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No. S269647

# In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,
*Plaintiff and Respondent,*

v.

JUVENTINO ESPINOZA,
*Defendant and Petitioner.*

Fifth District Court of Appeal, Case No. F079209
Tulare County Superior Court, Case No. VCF109133B-03
The Honorable Steven D. Barnes, Judge

## ANSWER TO PETITION FOR REVIEW

ROB BONTA (SBN 202668)
*Attorney General of California*
LANCE E. WINTERS (SBN 162357)
*Chief Assistant Attorney General*
MICHAEL P. FARRELL (SBN 183566)
*Senior Assistant Attorney General*
DARREN K. INDERMILL (SBN 252122)
*Supervising Deputy Attorney General*
RACHELLE A. NEWCOMB (SBN 173495)
*Deputy Attorney General*
*KARI RICCI MUELLER (SBN 260491)
*Deputy Attorney General*
1300 I Street, Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 210-7731
Fax: (916) 324-2960
Kari.Mueller@doj.ca.gov
*Attorneys for Plaintiff and Respondent*

September 1, 2021

## TABLE OF CONTENTS

**Page**


Issues Presented ........................................................................4

Introduction..............................................................................4

Statement of the Case ................................................................5

Reasons for Denial of Review .......................................................8

I. Defendant has not identified a division of authority regarding the statutory requirement that he show "prejudicial error" by a preponderance of the evidence .........8

II. The unique facts of defendant's case, including the Court of Appeal's doubts about defendant's general credibility, make it a poor vehicle for settling an important question of law ................................................... 11

Conclusion ............................................................................ 13

Certificate of Compliance .......................................................... 14

## TABLE OF AUTHORITIES

**Page**

**CASES**

*People v. Vivar*
(2020) 11 Cal.5th 510 ........................................................ *passim*

**STATUTES**

Health and Safety Code
§ 11350, subd. (a) ........................................................................ 6
§ 11366.5, subd. (a) ...................................................................... 5
§ 11379.6 ...................................................................................... 5

Penal Code
§ 182, subd. (a)(1) ........................................................................ 5
§ 273a, subd. (a) ........................................................................... 5
§ 1473.7 ................................................................................ *passim*
§ 1473.7, subd. (a)(1) .................................................................. 8

**COURT RULES**

California Rules of Court
Rule 8.500(b)(1) ................................................................ 5, 8, 11

## ISSUES PRESENTED

Defendant, Juventino Espinoza, has asked this Court to grant review on the following issue:

> Whether a defendant who submits unrebutted evidence that he was not advised by his attorney regarding the specific immigration consequences of his plea and that, had he been advised of the consequences he would have rejected the plea based on his desire to remain with his family in the United States, is entitled to relief under Penal Code section 1473.7.

(Pet. 4.)

## INTRODUCTION

In 2003, defendant was charged with crimes related to manufacturing large quantities of methamphetamine around children. In 2004, defendant agreed to plead no contest to some charges in exchange for the dismissal of other charges. Imposition of sentence was suspended, and the trial court granted defendant five years of formal probation with conditions that he serve 365 days in county jail and enroll in and complete a residential substance abuse treatment program. Although the record is sparse, defendant admitted that the trial court advised him that his plea to the offenses could result in deportation. Defendant, a longtime legal permanent resident whose wife and five children are all United States citizens, claims that he first learned of the adverse immigration consequences of his plea in 2015 when he returned to California after visiting family in Mexico.

Defendant filed two motions to vacate his plea pursuant to Penal Code section 1473.7, arguing that plea counsel had

committed prejudicial error by failing to advise him of the adverse immigration and penal consequences of his plea. Defendant argued that, due to his strong ties to the United States, he would not have accepted the plea had he known of the adverse immigration consequences. The superior court denied both motions, and defendant appealed the denial of the second motion. Applying this Court's decision in *People v. Vivar* (2020) 11 Cal.5th 510, the Fifth District Court of Appeal affirmed the judgment in an unpublished opinion, finding that defendant had not established "prejudicial error" because he failed to provide significant contemporaneous evidence to corroborate his claim that immigration was a material concern when he settled the case.

