S269647

Supreme Court No. _____
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.

PETITION FOR REVIEW

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

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TO THE HONORABLE CHIEF JUSTICE OF THE STATE OF CALIFORNIA, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT:

Petitioner Juventino Espinoza, through his attorneys, Sanger Swysen & Dunkle by Stephen K. Dunkle, and pursuant to Rule 8.500(a)(1), petitions this Court for review of the Court of Appeal's unpublished opinion filed on May 28, 2021, affirming the denial of his Penal Code section 1473.7 motion. (Exhibit A, slip opinion attached and cited as "Opn." or "Opinion.") Petitioner seeks review for the purpose of securing uniformity of decision and settling an important question of law (Rule 8.500(b)(1)) and for such other and further relief as this Court may deem just and proper.

ISSUES PRESENTED FOR REVIEW

This case presents the following issue for review:

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?

GROUNDS FOR REVIEW

A grant of review is necessary to secure uniformity of decision and to settle an important question of law pursuant to Rule 8.500(b)(1) of the California Rules of Court.

STATEMENT OF FACTS

Petitioner is a citizen of Mexico and has been a Lawful Permanent Resident of the United States since 1986. (CT 146.) His wife and five children are United States citizens. (*Ibid*.) His parents and siblings all reside in the United States. (*Ibid*.)

Following an investigation into suspected methamphetamine manufacturing by Tulare County law enforcement officials, Petitioner and five others were charged in a felony complaint. (CT 146-147.) After a preliminary hearing, Petitioner was charged in a first amended felony information on July 15, 2003 with conspiracy to manufacture methamphetamine in violation of Penal Code section 182(a)(1), manufacturing a controlled substance in violation of Health and Safety Code section 11379.6(a), possession of methamphetamine analogs with intent to manufacture methamphetamine in violation of Health and Safety Code section 11383(c), allowing a place for preparation or storage of a controlled substance in violation of Health and Safety Code section 11366.5(a), child abuse in violation of Penal Code section 273a(a) and possession of a controlled substance in violation of Health and Safety Code section 11350. (CT 20-25; 147.)

On January 5, 2004, Petitioner pled no contest to violations of Penal Code section 182(a), Health and Safety Code section 11366.5(a), Penal Code section 273a(a) and Health and Safety Code section 11350. (CT 26-27; 147.) On February 2, 2004, the court sentenced Petitioner to 9 years, 8 months and suspended the execution of sentence for five years, with 365 days in the

county jail to be served as a condition of probation. (CT 26-27; 147; 173.)

Petitioner was not informed by his attorney that entering pleas to the charges would result in his deportation, exclusion from admission to the United States and denial of naturalization. (CT 172; 175.) He was instead told by his attorney that, if he pleaded no contest, everything would be fine. (CT 173; 175.) Had he been meaningfully informed of those consequences, he would not have accepted the government's offer and would have taken the case to trial, given his strong ties to the United States. (CT 172; 175.)

In 2015, Petitioner first learned of the adverse immigration consequences of his convictions when immigration authorities commenced removal proceedings upon his return from Mexico at the Fresno airport. (CT 148; 165-167; 176.) In fact, Petitioner's conviction under Health and Safety Code section 11366.5 is a controlled substance offense and crime of moral turpitude which renders him subject to removal. (CT 169.) It is also an aggravated felony for immigration purposes. (*Ibid*.) The conviction significantly precludes Petitioner's opportunity for relief from removal as it makes him ineligible, as a noncitizen convicted of an aggravated felony, from most forms of relief under immigration law. (*Ibid*.) He would otherwise be eligible for Cancellation of Removal. (*Ibid*.) His conviction under Health and Safety Code section 11350(a) for possession of cocaine also makes him removable as it is a controlled substance offense. (*Ibid*.) His conviction under Penal Code section 182(a)(1) for

conspiracy to violate Health and Safety Code section 11379.6 is also a controlled substance offense. (*Ibid*.) Furthermore, his conviction under Penal Code section 273a(a) is a deportable offense as a crime of child abuse. (*Ibid*.) As a result of the plea, Petitioner is in grave danger of losing his Lawful Permanent Resident status, being ineligible for naturalization, being removed from the United States and being separated from his family. (*Ibid*.)

