In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, **v.** **ROBERT VIVAR,** Defendant and Appellant.	Case No. S260270

Fourth Appellate District, Division Two, Case No. E070926
Riverside County Superior Court, Case No. RIF101988
The Honorable Bambi J. Moyer, Judge

ANSWER BRIEF ON THE MERITS

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INTRODUCTION

This case involves Penal Code section 1473.7, which allows individuals who are "no longer in criminal custody" to 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).)[1] Petitioner Robert Vivar filed a section 1473.7 motion seeking to vacate his 2002 conviction for possession of materials with intent to manufacture methamphetamine, a violation of former Health and Safety Code section 11383(c). He argued that he is entitled to relief because his trial counsel did not inform him that his guilty plea would lead to his removal from this country, and that he was prejudiced as a result.

In the courts below, the parties principally focused on whether Vivar had established "error" for purposes of section 1473.7. (§ 1473.7, subd. (a)(1).) Respondent also briefly argued that Vivar had not shown that any error was "prejudicial." (*Ibid.*) The trial court denied Vivar's motion, holding that he had not established the requisite error because he did not demonstrate that his trial counsel rendered ineffective assistance under *Strickland v. Washington* (1984) 466 U.S. 668. The Court of Appeal disagreed with the trial court on that point, but affirmed

[1] All statutory references in this brief are to the Penal Code unless otherwise specified.

its denial of the motion on the ground that Vivar had not established prejudice.

Vivar filed a petition for review raising two issues related to the Court of Appeal's prejudice ruling. After a fresh review of California precedent and the record in this case, respondent is now of the view that Vivar has established that the error identified by the Court of Appeal was "prejudicial." (§ 1473.7, subd. (a)(1).) Properly understood, section 1473.7's prejudice inquiry requires defendants to establish a reasonable probability that they would not have entered their guilty plea but for the asserted error. Viewed in light of the record developed below, Vivar has carried that burden. Among other things, the record indicates that when Vivar agreed to plead guilty to a violation of former Health and Safety Code section 11383(c), he had lived in the United States for 40 years, and his entire immediate family lived here. He was acutely sensitive to the immigration consequences of his plea. And the prosecution presented him with an alternative offer under which Vivar would have pleaded guilty to a different offense that could have allowed him to avoid removal. There is at least a reasonable probability that, if Vivar had been advised of the immigration consequences of his plea, he would not have entered the plea that led to the conviction he now seeks to vacate.

In light of respondent's concession of error, this Court should either hold that Vivar has established prejudice and reverse the judgment of the Court of Appeal, or transfer this case back to the

Court of Appeal for further proceedings consistent with respondent's concession.

STATEMENT OF THE CASE

A. Legal Background

This Court and the U.S. Supreme Court have long recognized that the immigration consequences of a guilty plea may be "dire" for some noncitizen defendants. (*People v. Superior Court (Giron)* (1974) 11 Cal.3d 793, 798; see *Padilla v. Kentucky* (2010) 559 U.S. 356, 365 ["[D]eportation is a particularly severe 'penalty' [citation]"].) In 2001, this Court held that an attorney's "affirmative misadvice" about the immigration consequences of a guilty plea could give rise to a claim of ineffective assistance of counsel under *Strickland v. Washington* (1984) 466 U.S. 668. (*In re Resendiz* (2001) 25 Cal.4th 230, 239-240.) In 2010, the U.S. Supreme Court recognized the same thing, and broadened the scope of an attorney's duty to include providing "available advice about an issue like deportation," especially when the "deportation consequence is truly clear." (*Padilla*, *supra*, at pp. 369-371.)

The California Legislature has developed procedures to help ensure that noncitizens understand the possible immigration consequences of their pleas. In 1977, the Legislature enacted Penal Code section 1016.5, which requires trial courts to advise defendants who plead guilty or nolo contendere that their 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." (§ 1016.5, subd. (a).) Section 1016.5 also allows defendants to ask for more time to

"consider the appropriateness of the plea in light of the advisement." (§1016.5, subd. (b).)

This case involves another legislative reform, Penal Code section 1473.7. The Legislature adopted section 1473.7 in response to this Court's decision in *People v. Kim* (2009) 45 Cal.4th 1078. (See Sen. Comm. on Pub. Safety, Rep. on Assem. Bill No. 813 (2015-2016 Reg. Sess.) May 10, 2016, pp. 2-10.) *Kim* held that individuals no longer in custody could not seek to vacate their convictions through a writ of *coram nobis* based on an allegation that counsel rendered ineffective assistance by either failing to investigate the immigration consequences of a plea or by failing to seek a plea deal that would have avoided adverse immigration consequences. (*Kim*, *supra*, at pp. 1101-1104.) The Court concluded that such claims fell "outside the traditionally narrow limits of the writ of error *coram nobis* as that remedy has been defined in California." (*Id.* at p. 1104; see also *id.* at pp. 1104-1107.) It noted, however, that the Legislature had "been active in providing statutory remedies when the existing remedies" proved inadequate, and observed that the Legislature "remains free to enact further statutory remedies for those in defendant's position." (*Id.* at p. 1107.)

The Legislature took up that invitation in 2016 by enacting section 1473.7. As originally adopted, section 1473.7 allowed persons who were "no longer imprisoned" to file a motion to vacate a conviction that is "legally invalid due to a prejudicial error damaging the moving party's ability to meaningfully understand, defend against, or knowingly accept the actual or

potential adverse immigration consequences of a plea of guilty or nolo contendere." (Stats. 2016, ch. 739, § 1, codified at § 1473.7, subd. (a)(1).)[2] It directed that if a court granted the motion, it "shall allow the moving party to withdraw the plea." (*Ibid.*, codified at § 1473.7, subd. (e)(3).)

In the two years following section 1473.7's enactment, California courts "uniformly assumed" that relief under section 1473.7 was only available to individuals who met the *Strickland* standard for ineffective assistance of counsel claims. (*People v. Camacho* (2019) 32 Cal.App.5th 998, 1005; see also *ibid.* [collecting cases].) Thus, to prevail on a section 1473.7 motion, defendants had to show that their counsel's performance "fell below an objective standard of reasonableness under prevailing norms," and that there was a "reasonable probability of a different outcome if counsel had rendered effective assistance." (*Ibid.*)

In 2018, the Legislature amended section 1473.7. (See Stats. 2018, ch. 825, § 2.) The amendment clarified that a "finding of legal invalidity may, but need not, include a finding of ineffective assistance of counsel," and that to grant relief "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

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[2] Section 1473.7 also allows defendants who are no longer in custody to file a motion to vacate their convictions based on "[n]ewly discovered evidence of actual innocence." (§ 1473.7, subd. (a)(2).) That subdivision is not at issue in this case.

against, or knowingly accept the actual or potential adverse immigration consequences of a plea of guilty or nolo contendere." (§ 1473.7, subds. (a)(1), (e)(4).) It also required defendants to show that the challenged conviction or sentence "is currently causing or has the potential to cause removal or the denial of an application for an immigration benefit, lawful status, or naturalization." (§ 1473.7, subd. (e)(1).)[3] And it instructed that section 1473.7 "shall be interpreted in the interest of justice and consistent with the findings and declarations made in Section 1016.2 of the Penal Code." (Stats. 2018, ch. 825, § 1, subd. (c).)[4]

B. Procedural Background

1. Vivar's background and conviction

Robert Vivar immigrated with his family to the United States from Mexico in 1962, at age six. (CT 136.) The Vivar family entered the United States as legal permanent residents.