Review is not warranted because defendant has failed to identify a division of published authority in the appellate courts regarding application of this Court's decision in *Vivar*, and this case presents a fact-bound claim that will not settle an important question of law. (Cal. Rules of Court, rule 8.500(b)(1).)

## STATEMENT OF THE CASE

In 2004, defendant pled no contest to conspiracy to manufacture methamphetamine (Pen. Code,[1] § 182, subd. (a)(1); Health & Saf. Code, § 11379.6; count 1); providing space for manufacturing methamphetamine (Health & Saf. Code, § 11366.5, subd. (a); count 4); child endangerment (§ 273a, subd.

[1] Unless otherwise designated, all further statutory references are to the Penal Code.

(a); count 5); and possession of cocaine (Health & Saf. Code, § 11350, subd. (a); count 7). (CT 26-27, 147.) In exchange for defendant's plea, other drug-manufacturing charges and special allegations, including enhancements for large quantities of methamphetamine in the presence of children, were dismissed. (CT 22-23, 147.) Although the record regarding the change of plea and sentencing is sparse,[2] defendant admits that the trial court advised him that the offenses could result in deportation at the time of his plea. (See CT 30, 71, 115, 172; see also CT 53.)

At sentencing, defendant received a grant of five years formal probation.[3] (CT 26.) As a condition of probation, the court ordered him to serve 365 days in county jail. (CT 26-27.) The court also directed him to enroll in and complete a residential substance abuse treatment program while in custody. (*Ibid.*)

On February 24, 2015, defendant was notified that his prior convictions subjected him to removal from the United States. (CT 93-95, 165-167.)

On March 9, 2018, defendant filed a motion to vacate his convictions pursuant to section 1473.7 based on counsel's failure

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[2] Information regarding defendant's change of plea was not attached in support of his motion to withdraw his plea, and neither the reporter's transcript from the change of plea hearing nor from the February 2, 2004, sentencing hearing are part of the record in this appeal.

[3] According to defendant, the trial court suspended execution, rather than imposition, of a nine-year, eight-month sentence. (Pet. 5.) But the sentencing hearing minute order states, "Imposition of sentence suspended during this term [of probation]." (CT 26.)

to inform defendant of the immigration and immediate penal consequences of his plea.[4] (CT 66-117.) Following a contested hearing on June 20, 2018, the trial court denied the motion because the record did not support defendant's claim of ineffective assistance of counsel, and the motion was untimely. (CT 143; 2RT 22.) Defendant did not file a notice of appeal.

On March 18, 2019, defendant filed a "renewed" motion to vacate the judgment based on recent amendments to section 1473.7. (CT 144-211.) On April 9, 2019, the court found that defendant had failed to provide sufficient evidence of prejudicial error and denied the motion. (CT 223.)

Defendant appealed from the trial court's denial of his renewed motion to vacate his convictions. (CT 224.) He argued that the trial court erred in denying his motion because he was not meaningfully informed of the immigration consequences prior to his plea, did not knowingly accept those consequences, and would have insisted on proceeding to trial had he known of the immigration consequences due to his strong familial ties to the United States and lack of ties to Mexico. (AOB 12-21.) On May 28, 2021, the California Court of Appeal, Fifth Appellate District, rejected defendant's contentions and affirmed the judgment based on its determination that defendant had failed to corroborate his claim that immigration was a material concern at

[4] Defendant had filed a "nonstatutory" motion to vacate his convictions based on ineffective assistance of counsel in November 2017, which was denied as untimely in December 2017. (CT 28-51, 65.)

the time he settled his case with any significant contemporaneous evidence.

On July 2, 2021, defendant filed a petition for review with this Court.

## REASONS FOR DENIAL OF REVIEW

### I. DEFENDANT HAS NOT IDENTIFIED A DIVISION OF AUTHORITY REGARDING THE STATUTORY REQUIREMENT THAT HE SHOW "PREJUDICIAL ERROR" BY A PREPONDERANCE OF THE EVIDENCE

Defendant asks this Court to grant review on the issue of whether a defendant establishes "prejudicial error" under section 1473.7 by submitting "unrebutted evidence" that the defendant was not meaningfully informed of the immigration consequences and did not knowingly accept those consequences prior to entering a negotiated plea. (Pet. 8.) In determining that defendant failed to establish prejudicial error under section 1473.7, the Fifth District Court of Appeal reasonably applied this Court's recent decision in *Vivar*. Because defendant has failed to identify a division of published authority in the appellate courts regarding application of *Vivar*, review is not necessary to secure uniformity of decision. (Cal. Rules of Court, rule 8.500(b)(1).)