On March 18, 2019, Petitioner filed a "Renewed Motion to Vacate Judgment. Amended Pen. C. § 1473.7" in Tulare County Superior Court. (CT 144-211.) On April 5, 2019, Respondent filed an opposition to the motion. (CT 212-222.) On April 9, 2019, the motion was heard and denied by the Honorable Steven Barnes. (CT 223.)

REASONS FOR GRANTING REVIEW

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

The unrebutted evidence in the trial court established that Petitioner was not meaningfully informed of the immigration consequences and did not knowingly accept those consequences prior to entering his plea. His attorney did not discuss his immigration status and instead told him that everything would be fine. Contemporaneous objective evidence established that, had he been advised of the immigration consequences, he would not have accepted the government's offer and would have taken the case to trial given his strong ties to the United States and lack of ties to Mexico. (See *People v. Vivar* (2021) 11 Cal.5th 510 [278 Cal.Rptr.3d 2, 18, 485 P.3d 425, 438].)

Penal Code section 1473.7 allows a conviction to be vacated where there is a showing that "[t]he conviction or sentence is legally invalid due to a 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." (Penal Code, § 1473.7(a)(1).) "A finding of legal invalidity may, but need not, include a finding of ineffective assistance of counsel." (Penal Code § 1473.7(a)(1), as amended by Stats. 2018, ch. 525, § 2.)

This Court recently held in *People v. Vivar* (2021) 11 Cal.5th 510 that "showing prejudicial error under section 1473.7, subdivision (a)(1) means demonstrating a reasonable probability that the defendant would have rejected the plea if the defendant had correctly understood its actual or potential immigration consequences." (*People v. Vivar*, *supra*, 11 Cal.5th 510 [278 Cal.Rptr.3d 2, 17, 485 P.3d 425, 437–438].) "When courts assess whether a petitioner has shown that reasonable probability, they consider the totality of the circumstances." (*Ibid*.)

In the present case, as was the case in *People v. Vivar* (2021) 11 Cal.5th 510, the evidence is that Petitioner's attorney never discussed the actual or potential immigration consequences of the plea with him. (CT 172; 175.) He was instead advised that if he pleaded no contest, everything would be fine. (CT 173; 175.) In other words, Petitioner did not "meaningfully understand" or "knowingly accept" the immigration consequences when he pleaded guilty in 2004. (Penal Code § 1473.7(a)(1).) Thus, Petitioner's declaration plainly established his own "error" within the meaning of Penal Code section 1473.7(a)(1).

With regard to prejudice, the contemporaneous objective evidence is that, had Petitioner been advised of the dire

immigration consequences, he would not have accepted the government's offer and would have taken the case to trial. (CT 172; 175.) Similar to *Vivar*, there is compelling evidence in the record that at the time of his plea, Petitioner would have considered his immigration status to be an important part of his decision to enter a plea and would not have knowingly accepted the consequence of removal without a fight. (See *People v. Vivar*, supra, 11 Cal.5th 510 [278 Cal.Rptr.3d 2, 18, 485 P.3d 425, 438].) These contemporaneous objective facts which corroborate Petitioner's concern about the immigration consequences include that he had been living in the United States for 18 years after leaving Mexico in 1986. His wife and children were United States citizens at the time of the plea. His parents and siblings lived in the United States. The consequences of being permanently removed from his wife, children, parents and siblings in the United States under those circumstances are objectively devastating and establish it is probable that he would not have accepted the plea had he been properly advised.