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[3] Congress abolished the distinction between "exclusion" and "deportation" proceedings as part of the Illegal Immigration Reform and Responsibility Act of 1996, and created a "uniform proceeding known as 'removal.'" (*Vartelas v. Holder* (2012) 566 U.S. 257, 262.) This brief refers to removal and deportation interchangeably.

[4] Section 1016.2 was adopted in 2016 as part of legislation intended to "codify *Padilla v. Kentucky* and related California case law and to encourage the growth of such case law in furtherance of justice." (§ 1016.2, subd. (h).) Pursuant to that legislation, defense counsel must provide "accurate and affirmative advice about the immigration consequences of a proposed disposition," and prosecutors must "consider the avoidance of adverse immigration consequences in the plea negotiation process." (§ 1016.3, subds. (a), (b).)

(*Ibid.*) They eventually settled in Corona, California. (*Ibid.*) Over the next several decades, Vivar helped establish his high school's Reserve Officers' Training Corps (ROTC) program, had two children, and worked for an airline. (CT 136-137.) His entire immediate family—including his two children, his siblings, and his six grandchildren—lives in California. (*Ibid.*)

Starting in the late 1980s or early 1990s, Vivar began experimenting with amphetamines. (CT 137.) In 1998 or 1999 he entered and completed treatment at a Residential Substance Abuse Treatment (RSAT) facility in California. (CT 138.) In February 2002, Vivar was arrested for taking 12 boxes of Sudafed from a grocery store. (CT 76-77, 138.) Vivar told the arresting officer that he planned to exchange the Sudafed for methamphetamine, and that his trading partner intended to use the Sudafed to manufacture more methamphetamine. (CT 76-78.) The Riverside County District Attorney charged Vivar with violating former Health and Safety Code § 11383(c) (Stats. 1995, ch. 571, § 1), possession of materials with the intent to manufacture methamphetamine. (CT 4.)[5] Vivar was also charged with one count of petty theft with a prior conviction, in violation of Penal Code section 666. (*Ibid.*)[6]

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[5] Former Health and Safety Code section 11383(c) was amended and renumbered in 2006; the amended version is now Health and Safety Code section 11383.5. (See Stats. 2006, ch. 646, § 3.)

[6] According to the felony complaint, Vivar was convicted of possessing stolen property on July 31, 1997. (CT 4.)

A public defender was appointed to represent Vivar, and the parties began to discuss a possible plea. (CT 138.) According to a declaration Vivar later submitted in support of his section 1473.7 motion, the prosecution offered to recommend a three-year prison sentence, of which Vivar could serve only half the time, if Vivar pleaded guilty to a felony charge. (CT 138-139.)[7] Vivar declares that he rejected that offer, and explained to his attorney that he was not a U.S. citizen and that he believed that the plea would "create immigration problems" for him. (CT 138.) Vivar asserts that he believed, based on his "own prior experiences with U.S. immigration authorities," that he could not be removed for a misdemeanor but that "all felonies resulted in deportation." (*Ibid.*) Although Vivar says that he told his attorney he was "very worried about possible deportation," his declaration indicates that his lawyer "never discussed the immigration consequences of my plea options." (*Ibid.*, underline omitted.) Vivar also recounts asking his attorney to help him "get a plea deal that included drug treatment and that could be reduced down to a misdemeanor." (*Ibid.*)

Notes kept by Vivar's attorney tell a similar story. They indicate that Vivar declined to plead guilty to a violation of section 459 "w/ LT state prison + parol [sic]." (CT 173.)[8] And

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[7] Vivar's declaration does not specify which crime he would have pleaded guilty to under this deal.

[8] "LT" most likely referred to the "low term" for a violation of section 459. (See Opn. 8, fn. 6.)

they reflect that Vivar "want[ed] help w[ith his] drug problem" and wanted to go back to the RSAT program. (CT 173.)

In March 2002, Vivar pleaded guilty to a single count of violating former Health and Safety Code section 11383(c), the originally-charged offense. (CT 5-6.) In exchange, the prosecution dismissed the petty-theft charge and recommended a two-year sentence that would be suspended upon completion of a three-year term of probation. (CT 5-7, 9.) As part of his probation, Vivar was required to serve 365 days in county jail and the trial court recommended that he be admitted to the RSAT program. (*Ibid.*) The parties also agreed that the two-year prison sentence would be imposed if Vivar failed to complete the RSAT program. (CT 9.) The trial court imposed a sentence consistent with the parties' agreement. (CT 5-7.)

Before pleading guilty, Vivar and his attorney both signed a "Felony Plea Form." (CT 8-9). Among other things, the form indicated that his conviction "may have the consequences of deportation, exclusion from the admission to the United States, or denial or naturalization pursuant to the laws of the United States." (CT 8.) Vivar initialed the portion of the form stating that he was "aware that [his] guilty plea to a felony will have the following consequences," including the possible immigration consequences described on the form. (*Ibid.*) Vivar's attorney also signed the portion of the form indicating that Vivar "had an adequate opportunity to discuss his/her case with me," and that he "understands the consequences of his/her guilty plea." (CT 9.)

2. Vivar's initial attempts to vacate his conviction

A month after pleading guilty, Vivar wrote to the trial court and stated that he had not been allowed to participate in the RSAT program "due to an I.U.S. hold." (CT 86; see also CT 139.) In the same letter, Vivar wrote that he was "a legal resident and ha[d] been for the past 40 years," that his wife and mother were U.S. Citizens, and that his son was currently serving in the U.S. Air Force and was "awaiting deployment to the Middle East." (CT 86.) He asked for the court's "mercy in assisting me in being accepted into the R-SAT program or similar." (CT 87.)[9]

A month after he sent that letter, Vivar received a "Notice to Appear" from the Immigration and Naturalization Service alleging that he was deportable because he had committed an "aggravated felony" as that term is defined by the Immigration and Nationality Act. (CT 96.) Two months later, Vivar wrote again to the trial court, this time asking for his conviction to be reduced to a misdemeanor under section 17(b). (CT 118-119.) That letter indicated that Vivar had been released from county jail but was currently being held at an immigration detention facility; and emphasized once again Vivar's connections to the United States. (*Ibid.*)[10] Three months after that, Vivar sent another letter to the trial court in which he asked for his case to be "[r]e-opened" because he "was never advised that guilty plea to

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[9] The trial court appears to have construed this letter as a motion for unspecified relief and denied it. (CT 57.)

[10] The trial court denied this request. (CT 56.)

H.S.11383(c) was an Aggravated Felony for Immigration purposes and thus would warrant Immediate Deportation without any Relief afforded to me." (CT 91.)[11]

3. Vivar's removal to Mexico and further attempts to vacate his conviction

In January 2003, Vivar was removed to Mexico. (CT 139.) Four months later, he re-entered the United States without inspection. (CT 139-140.) It appears that he continued living in the United States until he was taken into custody by federal immigration officials in 2011. (CT 143.) In 2008, Vivar sought, and the trial court granted, a motion to expunge his conviction under section 1203.4. (CT 11-12, 55, 98, 140.) Upon learning that expungement would not eliminate the immigration consequences of his guilty plea, he retained counsel in 2012 to file a petition for writ of *coram nobis* to vacate his conviction. (CT 100-121, 140.)[12] The trial court denied that petition. (CT 123.) Vivar was again removed to Mexico in 2013. (CT 140-142.) The record indicates that he remained in Mexico as of December 28, 2017, and Vivar's opening brief informs the Court that he is still there today. (CT 142-145; OBM 17.)

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[11] The record does not indicate how the trial court responded to this letter.

