No. S260270

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,

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 REPLY BRIEF

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

STATE CASES

STATE STATUTES

TABLE OF AUTHORITIES

(Continued)

Page

INTRODUCTION

Respondent concedes error under the particular circumstances of this case, acknowledging that Mr. Vivar has established prejudice under Penal Code section 1473.7. In light of that position, Respondent invites the Court to reverse the judgment or transfer the case back to the Court of Appeal for further proceedings. Mr. Vivar respectfully submits that the appropriate course of action would be to hear argument, reverse the judgment as advocated by both parties, and issue an opinion that provides guidance to the lower courts on the issues for which it granted review: the contours of the prejudice inquiry under section 1473.7, and the appellate standard of review applicable to factual determinations based on a cold record.

While the Courts of Appeal have invoked section 1473.7 almost 130 times in the past few years, often diverging in their interpretations on key points, this Court has never granted review of a case involving section 1473.7. In this case, the petition presented two fundamental and recurring issues relating to that statute: the type of evidence that corroborates an assertion of prejudice, and the applicable standard of review on appeal. Respondent's concession of error on the prejudice issue does not negate the need for guidance from this Court on those two recurring issues. As was the case when the Court granted the petition, an authoritative explanation of the prejudice inquiry under section 1473.7, and a clear resolution of divergent approaches to the standard of review, would provide much needed consistency among the lower courts as they apply this statute, which will continue to affect a broad class of Californians.

The issues under review have been comprehensively briefed, as both parties argued their respective sides in the trial court and in the Court of Appeal, and Respondent's brief to this Court evinces a fulsome analysis of the pertinent legal principles. There is no reason to think that a different case

in the future would provide a more useful explication than is currently available to the Court in this case

A judgment of reversal, rather than a transfer to the Court of Appeal, would also lessen the risk of undue delay, which would be particularly inequitable given Mr. Vivar's nearly two-decade struggle to reach this point. Further proceedings in the Court of Appeal might prove counterproductive, or at least could delay the ultimate disposition of this case. And given that the case is now fully briefed at this stage and ready for review, there is little conservation of judicial resources to be gained by a transfer to the Court of Appeals. The case is ripe for resolution now, and such resolution and guidance from this Court is both appropriate and salutary.

The Court should reverse the judgment, issue an opinion clarifying the issues on review for the benefit of the lower courts, and remand with instructions to grant the motion for relief under section 1473.7.

ARGUMENT

I. THE COURT SHOULD SET THE CASE FOR ARGUMENT AND REVERSE WITH AN OPINION THAT GIVES GUIDANCE TO LOWER COURTS ON SECTION 1473.7

A. Respondent's Position Does Not Diminish the Need to Resolve Recurring Issues of Statewide Concern

Respondent concedes that Mr. Vivar suffered prejudice "[u]nder the [p]articular [c]ircumstances of this [c]ase." (ABM 39.) But this Court does not ordinarily grant review just to correct a mistake of fact in a single case. (See Cal. Rules of Court, rule 8.500(b).) The petition for review invited the Court to take up this case to consider how prejudice is evaluated under section 1473.7, and the standard of review applicable to certain factual determinations under the statute—both of which are issues affecting a broad class of Californians, and are prone to recur in nearly every motion for relief under section 1473.7. The need to give clarifying guidance to the lower

courts on those questions thus remains as critical now as it was when this Court granted review. A judgment of reversal with an accompanying explanatory opinion is therefore warranted.

1. The Court should reverse with an opinion that clarifies how courts should evaluate prejudice under section 1473.7. While this Court has not yet addressed the statute, the Courts of Appeal have invoked section 1473.7 in almost 130 opinions in the last few years.[1] The published opinions continue to vary in the weight given to different categories of evidence supporting or negating a defendant's claim of prejudice. Some have suggested that the existence of longstanding and important ties to the United States can be sufficient on its own to establish prejudice. (*People v. Camacho* (2019) 32 Cal.App.5th 998, 1102; *People v. Espinoza* (2018) 27 Cal.App.5th 908, 917.) Others have found prejudice by citing U.S. connections, in addition to some other factor substantiating the defendant's assertion. (OBM 29 [citing reported cases].) And still others have rejected a claim of prejudice, despite corroborating factors, due to the improbability of success at trial or the comparative leniency of the sentence received after the conviction under review. (See, e.g., *People v. Chen* (June 28, 2019, A152754) review den. and opn. ordered nonpub. Oct. 9, 2019, S257172.)

