No. S260270

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE,
Plaintiff and Respondent,

v.

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)

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONER ROBERT LANDEROS VIVAR

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APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF IN SUPPORT OF APPELLANT ROBERT LANDEROS VIVAR

Pursuant to Rule 8.520(f) of the California Rules of Court, proposed amici,[1] the American Civil Liberties Union Foundation of Southern California (ACLU SoCal), American Civil Liberties Union of Northern California, and American Civil Liberties Union of San Diego & Imperial Counties (collectively "California ACLU affiliates") hereby respectfully apply to this Court for leave to file the accompanying Brief of Amicus Curiae in Support of Appellant Robert Landeros Vivar in the above-captioned case.

Proposed amici are the California affiliates of the American Civil Liberties Union, a national, nonprofit, nonpartisan civil liberties organization with more than 1.5 million members and supporters dedicated to the principle of liberty and equality embodied in both the United States and California constitutions and our nation's civil rights laws. Both as direct counsel and as amici, the California ACLU affiliates have appeared in numerous cases involving the fundamental constitutional rights of

[1] No party or counsel for a party in the pending appeal authored the proposed amicus brief in whole or in part; or made a monetary contribution intended to fund the preparation or submission of the brief. No person made a monetary contribution intended to fund the preparation or submission of the proposed brief, other than the proposed amici curiae, its members, or its counsel. *See* Cal. Rules of Court, rule 8.520(f)(4).

noncitizens, generally, and the right to effective assistance of counsel for noncitizens accused of crimes, more specifically.

Proposed amici have a devoted project focused on assisting deported U.S. veterans, nearly all of whom were long-time lawful permanent residents who pled guilty to crimes in the years following the 1996 changes to the immigration laws because their criminal defense lawyers never advised them of immigration consequences. Counsel for proposed amicus the ACLU Foundation of Southern California met Respondent Robert Landeros Vivar through this work and helped place his case with pro bono counsel representing him in this appeal.

In addition, the California ACLU affiliates co-sponsored the bill that became Penal Code Section 1473.7, the statute at issue in this appeal. Proposed amici sponsored this bill to respond to a crisis of ineffective assistance of counsel for noncitizens accused of crimes in California following the overhaul of federal immigration laws in 1996. The 1996 expansion of the immigration laws, which attached punitive immigration consequences to convictions for a wide range of crimes, dramatically added to the burden on criminal defense attorneys to know and understand immigration law in order to properly advise their clients of the consequences of criminal convictions. Although it is clear (and has been in California since 1987) that criminal defenders are required to advise clients about immigration consequences, far too often they do not because they

lack the time, training, or resources to adequately research questions of immigration law.[2] (*See, e.g.*, *People v. Soriano* (1987) 194 Ca1.App.3d 1470; *People v. Barocio* (1989) 216 Ca1.App.3d 99; *People v. Bautista* (2004) 115 Ca1.App.4th 229; *Padilla v. Kentucky* (2010) 559 U.S. 356; Cal. Penal Code section 1016.2 [codifying *Padilla* and California case law].) The result can be devastating. A guilty plea, even for many low-level misdemeanor crimes, can mandate deportation with no exceptions.

To address this, proposed amici the California ACLU affiliates have advocated for enhanced resources for public defender offices for immigration law assistance at both the state and local levels.[3] Proposed amici also championed the bill that became Section 1473.7 to provide a post-custodial vehicle in state law for individuals who pled guilty to crimes that carry immigration consequences without adequate advice of counsel to

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[2] *See, e.g.*, AB 3 (Bonta) – Stronger Public Defenders Act, https://static1.squarespace.com/static/5e31ce1fc5393e00e46cd6c0/t/5e694cfec0636a2c9dda42f8/1583959294190/AB3+%28Bonta%29%3DStronger+Public+Defenders+Act.pdf (ACLU of California-sponsored bill to provide state funding for immigration expertise at public defender offices) [as of Oct. 5, 2020]; Analysis of Assem. Bill No. 813 (2015–2016 Reg. Sess.) ("Even though current law requires counsel to inform noncitizen defendants of the immigration consequences of convictions, some defense attorneys still fail to do so. Failure to understand the true consequences of pleading guilty to certain felonies, for example, has led to the unnecessary separation of families across California.").