[12] Expungement under section 1203.4 generally has "no effect on the federal immigration consequences of [a] conviction." (*People v. Martinez* (2013) 57 Cal.4th 555, 560, citing *Ramirez-Castro v. I.N.S.* (9th Cir. 2002) 287 F.3d 1172, 1174-1175.)

4. Vivar's section 1473.7 motion

In January 2018, with the assistance of pro bono counsel, Vivar filed a motion to vacate his conviction under section 1473.7. (CT 14-26.) In support of that motion, Vivar submitted a declaration stating that during the original plea negotiations his defense attorney "never discussed the immigration consequences of my plea options"; that Vivar accepted the plea deal because he believed that if he successfully completed the RSAT program he would have been able to reduce his felony to a misdemeanor and "avoid deportation"; and that if his attorney had told him that pleading guilty to former Health and Safety Code section 11383(c) would have resulted in his removal, he "would never have pleaded guilty." (CT 138-140, underline omitted.) The declaration also states that Vivar "would have been willing to plead to a more serious crime with greater criminal punishment (including jail time) to avoid being deported." (CT 140-141, underline omitted.)

Vivar also submitted a copy of 2016 email correspondence between his pro bono counsel and his trial attorney. (CT 128-134.) Initially, Vivar's trial attorney indicated that she did not remember Vivar's case. (CT 133.) She did, however, indicate that at the time of Vivar's conviction it was "standard practice" in the Riverside County Public Defender's Office to "advise non-citizen clients of the potential for immigration consequences" of their convictions and that she "routinely followed that practice." (CT 133.) After reviewing her notes from the plea negotiations, the trial attorney indicated that the she was "confident that Mr. Vivar was 'fully advised' of the consequences of the plea," which

under the circumstances of the case "would have included the standard advisement of possible deportation." (CT 131.) She also stated that she "believe[d]" that she "specifically cautioned" Vivar "that, in spite of his experience on the prior HS11377 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 Vivar had any questions "he should consult an immigration attorney for clarification." (CT 130.)

In addition, Vivar submitted a declaration from Katherine Brady, an expert on the immigration consequences of criminal convictions. (CT 146-150.) That declaration states that Vivar's conviction under former Health and Safety Code section 11383(c) was a removable offense that "triggered the worst of all immigration consequences: mandatory deportation with a bar to almost all forms of immigration relief, and permanent ineligibility for U.S. citizenship." (CT 148.) The declaration also states that, had Brady been consulted at the time of Vivar's plea, she would have recommended that he avoid the plea in the "strongest possible terms"; that information about the specific immigration consequences of Vivar's plea was "readily available at the time of the plea"; and that pleading guilty to violating section 459 would have been an "excellent immigration-neutral disposition" for Vivar. (CT 148-149.) She also indicated that there were other offenses that Vivar could have pleaded guilty to that would have shielded him from immigration consequences. (CT 149.)

5. The trial court's denial of the section 1473.7 motion

On June 18, 2018, the trial court held a hearing on Vivar's section 1473.7 motion. (RT 1.) The hearing took place before section 1473.7 was amended, and the parties and the court focused on whether Vivar's trial attorney had rendered ineffective assistance under *Strickland*. (See RT 23-35.) The trial court denied the motion from the bench, on the ground that the conduct of Vivar's trial counsel did not fall "below that of a reasonably competent attorney acting pursuant to the norms of the profession at the time in 2002." (RT 35.) It reasoned that at that time, a mere "failure to affirmatively advise" a client about the potential immigration consequences of a plea did not amount to ineffective assistance. (RT 24.) In light of the prevailing legal standard at the time, the court concluded that the trial counsel's advice was "not misadvice" but "actually good advice." (RT 33.) The court also appeared to credit Vivar's trial counsel's email recounting that she told Vivar that completion of the RSAT program would not determine whether he would be removed and that he should consult an immigration attorney if he had questions. (RT 32.) And it apparently relied on those statements in concluding that Vivar's case was one of "buyer's remorse," and that Vivar was "more willing to rely on his experiences than he was on his counsel's advice." (RT 32, 33.)

6. The Court of Appeal decision

The Court of Appeal affirmed. (Opn. 2.) Although it issued its decision after the amendments to section 1473.7 became

effective, the parties' briefs focused on the *Strickland* standard, and the Court of Appeal applied that standard. (Opn. 10-11.)[13]

The Court of Appeal initially addressed the appropriate standard of appellate review with respect to the denial of a section 1473.7 motion. It noted that some appellate courts had applied different standards depending on the nature of the claim. (Opn. 9-10.) When the motion was based on an allegation of ineffective assistance of counsel, some courts had "'independently review[ed] the order denying the motion to vacate.'" (Opn. 9, quoting *People v. Olvera* (2018) 24 Cal.App.5th 1112, 1116.) But to the extent that the motion asserted "'statutory error or a deprivation of statutory rights,'" some appellate courts had held that a denial of a motion would be reviewed for abuse of discretion. (Opn. 9, quoting *People v. Rodriguez* (2019) 38 Cal.App.5th 971, 977.) In this case, because the Court of Appeal concluded that the outcome of the appeal would be the same under either standard of review, it reviewed the trial court's

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[13] Vivar's opening brief was filed on October 24, 2018—after the Governor signed the bill that amended section 1473.7, but before those amendments took effect. Respondent filed its brief on March 22, 2019, after the amendments had taken effect. Both argued that *Strickland* governed section 1473.7 motions (see Appellant's Opening Brief at 42-45, *People v. Vivar*, No. E070926 (Oct. 24, 2018); Corrected Respondent's Brief at 27-28, *People v. Vivar*, No. E070926 (Mar. 22, 2019)), although Vivar also argued that his plea was "legally invalid" because his plea was "subject to conditions that were impossible to complete"—i.e., the RSAT program (Appellant's Opening Brief at 95-96, *People v. Vivar*, No. E070926 (Oct. 24, 2018)).

ruling under the less-deferential independent review standard. (Opn. 9-10.)

Turning to the merits, the Court of Appeal held that Vivar's trial counsel rendered ineffective assistance by failing to warn him of the "certain immigration consequences of his plea." (Opn. 16.) But it concluded that Vivar had failed to demonstrate prejudice because he had not shown that it was "reasonably probable that [he] would not have pleaded guilty if properly advised [citations]." (Opn. 17, internal quotation marks omitted.) The court reasoned that Vivar's decision to reject the offer to plead guilty to a crime that would have "completely avoided any immigration consequences" (section 459) was evidence that he "prioritized drug treatment over potential immigration-neutral pleas." (Opn. 18-19.) And it noted that the trial court "came to the same conclusion" when it made a "factual finding" that Vivar had been "unwilling to listen to the advice of counsel," based also on Vivar's decision to reject the offer to plead guilty to a violation of section 459. (Opn. 19.)[14]

ARGUMENT

The Court of Appeal held that Vivar demonstrated "error" for purposes of section 1473.7 by showing that his trial counsel's performance "fell below an objective standard of reasonableness

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[14] The Court of Appeal also rejected Vivar's argument that his plea was invalid because it required him to complete the RSAT program, which Vivar argued was "impossible for defendant to meet." (Opn. 22; see also *ante*, p. 22, fn. 13.) Vivar has not sought review of that conclusion.

under prevailing professional norms at the time of his conviction." (Opn. 15; see also *id.* at pp. 11-16.) Neither party sought review of that holding. Accordingly, as the case comes to this Court, it presents only the question whether the error identified by the Court of Appeal was "prejudicial" within the meaning of section 1473.7(a)(1). In briefing the case before the Court of Appeal, respondent argued that Vivar had not established prejudice. (See Corrected Respondent's Brief at 36-39, *People v. Vivar*, No. E070926 (Mar. 22, 2019).) This Court's grant of review occasioned a fresh look at the record and the relevant case law. For the reasons set out below, respondent is now convinced that Vivar satisfied section 1473.7's prejudice requirement.

