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Supreme Court of California
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No. S260270

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)

APPELLANT'S OPENING BRIEF ON THE MERITS

MUNGER, TOLLES & OLSON LLP
Joseph Lee (SB No. 110840)
(*pro bono*)
Joseph.Lee@mto.com
350 South Grand Avenue, 50th Floor
Los Angeles, California 90071-3426
Telephone: (213) 683-9100
Facsimile: (213) 687-3702

MUNGER, TOLLES & OLSON LLP
*Dane Shikman (SB No. 313656)
(*pro bono*)
Dane.Shikman@mto.com
560 Mission Street, 27th Floor
San Francisco, California 94105-2907
Telephone: (415) 512-4000
Facsimile: (415) 512-4077

Attorneys for Defendant/Appellant/Petitioner
ROBERT LANDEROS VIVAR

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ISSUES PRESENTED

The petition for review presented the following issues:

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

Robert Landeros Vivar came to the United States in 1962 as a legal permanent resident when he was six years old. Over the next forty years, he built a fulfilling life in California, with citizen children and grandchildren. In 2002, he was arrested for shoplifting cold medication from a grocery store. Facing multiple felony charges, Mr. Vivar informed his defense counsel that he was concerned about the immigration consequences of pleading guilty. His entire family was in the California, he had no connections to Mexico, and he did not speak Spanish natively.

His counsel advised him that immigration consequences were possible because he was not a citizen, but failed to explain the actual immigration effects of his plea options. Without the benefit of legal advice on the potential immigration consequences—advice to which he was constitutionally entitled—Mr. Vivar was left to rely on his own experiences and judgment. Although he received a plea offer to felony burglary, Penal Code § 459, he was unaware that this plea was immigration-safe. Mr. Vivar thus declined that plea offer and accepted a felony drug plea to possession of methamphetamine precursors with intent to manufacture, Health & Safety ("H&S") Code § 11383(c), which he wrongly believed preserved an avenue for him to remain in the United States legally as he had done for forty years, and gave him the opportunity to participate in in-custody treatment to fight his drug addiction.

That erroneous decision had an immediate and devastating impact on Mr.Vivar's life. The drug charge to which he pleaded guilty was an "aggravated felony" under immigration law, which rendered him immediately and unavoidably deportable. Mr. Vivar was shocked to learn, mere days later, that he was placed on an immigration hold. He spent the next several months in custody imploring the trial court to reopen his case to rectify this mistake. But each of his letters went unanswered. In January

2003, Mr. Vivar was deported, and while he returned for a period of time, he remains exiled from his family to this day.

After Mr. Vivar spent years unsuccessfully fighting to undo this result in the courts, the Legislature enacted a new law, Penal Code § 1473.7, permitting non-citizens to challenge old, unlawful convictions on the basis of "prejudicial error[s]" that impaired a defendant's ability to "meaningfully understand, defend against, or knowingly accept" the immigration consequences of pleading guilty. Mr. Vivar filed a motion to vacate his conviction under this statute, arguing that he received ineffective assistance of counsel, which prejudiced him because he would have declined the plea to H&S Code § 11383(c) had he been properly advised that it would trigger mandatory deportation.

The trial court denied Mr. Vivar's motion, finding that he failed to prove ineffective assistance of counsel. The Court of Appeal disagreed with that conclusion, holding that counsel's advice was constitutionally deficient, but it nonetheless affirmed the denial of Mr. Vivar's motion on the ground that such deficiency did not prejudice him. According to the Court of Appeal, Mr. Vivar would have entered the same guilty plea even if he had understood the immigration consequences or been properly advised. This conclusion was manifestly erroneous, and it warrants reversal.

Under section 1473.7, an error is "prejudicial" when there is a reasonable probability that the defendant, absent the error, would not have entered the plea. Because this inquiry focuses on what a defendant would have done in a counterfactual world, the Court must draw inferences from contemporaneous evidence at or near the time of the plea that tend to corroborate, or negate, a defendant's assertion of prejudice.

Here, there is at least a reasonable probability that Mr. Vivar would not have accepted the drug plea had he known that it would subject him to mandatory deportation. Mr. Vivar's deep roots to the California

community, his lack of any meaningful connections to Mexico, and the availability of an alternative, immigration-safe plea combine to make it reasonably likely that he would have declined the drug plea. Mr. Vivar's pre-plea emphasis on deportation, and his post-plea letters to the trial court asking to undo the plea, further corroborate his assertion of prejudice.

The Court of Appeal sidestepped this evidence, and reasoned that Mr. Vivar's rejection of the immigration-safe plea revealed his indifference to the risk of deportation. But the court failed to acknowledge the obvious explanation for why Mr. Vivar turned that option down: *He did not realize the plea was immigration-safe*, given his lawyer's failure to advise him on that point. Indeed, the Court of Appeal itself found that Mr. Vivar did not receive adequate legal advice, so its rationale that Mr. Vivar must not have prioritized immigration safety due to his rejection of the burglary plea does not follow.

The Court of Appeal attempted to support its shaky reasoning by focusing on the prejudice from *counsel*'s error in rendering advice, rather than on defendant's *own* error in understanding immigration consequences. Acknowledging that Mr. Vivar never received the legal advice to which he was entitled, the Court of Appeal speculated that Mr. Vivar would not have listened to his lawyer anyway, so he therefore cannot show that counsel's inadequate performance had any effect on his decision-making.

The Court of Appeal's reliance on Mr. Vivar's receptivity to counsel's advice gives rise to an antecedent question of what "error" supplies the prejudice under section 1473.7—the defendant's own error in misunderstanding immigration consequences, or counsel's error in rendering advice. As demonstrated here, the former framework (*i.e.*, defendant's own error) represents the correct interpretation of section 1473.7, and provides the cleanest and easiest way to dispose of this appeal. Under that framework, the question is whether Mr. Vivar would have

rejected the drug plea if he had correctly *understood* the immigration effects of his plea options. For the reasons stated, the answer is clearly yes. The Court of Appeal's backup argument that he would not have listened to his counsel's advice is irrelevant under that standard, because *even if* he would have blinded himself to such advice, he still would have been proceeding under misunderstanding of law, and *that* error prejudiced him.

The same result follows if this Court adopts a narrower interpretation of section 1473.7, and requires error by *counsel* to ground a motion for vacatur. Had Mr. Vivar been properly advised, he would have understood not only that the drug plea would exile him to an unfamiliar land, but also that the in-custody treatment program he wanted to fight his addiction was actually unavailable to him. The Court of Appeal's conjecture that Mr. Vivar would have been unwilling to listen even to counsel's correct advice has no basis in the record or in common sense. Had counsel given him the kind of direct and accurate advice required by the Constitution—i.e., that he would be deported and ineligible for in-custody treatment if he entered the drug plea—then it is at least reasonably probable that Mr. Vivar would never have entered the plea. Indeed, it is difficult to fathom how any rational defendant in Mr. Vivar's position would have done so. The Court of Appeal's misguided reasoning to the contrary entrenches an unjust and unlawful result that Mr. Vivar has been fighting for almost two decades to correct.

This Court should reverse the decision below, and remand with instructions to grant the motion for vacatur.

STATEMENT OF THE CASE

I. Factual Background

1. Petitioner Robert Vivar was six years old when his family left Mexico with dreams of a better life in the United States. (I CT 136.) His

family entered the United States in 1962 as legal permanent residents, settling in Lake Elsinore, California. (*Ibid.*) Mr. Vivar was a legal resident of California for the following forty-one years. (I CT 137.)

Even as a child, Mr. Vivar quickly adapted to life in the United States. Despite being born in Mexico, his native language is English. (I CT 137, 139.) In 1969, Mr. Vivar's family moved from Lake Elsinore to Corona, California. (I CT 136.) Mr. Vivar attended Corona schools from elementary school through high school. (*Ibid.*) In high school, as the Vietnam War raged, Mr. Vivar helped establish the school's ROTC program, which still exists today. (*Ibid.*) His older brother, Martin, served as a tank commander sergeant in the Vietnam War as part of the Ninth Armored First Cavalry Black Horse Unit. (*Ibid.*) Mr. Vivar, too, was eager to serve his country in Vietnam and registered for the draft. (I CT 136–137.) Although Mr. Vivar hoped to join his brother, the war ended a few months after he completed high school. (I CT 136.)

After graduation, in an effort to support himself and his family, Mr. Vivar accepted a job working for an airline. (I CT 137.) He was a diligent worker, and the airline soon 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. (*Ibid.*) Because his new position required him to work both day and night, Mr. Vivar was able to sleep for only three to four hours per day. (*Ibid.*) Mr. Vivar turned to amphetamines to stay awake, but unfortunately developed an addiction. (*Ibid.*)

In 1998 or 1999, Mr. Vivar first entered drug treatment, participating in a Residential Substance Abuse Treatment ("RSAT") program. (I CT 138.) Determined to beat his addiction, Mr. Vivar successfully completed the program and remained clean for two or three years. (I CT 138.) As often happens to those in Mr. Vivar's position, he relapsed in 2001. (*Ibid.*)

2. On February 16, 2002, Mr. Vivar was arrested at an Albertsons grocery store in Corona, while attempting to shoplift twelve boxes of Sudafed cold medication. (I CT 76–77.) He had no plans to manufacture any drugs himself, but rather planned to trade the Sudafed for methamphetamine for personal consumption. (I CT 77.) The arrest culminated in a two-count complaint filed on February 20, 2002. (I CT 4.) Mr. Vivar faced felony charges of (1) violation of H&S Code § 11383(c) (possession of methamphetamine precursors with intent to manufacture);[1] and (2) violation of Penal Code § 666 (petty theft with a prior), based on a previous conviction for possession of stolen property. (*Id.*) The trial court appointed counsel for Mr. Vivar. (I CT 138.)