[3] *See, e.g.*, ACLU of Southern California Press Release, *ACLU Report: L.A. Public Defender's Office Ill-Equipped to Handle Noncitizen Cases,* May 15, 2018, https://www.aclusocal.org/en/press-releases/aclu-report-la-public-defenders-office-ill-equipped-handle-noncitizen-cases [as of Sept. 30, 2020].

seek relief from such convictions, and thus avoid or undo devastating immigration consequences. Section 1473.7 is not only a critical correction for California's failure, to date, to ensure effective representation of noncitizens accused of crimes, but it is also a vital protection against unwarranted deportation and family separation. Proposed amici therefore have a strong interest in ensuring a correct, uniform, and consistent interpretation and application of Section 1473.7.

Respectfully submitted,

ACLU Foundation of Southern California

ACLU Foundation of Northern California

ACLU Foundation of San Diego and Imperial Counties

Dated: October 13, 2020

By: Eva L. Bitran
Attorney for Amici

BRIEF OF AMICI CURIAE IN SUPPORT OF APPELLANT ROBERT LANDEROS VIVAR

I. INTRODUCTION

In a published ruling, the Court of Appeal below adopted a prejudice standard under Penal Code Section 1473.7 that conflicts with other Courts of Appeal's interpretations of what information can show prejudice, as well as California Supreme Court and U.S. Supreme Court precedent. That provision permits 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).)

Petitioner and Respondent *now agree* that, contrary to the Court of Appeal's decision, Petitioner satisfied Section 1473.7's prejudice standard. (*See* Reply 6). But unless this Court issues a decision overturning the Court of Appeal's incorrect interpretation of Section 1473.7, that opinion threatens to vitiate the law's critically important protections for thousands of California residents seeking to vacate legally invalid convictions that carry devastating immigration consequences, including mandatory

deportation. Left undisturbed, this decision will sow confusion in the courts at a time when the recently enacted law is first being interpreted.

II. BACKGROUND

This case involves the petition for post-conviction relief of Petitioner Robert Landeros Vivar, who immigrated lawfully into the United States from Mexico at the age of six and who, at the time of his plea in 2002, had been a lawful permanent resident of this country for 41 years. During those 41 years, Mr. Vivar was a hard-working resident of Riverside County, California. He married and had two children, one of whom entered the military and currently serves in active duty in the Air Force National Guard in California. Mr. Vivar now has six grandchildren. His entire extended family lives in California. Given that he left Mexico as a young child, Mr. Vivar never learned to speak Spanish natively.

Mr. Vivar was separated from his family when, in 2003, he was deported to Mexico. Unbeknownst to him at the time he entered his plea to California Health and Safety Code section 11383(c) (a controlled substance offense), that conviction subjected him to mandatory deportation. As the Court of Appeal correctly held, Mr. Vivar's public defender failed to advise him that a conviction under that statute would carry life-altering immigration consequences, including deportation and a lifetime bar to naturalization. The attorney's failure was compounded by the fact that she had also presented him with the option of pleading to an immigration-safe

charge (California Penal Code section 459, burglary), but again never advised him that that plea was the immigration-safe option.

Once Mr. Vivar learned that the conviction subjected him to mandatory deportation, it was too late to reverse course. Mr. Vivar immediately wrote *ex parte* letters to the trial court explaining that he had not known the conviction was deportable and that he never would have pled to that crime had he known. This evidence, as well as other substantial circumstantial evidence (*e.g.*, his family ties in the U.S. and lack of any remaining ties to Mexico; his inability to speak fluent Spanish; his wife's critical thyroid condition at the time of the plea; and his entire extended family's presence in California), demonstrate that, had Mr. Vivar been advised of the immigration consequences and the availability of an immigration-safe plea option, he would never have chosen to plead to the crime resulting in permanent banishment from this country and separation from his family.. But it is this evidence that the Court of Appeal declined to consider, even though it is the most probative evidence a litigant like Mr. Vivar could have about the way the failure to advise impacted his or her plea bargain decision-making.