I. VIVAR ESTABLISHED PREJUDICE UNDER SECTION 1473.7

The Court of Appeal correctly held that, to establish prejudice under section 1473.7, a defendant must demonstrate a "reasonable probability" that he "would not have pleaded guilty [citation]" but for the asserted error. (Opn. 17, internal quotation marks omitted.) In reviewing a trial court's decision granting or denying a section 1473.7 motion, the Court of Appeal should "independently review" a trial court's conclusions under section 1473.7, including any factual findings based solely on written or documentary evidence. (*People v. DeJesus* (2019) 37 Cal.App.5th 1124, 1132; cf. *In re Resendiz* (2001) 25 Cal.4th 230, 248-249.) Here, the trial court did not reach or resolve the prejudice question, but an independent review of the record establishes that Vivar carried his burden of showing prejudice: The record

shows, among other things, that Vivar had lived in the United States for 40 years at the time of his plea. His entire immediate family—including his wife and two children—all lived here. He was acutely sensitive to the immigration consequences of his plea. And he was apparently offered a plea deal under which he would have pleaded guilty to a crime that could have allowed him to avoid removal. Under all the circumstances reflected in the record here, Vivar has established a reasonable probability that he would not have pleaded guilty to violating former Health and Safety Code section 11383(c) had he been advised of the immigration consequences of that plea.

A. Prejudice Under Section 1473.7 Requires Showing A Reasonable Probability That the Defendant Would Not Have Pleaded Guilty

Section 1473.7 provides that individuals are entitled to relief if they can show that their 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." (§ 1473.7, subd. (a)(1).) Determining what prejudice means in this context requires examining the "'statute's words, which are the most reliable indicator of legislative intent.' [Citation.]" (*In re A.N.* (2020) 9 Cal.5th 343, 351.) This Court interprets statutory terms "in light of their ordinary meaning, while also taking account of any related provisions and the overall structure of the statutory scheme to determine what interpretation best advances the Legislature's underlying purpose." (*Ibid.*, citation and internal

quotation marks omitted.) And it presumes that the Legislature "know[s] about existing case law when it enacts or amends a statute." (*In re W.B.* (2012) 55 Cal.4th 30, 57.)

1. By the time the Legislature enacted section 1473.7, this Court had issued several decisions addressing the framework for assessing prejudice with respect to claims involving the impairment of a defendant's ability to comprehend the immigration consequences of a plea. Because those decisions inform the meaning of the term "prejudicial" in section 1473.7(a)(1), we review them in detail.

In *People v. Superior Court (Zamudio)* (2000) 23 Cal.4th 183, this Court considered whether defendants who did not receive the advisements required by section 1016.5 must show prejudice in order to seek vacatur of a conviction. (*Id.* at pp. 199-200.) After construing section 1016.5 to include a prejudice requirement (see *id.* at pp. 192-200), the Court articulated the standard governing the prejudice inquiry: whether it is "'reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error,'" (*id.* at p. 210, quoting *People v. Watson* (1956) 46 Cal.2d 818, 836.) The Court also observed that where a defendant seeks to overturn a conviction obtained through a plea of guilty or nolo contendere, he must show that it is "'"reasonably probable" [that] the defendant would not have pleaded guilty if properly advised.' [Citation.]" (*Ibid.*; see also *People v. Martinez* (2013) 57 Cal.4th 555, 562-563 [collecting cases applying same test in the guilty plea context].)

In *People v. Martinez*, *supra*, 57 Cal.4th 555, the Court reiterated that the prejudice inquiry under section 1016.5 turns on whether the defendant would have pleaded guilty had he been properly advised. (See *id.* at p. 562). And it rejected the argument that defendants must show that they would have "obtained a more favorable outcome"—by, for example, prevailing at trial—had they "chosen not to plead guilty or nolo contendere." (*Id.* at p. 559.) The Court explained that sometimes a defendant "'may view immigration consequences as the only ones that could affect his calculations regarding the advisability of pleading guilty to criminal charges' [citation]." (*Id.* at p. 563.) As a result, the prejudice inquiry under section 1016.5 asks "what the defendant would have done, not whether the defendant's decision would have led to a more favorable result." (*Id.* at p. 562.) The Court also clarified that defendants can establish prejudice either by showing that they would have "accept[ed] or tr[ied] to obtain a better bargain that d[id] not include immigration consequences," or by showing that they would have "go[ne] to trial." (*Id.* at p. 567.)

This Court has applied the same test to claims of ineffective assistance of counsel arising out of an attorney's failure to adequately inform a client about the immigration consequences of a plea. In *In re Resendiz*, *supra*, 25 Cal.4th 230, the Court held that such claims are cognizable under *Strickland*, at least when counsel "affirmatively misadvise[s]" a client about the immigration consequences of a plea. (*Id.* at p. 253; see also *ante*, p. 10.) The Court also addressed what a defendant must show to

establish prejudice in that context. Drawing on its own prior authority and U.S. Supreme Court precedent, the Court held that *Strickland*'s prejudice inquiry requires a defendant to demonstrate a "reasonable probability" that "but for counsel's incompetence, he would not have pled guilty and would have insisted, instead, on proceeding to trial." (*Ibid.* (plur. opn. of Werdegar, J.), citing *In re Alvernaz* (1992) 2 Cal.4th 924, 933-934 and *Hill v. Lockhart* (1985) 474 U.S. 52, 58-59; see also *People v. Patterson* (2017) 2 Cal.5th 885, 901-902 [reiterating same test for ineffective assistance of counsel claims].)[15]

The U.S. Supreme Court adopted the same test in *Lee v. United States* (2017) 137 S. Ct. 1958, holding that, in the context of a guilty plea, *Strickland*'s prejudice inquiry focuses on "what an individual defendant would have done" rather than the "likelihood of conviction after trial." (*Id.* at pp. 1966-1967.)[16] *Lee* explained that the immigration consequences of a guilty plea can

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[15] Although claims of ineffective assistance of counsel involve an alleged violation of a constitutional right, and claims arising out of a failure to give the section 1016.5 advisements involve an alleged state-law error, this Court has recognized that the prejudice inquiry under *Strickland* is the same as the prejudice inquiry under *Watson*. Both inquires ask whether it is reasonably probable that the outcome would have been different but for the error at issue. (See, e.g., *Richardson v. Superior Court* (2008) 43 Cal.4th 1040, 1050.)

[16] As noted above (see *ante*, p. 10), the U.S. Supreme Court has recognized that an attorney's failure to advise a client about the immigration consequences of a plea may give rise to a claim under *Strickland*, and has directed that counsel has a duty to provide "available advice about an issue like deportation." (*Padilla v. Kentucky* (2010) 559 U.S. 356, 369-371.)

be so "dire" that defendants will sometimes choose to proceed to trial even when the odds of success are long. (*Ibid.*) In such cases, a defendant can establish prejudice by showing that he would have "rejected any plea leading to deportation—even if it shaved off prison time—in favor of throwing a 'Hail Mary' at trial." (*Id.* at p. 1967.)

