

Case No. S260270

IN THE SUPREME COURT OF CALIFORNIA

The People of the State of California,

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
Riverside County Superior Court, Case No. RIF101988
(Hon. Bambi J. Moyer)

**APPLICATION TO FILE *AMICI CURIAE* BRIEF AND
BRIEF OF FORMER PROSECUTORS AND PUBLIC
DEFENDERS IN SUPPORT OF PETITIONER
ROBERT LANDEROS VIVAR**

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APPLICATION TO FILE *AMICI CURIAE* BRIEF

Pursuant to rule 8.520(f) of the California Rules of Court, Alyssa Bell, Reuven Cohen, Ingrid Eagly, Gilbert Garcetti, Meline Mkrtichian, Ronald Nessim, Gabriel Pardo, and Jennifer Resnik request permission to file the attached *amici curiae* brief.¹

Amici are a group of former public defenders and prosecutors with many decades of criminal-justice experience at the federal and state levels. The issues presented in this appeal are of particular importance to *amici*, who have long had an interest in ensuring that prosecutors enforce the law fairly and consistently and that the rights of defendants are respected under the law.² Accordingly, *amici* request leave to file the attached *amici curiae* brief, in which they argue that the Court should hold that (1) courts should consider defendants' basic biographical facts, such as how long they have lived in the United

¹ No party or counsel for party in this case authored the proposed brief in whole or in part or made a monetary contribution intended to fund the preparation or submission of the proposed brief. No person or entity other than *amici* or their counsel made a monetary contribution intended to fund the preparation or submission of the proposed brief.

² Additional information regarding *amici* is included in the attached Appendix of Signatories.

States, in deciding whether they were prejudiced by counsel's ineffective assistance, and (2) *de novo* review applies to cases decided on a cold record.

For these reasons, the proposed *amici curiae* respectfully request that the Court accept the enclosed brief for filing and consideration.

DATED: October 12, 2020

Respectfully submitted,

GIBSON, DUNN & CRUTCHER LLP

By: /s/ Daniel R. Adler
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AMICI CURIAE BRIEF

I. Introduction

Although the government has appropriately conceded error, only one of its proposed dispositions of this case—a published decision reversing the Court of Appeal’s judgment—is appropriate. Transferring the case would not clarify the prejudice and standard-of-review issues it presents, both of which are important and recurring in section 1473.7 cases as well as other cases.

Prosecutors and defense attorneys alike would benefit from the guidance of this Court, which would also focus disputes in trial courts and limit the volume of appeals. Prosecutors in particular would benefit. Though they are zealous advocates for the People, they also have an interest in the just and consistent resolution of cases—an interest underscored by their statutory duty to “consider the avoidance of adverse immigration consequences in the plea negotiation process.” (Pen. Code, § 1016.3, subd. b.) Given the inconsistency in the decisions of the Courts of Appeal concerning both of the issues presented here, the government’s concession of error is insufficient to give

prosecutors clear direction and to minimize disputes over what should be settled issues.

The Court should publish a decision holding that (1) courts must take into account defendants' basic biographical facts, such as the extent of their ties to this country and their countries of origin, that would influence those defendants' decisions to accept or fight deportation, and (2) *de novo* review applies in cases decided on a cold record.

II. Argument

A. **The Court should issue a decision holding that courts must take into account basic biographical facts that would influence a defendant's decision to accept or fight deportation**

Courts of Appeal have disagreed as to how defendants like Mr. Vivar—claiming that ineffective assistance of counsel caused them to accept guilty pleas exposing them to deportation—must prove that they were prejudiced. Some courts have sensibly looked to defendants' basic biographical facts—the extent of their competing ties to the United States and to their countries of origin—to determine whether they had good reason to accept or fight deportation. (See, e.g., *People v. Mejia* (2019) 36 Cal.App.5th 859, 872 [defendant had lived in the U.S. since he

was 14, his entire family lived in the U.S., and no family lived in Mexico]; *People v. Camacho* (2019) 32 Cal.App.5th 998, 1011 [defendant had lived in U.S. for over 30 years, was married to an American citizen, and had citizen children]; *People v. Espinoza* (2018) 27 Cal.App.5th 908, 917 [defendant had resided in the U.S. since he was four].) That approach comports with the experience of *amici*, who agree that defendants are prejudiced by their lawyers' ineffective assistance when they plead guilty despite having every reason to fight deportation—such as spouses and children living in, and a history of employment in, the United States—and no reason to embrace a return to countries they barely know.

