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# Ties to U.S. must be considered in criminal-related deportations

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At the end of January, the California Supreme Court ruled that Juventino Espinoza, a longtime permanent resident who pleaded no contest to a criminal charge without being advised that the conviction would lead to his deportation, could vacate that uninformed guilty plea under Penal Code section 1473.7. The Court's unanimous opinion in *People v. Espinoza*, No. S269647, held that a noncitizen in Mr. Espinoza's position can show that, if properly advised, he would have made a different decision about a plea deal using any objective evidence, including evidence showing his connections to the United States.

*Espinoza* represents an important elaboration on the Court's 2021 opinion in *People v. Vivar*. In *Vivar*, the Court held that noncitizens seeking section 1473.7 relief from a guilty plea must show it is reasonably likely that they would have rejected the plea if properly counseled about its immigration consequences. Some lower courts had read *Vivar* to require the specific evidence presented in that case – contemporaneous writings showing that the noncitizen was specifically concerned about immigration consequences when he pleaded guilty. In *Espinoza*, the Court rejected that difficult-to-satisfy requirement, emphasizing

that noncitizens can rely on many types of evidence in seeking relief.

### *Vivar* and section 1473.7 relief

Anyone charged with a crime and considering a potential plea agreement has the right to advice from an attorney. For noncitizens, one of the most important factors in considering a plea is whether the resulting conviction will subject them to deportation or other immigration consequences. But too often, noncitizens – many of whom do not speak English and have little familiarity with our justice system – are not properly informed about the immigration consequences of a plea. Those noncitizens may learn that their guilty pleas, including pleas resulting in little to no jail time, make them deportable only months, years, or even decades later.

In 2017, the Legislature addressed this problem by enacting section 1473.7, which allows anyone “no longer in criminal custody” to “file a motion to vacate a conviction” that “is legally invalid due to prejudicial error” affecting the noncitizen’s “ability to meaningfully understand, defend against, or knowingly accept the actual or potential adverse immigration consequences of a plea.”

In 2021, the California Supreme Court took up the case of Robert Vivar. He came to the United States from Mexico when he was six. He obtained lawful immigration status and had a family here. Decades after arriving, he became addicted to amphetamines and, after stealing Sudafed from a grocery store,

pleaded guilty to a drug offense. He was sentenced to three years’ probation and referred to a substance-abuse treatment program. But when he went to sign up for the program, he learned he was ineligible because his plea carried immigration consequences of which he was unaware. Mr. Vivar wrote letters expressing confusion about those consequences, and years later, after he was deported to Mexico, he sought relief under section 1473.7.

In *Vivar*, the Court held that noncitizens can show “prejudicial error” under section 1473.7 if they demonstrate a reasonable probability that they would have rejected the plea had they been advised of its immigration consequences. In analyzing that question, courts should consider the totality of the circumstances. In Mr. Vivar’s case, that analysis was straightforward: He was a longtime U.S. resident with extensive family ties in the country and no ties to Mexico, he expressed how important avoiding deportation was to him, and he could have entered a plea with no immigration consequences.

### Lower courts struggle to interpret *Vivar*

Although Mr. Vivar’s case was typical of the problem the Legislature wanted to address in section 1473.7, it was atypical in one respect: Mr. Vivar learned of the immigration consequences of his plea almost immediately after entering it, when he went to sign up for the drug treatment program. That contemporaneous evidence of the impor-

tance of avoiding deportation was one of the factors the California Supreme Court considered in granting relief. Some lower courts took that feature of Mr. Vivar’s case to be a necessary part of the rule the Court announced, holding that a noncitizen seeking relief under section 1474.7 *had* to present such contemporaneous evidence to get relief.

That is what the California Court of Appeal held in Mr. Espinoza’s case. He came to California from Mexico when he was thirteen. He obtained lawful permanent residence, bought a house, provided for his family, and took care of his parents. In 2003, Mr. Espinoza – who had no prior criminal history – pleaded no contest to several drug offenses after his attorney told him that “everything was going to be fine.” He served one year in jail. More than a decade later, Mr. Espinoza left the country for a trip; he was detained when he came back and filed a section 1473.7 motion to vacate his conviction and restore his lawful status. But the trial court and Court of Appeal rejected his motion, holding that there was insufficient contemporaneous evidence around the time of his plea that he wanted to avoid deportation.

### The Supreme Court corrects course in *Espinoza*

The California Supreme Court reversed. It emphasized that courts considering section 1473.7 motions must consider the totality of the circumstances, including “the defen-

dant'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." Moreover, it explained that although noncitizens must provide "objective evidence" that they were prejudiced by the bad advice they got from counsel, that evidence is not limited to contemporaneous documentation of noncitizens' concerns and can include testimony and declarations from the noncitizens themselves or from their family members, friends, colleagues, or neighbors.

The Supreme Court explained that contemporaneous evidence like what Mr. Vivar presented will not be available in most cases. Noncitizens often don't learn of the immigration consequences of pleas for years or even decades. Noncitizens in that position should not be barred from seeking relief just because they were unaware of the consequences at the time; that is, after all, the very basis for their motions in the first place. Trial courts can assess a noncitizen's claim in light of a wide range of evidence, including declarations and live testimony showing how keen the noncitizen would have been to avoid deportation.

The Supreme Court's decision in *Espinoza* is a vital reinforcement of section 1473.7 and the rule announced in *Vivar*. Without the Court's intervention, lower courts could have made it effectively impossible for noncitizens to obtain relief from uninformed guilty pleas, even in cases where they were blatantly misinformed and had every incentive and ability to avoid unwanted immigration consequences. As a result of the decision, noncitizens seeking relief under section 1473.7 will refocus their attention on proving prejudicial error under the totality-of-the-circumstances framework, gathering as much objective evidence as they can of their ties to the United States and their reasons for and ability to seek an immigration-neutral outcome.

**Kahn Scolnick, Daniel Adler, Matt Aidan Getz, Patrick Fuster and Emily Saur**, all lawyers at Gibson, Dunn & Crutcher LLP, represented a distinguished group of former prosecutors and public defenders who served as amici in support of Mr. Espinoza.