Mr. Vivar had multiple plea options available to him. First, Mr. Vivar recalls his lawyer conveying an offer of a felony plea with a three-year sentence. (I CT 138–139.) He does not remember (and the record does not indicate) the specific offense offered at that time, but he recalls rejecting that offer believing that it would cause adverse immigration consequences. (I CT 138.) He assumed that all felonies resulted in deportation, and that all misdemeanor convictions were immigration-safe. (*Ibid.*) His lawyer did not correct this erroneous understanding of the law. (*Ibid.*) On this flawed premise, he informed his counsel that he was focused on immigration consequences, and asked her to secure a plea deal that could be reduced to a misdemeanor. (*Ibid.*) He also informed her that he had a drug problem, that he wanted treatment, and that he would enter a treatment program even if not required by the plea bargain. (I CT 139.)

Having rejected the unspecified felony offer above, Mr. Vivar's counsel relayed to him another offer for him to plead guilty to felony

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[1] This section was amended and renumbered in 2006; the new version of this charge is listed as H&S Code § 11383.5. (See 2006 Cal. Legis. Serv. ch. 646 (Sept. 29, 2006) S.B. 1299.)

burglary, Penal Code § 459, with a "LT" (i.e., "low term") prison sentence. (I CT 173.) Following this plea, he likely would have served one year in prison.[2] Most importantly, however, Penal Code § 459 did not have adverse immigration consequences. (I CT 148; cf. *Descamps v. United States* (2013) 570 U.S. 254, 264-265 [no categorical match between generic "burglary," as the term is used in federal law, and California burglary].) While defense counsel presented this option to Mr. Vivar, *she did not inform him that this plea offer would have been immigration-safe.* (I CT 138 ["[M]y lawyer never discussed the immigration consequences of my plea options."].) Without knowing that Penal Code § 459 was the immigration-safe option on the table, Mr. Vivar walked away from it.

Instead, he accepted a different plea offer. The People offered a felony drug plea to possession of methamphetamine precursors with intent to manufacture, H&S Code § 11383(c), in exchange for an agreed-upon 365-day county jail sentence—with a stipulation that the Court would recommend admission to the RSAT (in-custody treatment) program—and that a low-term, two-year suspended sentence be imposed only if Mr. Vivar failed to complete that RSAT program. (I CT 9.) This plea bargain appealed to Mr. Vivar because he believed that it gave him not only the chance to avoid deportation by obtaining a misdemeanor reduction, but also an opportunity to overcome his drug addiction with the help of RSAT. (I CT 139.) While this disposition involved a felony, Mr. Vivar recalls his lawyer informing him that, if Mr. Vivar completed RSAT, he could petition the court to reduce his conviction to a misdemeanor, which (according to

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[2] The low term for a burglary sentence in 2002 was two years. (Pen. Code, § 461, subd. (a), as amended by Stats. 1978, ch. 579, § 24.) At that time, Mr. Vivar would have been eligible for halftime credit on his prison sentence. (Pen. Code, § 2933, subd. (a), as amended by Stats. 1996, ch. 598, § 2.) His effective time in prison, assuming good conduct, would have thus been one year.

his flawed understanding of the law) would immunize him from the plea's immigration consequences. (See I CT 139; I RT 32.)

In unsworn email correspondence fourteen years later, Mr. Vivar's plea counsel recounted her statements differently from what Mr. Vivar attested to in his sworn declaration. She conceded that her general practice at the time of Mr. Vivar's plea was simply to give non-citizen defendants a formulaic warning of possible immigration consequences. (I CT 165.) When pressed for more information, she insisted that she also informed Mr. Vivar that, "to the best of [her] knowledge," completion of RSAT "would NOT determine whether or not he would be deported," and if he had further questions, Mr. Vivar should contact an immigration attorney.[3] (I CT 162.) Put another way, she told him: *I'm not sure about your RSAT strategy, and don't take my word for it.* She did not investigate and determine whether Mr. Vivar's theory of achieving immigration safety was actually correct, nor advise him of the actual immigration consequences of H&S Code § 11383(c), or any other plea alternative. (I CT 138.)

Without direct advice about the immigration effects of his available plea options, Mr. Vivar continued to believe that pleading guilty to the drug charge would preserve a route to immigration safety because of the potential for subsequent misdemeanor reduction, while also giving him the chance to secure treatment for his substance abuse issues. (I CT 138-139.) On that belief, he entered a plea of guilty to H&S Code § 11383(c) on March 6, 2003. (I CT 9.) The Court accepted the plea, issued the sentence, and recommended RSAT treatment as stipulated. (I CT 64-67.)

3. At that moment, Mr. Vivar's life immediately changed. H&S Code § 11383(c) was an "aggravated felony" under federal immigration

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[3] When asked for a declaration to support these email statements, Mr. Vivar's counsel refused. (I CT 128.)

law, 8 U.S.C. § 1101(a)(43)(B) (2000), which triggered mandatory deportation. (See I CT 148.) As a result, mere days after returning to custody, he learned that he was ineligible for RSAT—a central feature of the plea bargain he struck—due to an immigration hold. (I CT 139.) He attempted to contact his criminal defense counsel, but she did not return his calls. (*Ibid*.)

Starting one month after his guilty plea, Mr. Vivar began sending numerous letters to the trial court explaining his misunderstanding about the immigration consequences, and asking for assistance to be admitted into the RSAT program—still not comprehending that he would be deported regardless of whether he completed the RSAT program. (I CT 86–91, 118–119.) He specifically wrote: "Your honor, [i]f I would have been made aware of these facts I would never have plead[ed] Guilty to this Charge." (I CT 91.) His letters to the court went unanswered.

After transferring to immigration custody, Mr. Vivar set out to get his life back on track. (I CT 142.) During his detention, Mr. Vivar took classes to learn strategies for controlling his addiction and skills for contributing to his community once he was released. (I CT 46-51.) He rediscovered his faith, and started volunteering at the facility's church services, establishing a Bible study group for the other immigrants and refugees in the detention center. (I CT 143.) He credits his faith for helping him stay drug-free since 2002. (*Ibid.*)

After seven months in immigration custody, Mr. Vivar faced the consequence he dreaded most. (I CT 118, 139.) Although he had moved to the United States when he was six years old, had lived here for forty years, and did not speak Spanish natively, the federal government deported Mr. Vivar to Mexico in January 2003. (I CT 139.)

Banished him from his wife, citizen children and grandchildren, and the only community he ever called home, he returned in short order to the

United States, without inspection, in May 2003, to rejoin and support his family. (I CT 137–140.) Determined to remain, he set out to challenge his conviction *pro se*, filing a motion to expunge under Penal Code § 1203.4, which the Riverside County Superior Court granted in 2008. (I CT 10, 140.) Three years later, however, he was again detained by immigration authorities. (I CT 140.) Only then did Mr. Vivar learn that expungement, as a matter of law, has no effect on the federal immigration consequences of a conviction. (See *infra*, at p. 34.)

Petitioner then hired yet another attorney to try to vacate his conviction due to the ineffectiveness of his plea counsel. (I CT 140.) That attorney filed a petition for a writ of *coram nobis* in 2012—even though that relief too was unavailable as a matter of law at that time. (See *People v. Kim* (2009) 45 Cal.4th 1078.) Petitioner did not learn that the trial court had rejected his challenge until six months later, as his *coram nobis* counsel had abandoned the case without informing him. (I CT 123, 140.) Petitioner was deported again in March 2013. (I CT 142.)

4. Now 64 years old, exiled in Mexico away from his family, Mr. Vivar remains committed to the possibility of returning home. He volunteers for his church, which offers services at the border wall between the United States and Mexico. (I CT 143.) He co-founded a nonprofit that helps deported mothers of U.S.-citizen children integrate into Mexico and return, legally, to the United States. (I CT 143-144.) And he has worked for years with other nonprofits, helping deported U.S. military veterans obtain benefits, therapy, and legal services both in the United States and in Mexico. (I CT 144.) He does all of this on top of his paid work as a manager at a Tijuana call center. (*Ibid.*) Despite the good he is able to do in Mexico, Mr. Vivar wants nothing more than to reunite with his family—especially his son, currently serving in the U.S. Air Force Reserves, who cannot visit his father in Mexico due to the difficulty of obtaining a security

clearance for cross-border travel. (I CT 141.) Since his removal in 2013, Mr. Vivar has only been able to hug his son through the border fence at Friendship Park. (*Ibid.*)

II. Statutory Background

1. As pertinent here, Penal Code § 1473.7 provides: "A person who is no longer in criminal custody may file a motion to vacate a conviction or sentence" that 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 or nolo contendere." (Pen. Code, § 1473.7, subd. (a)(1).)

