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PERSPECTIVE

Ruling will protect noncitizens from consequences of uninformed guilty pleas

By Kahn Scolnick
and Daniel Adler

On May 3, the California Supreme Court decided *People v. Vivar*, 2021 DJ-DAR 4332. The court held that Robert Vivar, who pleaded guilty to a nonviolent drug offense without understanding that his plea would necessarily result in deportation, was prejudiced by his lawyer's bad advice and therefore must be allowed to withdraw his plea. The opinion will pave the way for the many immigrants who pleaded guilty in California without understanding that their pleas would result in deportation to attempt to vacate their convictions — and then either avoid deportation or return to this country after being deported.

Vivar pleads guilty, resulting in mandatory deportation

In 1962, at the age of six, Robert Vivar immigrated to the United States from Mexico as a lawful permanent resident. He later married an American citizen, and their children (and now grandchildren) are American citizens. But Vivar himself never became a citizen.

Vivar became addicted to amphetamines, which he used to stay awake during the night shift at his airport job. After he was arrested for shoplifting Sudafed from a grocery store, he pleaded guilty to a drug charge without knowing that the conviction would trigger mandatory deportation. He even rejected a plea deal (to a burglary charge) that would have allowed him to stay in the country. His lawyer

never advised him about the immigration consequences of either the plea deal he rejected or the one he took.

After pleading guilty to the drug charge in 2002, Vivar was deported. Now living in Tijuana, he founded a nonprofit to help deported mothers whose children remain in the United States and began volunteering with an organization supporting deported veterans.

Vivar challenges his conviction under Penal Code Section 1473.7

For many years, there was nothing Vivar could do to challenge his conviction and resulting deportation. But in 2017, the Legislature passed Penal Code Section 1473.7, allowing “[a] person no longer in criminal custody” to “file a motion to vacate a conviction” 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 plea of guilty or nolo contendere.” Now represented by Joseph Lee and Dane Shikman of Munger, Tolles, & Olson LLP, Vivar did just that, moving to withdraw his guilty plea on the ground that his lawyer misadvised him as to the immigration consequences of the plea. The trial court denied the motion.

Vivar’s case adds to a growing split among the Courts of Appeal

As with many new statutes, Section 1473.7 became the subject of competing interpretations in the Courts of Appeal. Some reviewed trial-court decisions inde-

pendently and looked to basic biographical facts that might have influenced a properly informed defendant’s decision to plead guilty. Other courts took the opposite approach, reviewing trial-court decisions deferentially and demanding direct evidence of what a defendant would have done if advised properly of the immigration consequences of the challenged guilty plea.

The Court of Appeal in Vivar’s case fell in the latter camp, deferring to the trial court’s “finding” that Vivar seemed “more willing to rely on his experiences than he was on his counsel’s advice,” and therefore would not have been receptive to good advice had he received it.

Vivar sought and obtained review from the California Supreme Court.

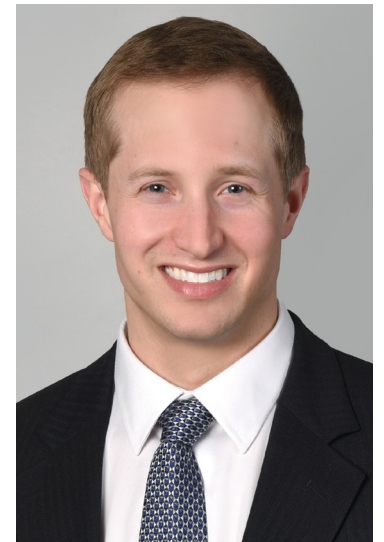
The government concedes error, and the Supreme Court reverses

After a “fresh look” at the Court of Appeal’s analysis, the solicitor general conceded that the court erred both in deferring to the trial court’s decision and in concluding that Vivar had failed to show prejudice from his attorney’s failure to advise him on the immigration consequences of the plea deals offered by the government.

The Supreme Court agreed that the Court of Appeal got it wrong on both the standard of review and the prejudice analysis.

The court held that appellate courts should review Section 1473.7 rulings independently, and for a few reasons. First, that’s the standard under which analogous claims are reviewed on habeas corpus. Second, inde-

Kahn Scolnick and Daniel Adler, both lawyers at Gibson, Dunn & Crutcher LLP, represented a distinguished group of former prosecutors and public defenders who served as amici in support of Mr. Vivar in the Court of Appeal and the Supreme Court.



pendent review is consistent with the Legislature's "intended purpose" of "mak[ing] relief more broadly available to deserving defendants, given the critical interests at stake." Third, independent review is a better fit than deference given the way most of these motions, including *Vivar's*, are decided — on a cold record of purely documentary evidence, by a judge who has "no firsthand familiarity with the circumstances surrounding" the challenged guilty plea.

Applying this standard to *Vivar's* case, the Supreme Court decided that the Court of Appeal erred in relying on the trial court's "finding" that *Vivar* "was more willing to rely on his experiences than he was on his counsel's advice." That *Vivar* rejected a deportation-neutral plea after receiving bad advice did not show that he would have rejected such a plea if he had received good advice.

The court also held that a Section 1473.7 movant shows

prejudicial error by "demonstrating a reasonable probability that the defendant would have rejected the plea if the defendant had correctly understood its actual or potential immigration consequences." In determining whether a movant has satisfied this standard, courts should "consider the totality of the circumstances," including "the defendant's ties to the United States, the importance the defendant placed on avoiding deportation," and "whether the defendant had reason to believe an immigration-neutral disposition was possible."

The facts of this case made plain that *Vivar* would have considered deportation more important than any other consequence of a guilty plea. Among other things, he was a longtime resident of the United States; he had no ties to Mexico; his wife was undergoing radiation treatment for a thyroid condition; his children and grandchildren were all citizens; his son was serving in the Air Force and was about to be deployed to the Mid-

dle East; and he could have entered a different plea that avoided immigration consequences. The court concluded that the Court of Appeal should have considered all these facts, which surely would have influenced *Vivar's* decision-making had his lawyer properly advised him.

Writing separately, Justice Carol Corrigan concurred on the question of prejudice but dissented on the standard of review, expressing concern that "reviewing courts will assume the role of fact finder" in Section 1473.7 appeals.

The impact of *Vivar*

The *Vivar* decision should lead to more successful Section 1473.7 motions. Because the analysis is inherently counterfactual, courts may not focus on what defendants *actually* did when they received bad legal advice or did not understand that their guilty pleas would result in deportation. Courts must instead assess what defendants who were properly advised *would have done*, in light of all

the facts that might bear on their decisions whether to plead guilty. Defendants with very strong ties to the United States should have an easier time proving prejudice under this standard — and, after withdrawing their pleas, seeking an immigration-neutral disposition of the charges against them and then immigration relief. Also, given the court's decision on the standard of review, defendants should stand a better chance of prevailing on appeal after an adverse decision in a trial court.

In short, the Supreme Court's opinion will likely allow many immigrants to unwind the devastating consequences of uninformed guilty pleas—precisely as the Legislature intended when it enacted Section 1473.7. And as a practical matter, the decision should result in prosecutors and courts doing more to ensure that noncitizen defendants understand the immigration consequences of guilty pleas before entering them, which also is a laudable outcome. ■