Respondent correctly explains how these considerations (among others) derive from the way this Court has analyzed prejudice in other contexts involving a challenge to a guilty plea. (ABM 32-33.) But this Court has not yet addressed the contours of the prejudice requirement under section 1473.7 in particular. The Legislature specially designed section 1473.7 to protect non-citizen Californians who—despite being valuable and longstanding members of the community—unwittingly stumble into a

[1] This figure is the product of a Westlaw search of all California state appellate decisions citing Penal Code section 1473.7, which produced a hit report of 127 decisions.

criminal disposition with devastating immigration consequences. (See Stats. 2018, ch. 825, § 1(c); Pen. Code, § 1016.2; see also Sen. Public Safety Com., analysis of Assem. Bill No. 813 (2015–2016 Reg. Sess.) p. 6.) Thus, whether prejudice principles from other contexts can be imported wholesale into this statute, or whether some additional gloss is needed to account for the special character of section 1473.7, is an question that warrants this Court's consideration and authoritative guidance.

The need to provide clarification on how a defendant establishes prejudice under section 1473.7 is no less important now than it was when the Court considered this question and granted review. Respondent's agreement that the facts of this case dictate a different outcome for Mr. Vivar should therefore not change the Court's standard procedure in resolving this case by hearing argument and issuing a final judgment.[2]

2. The Court of Appeal should reverse with an opinion clarifying the standard of review applicable in section 1473.7 cases, particularly where the trial court's decision is based on a cold record.

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[2] In his opening brief, Mr. Vivar invited the Court to consider the type of "error" that can supply the prejudice under section 1473.7(a)(1)—defendant's own error in understanding immigration consequences, or counsel's error in performance. (OBM 26-27.) Respondent has declined to address this antecedent legal question. (ABM 39, fn. 25.) If the Court is persuaded by both Mr. Vivar's and Respondent's position that prejudice has been established regardless of the type of error, then the Court need not reach this issue. However, to the extent the Court wishes to reach the error question in issuing its opinion, supplemental briefing would not be necessary. The Court of Appeal evaluated this issue, (Opn. 20-22), and despite the attention Mr. Vivar devoted to it in his opening brief in this Court, Respondent nonetheless submitted an under-length brief (by over 3,000 words). In any event, nothing more need be said, as Respondent acknowledges that the case articulating Mr. Vivar's view of the error question—*People v. Mejia* (2019) 36 Cal.App.5th 859—was correctly decided, and that Respondent has taken that position in multiple cases subsequent thereto. (ABM 39, fn. 25.)

a. The petition for review highlighted a narrow, but significant, point of divergence among the Courts of Appeal regarding whether deference to a trial court's factual findings on post-conviction review is appropriate when such findings are predicated on a document-only record. (PFR 31-33.) Mr. Vivar's opening brief argued that *de novo* review of such factual findings is appropriate because the appeals court is identically situated to the trial court when reviewing a cold record from a prior proceeding in which the trial court did not participate. (OBM 43.) Respondent's brief has largely adopted this view, explaining that the trial court's findings do not receive deference when based on a transcript of prior proceedings, in contrast to findings that are based on direct observation of witness testimony or other aspects of the conviction proceeding. (ABM 34-35 & fn. 22.)

Nothing about Respondent's agreement in this case changes the fact that Courts of Appeal remain divided on this aspect of the standard of review. Some courts have held that orders granting or denying section 1473.7(a)(1) relief are reviewed independently, *including* the underlying factual findings when they are based on a cold record of written materials alone. (See *People v. Ogunmowo* (2018) 23 Cal.App.5th 67, 79 [factual findings "not entitled to our deference" because "[t]he trial court and this court are in the same position in interpreting written declarations."]; cf. *In re Tripp* (2007) 150 Cal.App.4th 306, 313 [same for habeas review].) By contrast, other courts continue to defer to factual determinations when reviewing a section 1473.7(a)(1) ruling, even when those findings were made on a cold record. (E.g., *People v. Tapia* (2018) 26 Cal.App.5th 942, 950-951; *People v. Olvera* (2018) 24 Cal.App.5th 1112, 1116.) One such court, in fact, explicitly rejected the *de novo* approach to factual findings adopted by *Ogunmowo*, explaining that it "d[id] not find [*Ogunmowo*]'s reasoning persuasive" and that the appropriate standard is to defer to factual findings when they are

"supported by substantial evidence." (*People v. Gonzalez* (Sept. 27, 2018, D073436) review den. and opn. ordered nonpub. Jan. 23, 2019, S252173.)