The Legislature enacted the law in 2016. Prior to its enactment, California law did not provide a procedural mechanism for individuals no longer in custody to challenge their convictions based on errors in the plea process, including ineffective assistance of counsel. (See Sen. Public Safety Com., analysis of Assem. Bill No. 813 (2015–2016 Reg. Sess.) p. 6.) While that procedural avenue had historically been available in California through the writ of *coram nobis*, this Court eliminated that option for claims predicated on ineffective assistance of counsel in *People v. Kim, supra*, 45 Cal.4th 1078. The Court noted, however, that the Legislature was "free to enact" a "statutory" "postcustody remedy." (*Id.* at p. 1107.)

The Legislature did just that, and crafted a statute designed specifically to protect non-citizen defendants. Indeed, the inability to challenge a plea after a custodial sentence has been completed had "a particularly devastating impact on California's immigrant community," for two reasons. (Sen. Public Safety Com., analysis of Assem. Bill No. 813 (2015–2016 Reg. Sess.) p. 6.)

First, even in 2016, "many defense attorneys still" were still failing to "inform non-citizen defendants about the immigration consequences of

convictions"—even though that duty had been settled in California law "[s]ince 1987." (*Id.* at p. 4; see also *People v. Soriano* (1987) 194 Cal.App.3d 1470, 1481.) As a result, non-citizen defendants were routinely accepting plea bargains "without having any idea that their criminal record [would], at some point in the future, result in mandatory immigration imprisonment and deportation." (Sen. Pub. Safety Com., analysis of Assem. Bill No. 813 (2015–2016 Reg. Sess.) p. 4.)

Second, federal immigration authorities frequently institute removal proceedings only after a non-citizen has completed his criminal sentence and is no longer in custody. (*Ibid.*) "Challenging the unlawful criminal conviction is often the only remedy available to allow immigrants an opportunity to remain with their families in the United States." (*Ibid.*) With no procedure for collaterally attacking that invalid prior conviction, Californians were "routinely deported on the basis of convictions that never should have existed in the first place." (*Ibid.*) The Legislature enacted section 1473.7 primarily to address this procedural omission.

2. Section 1473.7 requires proof of 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).) The Legislature instructed courts to interpret this text "in the interests of justice and consistent with the findings and declarations" of Penal Code § 1016.2 (Stats. 2018, ch. 825, § 1, subd. (c)), which in turn emphasizes the need to ensure non-citizens have an "*accurate understanding* of immigration consequences." (Pen. Code, § 1016.2, subd. (d), italics added.) This Court has never addressed the scope of section 1473.7, but the lower courts have done so in multiple published opinions.

In the initial period after the law's enactment in 2016, California courts "assumed" a narrow interpretation of the statute: that the only basis

for a vacatur motion could be the constitutionally inadequate advice of counsel, and that the petitioner must meet the rigorous evidentiary standards set out in *Strickland v. Washington* (1984) 466 U.S. 668. (*People v. Camacho* (2019) 32 Cal.App.5th 998, 1005, review denied June 12, 2019 [citing cases]; see also *People v. Ruiz* (Cal. Ct. App., June 5, 2020, No. 2D CRIM. B296742) 2020 WL 3026049.)

In the face of this trend, the Legislature corrected course in 2018 by amending the law. The amendment explicitly states that a defendant *need not show* ineffective assistance of counsel to obtain relief. (Stats. 2018, ch. 825, § 2, italics added ["A finding of legal invalidity may, but need not, include a finding of ineffective assistance of counsel."]; see also *Ruiz*, *supra*, 2020 WL 3026049, at *3 ["The new law, effective in 2019, eliminated the *Strickland* requirements."].) After this 2018 revision, multiple appellate courts held that the defendant's *own* misimpression of the law can be the kind of "error" that warrants relief. (See *People v. Mejia* (2019) 36 Cal.App.5th 859, 871; *Camacho*, *supra*, 32 Cal.App.5th at p. 1009.)

3. The passage of section 1473.7 was not an isolated event; its enactment came on the heels of the Legislature's focused effort to ensure that non-citizen defendants were *aware* of immigration consequences before pleading guilty to a crime. In 2015, the Legislature enacted formal declarations explaining that non-citizen defendants' misunderstanding of immigration consequences of criminal convictions had devastating, and avoidable, consequences for California's immigrant community. (Pen. Code, § 1016.2.) For that reason, the Legislature codified prior case law requiring defense counsel to affirmatively advise clients on the immigration consequences of a proposed disposition, and defend against those consequences (Pen. Code, § 1016.3, subd. (a)), and even required prosecutors to "consider the avoidance of adverse immigration

consequences in the plea negotiation process as one factor" in reaching a resolution (Pen. Code, § 1016.3, subd. (b)).

III. Procedural Background

1. On January 3, 2018, Mr. Vivar filed a motion to vacate his conviction under Penal Code § 1473.7(a)(1). He sought relief on the ground that his criminal defense counsel failed to advise him of the immigration consequences of his plea to H&S Code § 11383(c). He argued that, although Mr. Vivar raised his immigration concerns with his criminal counsel, she provided merely a formulaic warning that immigration consequences were possible—an advisement given to all non-citizen defendants—and told him to consult an immigration attorney with further questions. (I CT 162.) Mr. Vivar asserted that such a pro forma caution did not constitute adequate advice under *Soriano*, *supra*, 194 Cal.App.3d 1470, among other authorities, and that he consequently failed to understand that he was agreeing to an aggravated felony.

On June 18, 2018, the trial court heard argument and issued an oral decision, denying the motion. (I CT 229.) The trial court concluded that claims for ineffective assistance based on "nonadvisement" do not qualify as ineffective assistance under U.S. Supreme Court precedent. (I RT 31–32.) Because Mr. Vivar's evidence did not prove "affirmative misadvisement," the trial court found there was no ineffective assistance.

The trial court reached this conclusion based exclusively on written and documentary evidence; no testimony was taken or considered. In particular, the trial court relied on defense counsel's recent email statements, fourteen years after the fact, that she advised Mr. Vivar that his RSAT misdemeanor reduction strategy might not be determinative of his immigration risk, and that he should consult an immigration attorney if he had further questions about that. (I RT 32.) The trial court held: "[I]n the structure of what was considered appropriate legal advice, *that's not*

misadvice. That's actually good advice." (I RT 32–33, italics added.) To buttress its conclusion, the trial court acknowledged that Mr. Vivar's "understanding of immigration was that to take a drug treatment program and to get the case reduced to a misdemeanor would save him from immigration[.]" (I RT 32.) The trial court additionally found significant Mr. Vivar's rejection of the burglary plea offer, Penal Code § 459, 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.)

Because the trial court limited its analysis to whether defense counsel affirmatively *misadvised* Mr. Vivar, it did not analyze whether her advice was insufficient on the ground that she did not investigate and explain to Mr. Vivar the immigration consequences of his specific plea options. The trial court thus denied relief, without reaching the issue of prejudice. Mr. Vivar timely appealed. (I CT 230.)

2. The Court of Appeal disagreed with the trial court on the principal issue, finding that Mr. Vivar did not receive effective assistance of counsel. It nonetheless affirmed on the ground that Mr. Vivar did not show that he was prejudiced by his counsel's inadequate advice.

a. In finding that counsel's performance was constitutionally inadequate, the Court of Appeal reasoned that Mr. Vivar, a non-citizen understandably worried about immigration consequences, "asked [defense counsel] a specific question about deportation, which triggered . . . the duty set out in *Soriano*" to fully advise a defendant of the immigration consequences of a proposed disposition. (Opin. 16.) *Soriano*, in turn, was based on an earlier American Bar Association standard: "[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." (Opin. 15, internal quotation marks omitted.)

The Court of Appeal held that this was nearly the exact scenario presented in this case. (Opin. 15.) And yet, although Mr. Vivar specifically inquired about how he could secure an immigration-neutral disposition, defense counsel apparently made no attempt to educate herself on the immigration consequences of the plea deal before advising Mr. Vivar about whether to accept it. (Opin. 16.) Instead, rather than fully advising Mr. Vivar, she offered only a generalized caution about the *possibility* of immigration consequences—a pro forma warning given to all non-citizen defendants regardless of the specific plea options available. (Opin. 16.) This advice, the Court of Appeal held, was constitutionally inadequate under established California law.

b. The Court of Appeal nevertheless affirmed the denial of Mr. Vivar's section 1473.7 motion on the ground that he failed to establish prejudice resulting from counsel's inadequate advice. (Opin. 18.) The Court of Appeal acknowledged Mr. Vivar's overwhelming ties to this country and lack of any connection to Mexico (Opin. 3), his pre-plea question to defense counsel about immigration consequences (Opin. 6–7, 15–16), and his post-plea letter-writing campaign to the trial court imploring it to unwind the conviction after learning of its immigration effect (Opin. 5). Notwithstanding that evidence, the Court of Appeal held that Mr. Vivar "point[ed] to no contemporaneous evidence in the record that corroborates" his claim that he would not have accepted the plea if properly informed. (Opin. 19-20.)

