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 Appellant.

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

ANSWER BRIEF ON THE MERITS

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ISSUE PRESENTED

Did the Court of Appeal err in ruling that defendant failed to demonstrate prejudice within the meaning of Penal Code section 1473.7 from trial counsel's failure to properly advise him of the immigration consequences of his plea?

INTRODUCTION

This Court granted review to address the standard for establishing prejudice under Penal Code section 1473.7.[1] The People initially opposed review, principally because of the absence at that time of any conflict of authority regarding the prejudice standard. But recent decisions of the courts of appeal have since created substantial confusion over how that standard should be understood and applied. This case thus presents an important opportunity for the Court to clarify the principles that should inform section 1473.7's prejudice analysis, which the People address below.

Having studied the record in this case in light of those principles and the intervening appellate authority, the Attorney General is now of the view that Espinoza's current evidentiary showing could establish that he experienced "prejudicial error" within the meaning of section 1473.7. If the Court views the present record as insufficient to establish prejudice, however, it should at a minimum remand to allow Espinoza an opportunity to provide additional evidence in light of new authority

[1] All statutory references in this brief are to the Penal Code unless otherwise specified.

construing section 1473.7 that was not available at the time that Espinoza assembled his record.

LEGAL BACKGROUND

For non-citizens in the United States, the potential immigration consequences of a criminal conviction can be "dire." (*People v. Superior Court* (*Giron*) (1974) 11 Cal.3d 793, 798; see also *Padilla v. Kentucky* (2010) 559 U.S. 356, 365.) Over the last several decades, courts and the Legislature have sought to ensure that defendants who plead guilty receive accurate advice about the immigration consequences of their plea—and that those who have pleaded guilty without receiving such advice have access to appropriate remedies. (See generally *People v. Vivar* (2021) 11 Cal.5th 510, 516.) Relevant here, in 2001 this Court held that an attorney's "affirmative misadvice" about the immigration consequences of a guilty plea could give rise to a claim of ineffective assistance of counsel. (*In re Resendiz* (2001) 25 Cal.4th 230, 239-240 (plur. opn. of Werdegar, J.); see also *Padilla*, *supra*, 559 U.S. at pp. 369-371 [similar].) In 2009, however, this Court held that persons who were no longer in custody could not ask a court to vacate their convictions through a writ of *coram nobis* based on an allegation that counsel rendered ineffective assistance by failing to adequately advise them about the potential immigration consequences of their pleas. (*People v. Kim* (2009) 45 Cal.4th 1078, 1101-1104.) Such claims fell "outside the traditionally narrow limits of the writ of error *coram nobis* as that remedy has been defined in California." (*Id.* at p. 1104.) At the same time, the Court noted that the Legislature could adopt a

statute that would allow individuals who were no longer in custody to seek that relief. (*Id.* at p. 1107.)

In 2016, the Legislature adopted Penal Code section 1473.7 for that purpose. (See Stats. 2016, ch. 739, § 1.) As relevant here, section 1473.7 provides that persons "no longer in criminal custody may file a motion to vacate a conviction or sentence" that is "legally invalid due to 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 conviction or sentence." (Pen. Code, § 1473.7, subd. (a)(1).) If a person makes that showing, the trial court "shall grant the motion to vacate the conviction or sentence" and "shall allow the moving party to withdraw the plea." (*Id.* § 1473.7, subds. (e)(1), (3).)[2]

This appeal raises the issue of what a defendant must show to demonstrate that an error was "prejudicial" under section

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[2] In construing the original text of section 1473.7, California courts "uniformly assumed" that relief under section 1473.7 was only available to defendants who could demonstrate that their counsel had rendered ineffective assistance under *Strickland v. Washington* (1984) 466 U.S. 668. (*People v. Camacho* (2019) 32 Cal.App.5th 998, 1005; see also *ibid.* [collecting cases].) In 2018, the Legislature clarified that a showing of ineffective assistance of counsel is not required to secure relief under section 1473.7, and that defendants need only show that there was some "prejudicial error" that damaged their ability "to meaningfully understand, defend against, or knowingly accept the actual or potential adverse immigration consequences of a plea of guilty or nolo contendere." (Stats. 2018, ch. 825, § 2; see also Pen. Code, § 1473.7, subds. (a)(1), (e)(4).)