Respondent's agreement that a *de novo* standard is appropriate on this issue does not lessen the need to give direction to the Courts of Appeal, which continue to reach different conclusions about when to accord deference to factual determinations in support of a section 1473.7(a)(1) ruling. Indeed, this issue remains as important now as it was when the Court granted the petition to review it. It will recur in every appeal from an order granting or denying a section 1473.7 motion based on a cold record. And it is all the more important given how trial courts routinely decide section 1473.7 motions based on a cold written record, and without hearing live testimony. Indeed, disposing of section 1473.7 motions without hearing live testimony may become increasingly more common under current pandemic conditions.

b. Respondent's brief highlights an additional reason why guidance from this Court would be valuable regarding the standard of review. While the petition narrowly focused on the standard of review applicable to *underlying* factual findings based on a cold record, Respondent points out that the "broader" standard of review under section 1473.7—that which applies to the ultimate conclusions regarding "whether counsel performed deficiently and whether the defendant was prejudiced"—should also be *de novo*. (ABM 35-37, & fn. 21.) Some lower courts, however, have departed from that approach, holding that an abuse-of-discretion standard applies under section 1473.7 when the motion asserts a deprivation of "statutory right[s]" (such as a misunderstanding of immigration consequences) rather than a constitutional claim of ineffective assistance of counsel. (Opn. 21; *People v. Rodriguez* (2019) 38 Cal.App.5th 971, 977.) By way of example, in response to Mr. Vivar's contention that the "error" supplying the prejudice could be his *own* misunderstanding of immigration consequences, even absent ineffective assistance, the Court of Appeal held that such a framework

would require the trial court's ruling to be reviewed for abuse of discretion. (Opn. 20-21.) Other courts do not accord deference in those circumstances. (See *People v. Mejia* (2019) 36 Cal.App.5th 859; *Camacho, supra*, 32 Cal.App.5th 998; see also PFR 32, fn. 3.) Respondent cuts through the divide and correctly explains why *de novo* is the correct standard of review, regardless whether a statutory or constitutional right is implicated. (ABM 36-39.) This Court should issue an opinion, consistent with both parties' briefs, clarifying that *de novo* review is the appropriate standard for both constitutional and statutory claims under section 1473.7.

B. The Issues Have Been Comprehensively Briefed

The issues necessary to resolve this appeal have been fully developed and comprehensively briefed. Respondent briefed the opposing position below in the trial court and again in the Court of Appeal, urging denial of relief for failure to establish prejudice. The Court of Appeal issued a published opinion explaining its view of the law and facts. And in this Court, the parties have thoroughly briefed the issues on review, with additional briefing from *amici curiae* at the petition stage. Respondent in particular has devoted considerable attention to the pertinent precedent and legal principles, helping to lay the groundwork for an opinion that gives the kind of authoritative guidance that Courts of Appeal need. There is no reason to think that a different case in the future would provide a more useful explication of the issues than is currently available to the Court in this case.

C. Transfer Without Judgment Would Risk Undue Delay

Mr. Vivar has been battling to undo the life-altering consequences of his conviction for almost two decades, beginning mere days after it was entered in 2002 when he asked the trial court to re-open the case. (I CT 139.) In 2008, he again sought to purge the conviction from his record by a motion for expungement, (I CT 10, 140), only to learn that such an effort was futile

as a matter of law. Then, again in 2012, he sought relief through a petition for a writ of *coram nobis*, which he later learned was legally unavailable for claims of ineffective assistance at that time. (I CT 123, 140.) Now, in enacting section 1473.7, the Legislature has given Mr. Vivar a procedural avenue to erase his conviction for immigration purposes, enabling him to return to his family in the United States, from whom he has been exiled for too long. Mr. Vivar, now 64 years old, finds himself at the precipice of a final judgment in this case that will bring him the relief for which he has been fighting for almost two decades.

Without a judgment of reversal, a transfer could risk leaving the case open for resolution on the lower court's terms. Indeed, the Court of Appeal's affirmance did not depend on Respondent's arguments below; rather, the court reached its own conclusion based on the facts as understood by the trial court, and an independent examination of the law. (Opn. 9.) Without clear direction, it remains possible that the Court of Appeal could reach the same or similar judgment, or otherwise frustrate the expeditious resolution that this case warrants. There is no reason to risk such an unnecessary and costly delay, particularly because the case is now fully briefed and ready for this Court's review.

CONCLUSION

Mr. Vivar respectfully submits that the appropriate course of action would be to hear argument and then reverse the judgment, with an opinion that provides guidance to the lower courts on the contours of the prejudice inquiry and the standard of review on appeal.

DATED: September 11, 2020 Respectfully submitted,

MUNGER, TOLLES & OLSON LLP

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

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ROBERT LANDEROS VIVAR

CERTIFICATE OF COMPLIANCE

The undersigned counsel of record hereby certifies, pursuant to Rule 8.520(c)(1) of the California Rules of Court, that the foregoing Appellant's Reply Brief is produced using 13-point Roman type, including footnotes, and contains approximately 2,545 words, which is less than the 8,400 words permitted by this rule. Counsel relies on the word count of the computer program used to prepare this brief.

DATED: September 11, 2020

Respectfully submitted,

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By: /s/ *Dane P. Shikman*
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ROBERT LANDEROS VIVAR

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 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.

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STATE OF CALIFORNIA
Supreme Court of California

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Supreme Court of California

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