

Supreme Court No. S269647
Court of Appeal No. F079209
Superior Court No. VCF109133B
(Tulare County)

IN THE SUPREME COURT OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

vs.

JUVENTINO ESPINOZA,

Defendant and Petitioner.

REPLY TO ANSWER TO PETITION FOR REVIEW

Appeal from Order After Judgment of the Superior Court
Of Tulare County, The Honorable Steven Barnes, Judge
Presiding

SANGER SWYSEN & DUNKLE

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ARGUMENT

I. THE COURT SHOULD GRANT REVIEW TO DECIDE 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

Following the issuance of this Court's opinion in *People v. Vivar* (2021) 11 Cal.5th 510, two published opinions have issued in the Court of Appeal applying *Vivar* to very similar facts to the present case to find prejudicial error. (*People v. Rodriguez* (Cal. Ct. App., Aug. 30, 2021, No. A159679) 2021 WL 3854889; *People v. Perez* (Cal. Ct. App., Aug. 17, 2021, No. F080837) 2021 WL 3629080.) These opinions conflict with the opinion in Petitioner's case.

In *People v. Rodriguez* (Cal. Ct. App., Aug. 30, 2021, No. A159679) 2021 WL 3854889, the defendant submitted a declaration from her immigration attorney in support of her Penal Code section 1473.7 motion stating that: (1) she was currently married to a United States citizen; (2) her mother and father were a U.S. citizen and a lawful permanent resident,

respectively; (3) her four siblings are U.S. citizens; and (4) all of her immediate family members resided in the United States, including her 4 children who were born in the U.S. and were citizens. (*People v. Rodriguez* (Cal. Ct. App., Aug. 30, 2021, No. A159679) 2021 WL 3854889, at *9.) The Court of Appeal found that this showing “plainly met this ‘reasonable probability’ standard.” (*Id.* at 14.) The court found “Rodriguez's deep, lifelong ties to the United States” to be very similar to those considered by this Court in *Vivar*. (*Ibid.*) The Court of Appeal stated:

Given these circumstances, and in light of her deep, lifelong bonds in the United States, we fail to see how any court could confidently look back and conclude that if she had understood the consequences of her plea, Rodriguez would not have bargained for an immigration-neutral plea deal or risked going to trial in an effort to avoid certain deportation.

(*Id.* at 15.)

In *People v. Perez* (Cal. Ct. App., Aug. 17, 2021, No. F080837) 2021 WL 3629080, a different panel of the Fifth District Court of Appeal than the panel who decided Petitioner’s case applied *Vivar* to hold that the fact that the defendant: (1) had spent the last 16 years of his life in the United States; (2) had been a legal permanent resident for approximately five years; (3) had virtually no ties to Mexico; and (4) that his parents were legal permanent residents of the United States provided “sufficient corroboration and establish a reasonable probability that Perez would not have entered the plea that resulted in his deportation if he had meaningfully understood the immigration consequences at the time of his plea and, instead, would have

risked going to trial if he had known he was going to be deported as a result of his plea.” (*People v. Perez* (Cal. Ct. App., Aug. 17, 2021, No. F080837) 2021 WL 3629080, at *9.)

The application of *Vivar* in *Rodriguez* and *Perez* is inconsistent with how it was applied by the Court of Appeal in this case. Respondent asserts that the Court of Appeal reasonably applied *Vivar* to find that Petitioner’s showing of his biographical history as the sole corroborating evidence was insufficient to show prejudicial error. (Answer, p. 10.) However, following *Vivar*, these exact sort of unrebutted biographical facts are precisely what the Court of Appeal relied upon to find clear prejudicial error in *Rodriguez* and *Perez*. Here, the unrebutted biographical facts that Petitioner had resided in the United States for 18 years at the time of the plea and that all of his close family resided in the United States, including his wife and children who were U.S. citizens, establish it is probable that he would not have accepted the plea had he been properly advised.

The opinion in this case purports to distinguish *Vivar* by noting that “the defendant [in *Vivar*] quickly learned of adverse immigration consequences after his conviction by plea and ‘promptly sent a series of letters to the court expressing confusion about the situation ...’ (*Vivar, supra*, 2021 WL 1726827, at *3.)” (Opn., p. 7.) The Court of Appeal further states that, “[i]mportantly, these letters were written ‘at or near the time of his plea’ and memorialized concerns about immigration. (*Vivar, supra*, 2021 WL 1726827, at *10.)” (*Ibid.*) However, in contrast, the Court of Appeal in *Rodriguez* and *Perez* required no such

showing that contemporaneous evidence be memorialized in some fashion at the time of the plea. Here, the unrebutted evidence in the trial court established was that Petitioner was not meaningfully informed of the immigration consequences and did not knowingly accept those consequences prior to entering his plea.

A faithful application of this Court's opinion in *Vivar* dictates that Petitioner be granted relief under Penal Code section 1473.7. In contrast to *Rodriguez* and *Perez*, the Court of Appeal opinion in this case gives short shrift to *Vivar* and fails to review the record independently regarding the substantial contemporaneous evidence at or near the time of Petitioner's plea corroborating his claim that he wouldn't have pleaded guilty if he'd known it would result in his deportation from his life in the United States. Review is necessary to secure uniformity of decision and to settle an important question of law

CONCLUSION

For the reasons stated above and in the petition, Petitioner respectfully requests that this Court grant review.

Dated: September 9, 2021

Respectfully submitted,

SANGER SWYSEN & DUNKLE

By: /s/ Stephen K. Dunkle
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CERTIFICATE OF WORD COUNT

California Rules of Court, Rule 8.504

I have run the “word count” function in Microsoft Word and hereby certify that this brief contains 957 words, including footnotes.

Dated: September 9, 2021

/s/ Stephen K. Dunkle
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PROOF OF SERVICE

I, the undersigned declare:

I am over the age of 18 years and not a party to the within action. I am employed in the County of Santa Barbara. My business address is 222 E. Carrillo St., Ste. 300, Santa Barbara, California, 93101.

On September 9, 2021, I served the foregoing document entitled: **REPLY TO ANSWER TO PETITION FOR REVIEW** on the interested parties in this action by depositing a true copy thereof as follows:

SEE ATTACHED SERVICE LIST

X **BY ELECTRONIC TRANSMISSION** - I caused the above referenced document(s) to be transmitted via electronic transmission to the interested parties at the email addresses referenced in the attached service list.

X **BY U.S. MAIL** - I am readily familiar with the firm's practice for collection of mail and processing of correspondence for mailing with the United States Postal Service. Such correspondence is deposited daily with the United States Postal Service in a sealed envelope with postage thereon fully prepaid and deposited during the ordinary course of business. Service made pursuant to this paragraph, upon motion of a party, shall be presumed invalid if the postal cancellation date or postage meter date on the envelope is more than one day after the date of deposit.

X **STATE** - I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed September 9, 2021, at Santa Barbara, California.

/s/ Jake Swanson
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