The Court of Appeal's principal rationale focused on Mr. Vivar's rejection of the burglary charge, Penal Code § 459, an immigration-safe disposition. (Opin. 18-19.) The explanation for Mr. Vivar's rejecting this charge is apparent: *he did not realize the plea was immigration-safe*, given his lawyer's failure to advise him on that point. Not acknowledging this fact, the Court of Appeal reasoned that Mr. Vivar's rejection of the

immigration-safe charge showed that "immigration consequences were not [his] primary consideration," and thus, "further advice on this front was not reasonably probable to change his decisionmaking." (Opin. 19.)

In support of this conclusion, the Court of Appeal referenced a handwritten note by defense counsel, at the time of the plea, indicating that Mr. Vivar "want[ed] help w/ his drug problem," which led to an inference that he "prioritized drug treatment over potential immigration-neutral pleas." (Opin. 18, alterations omitted.) The Court of Appeal then relied on the trial court's statement that Mr. Vivar "was more willing to rely on his experiences than he was on his counsel's advice." (Opin. 19; see also I RT 33.) The Court of Appeal extrapolated from this finding that Mr. Vivar was thus "apparently unwilling to listen to the advice of counsel," so "further advice would [not] have induced him to change his mind about his plea." (*Ibid.*) The Court of Appeal did not appear to factor in its prior conclusion that Mr. Vivar was proceeding with constitutionally deficient legal counsel; nor did the Court of Appeal explain why a defendant's response to such woefully inadequate advice could be any indication of how that defendant would have responded to the correct advice required by the Constitution.

Mr. Vivar reminded the Court of Appeal that his perceived receptivity to counsel's advice is nonetheless not determinative because a defendant's *own* misunderstanding of law, itself, can ground a section 1473.7 motion—and all parties agreed that Mr. Vivar misunderstood the immigration implications of his plea at the time. (Opin. 20-22.) Recognizing that other courts had weighed in on this interpretation of the statute, the Court of Appeal accepted Mr. Vivar's premise—that defendant's own error could suffice—and held that a motion on such ground would trigger a deferential standard of review. (Opin. 21.) Then, the Court disregarded Mr. Vivar's contention that his own misunderstanding prejudiced him because "no amount of *additional advice*

was reasonably probable to induce a different action." (Opin. 21-22, italics added.) The Court did not explain why "additional advice" was relevant where the claimed error was Mr. Vivar's own understanding of law.

On this reasoning, the Court of Appeal declined to remand for further proceedings (Opin. 26-28) and affirmed.[4] Petitioner filed a petition for review on January 21, 2020, and this Court granted the petition on March 25, 2020.

ARGUMENT

The central question in this case is whether Mr. Vivar suffered prejudice. Under section 1473.7, an error is "prejudicial" when there is a reasonable probability that the defendant, absent the error, would not have entered the guilty plea. This analysis begins with a defendant's statement "that he or she would not have entered into the plea bargain" absent the error, after which the Court looks "to determine whether the defendant's assertion is credible." (*People v. Martinez* (2013) 57 Cal.4th 555, 565.) Because this inquiry focuses on what a defendant would have done in a counterfactual world, the Court must draw inferences from contemporaneous evidence at or near the time of the plea that tend to corroborate, or negate, a defendant's assertion that he or she would have rejected the plea, absent the error.

Under this standard, there is at least a reasonable probability that Mr. Vivar would not have accepted the drug plea had he known that it would subject him to mandatory deportation. Mr. Vivar had deep roots in the

[4] Mr. Vivar additionally argued that the conviction was legally invalid because the plea bargain contained conditions that were legally impossible—as the conviction triggered an immigration hold that rendered Mr. Vivar ineligible to complete the RSAT program, a core premise of the plea deal. The Court of Appeal rejected this argument. (Opin. 22-26.) This issue is not under review.

California community in which he long resided, virtually no connections to Mexico, and the immigration-safe burglary plea was obviously preferable to the drug charge he ultimately chose. His pre-plea emphasis on immigration consequences, and his post-plea letters to the trial court asking to undo the plea, further corroborate his assertion that immigration consequences were material to his decision-making at that time. The Court of Appeal ignored this evidence, and instead concluded that his rejection of an immigration-safe burglary plea revealed his indifference to deportation. But the court failed to acknowledge the obvious explanation for Mr. Vivar's decision: He did not know the burglary plea was immigration-safe.

The Court of Appeal compounded this mistake by focusing on the prejudice from *counsel*'s error in rendering advice, rather than on defendant's *own* error in understanding immigration consequences. By proceeding that way, the court attempted to shore up its reasoning by finding that Mr. Vivar would not have listened to correct legal advice anyway, so he would not have changed his decision in the absence of counsel's error.

Because the Court of Appeal's decision relied so heavily on Mr. Vivar's perceived receptivity to counsel's error, it is appropriate to address the antecedent question of what "error" can supply the prejudice under section 1473.7—the defendant's own error in misunderstanding immigration consequences, or counsel's error in rendering advice. In either case, Mr. Vivar clearly experienced prejudice, but the former is the correct interpretation of the statute, and conveniently provides the cleanest way to dispose of this appeal. Under that framework, the simple question is whether Mr. Vivar would have rejected the drug plea if he had a correct understanding of the immigration effects of his plea options. The Court of Appeal's secondary argument that he would not have listened to his counsel's correct advice is legally irrelevant under that standard, because

even if he would have refused that advice, he still would have maintained his errant understanding of law, and *that* error prejudiced him.

Were this Court to require error by *counsel* to ground a motion for vacatur under section 1473.7, then Mr. Vivar still plainly prevails. Had he been properly advised, he would have understood not only that the drug plea would exile him to an unfamiliar land, but also that the in-custody treatment program he wanted was actually unavailable to him, which would have eviscerated any basis for him to choose the drug plea, particularly with the burglary option on the table. The Court of Appeal's remaining speculation that Mr. Vivar would have been unwilling to listen even to counsel's correct advice is unfounded and illogical. It is a radical inference drawn from trial court findings that, under settled law, should not be afforded deference anyway. The only inference supported by the record is that, had counsel given Mr. Vivar the kind of direct and accurate advice required by the Constitution—i.e., that he would be deported and ineligible for in-custody treatment if he entered the drug plea—it is at least reasonably probable that Mr. Vivar would not have entered the plea.

I. Prejudice Depends on Whether It Is Reasonably Probable That the Defendant Would Have Rejected the Plea Absent the Error

Section 1473.7 requires proof, by a preponderance of the evidence, of a "*prejudicial error* damaging the moving party's ability to meaningfully understand, defend against, or knowingly accept the actual or potential adverse immigration consequences of a plea of guilty or nolo contendere." (Pen. Code, § 1473.7, subd. (a)(1), italics added.) Under this statute, the error is "prejudicial" when the evidence shows a *reasonable probability* that the movant *would not have entered the plea* if he had properly understood its immigration consequences (i.e., absent the "error" at issue).

1. In the context of a guilty plea, the prejudice inquiry turns on whether the defendant would have rejected the plea bargain absent the error, "not whether the defendant's decision would have led to a more favorable result," such as winning at trial.[5] (*Martinez*, *supra*, 57 Cal.4th at pp. 562, 567; accord *Lee v. United States* (2017) 137 S.Ct. 1958, 1962 [finding prejudice where defendant accepted a guilty plea with adverse immigration consequences despite having no reasonable prospect of success at trial].) To that end, the Court "considers evidence that would have caused the defendant to expect or hope a different bargain would or could have been negotiated." (*Id.* at p. 567.)

Critical to this exercise is the focus on inferences from contextual evidence at or near the time of the plea. The analysis begins with a movant's "declaration or testimony stating that he or she would not have entered into the plea bargain" absent the error. (*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." (*Id.*; see *In re Alvernaz* (1992) 2 Cal.4th 924, 938 ["[A] defendant's self-serving statement . . . that with competent advice he or she *would* have accepted 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."].) As noted, "other corroborating circumstances" in the record may confirm or negate the credibility of the defendant's assertion. (*Martinez*, *supra*, 57 Cal.4th at p. 565; accord *Lee*, *supra*, 137 S.Ct. at p. 1967 ["Judges should instead look to contemporaneous evidence to substantiate a defendant's expressed preferences."].) So each assertion of

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[5] This inquiry diverges from the usual *Strickland* test for prejudice based on deficient trial performance, which focuses on whether a different *outcome* would have resulted absent the error. (*Strickland*, *supra*, 466 U.S. at p. 694.)

prejudice "demands a 'case-by-case examination' of the 'totality of the evidence,'" which means "categorical rules are ill suited to [this] inquiry." (*Lee*, *supra*, 137 S.Ct. at p. 1966 (quoting *Williams v. Taylor* (2000) 529 U.S. 362, 391).)