Thus, by the time the Legislature enacted section 1473.7 in 2016, the prejudice standard for errors related to a defendant's ability to understand the immigration consequences of a plea was well established. And the Legislature's 2018 amendment to section 1473.7 indicates that it intended to embrace those precedents: The statutory findings for that amendment specified that it "shall be interpreted in the interests of justice and consistent with the findings and declarations made in Section 1016.2 of the Penal Code." (Stats. 2018, ch. 825, § 1, subd. (c).) Section 1016.2, in turn, was adopted as part of the Legislature's effort to "codify *Padilla v. Kentucky* and *related California case law*," and states that the Legislature intended to "encourage the *growth of such case law in furtherance of justice*." (§ 1016.2, subd. (h), italics added.)

Viewed in light of this precedent, the meaning of "prejudicial error" in section 1473.7 is apparent: defendants must show that it is "reasonably probable" that they "would not have pleaded guilty" but for an error that damaged their ability to meaningfully understand, defend against, or knowingly accept the actual or potential adverse immigration consequences of their plea. (*Martinez*, *supra*, 57 Cal.4th at p. 562, citation and internal

quotation marks omitted.) Defendants can make that showing either by establishing that they would "accept[ed] or tr[ied] to obtain a better bargain that d[id] not include immigration consequences," or by showing that they would have "go[ne] to trial" but for the error. (*Id.* at p. 567; see also OBM 27-30 [arguing for the same standard].)

2. In most cases, a defendant who files a section 1473.7 motion bears the burden of showing that he would have rejected the plea offer by a "preponderance of the evidence." (§ 1473.7, subd. (e)(1); see also *Martinez, supra*, 57 Cal.4th at p. 565.)[17] This Court's precedents also provide important guidance about how trial courts should assess whether a defendant has made a sufficient showing to establish prejudice.

Initially, the defendant must 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." (§ 1473.7, subd. (e)(1).) In other words, he must show "'more than just a remote possibility of' [citation]" adverse immigration consequences. (*Zamudio*, *supra*, 23 Cal.4th at p. 201-202 [addressing section 1016.5].) The defendant must then "provide a

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[17] Section 1473.7 specifies one circumstance in which the defendant does not bear the burden: a plea is presumptively invalid when the "moving party pleaded guilty or nolo contendere pursuant to a statute that provided that, upon the completion of specific requirements, the arrest and conviction shall be deemed never to have occurred" but where the "disposition under the statute has been, or potentially could be, used as a basis for adverse immigration consequences." (§ 1473.7, subd. (e)(2).)

declaration or testimony stating that he or she would not have entered into the plea bargain" but for the error. (*Martinez*, *supra*, 57 Cal.4th at p. 565.) Next, the trial court should determine whether or not the defendant's assertion is credible, and may reject it if it is "not supported by an explanation or other corroborating circumstances." (*Ibid.*) Where appropriate, the trial court may hold an evidentiary hearing to resolve any factual disputes. (See *Patterson*, *supra*, 2 Cal.5th at p. 901.)

When deciding whether a defendant has carried his burden, trial courts should "scrutinize closely" the claim that the defendant would not have pleaded guilty but for the error. (*In re Alvernaz*, *supra*, 2 Cal.4th at p. 938.) Society has a "strong . . . interest in finality," one that has "'special force with respect to convictions based on guilty pleas.' [Citation.]" (*Lee, supra*, 137 S. Ct. at p. 1967.) And it can be "'all too tempting'" for a defendant to submit a declaration, years after his plea, averring that he would have rejected the plea. (*In re Alvernaz*, *supra*, 2 Cal.4th at p. 938, quoting *Strickland*, *supra*, 466 U.S. at 689.)

For those reasons, a defendant's "self-serving statement" that he would not have not have accepted a plea bargain but for an error that damaged his ability to meaningfully understand the immigration consequences of the plea "is insufficient in and of itself to sustain the defendant's burden of proof." (*In re Alvernaz*, *supra*, 2 Cal.4th at p. 938.) Instead, defendants must corroborate their claims with "'objective evidence'" from the "'time of the offer' [citation]." (*In re Resendiz*, *supra*, 25 Cal.4th at p. 253 (plur. opn. of Werdegar, J.); see also *Lee*, *supra*, 137 S. Ct. at p. 1967

["[c]ourts should not upset a plea solely because of *post hoc* assertions from a defendant about how he would have pleaded," but "should instead look to contemporaneous evidence to substantiate a defendant's expressed preferences"]; OBM 28 [recognizing that the prejudice inquiry "focus[es] on inference from contextual evidence at or near the time of the plea"].)

This Court's precedents illuminate the kinds of "contemporaneous evidence" that courts should consider in determining whether a defendant has met his burden. (*Lee*, *supra*, 137 S. Ct. at p. 1967.) Among other things, courts may consider:

- whether counsel actually and accurately communicated the offer and the potential immigration consequences to the defendant (see *In re Resendiz*, *supra*, 25 Cal.4th at p. 253 (plur. opn. of Werdegar, J.));[18]
- whether the defendant received the advisement required by section 1016.5 and, if so, the defendant's reaction (see *Patterson*, *supra*, 2 Cal.5th at p. 899);
- whether the defendant expressed concerns about possible immigration consequences of the plea (see *id.* at p. 899);
- whether the defendant indicated that he was amenable to further plea bargaining (see *In re Alvernaz*, *supra*, 2 Cal.4th at p. 938);

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[18] In some cases—and perhaps many—the immigration consequences of a plea will be "unclear or uncertain." (*Padilla*, *supra*, 559 U.S. at p. 369; see also *id.* at pp. 377-381 [opn. of Alito, J., conc. in the judgment] [collecting examples].) In those circumstances, counsel's general advisement that the "pending criminal charges may carry a risk of adverse immigration consequences" may be the best advice that counsel can give the client. (*Id.* at p. 369; see also *Patterson*, *supra*, 2 Cal.5th at p. 898.)

- the presence or absence of other plea offers (see *Martinez*, *supra*, 57 Cal.4th at p. 568);
- evidence about the prosecution's willingness to enter into a plea bargain that would have allowed the defendant to avoid immigration consequences (see *In re Resendiz*, *supra*, at pp. 253-254 (plur. opn. of Werdegar, J.));
- the probability that the defendant might obtain a more favorable outcome (either acquittal at trial or a plea agreement without adverse immigration consequences), including the strength of the case against the defendant (see *Martinez*, *supra*, at p. 564);
- the possible prison sentence the defendant was facing if convicted at trial of the crime or crimes charged (see *In re Resendiz, supra*, at p. 253 (plur. opn. of Werdegar, J.));
- the "disparity between the terms of the proposed plea bargain and the probable consequences of proceeding to trial, as viewed at the time of the offer" (*In re Alvernaz*, *supra*, at p. 938);
- the defendant's connections to the United States at the time of the plea, including whether the defendant had friends, family, employment, or other community ties to this country (see *Zamudio*, *supra*, 23 Cal.4th at p. 209); and
- the defendant's experience with the criminal justice system, including whether the defendant was aware of a "specific risk of deportation in his particular case" (*Patterson*, *supra*, at p. 899, fn. 6).

Of course, this list is not exhaustive, and no one factor is dispositive. The prejudice inquiry "demands a 'case-by-case examination' of the 'totality of the evidence.' [Citation.]" (*Lee*, *supra*, 137 S. Ct. at p. 1966; see also OBM 27-28.) Prejudice is established only if, "after an examination of the entire cause, including the evidence," the court "is of the opinion that it is reasonably probable that a result more favorable to the [moving] party would have been reached in the absence of the error."

(*Zamudio*, *supra*, 23 Cal.4th at p. 210, quoting *Watson*, *supra*, 46 Cal.2d at p. 836, internal quotation marks omitted.)