This Court's decision in *Vivar* set forth the legal definition of "prejudicial error" under section 1473.7, subdivision (a)(1), explaining that a defendant must demonstrate "a reasonable probability that the defendant would have rejected the plea if the defendant had correctly understood its actual or potential immigration consequences." (*Vivar*, *supra*, 11 Cal.5th at p. 529.) To determine whether the defendant has shown a "reasonable probability," courts must consider the totality of the

circumstances. (*Ibid.*) The Court also identified several factors "particularly relevant" to the inquiry, including "the defendant's ties to the United States, the importance the defendant placed on avoiding deportation, the defendant's priorities in seeking a plea bargain, and whether the defendant had reason to believe an immigration-neutral negotiated disposition was possible." (*Id.* at pp. 529-530.) It is not enough simply to assert that counsel erred by failing to inform (or misinforming) a defendant of the immigration consequences at the time of the plea; the error must also be prejudicial. (*Id.* at p. 528.) Accordingly, when a defendant seeks to withdraw a plea based on inadequate advisement of immigration consequences, the assertions must be corroborated with """objective evidence."""  (*Id.* at p. 530.)

In this case, the Court of Appeal's opinion faithfully applied *Vivar* and reasonably considered all of the relevant factors and evidence in the record before concluding that defendant failed to establish prejudicial error under section 1473.7. (Opn. 4-7.) The appellate court first observed that defendant's claim was based entirely on his own declaration and "devoid of any objective corroborating evidence." (Opn. 5-6.) The court also noted that defendant had failed to provide any evidence from his plea counsel, such as notes or a declaration, to corroborate his concerns regarding immigration at the time of his plea. (Opn. 6, 7.) In addition, defendant failed to provide contemporaneous evidence corroborating his claim that immigration consequences were of such a paramount concern that he would have pursued a resolution that would have avoided or mitigated adverse

immigration consequences notwithstanding its viability. (Opn. 6.)

Contrary to defendant's claim (Pet. 10), the appellate court did not fail to apply the independent standard of review or fail to consider any particular evidence. Defendant proffered four biographical facts from the time of his plea to demonstrate prejudice: (1) he had a job, (2) he was a legal permanent resident, (3) he had a wife who was a United States citizen, and (4) he had several minor children, all of whom were United States citizens. (CT 172, 177-191, 193, 198, 200-206, 208-210.) The Court of Appeal found that defendant's biographical history was the "sole corroborating evidence in the record" to support his claim of prejudicial error and agreed that "his history present[ed] a sympathetic case for relief." (Opn. 6.) But the appellate court ultimately, and reasonably, found that this evidence was unpersuasive given the lack of any other significant contemporaneous evidence to objectively corroborate the claim that immigration was a material concern at the time he settled his case and the large benefit that defendant received by entering into the plea agreement. (*Ibid.*)

In upholding the denial of defendant's section 1473.7 motion, the Court of Appeal did not create a division of authority, as no published authority has held that the facts proffered by defendant necessarily establish prejudice either individually or collectively. Defendant fails to explain why review is necessary to secure uniformity of decision. Accordingly, review should be denied.

## II. THE UNIQUE FACTS OF DEFENDANT'S CASE, INCLUDING THE COURT OF APPEAL'S DOUBTS ABOUT DEFENDANT'S GENERAL CREDIBILITY, MAKE IT A POOR VEHICLE FOR SETTLING AN IMPORTANT QUESTION OF LAW

This Court may also order review of a Court of Appeal decision when review is necessary to settle an important question of law. (Cal. Rules of Court, rule 8.500(b)(1).) But defendant has failed to explain why review is necessary to settle an important question of law. Instead, defendant's petition presents factual arguments, disagrees with the Court of Appeal's exercise of its independent judgment, and claims that the Court of Appeal should have reached a different result. (Pet. 8-11.) Because this case presents a fact-bound claim that will not settle an important question of law, review should be denied.