The lower courts have held contextual evidence to be not only relevant under section 1473.7, but often determinative. In some cases, the existence of longstanding and important ties to the United States has been deemed sufficient on its own to corroborate a defendant's post-conviction assertions of prejudice. (See *Camacho*, *supra*, 32 Cal.App.5th at p. 1102; *People v. Espinoza* (2018) 27 Cal.App.5th 908, 917.) In others, courts have found prejudice where the defendant pointed to U.S. connections in addition to some other factor substantiating his claim. For example, in *Mejia*, *supra*, 36 Cal.App.5th at pp. 872-873, the court evaluated the immigration-neutral sentencing alternative that the defendant could have chosen, and concluded that the movant would have preferred that outcome over deportation. In *People v. Ogunmowo* (2018) 23 Cal.App.5th 67, the court found it notable that the defendant had affirmatively asked his counsel about the immigration consequences of a plea. (*Id.* at p. 79.) And in *In re Hernandez* (2019) 33 Cal.App.5th 530, the court relied on the defendant's statements and behavior after realizing that her plea triggered deportation, including her refusal to sign a form authorizing her voluntary removal. (*Id*. at pp. 547–548.)

2. The quantum of certainty needed to sustain a defendant's burden is that of *reasonable probability*: It must be reasonably probable that, absent the error, the defendant would have rejected the plea. This Court and the U.S. Supreme Court have embraced this standard in connection with similar claims for post-conviction relief. In *Martinez*, *supra*, 57 Cal.4th at p. 566, this Court held that the failure to give the required statutory advisement to non-citizen defendants under Penal Code

§ 1016.5, prior to a guilty plea, results in prejudice "if the defendant establishes it was reasonably probable he or she would have rejected the plea if properly advised." (*Ibid.* [citing *People v. Superior Court* (*Zamudio*) (2000) 23 Cal.4th 183, 210]; see also *People v. Watson* (1956) 46 Cal.2d 818, 836.) And in *Lee*, *supra*, 137 S.Ct. 1958, the U.S. Supreme Court held that a Sixth Amendment deprivation of the right to effective assistance of counsel in the plea-bargaining process is prejudicial if there is "a reasonable probability that [the movant] would have rejected the plea *had he known* that it would lead to mandatory deportation." (*Id.* at p. 1967.) Notably, the lower appellate courts, including the Court of Appeal below, have extended this reasonable-probability standard to the prejudice requirement of section 1473.7. (Opin. 17; *Mejia*, *supra*, 36 Cal.App.5th at p. 871; *Ogunmowo*, *supra*, 23 Cal.App.5th at p. 81.)

II. It Is Reasonably Probable That Mr. Vivar Would Have Rejected the Plea Bargain Absent the Error

In this case, prejudice is unmistakable. Whether the Court analyzes prejudice flowing from Mr. Vivar's *own* error in misunderstanding the law, or from his *counsel*'s error in rendering inadequate advice, it is reasonably probable that Mr. Vivar would have rejected the H&S Code § 11383(c) plea, but for the error at issue.

Because section 1473.7 permits a motion based on a defendant's own error, and because that framework provides the cleanest and easiest way to dispose of this appeal, the prejudice argument begins there. And that is where it should end: The evidence surrounding Mr. Vivar's plea demonstrates at least a reasonable probability that, had he properly understood the immigration consequences of his plea options, he would have declined the drug plea.

Even if the Court were to require that the prejudice stem from error by counsel, Mr. Vivar still prevails. Had he been properly advised, he

would have understood not only the deportation consequence itself, but also that the in-custody treatment program he wanted was actually unavailable to him under this plea. And there is no legitimate reason to conclude that Mr. Vivar—desperate to remain in the country—would have ignored clear and direct legal advice explaining the life-altering consequences of entering the drug plea.

A. Mr. Vivar Was Prejudiced By His Own Error

1. Section 1473.7 requires proof of 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).) Because "prejudice" turns on whether the defendant would have rejected the plea deal absent the error, there is a necessarily antecedent question of what "error" caused the prejudice. There is no textual limitation on the kind of error that may ground a section 1473.7 motion, except that the error must be one that "damag[es] the moving party's ability to [a] meaningfully understand, [b] defend against, or [c] knowingly accept" a plea's immigration consequences. (Pen. Code, § 1473.7, subd. (a)(1).)

The Legislature instructed courts to interpret this text "in the interests of justice and consistent with the findings and declarations" of Penal Code § 1016.2, Stats. 2018, ch. 825, § 1(c), which in turn emphasize the need to ensure non-citizens have an "*accurate understanding* of immigration consequences." (Pen. Code, § 1016.2, subd. (d), italics added.) Accordingly, from a textual perspective, the appropriate reading of this statute is that a defendant's *own* error can be the source from which the claimed prejudice stems. After all, a defendant's misimpression about the interaction of state law and immigration law can impair his or her ability to "meaningfully understand, defend against, or knowingly accept" the

immigration consequences associated with the plea (Pen. Code, § 1473.7, subd. (a)(1)), as it has done in this case.

The history of the statute's evolution confirms the point. In the initial period after the law's enactment in 2016, California courts generally "assumed" a narrow interpretation of the statute: that the error must be counsel's constitutionally deficient performance. (*Camacho*, *supra*, 32 Cal.App.5th at p. 1005 [citing earlier cases].) The Legislature then corrected course in 2018 by amending the law to clarify that a movant *need not show* ineffective assistance of counsel. (Stats. 2018, ch. 825, § 2 ["A finding of legal invalidity may, but need not, include a finding of ineffective assistance of counsel."].)

After this 2018 revision, subsequent appellate decisions confirmed that the defendant's own misimpression of the law can be the kind of "error" that warrants relief. (See *Mejia*, *supra*, 36 Cal.App.5th at p. 871 ["[T]he focus of the inquiry in a section 1473.7 motion is on the '*defendant's own error* in . . . not knowing that his plea would subject him to mandatory deportation and permanent exclusion from the United States.'" (quoting *Camacho*, *supra*, 32 Cal.App.5th at p. 1009)]; *id.* at pp. 870-871 [approving *Camacho*'s reasoning that "the law require[s] an error on the part of the defendant" rather than "an error by defendant's counsel"].)

Indeed, by permitting an avenue for relief based on the defendant's own error of law, the Legislature aligned section 1473.7 with the settled principle, recently affirmed by this Court, that "ignorance" of deportation consequences of a guilty plea "may constitute good cause to withdraw the plea under Penal Code section 1018." (*People v. Patterson* (2017) 2 Cal.5th 885, 889 [citing *People v. Superior Court (Giron)* (1974) 11 Cal.3d 793, 798]; see also *id.* at p. 894 ["[A] defendant may establish good cause to withdraw a guilty plea under section 1018 by showing that he or she was

unaware that the plea would result in deportation."].) Even the Court of Appeal below did not appear to take issue with this interpretation. (Opin. 21.) Accordingly, although a defendant's misunderstanding of the law is often the result of his counsel's failure to give adequate advice, a defendant need not rely on deficiencies in counsel's performance as *the* source of his prejudice. His own subjective misunderstanding can be the "error" that "prejudic[ed]" him under section 1473.7. (Pen. Code, § 1473.7, subd. (a)(1).)

2. It is undisputed that Mr. Vivar misunderstood the immigration consequences of his available plea options.

First, he did not know that the felony burglary plea, Penal Code § 459, was immigration-safe, as his lawyer did not advise him of that fact. (I CT 138.) There is nothing in the record that suggests he might have learned that information from another source, and neither the State, nor the trial court, nor the Court of Appeals has asserted that he actually understood the immigration-safe nature of the burglary charge. Instead, the record indicates only that his counsel employed the general practice of giving a formulaic warning to all her non-citizen clients that the plea at issue might have the risk of deportation. (I CT 131.) There is no indication that Mr. Vivar's lawyer deviated from that practice and informed him that the burglary charge, Penal Code § 459, was in fact immigration-safe.

Second, Mr. Vivar incorrectly understood that he could plead guilty to the drug charge, H&S Code § 11383(c), while preserving a legal avenue to avoid removal. (I CT 138-139.) H&S Code § 11383(c) was an "aggravated felony" under federal immigration law (8 U.S.C. § 1101(a)(43)(B) (2000)), and would have triggered mandatory deportation with no opportunity for discretionary immigration relief. (See I CT 148.) Moreover, Mr. Vivar's operating premise—that he could avoid that result by completing RSAT and obtaining a misdemeanor reduction—was wrong

as a matter of law. Then, as now, the state classification of an offense as a felony or misdemeanor had little bearing on the immigration consequences of a particular conviction—a conviction remains on a non-citizen's record for immigration purposes unless it is invalidated due to a procedural or substantive defect in the underlying proceeding itself. (See *In re Pickering* (BIA 2003) 23 I. & N. Dec. 621, 624 [citing earlier cases], rev'd on other grounds, *Pickering v. Gonzales* (6th Cir. 2006) 465 F.3d 263.) In fact, to advise a non-citizen otherwise would constitute ineffective assistance of counsel. (See *Camacho*, *supra*, 32 Cal.App.5th at p. 1004 [ineffective assistance when counsel advised non-citizen defendant that expungement under Penal Code § 1203.4 could help defendant avoid adverse immigration consequences, because expungement "has no effect on the federal immigration consequences of a conviction of such a felony"].) So Mr. Vivar's plan to achieve a post-conviction reduction was based on an error of immigration law relating to drug plea.

3. Had Mr. Vivar accurately understood the immigration consequences of his plea offers, it is at least reasonably probable that he would have rejected the plea to H&S Code § 11383(c).