While the Court of Appeal references *Vivar* in its opinion, it failed to review the record independently and failed to take into account 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 home of 18 years. (See *People v. Vivar*, *supra*, 11 Cal.5th 510 [278 Cal.Rptr.3d 2, 20–21, 485 P.3d 425, 441]. As was the case in *Vivar*, the evidence demonstrates that if Petitioner had meaningfully understood the mandatory

immigration consequences of his guilty plea in 2004, versus the potential risks and rewards of going to trial, it is reasonably probable that he would have not pleaded guilty and would have instead taken his chances at trial. Therefore, Petitioner established a "prejudicial error" within the meaning of Penal Code section 1473.7(a)(1) and review should be granted to clarify that he is entitled to relief.

CONCLUSION

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

Dated: July 2, 2021

Respectfully submitted,

SANGER SWYSEN & DUNKLE

By: /s/ Stephen K. Dunkle
Stephen K. Dunkle
Attorneys for Petitioner,
Juventino Espinoza

CERTIFICATE OF WORD COUNT

California Rules of Court, Rule 14 (c)(1)

I have run the "word count" function in Microsoft Word and hereby certify that this brief contains 1,643 words, including footnotes.

Dated: July 2, 2021

/s/ Stephen K. Dunkle
Stephen K. Dunkle

EXHIBIT A

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. JUVENTINO ESPINOZA, Defendant and Appellant.	F079209 (Super. Ct. No. VCF109133B-03) **OPINION**

APPEAL from a judgment of the Superior Court of Tulare County. Steven D. Barnes, Judge.

Sanger Swysen and Dunkle and Stephen K. Dunkle for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Darren K. Indermill, David Andrew Eldredge, and Kari Ricci Mueller, Deputy Attorneys General, for Plaintiff and Respondent.

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Juventino Espinoza moved to vacate his conviction three separate times due to ongoing immigration proceedings. The first motion was nonstatutory. The second was pursuant to Penal Code[1] section 1473.7. The third "renewed" the second motion. The

[1] Undesignated references are to the Penal Code.

trial court denied all three. Espinoza appeals the third denial, arguing he was entitled to relief.

The People argue this appeal should be dismissed because the first two denials were not appealed. They also contend the appeal otherwise lacks merit. We reject the former argument but accept the latter and will affirm the judgment.

BACKGROUND

In 2004, Espinoza pled no contest to conspiracy (§ 182, subd. (a)(1)), controlling property to manufacture a controlled substance (Health and Saf. Code, § 11366.5, subd. (a)), felony child abuse (§ 273a, subd. (a)), and possessing a controlled substance (Health and Saf. Code, § 11350, subd. (a)). He was sentenced to serve 365 days in jail.[2]

According to a declaration filed by Espinoza, he learned in 2015 that he was at risk for deportation. Two years later, he moved to vacate his conviction on the basis his plea counsel failed to properly advise him regarding immigration. The trial court denied the motion as untimely.

The next year, Espinoza filed a motion pursuant to then newly enacted section 1473.7. This motion was based on multiple allegations of ineffective assistance of counsel including not explaining incarceration, failing to provide investigatory reports, and failing to defend against or identify adverse immigration consequences. The court noted Espinoza expressed no hesitation or surprise when incarcerated and denied the motion as unsupported and untimely.

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[2] According to the People's opposition to Espinoza's 2019 "renewed" motion to vacate his conviction, at his January 5, 2004, change of plea hearing, Espinoza "was advised by the court of the consequences of his plea and that his plea 'could result in your being deported from the United States, denied readmission, naturalization and permanent residency.' " However, neither the reporter's transcript from the change of plea hearing nor from the February 2, 2004 sentencing hearing were made a part of the record in this appeal.

Espinoza "renewed" the motion the following year. This time he argued it was unnecessary to prove ineffective assistance of counsel, offered an alternative resolution to mitigate against adverse immigration consequences, and insisted he would have declined to settle the case had he known he would be deported.