B. Appellate Courts Should Independently Review a Trial Court's Grant or Denial of a Section 1473.7 Motion

In the Court of Appeal, the parties disputed whether the trial court's ruling should be reviewed independently or for abuse of discretion.[19] The Court of Appeal did not resolve that dispute, reasoning that Vivar had failed to establish that reversal was required even under the less deferential standard. (Opn. 10.)[20] Before this Court, Vivar again raises a question about the proper standard of review. (See OBM 7, 43-44.)[21] After further

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[19] Vivar argued that all aspects of the trial court's ruling—including its factual findings—should be reviewed independently. (See Appellant's Opening Brief at 45-47, *People v. Vivar*, No. E070926 (Oct. 24, 2018)). Respondent argued that the trial court's ruling should be reviewed for abuse of discretion, and that its findings of fact were owed deference even though they were made on a cold record. (See Corrected Respondent's Brief at 20-27, *People v. Vivar*, No. E070926 (Mar. 22, 2019).)

[20] Although the trial court did not expressly decide the prejudice issue, it made several statements from the bench that the Court of Appeal construed as factual findings. (See, e.g., Opn. 19 [the trial court's observation that Vivar was "'more willing to rely on his experiences that he was on his counsel's advice'" was a "factual inference"].) The Court of Appeal held that those findings "must be accorded deference under any applicable standard." (Opn. 21-22.)

[21] The specific issue presented by Vivar's petition for review is whether any deference is owed to a trial court's factual findings made "solely on written and documentary evidence." (OBM 7.) Respondent addresses that issue and the broader standard of

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reflection, respondent now agrees that the "'independent review'" standard that applies to ineffective assistance of counsel claims also applies in this context. (*In re Resendiz*, *supra*, 25 Cal.4th at p. 249, citation omitted.)

When considering claims of ineffective assistance of counsel, this Court has held that whether counsel performed deficiently and whether the defendant was prejudiced are "mixed law-fact questions" that are "generally subject to independent review as predominantly questions of law." (*People v. Ledesma* (1987) 43 Cal.3d 171, 219.) In the same context, the Court has held that appellate courts are not bound by a trial court's factual determinations that are "based upon the transcript of the evidentiary proceedings conducted in the superior court," but may instead "'independently evaluate[] the evidence and make[] [their] own factual determinations.' [Citation.]" (*In re Resendiz*, *supra*, 25 Cal.4th at p. 249.)[22]

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review question that was briefed and argued in the Court of Appeal.

[22] Of course, that does not mean a trial court's factual findings are irrelevant. Even when an appellate court conducts an "independent review of the record," the trial court's factual determinations are "entitled to great weight when supported by the record"—especially when they are based on the "credibility of witnesses the superior court heard and observed." (*In re Resendiz*, *supra*, 25 Cal.4th at p. 249, citations, internal quotation marks, ellipses, and brackets omitted.) And there may be other circumstances in which deference is owed to the trial court's findings of fact, including where the trial court "actually observe[s]" a relevant portion of the proceeding—in which case the trial court's factual findings should be reviewed for

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In the context of reviewing a trial court's decision to grant or deny a motion to withdraw a plea, however, this Court has held that the proper standard of appellate review is abuse of discretion. (See, e.g., *People v. Superior Court (Giron)* (1974) 11 Cal.3d 793, 798 [motion to withdraw a plea under section 1018]; *Zamudio*, *supra*, 23 Cal.4th at p. 192 [motion to withdraw plea for failing to give section 1016.5 advisements].) Under that standard, appellate courts ask "whether the trial court's findings of fact are supported by substantial evidence, whether its rulings of law are correct, and whether its application of the law to the facts was not arbitrary or capricious." (*People v. Superior Court (Humberto)* (2008) 43 Cal.4th 737, 746.) When applying the abuse of discretion standard, this Court has instructed that a trial court's findings are owed the *same* deference whether they are based on live testimony or "on declarations and other written evidence." (*Haraguchi v. Superior Court* (2008) 43 Cal.4th 706, 711, fn. 3.).

These two lines of precedent have led to disagreement over the proper standard of appellate review for a trial court's grant or denial of a section 1473.7 motion since the statute was amended. (Compare *People v. Perez* (2020) 47 Cal.App.5th 994, 997 [abuse of discretion] with *People v. DeJesus* (2019) 37 Cal.App.5th 1124, 1132 [independent review].) But the history of section 1473.7

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"substantial evidence." (*People v. Gonzales* (2012) 54 Cal.4th 1234, 1285, citation and internal quotation marks omitted [discussing review of trial court's evaluation of juror qualifications].)

shows that the same "independent review" standard that applies to ineffective assistance of counsel claims should also apply to a trial court's ruling on a section 1473.7 motion.

Section 1473.7 was initially adopted in response to this Court's decision in *People v. Kim* (2009) 45 Cal.4th 1078. (See *ante*, p. 11.) In *Kim*, the Court held that a defendant who was no longer in custody could not seek a writ of *coram nobis* to vacate a conviction based on a claim that counsel rendered ineffective assistance by failing to investigate the immigration consequences of his plea or by failing to seek a plea deal that would not have rendered him removable. (*Kim*, *supra*, at pp. 1101-1104.) During the first two years after section 1473.7 was adopted, courts "uniformly assumed" that relief under the statute was only available to individuals that could meet *Strickland*'s test. (*People v. Camacho* (2019) 32 Cal.App.5th 998, 1005.)[23] And with the exception of one case that this Court promptly ordered depublished, every court to address the issue in a published decision applied the "independent review" standard that governs ineffective assistance of counsel claims, because they understood section 1473.7 movants to be "claiming violation of a *constitutional* right." (*People v. Ogunmowo* (2018) 23 Cal.App.5th 67, 76, original italics; see also *People v. Olvera* (2018) 24

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[23] See also *People v. Espinoza* (2018) 27 Cal.App.5th 908, 914; *People v. Tapia* (2018) 26 Cal.App.5th 942, 949; *People v. Cruz-Lopez* (2018) 27 Cal.App.5th 212, 222; *People v. Morales* (2018) 25 Cal.App.5th 502, 504; *People v. Olvera* (2018) 24 Cal.App.5th 1112, 1114, 1116; *People v. Ogunmowo* (2018) 23 Cal.App.5th 67, 75-76; *People v. Perez* (2018) 19 Cal.App.5th 818, 828, 831 & fn.8.

Cal.App.5th 1112, 1116; *People v. Tapia* (2018) 26 Cal.App.5th 942, 950. But see *People v. Gonzalez* (Sept. 27, 2018) D073436, opn. ordered nonpub. Jan. 23, 2019.)

In 2018, the Legislature amended section 1473.7 to specify that relief may be granted even absent a "finding of ineffective assistance of counsel." (§ 1473.7, subd. (a)(1); *see also* § 1473.7, subd. (e)(4); *ante*, pp. 12-13.) As a result, a defendant may prevail on a section 1473.7 motion by asserting only a "'statutory error.'" (Opn. 9.) Some lower courts have suggested that this amendment altered the standard of appellate review.[24] But this Court presumes that the Legislature "know[s] about existing case law when it enacts or amends a statute." (*In re W.B.*, *supra*, 55 Cal.4th at p. 57.) And, in amending the statute, the Legislature "did not signal an intent to supersede" pre-existing precedent directing that a trial court's denial or grant of a motion under section 1473.7 is subject to the independent review standard. (*Ibid.*) On the contrary, the amendment instructed that section 1473.7 "shall be interpreted . . . consistent with the findings and declarations made in Section 1016.2 of the Penal Code" (Stats. 2018, ch. 825, § 1, subd. (c))—which in turn indicates that the Legislature intended to "codify *Padilla v. Kentucky* and related

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[24] In *People v. Rodriguez* (2019) 38 Cal.App.5th 971, for example, the Court of Appeal reasoned that a trial court's ruling on a section 1473.7 motion that asserts only a "deprivation of statutory rights" should be reviewed for abuse of discretion; but a ruling on a motion that asserts ineffective assistance of counsel should be reviewed under the independent review standard. (*Id.* at pp. 977-978.)