The Court of Appeal adopted an erroneous rule permitting consideration only of *direct, contemporaneous* evidence from the precise moment when an individual considered and accepted a plea deal to determine whether that person would have made a different decision had

they been properly advised of immigration consequences. This rule demonstrates a lack of understanding of immigration law and the significance of deportation, and betrays common sense. In cases where counsel fail to advise their clients about immigration consequences, it is highly unlikely that there will be *direct* evidence that is perfectly contemporaneous with the entry of a guilty plea regarding whether a properly-advised defendant would have made a different choice. It is *precisely because* of the failure to advise and discuss immigration consequences that there would likely be no such record of a client's wishes.

III. ARGUMENT

This Court should reverse the Court of Appeal's decision and issue an opinion providing necessary guidance to lower courts on the interpretation of Section 1473.7. The Court of Appeal's restrictive rule on what evidence may be considered in evaluating prejudice writes into law two critical errors. First, it fundamentally misunderstands the legal and practical impacts of the criminal grounds for deportation. Second, the rule defies a commonsense understanding of what it means not to be advised about a consequence as severe as deportation—and thus what evidence would exist to show that a person would not choose deportation had they been presented that option.

A. The Court of Appeal Misapprehended Immigration Law and the Punishing Reality of Deportation for Long-Time Residents

As the U.S. Supreme Court recognized in *Padilla v. Kentucky* (2010) 559 U.S. 356, 364, "deportation 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." As a result, "the importance of accurate legal advice for noncitizens accessed of crimes has never been more important" following sweeping changes made to immigration laws in 1990 and 1996. (*Padilla*, *supra*, 559 U.S. at pp. 362-364.)

In 1996, Congress enacted two laws, the Anti-Terrorism and Effective Death Penalty Act ("AEDPA") and the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), that overhauled immigration law. The 1996 laws added 21 crimes to the definition of "aggravated felony,"[4] a category of deportable crimes first introduced into immigration law in 1988 and understood at that time to include only crimes of murder, drug trafficking, and trafficking in firearms.[5]

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[4] *See* Human Rights Watch, *Forced Apart: Families Separated and Immigrants Harmed by U.S. Deportation Policy*, July 16, 2007, at 18, https://www.hrw.org/report/2007/07/16/forced-apart/families-separated-and-immigrants-harmed-united-states-deportation [as of Feb. 20, 2020].

[5] American Immigration Council ("AIC"), *Aggravated Felonies: An Overview*, Dec. 16, 2016,

Today, an "aggravated felony," as it is defined in the Immigration and Nationality Act ("INA"), may be neither "aggravated" nor a "felony." Indeed, numerous non-violent misdemeanors are now considered "aggravated felonies" in immigration law, with the definition covering more than 30 types of offenses. Such offenses include misdemeanor theft, writing a bad check, filing a false tax return, and failing to appear in court—hardly what an average person would consider an "aggravated felony."[6] The 1996 laws also eliminated all forms of discretionary relief for people with convictions falling within the expanded "aggravated felony" definition, meaning that immigration judges were stripped of their ability to consider military service, long-term residence, and other factors in deciding whether to order deportation.[7] With the elimination of all prior forms of judicial discretion, deportation became *mandatory* for any noncitizen with an "aggravated felony"—with no ability for an immigration judge to balance equities, even for life-long residents.

It is against this backdrop that the U.S. Supreme Court recognized that the Sixth Amendment right to counsel requires defense counsel to accurately advise about immigration consequences of a criminal conviction.

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http://www.immigrationpolicy.org/sites/default/files/research/aggravated_felonies.pdf [as of Feb. 20, 2020].

[6] AIC, *Aggravated Felonies*, *supra* note 5; *see also* 8 U.S.C. § 1101(a)(43) (definition of aggravated felony); 8 U.S.C. § 1227(a)(2)(A)(iii) (aggravated felony grounds of removal).

[7] *See* AIC, *Aggravated Felonies*, *supra* note 5.