In a declaration attached to the third motion, Espinoza declared the following: 1) he came to this country at age 13; 2) he became a permanent resident several years later; 3) his five children, parents, and eight siblings all live in the United States; 4) he did not believe the court's immigration warning applied to him as a permanent resident; and 5) deportation would cause hardship to himself, his spouse, and his children. The court ultimately denied the motion based on "a failure of the standard of proof."

DISCUSSION

Espinoza argues "the undisputed evidence is that [his] attorney never discussed the actual or potential immigration consequences of the plea with him. [Citation.] He was instead advised that if he pleaded no contest, everything would be fine." He concludes his "declaration plainly established his own 'error' within the meaning of Penal Code § 1473.7(a)(1)."

The People assert the present appeal is barred by "res judicata …." Alternatively, they claim the court properly denied the motion. We find the appeal is not barred but our independent review leads us to nonetheless affirm the judgment.

I. The Appeal Is Not Barred

"The claim preclusion doctrine, formerly called res judicata, 'prohibits a second suit between the same parties on the same cause of action.' [Citation.] 'Claim preclusion arises if a second suit involves (1) the same cause of action (2) between the same parties

(3) after a final judgment on the merits in the first suit.' " (*Kim v. Reins International California, Inc.* (2020) 9 Cal.5th 73, 91.)[3]

" 'The burden of proving that the requirements for application of [claim preclusion] have been met is upon the party seeking to assert it as a bar or estoppel.' " (*Patel v. Crown Diamonds, Inc.* (2016) 247 Cal.App.4th 29, 40.) Claim preclusion " 'is not a jurisdictional defense, and may be waived by failure to raise it in the trial court.' " (*David v. Hermann* (2005) 129 Cal.App.4th 672, 683.)

The People here failed to assert claim preclusion in the trial court. The failure to do so waives its application on appeal. Accordingly, we turn to the merits.

II. The Motion Lacks Merit

Section 1473.7 permits a person to "file a motion to vacate a conviction" if "[t]he conviction … is legally invalid due to a 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. A finding of legal invalidity may, but need not, include a finding of ineffective assistance of counsel." (§ 1473.7, subds. (a), (a)(1).)

Prejudicial error "means demonstrating a reasonable probability that the defendant would have rejected the plea if the defendant had correctly understood its actual or potential immigration consequences. When courts assess whether a petitioner has shown that reasonable probability, they consider the totality of the circumstances. [Citation.] Factors particularly relevant to this inquiry include 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

[3] On a related note, the Supreme Court has "not yet decided … whether either aspect of the res judicata doctrine 'even applies to further proceedings in the same litigation.' " (*People v. Barragan* (2004) 32 Cal.4th 236, 253.)

immigration-neutral negotiated disposition was possible." (*People v. Vivar* (May 3, 2021, S260270) ___ Cal.5th ___ 2021 WL 1726827, at *10 (*Vivar*).)

"[W]hen a defendant seeks to withdraw a plea based on inadequate advisement of immigration consequences," he or she must corroborate "such assertions with ' "objective evidence." ' " (*Vivar, supra,* 2021 WL 1726827, at *10.) In determining whether the defendant would have insisted on an alternative resolution, the focus is not placed on "whether the prosecution would actually 'have offered a different bargain' — rather" the focus is on whether " '*the defendant*' " could " 'expect or hope a different bargain' " was possible. (*Vivar, supra,* 2021 WL 1726827, at *9.)

A trial court's decision to grant or deny a section 1473.7 motion is reviewed independently. " '[U]nder independent review, an appellate court exercises its independent judgment to determine whether the facts satisfy the rule of law.' [Citation.] … ' "[I]ndependent review is *not* the equivalent of de novo review ...." ' [Citation.] An appellate court may not simply second-guess factual findings that are based on the trial court's own observations. [Citations.] … In section 1473.7 proceedings, appellate courts should … give particular deference to factual findings based on the trial court's personal observations of witnesses. [Citation.] Where, as here, the facts derive entirely from written declarations and other documents, however, there is no reason to conclude the trial court has the same special purchase on the question at issue; as a practical matter, '[t]he trial court and this court are in the same position in interpreting written declarations' when reviewing a cold record in a section 1473.7 proceeding. [Citation.] Ultimately it is for the appellate court to decide, based on its independent judgment, whether the facts establish prejudice under section 1473.7." (*Vivar, supra,* 2021 WL 1726827, at *8, fn. omitted.)