1473.7. This Court first addressed that issue last year in *People v. Vivar* (2021) 11 Cal.5th 510. The Court held that to satisfy the prejudice requirement of section 1473.7 defendants must demonstrate that there is a "reasonable probability" that they "would have rejected the plea if [they] had correctly understood its actual or potential immigration consequences." (*Id.* at p. 529.) The Court explained that in the context of plea deals, the prejudice inquiry focuses on "'what the defendant would have done, not whether the defendant's decision would have led to a more favorable result,'" in recognition of the "fact that a defendant "'may view immigration consequences as the only ones that could affect his calculations regarding the advisability of pleading guilty to criminal charges.'"'" (*Id.* at pp. 528-529, quoting *People v. Martinez* (2013) 47 Cal.4th 555, 562-563.) When conducting the prejudice inquiry, courts must consider the "totality of the circumstances," including "particularly relevant" factors such as "the defendant's ties to the United States," along with "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.) And defendants must corroborate—with "'"objective evidence"'"—their assertions that they "would never have entered [a] plea had [they] understood" its immigration consequences. (*Id.* at p. 530.)

Under the particular circumstances in *Vivar*, this Court held that the defendant had demonstrated prejudice. (*Vivar*, *supra*, 11 Cal.5th at pp. 533-534.) At the time of his plea deal, Vivar

had been in this country for nearly four decades, had a family here, and lacked any meaningful ties to his country of birth. (*Id.* at pp. 516, 530.) And because Vivar was served with an immigration hold "within days" of entering his plea, the record also contained letters Vivar wrote to the sentencing court just months after he entered his plea, stating that he had learned that his conviction could lead to removal and asking the court to reverse the conviction. (*Id.* at pp. 517, 522, 530-531.) In addition, this Court relied on notes from Vivar's plea counsel indicating that the prosecution had offered a plea deal that could have avoided mandatory deportation and that would not have resulted in markedly different jail time. (*Id.* at p. 531.) This Court observed that Vivar had rejected that deal because he misunderstood how immigration law works. (*Id.* at pp. 518, 531.) In light of this "substantial contemporaneous evidence at or near the time of Vivar's plea corroborating his claim that he wouldn't have pleaded guilty if he'd known" of the immigration consequences, this Court held that Vivar had established prejudiced under section 1473.7. (*Id.* at p. 534.)

STATEMENT OF THE CASE

1. Petitioner Juventino Espinoza came to the United States from Mexico in 1981 when he was thirteen years old. (CT 172.) He became a lawful permanent resident in 1986. (CT 146, 172.) His wife and five children are United States citizens. (CT 172.) His siblings and parents also live in this country and are citizens or lawful permanent residents. (*Ibid.*)

In 2004, following an investigation into suspected methamphetamine manufacturing by Tulare County law enforcement, Espinoza pleaded no contest to conspiracy to manufacture methamphetamine (Pen. Code, § 182, subd. (a)(1); Health & Saf. Code, § 11379.6), controlling property to manufacture methamphetamine (Health & Saf. Code, § 11366.5, subd. (a)), felony child abuse (Pen. Code, § 273a, subd. (a)), and possession of cocaine (Health & Saf., § 11350, subd. (a)). (CT 26, 95, 146-147.) According to a declaration that Espinoza later submitted in support of his section 1473.7 motion, Espinoza's plea counsel did not advise him that pleading no contest to these crimes could result in his removal from this country or prevent him from becoming a naturalized citizen; instead his "attorney[']s assistant" told him that "everything was going to be fine." (CT 173.) Espinoza received a grant of five years formal probation. (CT 26.) As a condition of probation, the court ordered Espinoza to serve 365 days in county jail. (CT 26-27.)[3]

2. In 2015, Espinoza learned for the first time that his convictions could lead to his removal from the United States when he was questioned by immigration officials upon his return to the United States from Mexico. (Opn. 2; CT 173.) Espinoza was subsequently sent a notice to appear for removal

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[3] Both below and in his opening brief, Espinoza states that he additionally received a "suspended" sentence of "9 years, 8 months." (OB 9; CT 147.) But the record is not clear on the nature of any suspended sentence. (Compare CT 147 with CT 213 [motion asserts that "defendant was advised that his maximum exposure was nine years, eight months"].)

proceedings. (CT 165.) He then made several attempts to vacate his convictions. In 2017, Espinoza filed a "motion to vacate" his convictions that did not reference section 1473.7 but instead argued that he was entitled to relief because his plea counsel provided ineffective assistance. (Opn. 2; CT 28, 32.) The trial court denied that motion. (Opn. 2; RT 7.) In 2018, Espinoza filed another motion that did rely on section 1473.7. (CT 66.) The trial court also denied that motion, reasoning that "the record [did] not support the allegation that [there] was ineffective assistance of counsel." (RT 22.)