As this Court made clear in *Vivar*, "[u]ltimately it is for the appellate court to decide, based on its independent judgment, whether *the facts* establish prejudice under section 1473.7." (*Vivar, supra,* 11 Cal.5th at p. 528, italics added.) Thus, the claim raised by defendant is necessarily fact-bound.

Here, as Respondent has shown, *ante*, the Court of Appeal reviewed all the evidence in the record and relied upon its independent judgment to conclude that defendant failed to sufficiently corroborate his assertions of prejudicial error under section 1473.7. (Opn. 5-7.) In upholding the denial of defendant's petition, the Court of Appeal expressed "material doubt" about defendant's credibility. The appellate court noted the possibility that defendant failed to contemporaneously memorialize his immigration concerns because, according to defendant, he did not learn about them until more than 10 years after his conviction.

(Opn. 7.) But the court found defendant's claim to be incredible because he *also* claimed that plea counsel had failed to inform him of the penal consequences he faced due to his plea. (*Ibid.*; see also CT 68, 71-72, 137-139, 141.) Yet there was no evidence that defendant expressed any "on-the-record confusion [or] hesitation when actually incarcerated—despite claiming he was caught unaware." (Opn. 7.) Nor did defendant write any letters "documenting his lament at incarceration." The appellate court found that "[t]his evidentiary void cast[] material doubt on [defendant's] credibility." (*Ibid.*)

While reasonable minds can disagree as to the Court of Appeal's exercise of its independent judgment and credibility determination, these are necessarily fact-bound determinations made by the Court of Appeal when independently reviewing the denial of relief under section 1473.7. The Court of Appeal's opinion in this case faithfully and reasonably applied *Vivar*, and defendant's petition amounts to a request for, at most, error correction. But, as Respondent has demonstrated, error is not immediately apparent from the Court of Appeal's application of *Vivar*.

For these reasons, defendant has failed to explain or show why review is necessary to settle an important question of law, and his petition for review should be denied.

## CONCLUSION

Accordingly, respondent respectfully requests that the petition for review be denied.

Respectfully submitted,

ROB BONTA
*Attorney General of California*
LANCE E. WINTERS
*Chief Assistant Attorney General*
MICHAEL P. FARRELL
*Senior Assistant Attorney General*
DARREN K. INDERMILL
*Supervising Deputy Attorney General*
RACHELLE A. NEWCOMB (SBN 173495)
*Deputy Attorney General*

/S/ Kari Ricci Mueller

KARI RICCI MUELLER
*Deputy Attorney General*
*Attorneys for Plaintiff and Respondent*

September 1, 2021

## CERTIFICATE OF COMPLIANCE

I certify that the attached ANSWER TO PETITION FOR REVIEW uses a 13 point Century Schoolbook font and contains 2,063 words.

ROB BONTA
*Attorney General of California*

/S/ *Kari Ricci Mueller*

KARI RICCI MUELLER
*Deputy Attorney General*
*Attorneys for Plaintiff and Respondent*

September 1, 2021

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No.: **S269647**

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**Stephen K. Dunkle, Esq.**
**SANGER SWYSEN & DUNKLE**
**222 E. Carrillo Street, Suite 300**
**Santa Barbara, CA 93101**
**[Courtesy Copy for Counsel's Client]**
**[Attorney for Appellant]**

**Clerk of the Court**
**Tulare County Superior Court**
**221 South Mooney Blvd., Room 124**
**Visalia, CA 93291**

**Honorable Tim Ward**
**Tulare County District Attorney**
**221 South Mooney Blvd., Suite 224**
**Visalia, CA 93291**

**Fifth District Court of Appeal**
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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 September 1, 2021, at Sacramento, California.

| M. Latimer | /s/ *M. Latimer* |
|---|---|
| Declarant | Signature |

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Mueller, Kari (260491)
Last Name, First Name (PNum)

DOJ Sacramento/Fresno AWT Crim
Law Firm