For a non-citizen, the threat of deportation is often *the main factor* in evaluating whether to accept a plea. (*Martinez*, *supra*, 57 Cal.4th at p. 563 ["[A] defendant 'may view immigration consequences as the *only* ones that could affect his calculations regarding the advisability of pleading guilty to criminal charges.'" (italics added, quoting *In re Resendiz* (2001) 25 Cal.4th 230, 253, abrogated on other grounds by *Padilla v. Kentucky* (2010) 559 U.S. 356)]; accord *Patterson*, *supra*, 2 Cal.5th at p. 896; *Padilla v. Kentucky* (2010) 559 U.S. 356, 364 ["[D]eportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes."].) That is 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.)

By the time of his arrest in 2002, Mr. Vivar had cultivated rich and longstanding connections in the United States. He immigrated legally to this country at the age of six, and lived in California for forty years. (I CT 136.) He founded his high school ROTC chapter and registered for the draft—all in hopes of following in his older brother's footsteps to serve his country in the Vietnam War. (*Ibid.*) And at the time of his plea, he had two children, two grandchildren, and a wife who was sick with a thyroid condition. (I CT 137, 141.) By contrast, he had virtually no ties to Mexico, and did not speak Spanish natively. (Opin. 3.)

It is against this backdrop, and the general understanding that non-citizen defendants often prioritize immigration consequences as the key factor in plea negotiations, that Mr. Vivar's choice to accept the drug plea must be analyzed. Prior to accepting that plea, he faced essentially two options:

CHOICE 1: Accept the plea offer to burglary, Penal Code § 459. This option came with a stipulation to the low-term sentence—two years, Pen. Code, § 461(a) , which would likely have been reduced to one year due to conduct credits.[6] Because he was a legal permanent resident, and because burglary was not a deportable offense, he would return to his family and job after release. And, assuming he could find no in-custody drug treatment program during his sentence, he could pursue treatment thereafter in his own community with his family's support.

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[6] The scheme of "conduct credits" applicable to this prison sentence in 2002 would have reduced his custodial sentence by half. (Pen. Code, § 2933, subd. (a), as amended by Stats. 1996, ch. 598, § 2.)

CHOICE 2: Accept the plea offer to the drug charge, H&S Code § 11383(c). This option ostensibly came with a stipulation to serve one year in the county jail—which would likely have become eight months due to conduct credits[7]—and a recommendation for admission to the in-custody drug treatment program (RSAT). But properly advised, he would have known that, as confirmed by actual events, this option would upend his life. It would trigger immediate ineligibility for RSAT treatment due to an immigration hold, and then subject him to mandatory deportation to an unfamiliar country, exiling him permanently from his family and community.

Faced with these options, and accounting for Mr. Vivar's longstanding roots and family ties in the United States, it is at least reasonably probable that he would have declined the drug plea—which carried the virtual certainty of permanent banishment—and instead would have opted for the burglary plea available to him.[8] That is a commonsense

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[7] The scheme of "conduct credits" applicable to this jail sentence in 2002 would have reduced his custodial sentence by one third. (Pen. Code, § 4019, subd. (f), as amended by Stats. 1982, ch. 1234, § 7.)

[8] Mr. Vivar had a third option: He could have proceeded to trial on the Health & Safety Code § 11383(c) charge, and pleaded open to the Penal Code § 666 charge. First, he had a non-trivial prospect of defeating the drug charge at trial, the statute for which required "proof of intent to *personally participate* in manufacturing" methamphetamine (*People v. Perez* (2005) 35 Cal.4th 1219, 1231, italics added); the police report indicated that Mr. Vivar intended to *trade* the Sudafed for methamphetamine (I CT 72-78), not "personally participate in manufacturing" it. (See *Lee*, *supra*, 137 S.Ct. at p. 1967 [finding prejudice where it was reasonably probable defendant "would have rejected any plea leading to deportation—even if it shaved off prison time—in favor of throwing a 'Hail Mary' at trial."].) Second, had he pleaded open to the Penal Code § 666 charge (petty theft with a prior), he would have had the opportunity to persuade the trial court to impose a non-felony sentence that would have avoided the drastic result of mandatory removal.

inference based on the wildly different consequences of these plea offers. (See *Mejia*, *supra*, 36 Cal.App.5th at pp. 872-873 [finding prejudice after comparing the choices available to defendant].)

Contemporaneous evidence before and after the plea further corroborates Mr. Vivar's assertion that he would have rejected it if properly informed. Prior to the plea, he specifically asked his defense counsel to help him secure an immigration-safe disposition, demonstrating the importance of immigration consequences to him—a fact that was dispositive in *Ogunmowo*, *supra*, 23 Cal.App.5th at p. 79. More importantly, as soon as Mr. Vivar accepted the plea and learned of its real effect on his immigration status, he sent multiple letters to the trial court explaining his confusion and begging for "mercy" from deportation. (I CT 87, 91.) He wrote to the Court: "Your honor, [i]f I would have been made aware of these facts I would never have plead[ed] Guilty to this Charge." (I CT 91.) As in *In re Hernandez*, *supra*, 33 Cal.App.5th at pp. 547-548, which considered immediate post-plea conduct to be powerful evidence of prejudice, it difficult to imagine evidence more probative of Mr. Vivar's prejudice than his own words shortly after he entered his plea.

4. The Court of Appeal's reasoning to the contrary does not pass muster. After reciting these facts—Mr. Vivar's family ties to California, his pre-plea discussions with counsel, and post-plea attempts to unwind the conviction—the Court of Appeal held that Mr. Vivar "point[ed] to *no contemporaneous evidence* in the record that corroborates" his claim that he would not have accepted the plea if properly informed. (Opin. 19-20, italics added.) There is no principled basis for the court's categorical rejection of this evidence, as it is probative of whether Mr. Vivar would have made a different choice had he properly understood the immigration consequences. Indeed, this evidence is precisely the kind that other courts

in this State have routinely considered to be determinative in testing a claim of prejudice under Penal Code § 1473.7. (See *supra*, at p. 29.)

The Court of Appeal nevertheless concluded that the evidence pointed in the *other* direction. The principal point for the Court of Appeal was Mr. Vivar's rejection of the immigration-safe burglary charge, which suggested to the court that he did not prioritize immigration safety during the plea process. (Opin. 18–19.) That logic, however, fails to assume a counterfactual world in which Mr. Vivar would have been fully aware that the burglary plea was the safe option. In fact, the availability of the immigration-safe burglary plea actually *confirms* that Mr. Vivar would have declined the drug plea, had he understood its draconian immigration effect, because he would have known that he had available to him a plea disposition that was clearly preferable to that option. (See generally *People v. Bautista* (2004) 115 Cal.App.4th 229, 240 ["One technique the attorney could have used to defend against adverse immigration consequences was to plead to a different but related offense. Another was to 'plead up' to a nonaggravated felony even if the penalty was stiffer."].)

Recognizing the position of California appellate courts that a defendant's *own* error can be the basis of a section 1473.7 motion (see *Mejia*, *supra*, 36 Cal.App.5th at p. 871; *Camacho*, *supra*, 32 Cal.App.5th at p. 1009), the Court of Appeal below accepted this premise, but stated that a motion on that basis would trigger a deferential standard of review because the focus would be the deprivation of a statutory, rather than constitutional, right. (Opin. 21.) Although that deference is unwarranted here because the record consists purely of documentary evidence, see *infra,* at p. 43, that is beside the point. The Court of Appeal held that "even under an expansive reading of *Camacho* and *Mejia*," in this case "no amount of *additional advice* was reasonably probable to induce a different action." (Opin. 21-22, italics added.) That does not follow. Even accepting the court's flawed

premise that Mr. Vivar would not have been receptive to "additional advice," that fact has no bearing on whether he subjectively misunderstood the law, or on whether he would have rejected the plea absent that misunderstanding. *That* is the operative question under this statutory framework. In other words, *even if* he would have been categorically unwilling to listen to counsel's correct advice, he undisputedly would have been proceeding under a misimpression of law in spite of that advice. In the parlance of section 1473.7, there would still have been an "error" (misunderstanding of law) that "prejudice[ed]" him (because he would have rejected the plea absent such misunderstanding). (Penal Code, § 1473.7.)

For the foregoing reasons, Mr. Vivar was prejudiced by his own errors. This is the end of the case. Because Mr. Vivar has demonstrated prejudice under a valid framework for section 1473.7 motions, reversal is warranted on this basis.

B. <u>Mr. Vivar Was Prejudiced By His Counsel's Error</u>

Even if, contrary to Legislative direction to interpret the statute "in the interests of justice" (Stats. 2018, ch. 825, § 1, subd. (c)), the Court were to require Mr. Vivar to demonstrate prejudice from his *counsel*'s error, he still easily prevails, as it is reasonably probable that he would not have accepted the H&S Code § 11383(c) plea if his counsel had given adequate advice.

The Court of Appeal outlined at length how Mr. Vivar's counsel rendered deficient advice. While she knew that Mr. Vivar was not a citizen and that he feared deportation, counsel made no attempt to educate herself on the immigration consequences of the plea options and advise Mr. Vivar about them. (Opin. 16.) That was not only error, but one that fell below even the low professional competency bar imposed by *Strickland*.