After the Legislature amended section 1473.7 to make clear that defendants can secure relief without demonstrating that their plea counsel rendered ineffective assistance (see *ante* p. 8, fn. 2), Espinoza filed the renewed section 1473.7 motion in 2019 that is at issue in this proceeding. (Opn. 3; CT 144.) In support of that motion, Espinoza submitted a declaration explaining that he would have "made a different choice" and even "'agreed to a longer jail sentence'" had he understood the immigration consequences of his plea. (CT 173.) Espinoza also detailed his extensive ties to the United States: he has lived here since he was thirteen, his wife and five children are American citizens and live in the United States, and all eight of his siblings and his parents live in this country. (Opn. 6; CT 172.) He submitted several letters from family, friends, employers, and community members detailing his contributions to his family and community. (CT 177-211.) And he presented a declaration from an immigration attorney asserting that there were other, similar

offenses to which Espinoza could have pleaded guilty that would not have resulted in the same immigration consequences. (CT 168-171.) The trial court denied the motion, stating that there was a "failure of the standard of proof" about whether the conviction was "legally invalid." (RT 31; see also CT 223).

3. The Court of Appeal affirmed in an unpublished decision. (Opn. 8.) It appeared to reason that Espinoza's claim of prejudice was based "entirely on his own declaration and devoid of any objective corroborating evidence" (Opn. 5), although the court later recognized that Espinoza's "biographical history" was "corroborating evidence" that could support his argument (Opn. 6). The court also observed that Espinoza's biographical details presented 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." (*Ibid.*) But the Court of Appeal ultimately concluded that the trial court had properly denied relief because the record lacked "any other significant contemporaneous evidence to corroborate the claim [that] immigration was a material concern at the time he settled the case." (*Ibid.*) The court also contrasted the record assembled by Espinoza with the one presented in *Vivar*. (Opn. 5-6.) Unlike Vivar, the court explained, Espinoza had not introduced any evidence from his plea counsel demonstrating that he had "explicit concerns regarding immigration" or letters written "'at or near the time of his plea'" that "memorialized concerns about immigration." (Opn. 6-7, quoting *Vivar*, *supra*, 11 Cal.5th at pp. 530-531.)

While recognizing that Espinoza may "not have had a similar opportunity to contemporaneously memorialize his immigration concerns" because he did not learn of the immigration consequences of his plea until more than a decade after it was entered, the court noted that Espinoza had not "express[ed] any on-the-record confusion []or hesitation when actually incarcerated." (Opn. 7.)[4]

4. Espinoza then filed a petition for review in this Court. This Court asked the People to file an answer to that petition. That answer argued that the Court should deny review, principally because Espinoza had not "identif[ied] a division of published authority in the appellate courts regarding application of *Vivar*." (Answer at 8; see also *id.* at 11 [noting that Espinoza's case presented a "fact-bound claim" that made it a "poor vehicle" for resolving any questions of law].) This Court granted review, and reformulated the issue presented to focus exclusively on the prejudice question. (See *ante*, p. 6.)

Since the People finalized their answer to the petition for review in this case, several other courts of appeal have issued decisions bearing on what is sufficient to establish prejudice under section 1473.7 that have created a division of authority. In

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[4] The Court of Appeal did not address whether Espinoza had established that there was an "error" that damaged his ability to "meaningfully understand, defend against, or knowingly accept the actual or potential adverse immigration consequences of a conviction or sentence." (§ 1473.7, subd. (a)(1).) Nor is that question at issue in proceedings in this Court. (See *ante*, p. 6)

particular, lower courts have diverged as to the significance of longstanding ties to this country in the prejudice analysis. In *People v. Alatorre* (2021) 70 Cal.App.5th 747, for example, the court relied almost entirely on the defendant's longstanding ties to this country in concluding that he had established prejudice. (*Id.* at pp. 770-771; see also *People v. Perez* (2021) 67 Cal.App.5th 1008 [similar].) Other decisions, like the one issued by the Court of Appeal in this case, have held that a defendant did not establish prejudice despite powerful evidence of substantial ties to this country, and have even suggested that such ties do not constitute objective evidence of prejudice. (Opn. 5-7.)[5]