California case law" (§ 1016.2, subd. (h)). Presumably, that "related California case law" included decisions like *In re Resendiz*, which adopted the independent standard of appellate review for claims similar to the ones made cognizable by Section 1473.7. (See *ante*, p. 35.)

C. Under the Particular Circumstances of this Case, Vivar Has Established Prejudice

The Court of Appeal held that Vivar established error within the meaning of section 1473.7 because he demonstrated that his trial attorney's "performance fell below an objective standard of reasonableness." (Opn. 15.) In particular, the attorney provided only the general advisement as contained in the felony plea form (see *ante*, pp. 15-16), and "fail[ed] to further warn or otherwise advise defendant of the certain immigration consequences of his plea." (Opn. 16.) As the case comes to this Court, the central question is whether Vivar established that it is "reasonably probable" that he "would not have pleaded guilty" but for that error. (*Martinez*, *supra*, 57 Cal.4th at p. 562, citation and internal quotation marks omitted.)[25] Although respondent

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[25] Before this Court, Vivar raises the "antecedent question of what 'error' supplies the prejudice under section 1473.7," and argues that the inquiry should focus on "the defendant's own error in misunderstanding immigration consequences" rather than "counsel's error in rendering advice." (OBM 10; see *id.* at pp. 30-39.) In support of that argument, he invokes *People v. Mejia* (2019) 36 Cal.App.5th 859, which was decided three months after respondent filed its brief in the Court of Appeal in this case. (OBM 20, 32.) The Department of Justice's position is that *Mejia* adopted the proper standard for determining error under section 1473.7; and the Department has taken that

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took a different position below, a fresh look at the record and precedent governing the prejudice inquiry persuades us that Vivar has established prejudice by showing that he would have "accept[ed] or tr[ied] to obtain a better bargain that d[id] not include immigration consequences"—i.e., the alternative plea deal that the prosecution offered him—had his attorney advised him about the immigration consequences of each plea. (*Id.* at p. 567; see also *id.* at p. 562 [prejudice inquiry focuses on what the defendant "would have done, not whether the defendant's decision would have led to a more favorable result"].)

Vivar has plainly satisfied the threshold requirement for prejudice under section 1473.7: he has demonstrated that his 2002 conviction "is currently causing or has the potential to cause removal or the denial of an application for an immigration benefits, lawful status, or naturalization." (§ 1473.7, subd. (e)(1).) Pleading guilty to a violation of former Health and Safety Code section 11383(c) led directly to his removal from this country. (See CT 96, 139, 146-150; see also *Lopez-Jacuinde v. Holder* (9th

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position in several cases since *Mejia* was decided. (See, e.g., Respondent's Brief at 9-11, *People v. Martinez*, No. A157100 (Feb. 14, 2020); Respondent's Brief at 14, *People v. Coto*, No. E072720 (Jan. 24, 2020).) In this case, however, that "antecedent question" appears to be beyond the scope of the issues presented. For that reason, this brief does not address that question, and instead addresses the issue of prejudice with respect to the error actually identified by the Court of Appeal below. To the extent this Court desires briefing on the error question, respondent respectfully suggests that the Court expand the issues presented and order supplemental briefing.

Cir. 2010) 600 F.3d 1215, 1217-1219 [violation of former Health and Safety Code section 11383(c) is an aggravated felony and requires removal].) As Vivar's immigration expert explained, pleading guilty to that offense "triggered the worst of all immigration consequences: mandatory deportation with a bar to almost all forms of immigration relief, and permanent ineligibility for U.S. citizenship." (CT 148.)

Vivar has also made a sufficient showing that he "would not have entered into the plea bargain if properly advised." (*Martinez*, *supra*, 57 Cal.4th at p. 565.) He submitted a declaration stating that he "would never have pleaded guilty" had his attorney told him that his plea would have resulted in his removal. (CT 140, underline omitted.) And he corroborated that assertion with "'objective evidence'" from the "'time of the offer.'" (*In re Resendiz*, *supra*, 25 Cal.4th at p. 253 (plur. opn. of Werdegar, J.), quoting *In re Alvernaz*, *supra*, 2 Cal.4th at p. 938.) At the time of the plea, Vivar had lived in the United States for 40 years and developed deep roots in this country. (CT 136-138.) His entire immediate family lived here. (CT 137.) His trial attorney's contemporaneous notes confirm that he was concerned about the "consequences of [his] plea." (CT 173.)

Those notes also indicate that the prosecution offered a deal under which Vivar would have pleaded guilty to a single count of violating section 459, with a recommendation that Vivar serve

the low-term in state prison "+ parol." (CT 173.)[26] At the time of Vivar's plea deal, a burglary conviction under section 459 could only support removal as an "aggravated felony" if certain documents indicated that the defendant had pleaded guilty to "unlawful[ly]" entering into or remaining in a building or structure "with intent to commit a crime." (*Sareang Ye v. I.N.S.* (9th Cir. 2000) 214 F.3d 1128, 1132; see also *United States v. Parker* (9th Cir. 1993) 5 F.3d 1322, 1325, 1328.)[27] Vivar's immigration expert opined that at the time of Vivar's plea, prosecutors were "open to accepting a vague plea, or a plea

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[26] Vivar's declaration details a similar offer under which he would have pleaded guilty to an unspecified felony in exchange for a recommendation of a "3-year prison sentence, of which [he] could serve only half the time." (CT 138.)

[27] At the time of Vivar's plea, the Immigration and Nationality Act (INA) provided that a person who committed a "'burglary offense for which the term of imprisonment is at least one year'" was removable because it was an "'aggravated felony.'" (*Ye*, *supra*, 214 F.3d at 1131, quoting 8 U.S.C. § 1101(a)(43)(G), brackets omitted.) To determine whether a state-law conviction was a "burglary offense" for purposes of the INA, courts began by determining whether the statute of conviction matched the "uniform definition of burglary," which the U.S. Supreme Court had defined as the "'unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime.'" (*Id.* at p. 1132, quoting *Taylor v. United States* (1990) 495 US. 575, 598-599.) If the statute was "overbroad—if it include[d] offenses that do not fall under the uniform definition," then courts could look to other documents to "determine whether the defendant's conviction actually me[t] the uniform definition." (*Ibid.*; see also *United States v. Velasco-Medina* (9th Cir. 2002) 305 F.3d 839, 851 [listing documents that courts may consider in determining whether a crime of conviction is an aggravated felony].)

designating a lawful entry . . . because it had no meaningful effect on the disposition." (CT 148.) Whether the prosecution would have agreed to a plea along those lines is unclear from the record. At the very least, however, Vivar has established a reasonable probability that he would have tried to "obtain a better bargain that [did] not include immigration consequences," (*Martinez*, *supra*, 57 Cal.4th at p. 567)—specifically, a deal under which he would have pleaded guilty to burglary under section 459 that designated a lawful entry or that was vague on that point. (See also Opn. 18-19 [Vivar "was offered and rejected a plea agreement that would have completely avoided any immigration consequences"].)[28]

Objective evidence from shortly after the time of the plea provides further support for Vivar's argument on prejudice. The month after the plea, Vivar began writing letters to the trial court expressing concern about the immigration consequences of his plea. (CT 86-87.) Among other things, those letters emphasized his ties to the United States and asked for his case to be "[r]e-opened" because he had never been "advised that guilty plea to H.S.11383(c) was an Aggravated Felony for Immigration purposes and thus would warrant Immediate Deportation

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[28] Subsequent precedent has strengthened the conclusion that Vivar would not have been removed had he pleaded guilty to violating section 459: today, a burglary conviction under that statute is never an "aggravated felony" for purposes of the removal provisions of the INA. (See *Descamps v. United States* (2013) 570 U.S. 254, 277-278; *Rendon v. Holder* (9th Cir. 2014) 764 F.3d 1077, 1082-1084.)

without any Relief afforded to me." (CT 91; see also CT 86.) Even at that time, Vivar stated that he "would have never plead Guilty to this Charge" had he known the immigration consequences of his plea. (CT 91.)

