's section 1473.7 motion, the trial court noted this discrepancy, and found it "peculiar that it would only be a recommendation rather than a referral to RSAT." The trial court concluded that this discrepancy corroborated the notion that defendant ignored Jennifer D.'s advice because he was hyperfocused on drug treatment above all else, as "it doesn't appear that [Jennifer D.] was at all sure he would even get RSAT, but because [defendant] had had RSAT before, he was sure he would get RSAT."

However, even if RSAT was a term of probation as recorded in the plea form, that condition was that defendant would receive a two-year sentence if he failed to complete RSAT "after being admitted to the program." Defendant was never admitted to the program because of the immigration hold—indeed, his ex parte communications to the court in the months following his sentence were attempts to get admitted to the program. Thus, even assuming the condition recorded in the plea form is the condition actually imposed, this condition was not impossible to perform. While it is true that the immigration hold made it impossible for defendant to complete RSAT, it also made it impossible for him to be admitted to RSAT, thereby rendering the condition moot.

However, even accepting that the condition was impossible, defendant does not prevail under section 1473.7. Defendant admits that at the time of briefing only one

published case, the previously discussed *People v. Camacho, supra,* 32 Cal.App.5th at pages 1008 and 1009, had considered the legal invalidity of a plea under section 1473.7 independent of an ineffective assistance of counsel claim. Since then, at least two additional published cases have agreed with *Camacho*'s conclusion, including the previously discussed *Mejia* case. (See *People v. Mejia*, *supra*, 36 Cal.App.5th 859; *People v. DeJesus* (2019) 37 Cal.App.5th 1124.)

As these cases make clear, under section 1473.7 legal invalidity is one of the bases for vacating a conviction. Thus, a plea is legally invalid if it meets the standard necessary to vacate it, which standard we have already discussed at length—namely, that there was "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.'" (*People v. Mejia*, *supra*, 36 Cal.App.5th at p. 871.)

In this case, the alleged impossible condition of defendant's probation, even if error, had no effect on defendant's understanding of the immigration consequences of his plea. Even if we grant that imposing this condition tends to demonstrate that none of the involved parties fully understood the immigration consequences of the plea, the condition itself did not cause that confusion. Therefore, the imposition of a putatively impossible condition of defendant's probation did not render his plea legally invalid under section 1473.7.

Perhaps recognizing this, defendant instead argues that "legal invalidity" under section 1473.7 should be analogous to other cases where a defendant was entitled to withdraw his or her plea because of an invalid condition of that plea. Defendant cites three cases: *People v. Morris* (1979) 97 Cal.App.3d 358, *People v. Vargas* (1990) 223 Cal.App.3d 1107, and *People v. Pinon* (1973) 35 Cal.App.3d 120. Each of these cases is distinguishable.

In both *Morris* and *Vargas*, the courts considered cases where the defendant pleaded to a lower sentence, only to have the court unilaterally impose a higher sentence. In *Morris*, the trial court imposed but stayed a sentence above and beyond that contemplated by his plea bargain as an incentive for the defendant to return for formal sentencing. (*People v. Morris*, *supra*, 97 Cal.App.3d at pp. 360-361.) In *Vargas*, the court imposed a higher sentence than the one contemplated when the defendant failed to appear for resentencing. (*People v. Vargas*, *supra*, 223 Cal.App.3d at pp. 1110-1111.) Both of these cases are therefore readily distinguishable, as they involve a court ignoring a negotiated plea bargain and imposing a sentence greater than what was agreed upon without permitting the defendant the opportunity to withdraw his plea. That is not the case here.

Pinon is equally distinguishable. In *Pinon*, the defendant had two pending cases. (*People v. Pinon*, *supra*, 35 Cal.App.3d at pp. 122-123.) The defendant accepted a plea bargain on the first pending case that placed him on probation. (*Ibid.*) The defendant then entered a separate plea bargain on the other case, causing probation in his first case

to be revoked. (*Id.* at p. 123.) The court in *Pinon* held that "the trial court, knowing that another charge was pending, should have advised appellant that the other charge, depending on its disposition, would be considered by it in deciding whether he would continue on probation." (*Id.* at p. 125.) "By failing to advise appellant that his probation would be subject to termination on the basis of a conviction of the other charge, the promised probation which induced the guilty plea turned out to be illusory . . . ." (*Ibid.*)

Unlike in *Pinon*, the RSAT term in this case is not illusory. As discussed above, it is not at all clear that defendant's immigration status made it impossible to satisfy the terms of his probation. Nor did defendant fail to receive the benefits of his plea, which required only that he receive a recommendation for admission to RSAT and not a referral or an order for admission into the program. Defendant thus received the benefit of the plea bargain when the court recommended his admission to RSAT. That he was unable to take advantage of this recommendation, and that this recommendation was ultimately pointless, does not change that defendant received exactly what he bargained for.

Defendant's plea was thus not legally invalid under section 1473.7 simply because it was impossible for defendant to ultimately be admitted to and complete the RSAT program.

D. *Remand is Not Necessary or Appropriate*

At oral argument, counsel for defendant argued that rather than affirm the trial court's ruling, this court should remand the case for an evidentiary hearing in which they

could obtain Jennifer D.'s appearance for questioning. Defendant cited *People v. Patterson, supra,* 2 Cal.5th at page 889, for the proposition that remand is appropriate.

We find *Patterson* distinguishable. In *Patterson* the Supreme Court considered the denial of a motion to withdraw a plea under section 1018. (*Id.* at p. 889.) It determined that remand was necessary because "the trial court did not rule on whether [the defendant] had credibly demonstrated that he would not have entered a guilty plea . . . had he known the plea's immigration consequences," because it had erroneously concluded that "even if [the defendant] was unaware of the actual immigration consequences of his guilty plea, he could not, as a matter of law, show good cause to withdraw that plea . . . ." (*Id.* at p. 899.) Remand was therefore necessary "so that the trial court may exercise its discretion to determine whether [the defendant] has shown good cause to withdraw his guilty plea." (*Ibid.*)

Setting aside that the court in *Patterson* considered a different statute and different rule, we still do not find its reasoning applicable here. Unlike in *Patterson*, the trial court in this case explicitly considered defendant's contentions with regards to his contemporaneous knowledge and acceptance of the terms of his plea, concluding that defendant "was more willing to rely on his experiences than he was on his counsel's advice," and prioritized drug treatment over immigration concerns. The trial court thus properly considered the available evidence and exercised its discretion, making remand unnecessary.

Moreover, it is unclear what purpose such a hearing would serve. Because we find that Jennifer D.'s representation was constitutionally deficient, compelling her attendance and permitting questioning on the subject of her representation is unnecessary. Indeed, the only remaining issue is the prejudice analysis, which requires that defendant provide contemporaneous evidence that but for his counsel's error he would not have entered the plea. This contemporaneous evidence is already contained in the record, and defendant has already testified as to his state of mind at the time in the form of a declaration. It is unclear what, if any, other evidence would be relevant on remand.

Accordingly, we decline to remand this case for any further evidentiary hearings.

IV. DISPOSITION

The order denying defendant's section 1473.7 motion to vacate is affirmed.

CERTIFIED FOR PUBLICATION

RAMIREZ
P. J.

We concur:

McKINSTER
J.

CODRINGTON
J.

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

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Case Number: **TEMP-Z279RWO7**
Lower Court Case Number:

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