Courts of appeal have also reached divergent results regarding whether a defendant must make a showing comparable to the one made by the defendant in *Vivar* in order to establish prejudice. For example, in *People v. Rodriguez* (2021) 68 Cal.App.5th 301, the Court of Appeal held that the defendant had established prejudice even where the record supporting that conclusion was not nearly as robust as the one assembled in *Vivar*. (*Id.* at pp. 324-326 [holding that defendant had established prejudice by introducing evidence of strong ties to this country, lack of extensive criminal record, and existence of

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[5] See also *People v. Bohmwald* (October 20, 2021, B300743) 2021 WL 4891577, *3, *10 (nonpub. opn.) (holding that defendant did not establish prejudice and that ties did not constitute objective prejudice evidence); *People v. Romero* (Aug. 25, 2021, B307941) 2021 WL 3747147, *1, *3 (nonpub. opn.) (similar); *People v. Parra* (Aug. 6, 2021, B309749) 2021 WL 3441416, *2, *5 (nonpub. opn.) (similar).

"plausible defense" to the crime charged].)[6] Other courts, including the Court of Appeal here, have implied that a defendant must demonstrate evidence similar in strength to Vivar's in order to establish prejudice. (Opn. 7.)[7]

ARGUMENT

This Court recently held that defendants seeking to establish prejudice under section 1473.7 must demonstrate that there is a "reasonable probability" that they "would have rejected the plea if [they] had correctly understood its actual or potential immigration consequences," based on "objective evidence" from the time of the plea. (*Vivar*, *supra*, 11 Cal.5th at pp. 529, 530.) That prejudice inquiry requires courts to consider the "totality of the circumstances," including the "particularly relevant" factors of "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.)

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[6] See also *People v. Ortega* (October 18, 2021, E076424) 2021 WL 4843538, *10 (nonpub. opn.) (finding prejudice where defendant had ties to this country, a possible defense to the charges, no prior criminal record, and the offense was relatively minor without a lengthy potential prison sentence).

[7] See also *People v. Salinas* (August 18, 2021, F082342) 2021 WL 3660788, *5 (nonpub. opn.) (discounting defendant's three decades in the United States because "presentation of information about her ties was not as extensive as the evidence provided in *Vivar*").

In the courts below, the People successfully argued that Espinoza had not met his burden of demonstrating prejudice. (See CT 61-62, 125-128, 220; Respondent's Brief at 15-20, *People v. Espinoza*, No. F079209 (November 20, 2019).) And the People opposed Espinoza's petition for review last year, principally because Espinoza had not "identif[ied] a division of published authority in the appellate courts regarding application of *Vivar*." (Answer at 8). But circumstances have changed materially. Since the People finalized their answer to the petition for review, the courts of appeal have issued a number of new and sometimes conflicting decisions about how to conduct the prejudice inquiry under section 1473.7. (See *ante* pp. 14-16 [reviewing cases].) Those recent decisions have created confusion about how to apply the prejudice standard, including in circumstances where a defendant relies primarily (or exclusively) on evidence of strong ties to the United States to establish prejudice.

In light of that confusion, a decision from this Court about what type and quantum of evidence is necessary to establish prejudice under section 1473.7 would be of great assistance to litigants and the lower courts. This brief presents the People's views on considerations that should inform the prejudice inquiry, informed by the origins and purpose of section 1473.7 and recent appellate authority applying that provision. Having evaluated Espinoza's case in light of those considerations and the new authority, it is now the Attorney General's position that there is a sufficient basis for this Court to conclude that Espinoza's current evidentiary submission establishes prejudice under section

1473.7. But if the Court views the current record as insufficient to establish prejudice, then the Court should allow Espinoza an opportunity to attempt to advance a more robust evidentiary showing in the lower courts, informed by the legal standard this Court adopts in its opinion.

I. THE PREJUDICE INQUIRY UNDER SECTION 1473.7 IS FLEXIBLE AND CASE-SPECIFIC

While the totality-of-the-circumstances test for prejudice that this Court adopted in *Vivar* is flexible and fact-specific, certain guiding principles can be discerned from *Vivar* and other related precedents. This case presents the Court with an opportunity to clarify those principles in a way that comports with the Legislature's instruction that section 1473.7 "shall be interpreted in the interests of justice[.]" (Stats. 2018, ch. 825, § 1, subd. (c).) In this context, the interests of justice demand an approach that provides a more realistic path to relief for defendants whose convictions were tainted by error than the approach followed by the Court of Appeal below.