This omission prejudiced Mr. Vivar because, *absent* that error (i.e., had she correctly advised him of the immigration-related effects of his

plea), Mr. Vivar would be in the same position described above: He would have, as a result of receiving constitutionally effective advice, correctly understood that the drug plea would exile him to an unfamiliar land, while the burglary plea would put his life on temporary hold, after which he could return to his community. For all the reasons described, *supra*, at pp. 33-37, that would have prejudiced him.

The Court of Appeal offered essentially two responses to this, neither of which has merit.

1. The Court of Appeal held that Mr. Vivar would not have changed his plea upon receiving adequate advice because "[t]he record contains sufficient evidence to conclude that [he] *prioritized drug treatment* over potential immigration-neutral pleas[.]" (Opin. 18, italics added.) This is not only unsupported as a factual matter, but also does not lead to a conclusion that there was no prejudice.

a. The Court of Appeal's factual predicate, that he cared most about drug treatment, has no basis in the record. Tellingly, the trial court made no such finding. To support its own fact-finding on this point, the Court of Appeal relied on trial's counsel's handwritten notes indicating that Mr. Vivar "want[ed] help w/ [his] drug problem." (Opin. 18.) But the fact that a family man is struggling with addiction and wants to conquer it does not remotely mean that he would knowingly deport himself just to take advantage of a short-term in-custody treatment program, particularly when other post-custody programs may be available.

To that end, the Court of Appeal did not even consider that Mr. Vivar, if properly advised, might have chosen the burglary plea and participated in drug treatment *after* his custodial sentence on that offense—assuming no in-custody program was otherwise available—as he attested he was willing to do. (I CT 139 ["I told my lawyer that . . . I would enter a drug treatment program even if it was not required by the terms of my

plea."].) Nor did the Court of Appeal consider that Mr. Vivar's emphasis on RSAT, was driven by his flawed theory that RSAT was a path to a misdemeanor reduction, and hence safety from immigration consequences. (See *supra*, at pp. 13-15.) Indeed, that is fully supported by the trial court's view of Mr. Vivar's priorities. (I RT 32 ["I have the declaration from the defendant wherein he readily admits . . . that his understanding of immigration was that to take a drug treatment program and to get the case reduced to a misdemeanor would save him from immigration[.]"].) In sum, the evidence does not support the Court of Appeal's conclusion that Mr. Vivar prioritized drug treatment over immigration consequences.

b. Even if, contrary to fact and common sense, Mr. Vivar's primary focus was substance abuse treatment, that does not negate a finding of prejudice. Rather, it *confirms* that Mr. Vivar would not have entered the drug plea. Assuming that his lawyer had given adequate advice, he would have known that such a plea would (a) render him ineligible for RSAT, and (b) fast-track him for deportation before RSAT could be completed. As actual events demonstrated, mere days after entering his plea, he was notified of his ineligibility for RSAT due to an immigration hold, and the government began removal proceedings two months later. (I CT 139.) Had his counsel explained the full range of immigration-related effects that would flow from his entry of the H&S Code § 11383(c) plea, he would have strong reason to suspect (if not know with certainty) that he would not obtain the in-custody treatment benefit of the plea. At that point, Mr. Vivar would have understood that entry of this plea would not only exile him from his family, but also deny him the in-custody treatment program he wanted. The notion that he would still have entered this plea, particularly with the alternative burglary plea available to him, strains credulity. At a minimum, it is reasonably probable that he would have rejected it.

2. The Court of Appeal also held that Mr. Vivar was "apparently unwilling to listen to the advice of counsel," so "further advice would [not] have induced him to change his mind about his plea." (Opin. 19.) As noted, *supra*, at pp. 38-39, a defendant's receptivity to his or her counsel's advice does not affect the prejudice determination where the asserted prejudice flows a defendant's *own* misunderstanding of law. However, it may become relevant under the narrower reading of section 1473.7, requiring the prejudice to flow from counsel's error, because the question then is whether the defendant would have rejected the plea if his or her *counsel* rendered adequate advice.

Here, the Court of Appeal's conclusion that Mr. Vivar would have been "unwilling" to listen even to correct advice was based on deference to a finding of the trial court: that Mr. Vivar "was more willing to rely on his experiences than he was on his counsel's advice." (*Ibid.*; see also I RT 33.) The Court of Appeal's extrapolation from the trial court's remarks is wrong for three reasons.

a. The trial court did not actually find that Mr. Vivar was "*unwilling*" to listen to his lawyer. Rather, it found that Mr. Vivar was "*more* willing" to rely on prior experiences in the criminal justice system than on his lawyer's advice (I RT 33, italics added)—advice which the Court of Appeal separately held was so deficient as to fall "below an objective standard of reasonableness" (Opin. 15). There is a material difference between a defendant who might not, under any circumstances, be receptive to a lawyer's advice no matter how effective it is, and the trial court's finding here that Mr. Vivar gave his own experience greater weight than his counsel's constitutionally inadequate advice. The notion that Mr. Vivar would have been entirely unwilling to be coached about the law, even by constitutionally adequate counsel, is not supported by in the record.

b. Even assuming the trial court had made such a finding (it did not), the Court of Appeal improperly afforded it deference. This Court has repeatedly held that appellate deference is not warranted where factual findings made below are based solely on written or documentary evidence. (*People v. Thompson* (2010) 49 Cal.4th 79, 100 ["[b]ut 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, 687-688 [reviewing the factual record "independently" because "deference is arguably inappropriate" where "factual findings are based entirely on documentary evidence"]. The lower courts are in accord. (*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."]; *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."].)

When reviewing only documentary evidence, the post-conviction trial court has no practical advantage over the reviewing court in judging the credibility or weight of the evidence, so there is no judicial reason to accord such deference. (*Ogunmowo*, *supra*, 23 Cal.App.5th at p. 79 [no deference to section 1473.7 factual conclusion because "[t]he trial court and this court are in the same position in interpreting written declarations"]; *People v. Booth* (2016) 3 Cal.App.5th 1284, 1305–1306 ["Because all of this information is in the record before us, we are in the same position as the trial court in evaluating Bradford's credibility. Therefore, we need not defer to the trial court on this issue."].)

Here, it is undisputed that the trial court reviewed nothing but a cold record—written declarations, email correspondence, and case records from a different proceeding—fourteen years after the fact. The correct course, then, would have been for the Court of Appeal to analyze the cold record and come to its own conclusion about whether Mr. Vivar would have been receptive to constitutionally adequate advice. This Court should therefore review the record independently.

c. Under any standard of deference, there is only one inference supported by the record: It is reasonably probable that Mr. Vivar would have listened to his counsel's advice, had it been constitutionally adequate, and rejected the drug plea.

As the Court of Appeal thoroughly outlines, Mr. Vivar received constitutionally inadequate advice of counsel. It makes no sense for a defendant's receptivity to advice that "fell below an objective standard of reasonableness" (Opin. 15) to serve as a test for whether that defendant would have listened to advice that was constitutionally adequate. This is particularly true where the disparity between adequate and inadequate advice is dramatic.

Here, Mr. Vivar received a generic warning about possible immigration consequences, not a clear and direct explanation of his plea options' immigration effects. (*Patterson*, *supra*, 2 Cal.5th at p. 896 ["Warning of the possibility of a dire consequence is no substitute for warning of its virtual certainty. As Judge Robert L. Hinkle explained, 'Well, I know every time that I get on an airplane that it could crash, but if you tell me it's going to crash, I'm not getting on.'" (quoting *U.S. v. Rodriguez-Vega* (9th Cir. 2015) 797 F.3d 781, 790)].) Mr. Vivar's counsel also indicated she was uncertain about his RSAT strategy and invited him to contact an immigration attorney if he had further questions. Her advice was, in essence: *I'm not sure what immigration consequences there will be,*

and don't take my word for it. Faced with this equivocal legal advice, it is no surprise that Mr. Vivar fell back on his own experiences as a source of information.

Given Mr. Vivar's desperation to remain in the country with his family, it is inconceivable that he would have blinded himself to constitutionally adequate advice, which would have informed him that the drug charge would result in his banishment to an unfamiliar land while the burglary plea allowed him to remain here. At a minimum, it is reasonably probable that he would have been receptive to counsel's correct advice.

CONCLUSION

Mr. Vivar was an American in every way but citizenship status, as much a part of our community as anyone else. He came here when he was six years old, and built a family and life over forty years. When arrested on a shoplifting offense, he asked his lawyer to secure an immigration-safe plea, desperate to avoid banishment to an unfamiliar country. Had he known that the drug plea would subject him to a life sentence of exile away, while the burglary plea would allow him to remain in California, he would have made a different decision.

Mr. Vivar respectfully requests that this Court reverse the Court of Appeal's decision affirming the denial of his section 1473.7 motion, and order that the motion be granted on the ground that Mr. Vivar has established prejudice.