The record also shows that the two different plea offers presented to Vivar would have resulted in a similar amount of time in custody: had Vivar pleaded guilty to a violation of section 459, the prosecution would have recommended the low term, which at the time was two years in state prison. (See former § 461, subd. (1), as amended Stats. 1978, ch. 579, § 24.) As part of the plea deal to which Vivar actually agreed, Vivar was sentenced to 365 days in county jail with a recommendation that he complete an RSAT program. (CT 6, 9.)[29] Vivar's declaration states that he would have been willing to plead guilty to a crime "with greater criminal punishment (including jail time) to avoid being deported," (CT 140-141, underline omitted), and the circumstances surrounding his plea support that assertion. Based on all the information in the record, it is "reasonably probable" that Vivar would have tried to obtain a different plea deal than the one he accepted but for the error identified by the Court of Appeal, which damaged his ability to meaningfully

[29] Vivar also faced the possibility of a longer period in custody for the plea to which he actually agreed: the sentence of 365 days in county jail was contingent on Vivar's completion of the RSAT program; the plea agreement specified that a two-year prison sentence would be imposed if Vivar failed to finish that program. (See CT 5, 6, 9.)

understand the immigration consequences of the two deals offered to him. (*Martinez*, *supra*, 57 Cal.4th at p. 564.)[30]

In holding that Vivar had not established prejudice, the Court of Appeal pointed to Vivar's decision to reject a "plea agreement that would have completely avoided any immigration consequences," concluding that this decision demonstrates that "immigration consequences were not [Vivar's] primary consideration in accepting or rejecting any plea offer." (Opn. 18-19.) But Vivar's declaration states that he did not know that he might have been able to avoid removal by pleading guilty to section 459, and nothing in the record suggests that his attorney advised him of that fact. (CT 138-139.) Instead, the declaration supports Vivar's position that he erroneously believed that he "could not be deported for a misdemeanor" but that "all felonies resulted in deportation." (CT 138.)

For the same reason, Vivar's decision to reject the offer to plead guilty to violating section 459 does not establish that he "prioritized drug treatment over potential immigration-neutral pleas." (Opn. 18.) While Vivar acknowledges that he asked his lawyer to "get a plea deal that included drug treatment" (CT 138), that does not support the conclusion that he would have accepted

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[30] Because Vivar has shown that he would have pleaded guilty to violating section 459 had he been properly advised of the immigration consequences of each plea, this Court need not decided whether he would have "proceeded to trial" on the charge that he violated former Health and Safety Code section 11383(c) had he been informed that pleading guilty to that charge would have led to his removal. (OBM 36, fn. 8.)

the offer to plead guilty to violating former Health and Safety Code section 11383(c) and rejected the alternative offer to plead guilty to violating section 459 had he known of the immigration consequences of each plea. On the contrary, his decision to plead guilty to violating former Health and Safety Code section 11383(c) promptly triggered an "immigration hold" that *prevented* him from partaking in the RSAT program. (See CT 56, 86, 139.) Vivar's stated desire to get drug treatment thus supports the inference that he would have rejected the offer to plead guilty to that offense had he known of its adverse immigration consequences. So does his specific desire to get into the RSAT program: according to his declaration, Vivar's lawyer told him that completing that program would allow him to ask the court to change his conviction to a misdemeanor, a reduction Vivar believed would allow him to "avoid deportation." (CT 138-139.)

The Court of Appeal also focused on the trial court's observation that Vivar was "more willing to rely on his experiences than he was on counsel's advice." (Opn. 19.) Contrary to the Court of Appeal's conclusion, however, that "factual inference" was not "'supported by substantial evidence in the record.' [Citation.]" (*Ibid.*) The trial court relied on the statement of Vivar's trial counsel that she had "specifically cautioned [Vivar] 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 on the new offense," and that if Vivar had any questions "he should consult an immigration attorney for clarification." (CT 130; see also RT 32-

33.) Of course, Vivar claims that his attorney "never discussed the immigration consequences of [his] plea options." (CT 138, underline omitted). Even if his attorney's recollection is correct, however, it does not support the conclusion that "no amount of additional advice was reasonably probable to induce a different action." (Opn. 21-22.) As discussed above, at the time of his plea, Vivar had a chance to avoid any immigration consequences by pleading guilty to a violation of section 459. (See *ante*, pp. 41-43; see also CT 148.) Pleading guilty to violating former Health and Safety Code section 11383(c), on the other hand, triggered mandatory removal and permanent ineligibility for U.S. citizenship. (CT 148.)[31]

On this record, and especially in light of Vivar's longstanding ties to the United States and the similar jail or prison time under the two plea offers, it is reasonably probable that Vivar would have tried to obtain a better plea deal had his attorney accurately advised him of the immigration consequences of pleading guilty to former Health and Safety Code section 11383(c).

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[31] For the same reason, the fact that Vivar initialed the portion of the Felony Plea Form stating that he was aware that his plea "may have the consequences of deportation, exclusion from the admission to the United States, or denial or naturalization pursuant to the laws of the United States" (CT 8) does not show that he would have accepted the offer to plead guilty to violating former Health and Safety Code section 11383(c) plea had he been told that it would have resulted in his removal.

CONCLUSION

The Court should either reverse the judgment of the Court of Appeal, or transfer the case to the Court of Appeal for further proceedings in light of respondent's current position on the issue of prejudice.

Dated: August 26, 2020

Respectfully submitted,

XAVIER BECERRA
Attorney General of California
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s/ Samuel P. Siegel

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CERTIFICATE OF COMPLIANCE

I certify that the attached ANSWER BRIEF ON THE MERITS uses a 13 point Century Schoolbook font and contains 10,680 words.

Dated: August 26, 2020

XAVIER BECERRA
Attorney General of California

s/ Samuel P. Siegel

SAMUEL P. SIEGEL
Deputy Solicitor General
Attorneys for Respondent

DECLARATION OF ELECTRONIC SERVICE

Case Name: **People v. Vivar** Case No.: **S260270**

I declare: I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collecting and processing electronic and physical correspondence Participants who are registered with TrueFiling will be served electronically.

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I declare under penalty of perjury under the laws of the State of California and the United States of America the foregoing is true and correct and that this declaration was executed on August 26, 2020, at Sacramento, California.

A. Cerussi	/s/ *A. Cerussi*
Declarant	Signature

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **PEOPLE v. VIVAR**
Case Number: **S260270**
Lower Court Case Number: **E070926**

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

8/26/2020

Date

/s/Ann Cerussi

Signature

Siegel, Samuel P. (294404)

Last Name, First Name (PNum)

Department of Justice, Office of the Attorney General

Law Firm