1. One principle that follows from *Vivar* is that evidence of a defendant's ties to this country are "objective evidence" from the time of the plea that can help corroborate the defendant's claim that he would have rejected a plea deal had he known of its immigration consequences. (*Vivar*, *supra*, 11 Cal.5th at p. 530.) Indeed, evidence of connections to this country can be an especially important consideration in the prejudice analysis. *Vivar* identified a "defendant's ties to the United States" as one of several "particularly relevant" factors that a court should weigh in determining whether a defendant has met his burden of

demonstrating prejudice. (*Id.* at pp. 529-530.) And in concluding that the defendant in that case had established prejudice, it recited his connections to the United States in great detail: the Court noted, for example, that Vivar came to this country at age six "as a lawful resident, and he attended schools, formed a family, and remained here for 40 years." (*Id.* at p. 530.) It also noted that, at the time of his plea, Vivar had "two children, two grandchildren, and a wife, all of whom are citizens and all of who resided in California," and that he had "virtually no ties to" the country of his birth. (*Ibid.*)

Other cases from this Court and the U.S. Supreme Court have similarly pointed to a defendant's ties to this country as an important part of the inquiry into whether a defendant would have rejected a plea deal if the defendant had known of its immigration consequences. For example, in explaining how lower courts should conduct the prejudice inquiry in a related context, this Court observed that courts must take account of the fact that a person who is removed from this country "'loses his job, his friends, his home, and maybe even his children, who must choose between their [parent] and their native country' [citation]." (*People v. Superior Court (Zamudio)* (2000) 23 Cal.4th 183, 209.) And the U.S. Supreme Court held that a defendant had established prejudice with respect to a claim of ineffective assistance of counsel in part by demonstrating that he had "lived in the United States for nearly three decades, had established two businesses in Tennessee, and was the only family member in

the United States who could care for his elderly parents." (*Lee v. United States* (2017) 137 S.Ct. 1958, 1968.)

The special weight that courts accord to a defendant's ties to this country makes sense in light of the focus of the prejudice inquiry in this context. As this Court has explained, the relevant question under section 1473.7 is "'what the defendant would have done, not whether the defendant's decision would have led to a more favorable result[.]'" (*Vivar*, *supra*, 11 Cal.5th at pp. 528-529, quoting *Martinez*, *supra*, 47 Cal.4th at p. 562.) That is because a defendant "'"may view immigration consequences as the only ones that could affect his calculations regarding the advisability of pleading guilty to criminal charges."'" (*Ibid.*, quoting *Martinez*, *supra*, 47 Cal.4th at p. 563.)[8] In determining the weight that a defendant would have placed on immigration consequences, lengthy ties to this country are undoubtedly an important consideration.

In this case, the Court of Appeal appeared to draw conflicting conclusions about the relevance of Espinoza's ties to this country. At one point, the court recognized that Espinoza's "biographical history" was "corroborating evidence" that could support his claim that he would have rejected his plea deal had he known of its immigration consequences. (Opn. 6.) At another, however, it stated that Espinoza's claim of prejudice failed

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[8] See also *Padilla*, *supra*, 559 U.S. at p. 368 (recognizing that '"'[p]reserving the client's right to remain in the United States may be more important to the client than any potential jail sentence"'").

because the record was "devoid of any objective corroborating evidence." (Opn. 5.) Other courts of appeal have similarly suggested that evidence of a person's ties to this country is not a relevant consideration in the prejudice analysis. (See *ante*, pp. 14-15 & fn. 5 [reviewing cases].) That is plainly incorrect.

2. Recent lower court decisions also exhibit confusion over whether it is necessary to assemble an evidentiary record comparable to the one in *Vivar* in order to establish prejudice under section 1473.7. As discussed above, the defendant in *Vivar* presented substantial evidence of prejudice. For example, he had written letters to the superior court just months after his plea stating that he did not know that his convictions rendered him removable, and he "'would have never plead[ed] Guilty to this Charge'" if he had known that fact. (*Vivar*, *supra*, 11 Cal.5th at pp. 530-531; see also *ante*, p. 10.) He also introduced notes from his plea counsel indicating that the prosecution had offered an alternative plea deal involving a comparable custodial sentence that could have avoided mandatory immigration consequences. (*Id.* at pp. 518-519.) As this Court recognized, that amounted to powerful evidence of prejudice. (See *id.* at pp. 531-532.) Much of that evidence was available to Vivar because, just days after he entered his plea, he was subjected to an immigration hold that alerted him to the immigration consequences of his plea. (*Id.* at p. 517.)