(*Padilla*, *supra*, 559 U.S. at p. 374 ["[W]e now hold that counsel must inform her client whether his plea carries a risk of deportation. Our longstanding Sixth Amendment precedents, the seriousness of deportation as a consequence of a criminal plea, and the concomitant impact of deportation on families living lawfully in this country demand no less"].)

And it is against this backdrop that, *as Respondents agree*, it is implausible that Mr. Vivar, a life-long resident of the United States, would have freely chosen to plead guilty to a crime that mandates deportation—including permanent separation from his family—had he been given that choice. Mr. Vivar's 2002 guilty plea to Health and Safety Code section 11383(c)—entered just six years after the 1996 laws—not only triggered grounds of removability, but, post-1996, required deportation from which he could seek no relief in immigration court. (See 8 U.S.C. §§1227(a)(2)(A)(iii), 1227(a)(2)(B).) As an "aggravated felony," this conviction also imposed a lifetime bar to future reentry to the United States and to naturalization. (See 8 U.S.C. § 1182(a)(9)(A) [lifetime bar to admission for any person convicted of an aggravated felony and previously removed]; 8 U.S.C. § 1427 [requiring "good moral character" for naturalization]; 8 U.S.C. §1101(f)(8) [aggravated felony is lifetime bar to "good moral character"].)

B. The Court of Appeal's Consideration Only of Contemporaneous Evidence, Even Where It Has Found Ineffective Assistance of Counsel, is Illogical

A rule that a court may only consider direct, contemporaneous evidence of a person's intentions to avoid deportation at the time of their guilty plea, even where, as here, it has found that counsel failed to advise about the risk of deportation, is illogical and defies commonsense. If counsel failed to advise about immigration consequences, then it is implausible to expect there would be a record of what an individual would choose if fully informed about the risk of deportation. In other words, the predicate condition for that kind of an assessment must be that the individual had enough information about the potential consequences to consider his options, let alone create a record of that deliberation. Put simply, where counsel never raised the risk of deportation, there can be no expectation of a record of a client considering it.

Instead, it will almost always be the case that the evaluation of prejudice to a defendant for not being advised of immigration consequences will depend on contextual evidence—that is, evidence of the severe impact that deportation would have in an individual's life and that probability that an individual would freely choose such a harsh consequence.

C. To Ensure a Uniform, Correct Application of the Law, this Court Should Reverse and Publish an Opinion with Guidance on Section 1473.7

Without this Court's intervention, the Court of Appeal's opinion in this case—making as it does the two critical errors described above—will cement an erroneous interpretation of the law and further exacerbate a split among the lower courts as to the prejudice standard in Section 1473.7. As Petitioner's briefs explain, this Court has yet to issue an authoritative interpretation of this statute. In its absence, the Courts of Appeal have issued published opinions articulating different rules for how a defendant must establish prejudice, leading to an inconsistent application of this critical law. The Court of Appeal's contribution in this case threatens to worsen this split and undermine the very purpose for which Section 1473.7 was enacted: to correct for California's failure to ensure effective representation for noncitizens accused of crimes, and to protect against unwarranted deportation and family separation.

Because of the importance of this law for *all* the statute's intended beneficiaries, Amici respectfully request that the Court go beyond a simple reversal correcting the outcome in this case and instead provide a necessary clarification of Section 1473.7's prejudice standard.

IV. CONCLUSION

For the reasons set forth herein, Amici respectfully urge this court to reverse the Court of Appeal's decision and publish an opinion issuing guidance on Section 1473.7.

Respectfully submitted,

ACLU Foundation of Southern California

ACLU Foundation of Northern California

ACLU Foundation of San Diego and Imperial Counties

Dated: October 13, 2020

By: Eva L. Bitran
Attorney for Amici

CERTIFICATE OF WORD COUNT

I certify pursuant to California Rules of Court 8.204(c)(1) that the foregoing Brief of Amici Curiae is proportionally spaced, has a typeface of 13 points or more, contains 2537 words, excluding the cover, tables, signature block, and this certificate, which is less than the total number of words permitted by the Rules of Court. Counsel relies on the word count of the Microsoft Word word-processing program used to prepare this brief.

Dated: October 13, 2020 By: Eva L. Bitran

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STATE OF CALIFORNIA
Supreme Court of California

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