With these principles in mind, we conclude Espinoza has failed to prove a basis for relief. His ineffective assistance of counsel claim is based entirely on his own declaration and devoid of any objective corroborating evidence. The law has "long

required [a] defendant to corroborate such assertions with ' "objective evidence." ' " (*Vivar, supra,* 2021 WL 1726827, at *10.) Espinoza has not done so here.

Also lacking in this case is any evidence from Espinoza's plea counsel. (See *Vivar, supra,* 2021 WL 1726827, at *10 ["counsel's recollection and contemporaneous notes reflect[ing]" explicit concerns regarding immigration is significant corroborating evidence].) Espinoza did, on the other hand, present a declaration from an immigration attorney outlining a proposed resolution that could avoid or mitigate against adverse immigration consequences.

We need not pass upon the practical likelihood such a resolution would succeed because the focus is on whether Espinoza would have pursued such an alternative resolution notwithstanding its viability. (*Vivar, supra,* 2021 WL 1726827, at *9.) In assessing this factor, we again find no contemporaneous evidence corroborating his claim immigration consequences were a paramount concern.

The sole corroborating evidence in the record is Espinoza's biographical history. It is true his history presents a sympathetic case for relief: He came to this country more than 20 years prior to the convictions in this case and deportation will presumably result in separation from his immediate family. The record, however, lacks any other significant contemporaneous evidence to corroborate the claim immigration was a material concern at the time he settled the case.[4]

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[4] For example, Espinoza's plea could have been motivated by a desire to minimize incarceration. He was sentenced to serve 365 days in county jail, whereas a section 273a, subdivision (a), conviction is punishable by up to six years in state prison.

We emphasize section 1473.7 relief does not turn on whether immigration was the *most* important concern to an individual. There is no reason why minimizing both incarceration and immigration consequences are "incompatible" objectives. (See *Vivar, supra,* 2021 WL 1726827, at *11 [Court of Appeal erred by assuming multiple "goals" in plea bargaining lessens importance of immigration concern].) Our conclusion in this case is simply that there is slight evidence immigration was a significant concern at all.

In contrast to this case, the record in *Vivar, supra,* readily illustrates a sufficient showing of prejudice. The defendant there 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.) Importantly, these letters were written "at or near the time of his plea" and memorialized concerns about immigration. (*Vivar, supra,* 2021 WL 1726827, at *10.)

In fairness, Espinoza may not have had a similar opportunity to contemporaneously memorialize his immigration concerns because, according to him, he did not learn of actual adverse immigration consequences until more than 10 years after his conviction. In a similar vein, however, neither did he express any on-the-record confusion nor hesitation when actually incarcerated—despite claiming he was caught unaware. Nor did he later pen any letters documenting his lament at incarceration. This evidentiary void casts material doubt on his credibility.

In any event, Espinoza's concerns regarding immigration could have been documented *prior* to settling the case, in conversations with plea counsel. But, as noted, the record here lacks such evidence. (Cf. *Vivar, supra,* 2021 WL 1726827, at *10 ["counsel's recollection and contemporaneous notes reflect that [defendant] was indeed concerned about the [immigration] 'consequences' of his plea … constitute contemporaneous objective facts"].)

For all these reasons we conclude Espinoza has not proven a basis for relief. The trial court order denying the motion to vacate will stand.

DISPOSITION

The judgment is affirmed.

SNAUFFER, J.

WE CONCUR:

LEVY, Acting P.J.

POOCHIGIAN, J.

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 July 2, 2021, I served the foregoing document entitled: **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 July 2, 2021, at Santa Barbara, California.

/s/ Jake Swanson
Jake Swanson

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