But that kind of evidence is also quite unlikely to be available in a typical case. In this case, for example, Espinoza did not have any reason to "memorialize his immigration

concerns" at or near the time of his plea—or to ask his attorney for notes or other evidence bearing on the prejudice issue at that time—because he did not learn of the adverse immigration consequences of his plea "until more than 10 years after his conviction." (Opn. 7; see also CT 72, 214.) And Espinoza—like many defendants—cannot point to concrete evidence that the prosecution actually offered an alternative plea deal that would not have had immigration consequences.

In the wake of *Vivar*, however, some lower courts have used the facts in *Vivar* as a measuring stick of sorts, contrasting the evidence before them with the rather extraordinary factual showing in that case. (See *ante* pp. 15-16 & fn. 7 [reviewing cases].) But that approach is inconsistent with the Legislature's instruction that courts must apply section 1473.7 "in the interests of justice." (Stats. 2018, ch. 825, § 1, subd. (c); see also Sen. Com. on Pub. Safety, Rep. on Assem. Bill No. 1259 (2021-2022 Reg. Sess.) June 22, 2021, p. 5 ["[N]o person deserves to be deported as a result of an unconstitutional conviction . . . . This bill is about keeping California families whole"].) An evidentiary showing comparable to the one in *Vivar* is certainly sufficient to establish prejudice under section 1473.7—but it is not *necessary*. And it would be instructive for this Court to underscore that the unusual facts in *Vivar* do not create a legal standard or baseline for measuring prejudice in other cases.

3. An excessive focus on the facts in *Vivar* can also obscure that defendants may point to a wide variety of more readily available evidence to satisfy the totality-of-the-circumstances test

for prejudice. While the robust evidence introduced in *Vivar* will not be available in most cases—especially where defendants do not learn about the immigration consequences of their pleas until years or decades later—average defendants are likely to have access to other types of evidence that tend to support the claim that they would have rejected a plea deal if they had known of its immigration consequences.

To begin with, defendants know the details of their own lives, and should be able to establish the nature and extent of their ties to this country through their own declarations or declarations from family members, employers, neighbors, friends, or other acquaintances. (Cf. *ante*, pp. 9-10, 16.) Another important factor is the difference between the custodial sentence the defendant received under the plea deal and the prison or jail time the defendant could have received if convicted at trial. As the highest Court has noted, for example, "a defendant with no realistic defense to a charge carrying a 20-year sentence may nevertheless choose trial, if the prosecution's plea offer is 18 years." (*Lee*, *supra*, 137 S.Ct. at pp. 1966-1967.)[9] Where a defendant can show that the possible custodial sentence following a conviction at trial was not substantially greater than the sentence actually served as the result of a plea, that evidence can

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[9] See also *In re Alvernaz* (1992) 2 Cal.4th 924, 938 (relevant prejudice factors include "disparity between the terms of the proposed plea bargain and the probable consequences of proceeding to trial"); *Resendiz, supra*, 25 Cal.4th at p. 253 (plur. opn. of Werdegar, J.) (similar).

corroborate the assertion that the defendant would not have accepted the plea offer if properly informed of its immigration consequences. (See, e.g., *id.* at p. 1967; cf. *Vivar*, *supra*, 11 Cal.5th at p. 530 [relevant prejudice factors include "defendant's priorities in seeking a plea bargain"].)

Other kinds of evidence that courts have relied on in conducting the prejudice inquiry will also be commonly available. Many defendants may be able to provide at least some evidence about the "strength of the prosecution's case in relation to his or her own," a consideration that clearly bears on whether the defendant would have risked going to trial. (*Martinez*, *supra*, 57 Cal.4th at p. 564.)[10] Other defendants may be able to show that they did not have an extensive criminal record, which supports the inference that the prosecution might have been willing to offer an alternative plea deal that could have avoided immigration consequences. (See, e.g., *Rodriguez*, *supra*, 68 Cal.App.5th at p. 325 [concluding that defendant had established prejudice in part because she did not have a "serious criminal record"].)

Still other defendants may be able to show that the crime was relatively minor or unsophisticated, which could bolster a claim that the prosecution might have offered an immigration-neutral plea, or that their projected sentence at trial might have been similar to their sentence under the plea. (See, e.g., *People v.*

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[10] See also *Rodriguez*, *supra*, 68 Cal.App.5th at p. 325 (similar); *People v. Mejia* (2019) 36 Cal.App.5th 859, 872 (similar).