DATED: June 25, 2020 Respectfully submitted,

MUNGER, TOLLES & OLSON LLP

By: /s/ *Dane P. Shikman*
DANE P. SHIKMAN

Attorney for Defendant/Appellant/Petitioner
ROBERT LANDEROS VIVAR

CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies, pursuant to Rule 8.520(c)(1) of the California Rules of Court, that the enclosed Opening Brief on the Merits is produced using 13-point Roman type including footnotes and contains approximately 12,778 words, which is less than the 14,000 words permitted by this rule. Counsel relies on the word count of the computer program used to prepare this brief.

DATED: June 25, 2020　　Respectfully submitted,

MUNGER, TOLLES & OLSON LLP

By: /s/ *Dane P. Shikman*
DANE P. SHIKMAN

Attorney for Defendant/Appellant/Petitioner
ROBERT LANDEROS VIVAR

EXHIBIT A

Court of Appeal, Fourth Appellate District, Division Two
Kevin J. Lane, Clerk/Executive Officer
Electronically FILED on 12/12/2019 by B. Ramirez, Deputy Clerk

CERTIFIED FOR PUBLICATON

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

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

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. <u>Defendant's Trial Counsel Provided Ineffective Assistance</u>

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.

EXHIBIT B

STATE OF CALIFORNIA
AUTHENTICATED
ELECTRONIC LEGAL MATERIAL
Legislative Counsel Bureau

Assembly Bill No. 2867

CHAPTER 825

An act to amend Section 1473.7 of the Penal Code, relating to criminal procedure.

[Approved by Governor September 27, 2018. Filed with Secretary of State September 27, 2018.]

LEGISLATIVE COUNSEL'S DIGEST

AB 2867, Gonzalez Fletcher. Criminal procedure: postconviction relief.

Existing law creates an explicit right for a person no longer imprisoned or restrained to file a motion to vacate a conviction or sentence based on a prejudicial error damaging to 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, or based on newly discovered evidence of actual innocence, as specified. Under existing law, a defendant who files one of these motions is entitled to a hearing. Existing law authorizes the court, at the request of the moving party, to hold the hearing without the personal presence of the moving party if counsel for the moving party is present and the court finds good cause as to why the moving party cannot be present.

This bill would specify that a finding based on prejudicial error may, but need not, include a finding of ineffective assistance of counsel and that the only finding that the court is required to make in those cases is whether the conviction 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 or nolo contendere. The bill would authorize the court, upon the request of the moving party, to hold the hearing without the personal presence of the moving party and without the moving party's counsel present provided that it finds good cause as to why the moving party cannot be present. The bill would, if the prosecution has no objection to the motion, authorize the court to grant the motion to vacate the conviction or sentence without a hearing.

This bill would prohibit the court from issuing a specific finding of ineffective assistance of counsel as a result of a motion brought under these provisions unless the attorney found to be ineffective was given timely advance notice of the motion hearing by the moving party or the prosecutor.

Existing law requires a motion based on prejudicial error relating to the immigration consequences of the plea to be filed with reasonable diligence after the later of the date the moving party receives a notice to appear in immigration court or other notice from immigration authorities that asserts the conviction or sentence as a basis for removal or the date a removal order

against the moving party, based on the existence of the conviction or sentence, becomes final.

This bill would deem a motion, based on prejudicial error relating to the immigration consequences of the plea, timely filed any time in which the individual filing the motion is no longer in criminal custody unless the motion is not filed with reasonable diligence after the later of when the moving party receives notice to appear in immigration court or other notice from immigration authorities that asserts the conviction or sentence as a basis for the removal or the denial of an application for immigration benefit, lawful status, or naturalization, or notice that a final removal order has been issued against the moving party, based on the existence of the conviction or sentence that the moving party seeks to vacate.

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

SECTION 1. The Legislature finds and declares all of the following:

(a) The Legislature enacted Section 1473.7 of the Penal Code to provide people no longer in criminal custody, or after the specified period in which to move for withdrawal of a plea has elapsed, with the opportunity to raise a claim of legal invalidity based on actual innocence or failure to meaningfully understand, defend against, or knowingly accept the immigration consequences of a conviction.

(b) It is the intent of the Legislature to provide clarification to the courts regarding Section 1473.7 of the Penal Code to ensure uniformity throughout the state and efficiency in the statute's implementation.

(c) This measure shall be interpreted in the interests of justice and consistent with the findings and declarations made in Section 1016.2 of the Penal Code.

(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.

(e) It is the intent of the Legislature that courts have the authority to rule on motions filed pursuant to Section 1473.7 of the Penal Code, provided that the individual is no longer in criminal custody. Consistent with case law interpreting other statutes that authorize postconviction relief, including Meyer v. Superior Court (1966) 247 Cal.App.2d 133 (interpreting subdivision (b) of Section 17 of the Penal Code) and People v. Tidwell (2016) 246 Cal.App.4th 212 (interpreting Section 1170.18 of the Penal Code), a motion for relief pursuant to Section 1473.7 of the Penal Code shall be heard and may be granted, notwithstanding a prior order setting aside an adjudication of guilt or a prior order dismissing or reducing one or more charges under any provision of law.

SEC. 2. Section 1473.7 of the Penal Code is amended to read:

1473.7. (a) A person who is no longer in criminal custody may file a motion to vacate a conviction or sentence for either of the following reasons:

(1) The 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 or nolo contendere. A finding of legal invalidity may, but need not, include a finding of ineffective assistance of counsel.

(2) Newly discovered evidence of actual innocence exists that requires vacation of the conviction or sentence as a matter of law or in the interests of justice.

(b) (1) Except as provided in paragraph (2), a motion pursuant to paragraph (1) of subdivision (a) shall be deemed timely filed at any time in which the individual filing the motion is no longer in criminal custody.

(2) A motion pursuant to paragraph (1) of subdivision (a) may be deemed untimely filed if it was not filed with reasonable diligence after the later of the following:

(A) The moving party receives a notice to appear in immigration court or other notice from immigration authorities that asserts the conviction or sentence as a basis for removal or the denial of an application for an immigration benefit, lawful status, or naturalization.

(B) Notice that a final removal order has been issued against the moving party, based on the existence of the conviction or sentence that the moving party seeks to vacate.

(c) A motion pursuant to paragraph (2) of subdivision (a) shall be filed without undue delay from the date the moving party discovered, or could have discovered with the exercise of due diligence, the evidence that provides a basis for relief under this section.

(d) All motions shall be entitled to a hearing. Upon the request of the moving party, the court may hold the hearing without the personal presence of the moving party provided that it finds good cause as to why the moving party cannot be present. If the prosecution has no objection to the motion, the court may grant the motion to vacate the conviction or sentence without a hearing.

(e) When ruling on the motion:

(1) The court shall grant the motion to vacate the conviction or sentence if the moving party establishes, by a preponderance of the evidence, the existence of any of the grounds for relief specified in subdivision (a). For a motion made pursuant to paragraph (1) of subdivision (a), the moving party shall also establish that the conviction or sentence being challenged is currently causing or has the potential to cause removal or the denial of an application for an immigration benefit, lawful status, or naturalization.

(2) There is a presumption of legal invalidity for the purposes of paragraph (1) of subdivision (a) if the moving party pleaded guilty or nolo contendere pursuant to a statute that provided that, upon completion of specific requirements, the arrest and conviction shall be deemed never to have occurred, where the moving party complied with these requirements, and where the disposition under the statute has been, or potentially could be, used as a basis for adverse immigration consequences.

(3) If the court grants the motion to vacate a conviction or sentence obtained through a plea of guilty or nolo contendere, the court shall allow the moving party to withdraw the plea.

(4) When ruling on a motion under paragraph (1) of subdivision (a), the only finding that the court is required to make is whether the conviction 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 or nolo contendere. When ruling on a motion under paragraph (2) of subdivision (a), the court shall specify the basis for its conclusion.

(f) An order granting or denying the motion is appealable under subdivision (b) of Section 1237 as an order after judgment affecting the substantial rights of a party.

(g) A court may only issue a specific finding of ineffective assistance of counsel as a result of a motion brought under paragraph (1) of subdivision (a) if the attorney found to be ineffective was given timely advance notice of the motion hearing by the moving party or the prosecutor, pursuant to Section 416.90 of the Code of Civil Procedure.

O

PROOF OF SERVICE

PEOPLE V. VIVAR, S260270

STATE OF CALIFORNIA, COUNTY OF SAN FRANCISCO

At the time of service, I was over 18 years of age and **not a party to this action**. I am employed in the County of San Francisco, State of California. My business address is 560 Mission Street, Twenty-Seventh Floor, San Francisco, CA 94105-2907.

On June 25, 2020, I served true copies of the following document(s) described as

APPELLANT'S OPENING BRIEF ON THE MERITS

on the interested parties in this action as follows:

Samuel Siegel
Deputy Solicitor General
California Department of Justice
455 Golden Gate, Ste. 11000
San Francisco, CA 94102
Sam.Siegel@doj.ca.gov

Adrian Contreras
Deputy Attorney General
California Department of Justice
600 W. Broadway, Ste. 1800
San Diego, CA 92101
Adrian.Contreras@doj.ca.gov

X BY ELECTRONIC SERVICE: Based on a court order or agreement of the parties to accept electronic service, I caused the above document(s) to be served electronically through TrueFiling in portable document format ("PDF").

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