Notwithstanding the persuasive authorities focusing on defendants' basic biographical facts, other courts, including the Court of Appeal in this case, have disregarded such facts and insisted on something more. (See, e.g., *People v. Vivar* (2019) 43 Cal.App.5th 216, 229–231; *People v. Garcia* (Nov. 21, 2019, No. E070383) (unpublished).) In the view of *amici*, it is unreasonable to insist on concrete evidence of what defendants might have done had they been properly advised by their attorneys as to the immigration consequences of pleading guilty.

Instead, in this inherently counterfactual exercise, courts must look to the factors that would weigh most heavily on that decision—typically, in *amici*'s experience, the extent of defendants' competing ties to the United States and to their countries of origin.

That courts continue to reach the wrong result means that an opinion from this Court is necessary. The Court should reject the proposition that defendants like Mr. Vivar—who at the time of his plea had extensive ties to the United States and effectively no ties to Mexico apart from being born there—must show something more than the basic facts that would have motivated them to fight deportation.

B. The Court's decision should also hold that *de novo* review applies in cold-record cases

In cases decided on a cold record, this Court has repeatedly held the standard of review is *de novo*. (E.g., *People v. Avila* (2006) 38 Cal.4th 491, 529; *In re Rosenkrantz* (2002) 29 Cal.4th 616, 677; see also, e.g., *Flores v. Axxis Network & Telecommc'ns, Inc.* (2009) 173 Cal.App.4th 802, 805; *Marcus & Millichap Real Estate Inv. Brokerage Co. v. Hock Inv. Co.* (1998) 68 Cal.App.4th 83, 89.)

Although some courts have reached the same conclusion in section 1473.7 cases (e.g., *People v. Ogunmowo* (2018) 23 Cal.App.5th 67, 79), others, including the Court of Appeal in this case, have deferred to “findings” made by trial courts on a cold record. (E.g., *Vivar*, 43 Cal.App.5th at p. 230; *People v. Tapia* (2018) 26 Cal.App.5th 942, 951.)

The standard of review applied to cases frequently determines their outcome. As a result, litigants have a strong incentive, absent controlling authority, to contest the standard of review applicable to the disputed issues in any appeal. Without guidance from this Court, disputes over the standard of review are likely to multiply—especially because most section 1473.7 cases, including this one, are cold-record cases in which defendants did not seek to introduce, or trial courts did not permit them to introduce, live testimony in addition to declarations.

The Court should issue a decision confirming that *de novo* review applies in *all* cases decided on a cold record, and that

cases brought under section 1473.7 are no exception to that general rule.

III. Conclusion

Section 1473.7 is an important statute of great public concern. Courts of Appeal have disagreed on its application, and such disagreements may persist, notwithstanding the government's concession of error, unless this Court issues a published decision offering much-needed guidance to lower courts.

DATED: October 12, 2020

Respectfully submitted,

GIBSON, DUNN & CRUTCHER LLP

By: /s/ Daniel R. Adler
Daniel R. Adler

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief conforms to California Rules of Court, rules 8.520 and 8.204, and that it contains 972 words in 13-point New Century Schoolbook font, as calculated by Microsoft Word 2016.

Dated: October 12, 2020

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Appendix of Signatories

1. **Alyssa Bell** served as a Deputy Federal Public Defender in the Office of the Federal Public Defender in the Central District of California.
2. **Reuven Cohen** served as a Deputy Federal Public Defender in the Office of the Federal Public Defender in the Central District of California.
3. **Professor Ingrid V. Eagly** served as a Deputy Federal Public Defender in the Office of the Federal Public Defender in the Central District of California.
4. **Gilbert Garcetti** served two terms as Los Angeles County's 40th District Attorney.
5. **Meline Mkrtichian** served as a Deputy District Attorney in the Los Angeles County District Attorney's Office.
6. **Ronald J. Nessim** served as an Assistant United States Attorney in the Central District of California.
7. **Gabriel Pardo** served as a Deputy Federal Public Defender in the Office of the Federal Public Defender in the Central District of California.
8. **Jennifer Resnik** served as an Assistant United States Attorney in the United States Attorney's Office for the Central District of California.

CERTIFICATE OF SERVICE

I certify that today, October 12, 2020, a true and correct copy of the foregoing *Amici Curiae* brief has been electronically served on the following persons via TrueFiling:

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X (STATE) I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
Executed on October 12, 2020, in Los Angeles, California.

Dated: October 12, 2020



Daniel Adler

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.

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Date

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