Mejia (2019) 36 Cal.App.5th 859, 873 [given the "unsophisticated crime," it was "likely that even after a trial, the court would have still granted Mejia probation, but with more local custody time (up to a year in jail), or perhaps a lower term prison sentence"].)[11] And some defendants may be able to corroborate an assertion that immigration consequences were especially important to them during plea bargaining with evidence demonstrating that they had informed their plea counsel about their immigration status during the plea bargaining process (see, e.g., *People v. Lopez* (2021) 66 Cal.App.5th 561, 568), or that they reacted negatively when the court gave the admonitions required under Penal Code section 1016.5 (see, e.g., *People v. Patterson* (2017) 2 Cal.5th 885, 899).

Of course, no single type of evidence is necessarily dispositive of a claim that a defendant would have rejected a plea deal had the defendant known of its immigration consequences. When conducting the prejudice inquiry, courts must look at the "totality of the circumstances," which requires a careful assessment of any evidence that bears upon whether a defendant would have rejected his plea deal if the defendant had understood its immigration consequences. (*Vivar*, *supra*, 11 Cal.5th at pp. 529-530.) As this discussion highlights, that determination can encompass a variety of types of evidence. And the inquiry should be conducted in a manner that is flexible and cognizant of the

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[11] See also *People v. Jung* (2020) 59 Cal.App.5th 842, 858 (similar); *People v. Bautista* (2004) 115 Cal.App.4th 229, 239 (similar).

substantial challenges facing any immigrant who must gather evidence of prejudice years (and sometimes decades) after a conviction.

II. IN THIS CASE, THE COURT SHOULD EITHER REVERSE ON THE CURRENT RECORD OR ALLOW ESPINOZA TO PRESENT FURTHER EVIDENCE IN THE COURTS BELOW

Having re-assessed the record in this case in light of intervening appellate authority and the considerations outlined above, the Attorney General is now of the view that this Court could hold that Espinoza's current evidentiary submission is sufficient to establish prejudice under section 1473.7. Espinoza's declaration states that he "migrated to the United States in 1981, when [he] was only 13 years of age." (CT 172.) He had been a legal permanent resident since 1986, nearly two decades before his convictions in this case. (CT 146, 172.) His "attorney never advised [him] that pleading guilty or no [c]ontest . . . could result in [his] deportation, exclusion from admission to the United States, or denial of naturalization." (CT 172.) And he asserts that "[i]f [he] had known that pleading guilty to those charges would result in [his] deportation, exclusion from admission to the United States, or denial of naturalization, [he] would not have accepted the government's offer and would have taken [his] case to trial." (*Ibid.*) He explains that "[d]eportation would cause a great deal of hardship to [him], [his] wife, and children," and his "greatest concern" at the time of his plea "was being separated from [his] children and family." (CT 172-173.) In light of those concerns, he "would have made a different choice and even

'agreed to a longer jail sentence'" to avoid those consequences. (CT 173.)

Espinoza also provided contemporaneous evidence to corroborate these claims. That evidence principally addressed his ties to the United States. As discussed above, a "defendant's ties to the United States" are "particularly relevant" to the prejudice inquiry and can be compelling contemporaneous evidence of a prejudicial error. (*Vivar*, *supra*, 11 Cal.5th at p. 530; see also *ante* p. 23.) Here, Espinoza's strong and enduring ties to the United States are undisputed. He has lived here for much of his childhood and all of his adult life. (CT 172.) He had been in this country for twenty-three years by the time of his plea. (CT 172.) And his entire family—including his wife, children, parents, and siblings—lives in the United States. (CT 172-173.) The strength of these ties is comparable to the ties described by this Court in *Vivar*. (See *Vivar*, *supra*, 11 Cal. 5th at p. 530.)

Espinoza also submitted some evidence going beyond his ties. In particular, he introduced a declaration from an immigration attorney. (CT 168-171.) While that declaration does not address any actual alternative plea offers made by the prosecution, or assess the likelihood that the prosecution would have made such an offer if Espinoza had sought one, it does speak to the existence of other offenses to which Espinoza might have pleaded guilty that would not have triggered the same negative immigration consequences, and thus provides a modicum of additional evidence of prejudice. (CT 168-171.)

If the Court views the present record as insufficient to establish prejudice, however, it should at least allow Espinoza an opportunity to present further evidence in the lower courts. Espinoza assembled his current evidentiary submission long before this Court first addressed the standard for establishing prejudice under section 1473.7. And some of Espinoza's prior filings suggest the existence of other evidence—not formally presented in support of the current section 1473.7 motion—that might further corroborate Espinoza's assertion that he would have rejected his plea deal if had he known about its immigration consequences.

For example, in the non-statutory motion to vacate his conviction that Espinoza filed in 2017, Espinoza claimed that he had no "involvement from the beginning" with the drug offenses charged, and that the "police reports [showed] that no evidence of drugs, weapons nor precursor chemicals were located on Mr. Espinoza, his vehicle or his residence." (CT 30-31; see also CT 72 [prior section 1473.7 motion raising similar claims].) If supported with admissible evidence, those arguments would tend to corroborate his claim of prejudice. (See *Martinez*, *supra*, 57 Cal.4th at p. 564 [the "strength of the prosecution's case in relation to his or her own" is relevant to the prejudice inquiry].)

Similarly, one of Espinoza's prior motions refers to a "Collateral Consequences Policy" that he asserted was in place at the Tulare County District Attorney office at the time of Espinoza's plea. (CT 69.) According to Espinoza, that program "would have" made the prosecution "likely [to] agree[] to an

alternative plea deal that would [have] avoided some of the worst immigration consequences." (CT 69.) Admissible evidence demonstrating the existence of such a program would tend to support Espinoza's claim that the prosecution may have been willing to negotiate an immigration-neutral plea deal. (See *Vivar*, *supra*, 11 Cal.5th at p. 530 [evidence demonstrating that a defendant "had reason to believe an immigration-neutral negotiated disposition was possible" is a "particularly relevant" factor in the prejudice analysis].) Elsewhere, Espinoza asserted that he had no prior criminal history (CT 68), a factor that courts have also relied on in concluding that a defendant established prejudice under section 1473.7 (see, e.g., *Rodriguez*, *supra*, 68 Cal.App.5th at p. 325).[12]

To be sure, while Espinoza alluded to the existence of this evidence in prior court filings, he did not introduce admissible evidence bearing on these points in support of the motion at issue in this proceeding. While such evidence would therefore not provide a basis for holding that the lower courts should have

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[12] Espinoza's opening brief on the merits also alludes to evidence demonstrating that "separation from his family, even by jail time, was a concern of his at the time of the entry of his plea," citing only to a prior motion. (OB 16-17, citing CT 71-72.) But that kind of evidence might not (standing alone) support Espinoza's claim that he would have rejected his plea deal had he known of its immigration consequences. As the Court of Appeal explained, a defendant's desire to avoid separation from his family could bolster the inference that a defendant would have *accepted* a plea deal, in order to avoid a longer prison sentence. (See Opn. 6 fn. 4.)

granted this particular section 1473.7 motion, it provides a powerful illustration of why Espinoza should at least be allowed to file a new or amended motion seeking to satisfy the prejudice standard this Court adopts in this case. The ultimate outcome of this legal proceeding will have enormously consequential effects on Espinoza, his family, and his community. His ability to stay in the United States—where he has built a life and where his family resides—may depend on its outcome. Especially in light of the indications that Espinoza may have access to additional evidence corroborating his claims of prejudice, he should at least have an opportunity to bolster his submission with that evidence. (Cf. *Zamudio*, *supra*, 23 Cal.4th at p. 210; *Martinez*, *supra*, 57 Cal.4th at pp. 568-569.)

CONCLUSION

This Court should either reverse the judgment of the Court of Appeal or vacate the judgment and remand to allow Espinoza an opportunity to supplement his evidentiary submission.

Respectfully submitted,

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March 16, 2022

CERTIFICATE OF COMPLIANCE

I certify that the attached Answer Brief on the Merits uses a 13 point Century Schoolbook font and contains 6,389 words.

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/s/ Kimberly M. Castle

KIMBERLY M. CASTLE
Associate Deputy Solicitor General

March 16, 2022

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Case Name: **People v. Espinoza**
No.: **S269647**

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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 March 16, 2022, at San Francisco, California.

Kimberly Castle	*/s/ Kimberly Castle*
Declarant for eFiling	Signature

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 March 16, 2022, at Oakland, California.

Debra Baldwin	Debra Baldwin
Declarant for U.S. Mail	Signature

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

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