**sample memorandum of law**

The attached sample memorandum of law is not a substitute for independent legal advice supplied by a lawyer familiar with a client’s case. It is not intended as, nor does it constitute, legal advice.[[1]](#endnote-1)

It is intended to be used to present arguments and briefing in immigration proceedings. If used, it is beneficial to attach the Table of Cases as an appendix to the brief.

**INTRODUCTION**

“[A] conviction vacated because of a procedural or substantive defect is not considered a ‘conviction’ for immigration purposes and cannot serve as the basis for removability.” *Nath v. Gonzales*, 467 F.3d 1185, 1189 (9th Cir. 2006) (quotations omitted). *See also Pickering*, 23 I&N Dec. at 624 (“[I]f a court with jurisdiction vacates a conviction based on a defect in the underlying criminal proceedings, the respondent no longer has a ‘conviction’ within the meaning of section 101(a)(48)(A).”); *Wiedersperg v. I.N.S.*, 896 F.3d 1179, 1181 (9th Cir. 1990). The Respondent’s prior conviction has been vacated by the Superior Court of the State of California pursuant to California Penal Code § 1473.7(a)(1), due to legal defect. As a result, this prior offense is not a “conviction” under the Immigration and Nationality Act (“INA” or “the Act”). *See* INA § 101(a)(48)(A); *Matter of Pickering*, 23 I&N Dec. 621 (2003); Cal. P.C. § 1473.7. The Respondent’s prior conviction therefore does not render [him/her/them] [removable, ineligible for relief, or subject to detention under INA § 236(c)].

Section 1473.7(a)(1) authorizes vacaturs where the defendant’s “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. A finding of legal invalidity may, but need not, include a finding of ineffective assistance of counsel.” Cal. P.C. § 1473.7(a)(1).[[2]](#footnote-1) It is not a rehabilitative statute. The law vacates convictions that are defective because of violation of constitutional and statutory rights to due process and assistance of counsel. A vacatur on this basis necessarily falls outside the definition of “conviction” in federal immigration law, as multiple panels of the BIA have recognized. *See* Table of Cases, Appendix A, Appendix B. (collecting BIA cases holding prior convictions vacated under § 1473.7 are not “convictions” under the INA, and that prior convictions vacated because they were undermined by ineffective assistance of counsel, or secured through pleas that were not knowing, voluntary and intelligent, are not “convictions” under the INA).

A state court vacatur pursuant to § 1473.7 conclusively establishes vacatur for defect that meets the holdings in *Pickering* and *Nath*. *See Matter of Rodriguez-Ruiz*, 22 I&N Dec. 1378, 1379 (BIA 2011) (declining “to go behind the state court judgment” where the “criminal law provision under which the respondent’s conviction was vacated [was] neither an expungement statute nor a rehabilitative statute”). By its plain language, § 1473.7 vacates convictions “because of a defect in the underlying criminal proceedings,” and not because of “rehabilitation.” *Matter of Adamiak*, 23 I&N Dec. 878, 879 (BIA 2006). Vacatur of the Respondent’s prior conviction pursuant to § 1473.7 conclusively establishes that the offense is not a “conviction” under the Act. The government bears the burden of proving “the state set side” a prior offense for rehabilitative purposes, but “failed to carry its burden” here because § 1473.7 authorizes vacaturs only in cases of procedural or substantive defect. *Nath*, 467 F.3d at 1189.

**ARGUMENT**

1. **A PRIOR CONVICTION vacated UNDER CalIFORNIA PENAL CODE § 1473.7(a)(1) IS NOT A “conviction” under ina § 101(a)(48)(a) because ALL § 1473.7(a)(1) vacaturs ARE FOR LEGAL DEFECT.**

California Penal Code § 1473.7 exclusively vacates convictions for substantive and procedural defects. The law authorizes vacatur only when there has been a constitutional or statutory violation of the defendant’s rights including, but not limited to, ineffective assistance of counsel. *See* Cal. P.C. § 1473.7(a)(1) (“[t]he conviction or sentence is legally invalid due to prejudicial error” that “may, but need not, include a finding of ineffective assistance of counsel”); § 1473.7(e)(4) (“the only finding that the court is required to make is whether the conviction is legally invalid due to prejudicial error”). Under the INA’s statutory “conviction” definition, the BIA’s own rule, and decisions of the Ninth Circuit and other courts of appeals, offenses vacated under this statute are not “convictions” for immigration purposes because the convictions themselves were legally defective. The Respondent’s prior offense vacated under Cal. P.C. § 1473.7 is not a “conviction” under the Act, regardless of the Respondent’s personal motivation for pursuing the vacatur.

1. **Prior convictions vacated for ineffective assistance of counsel or constitutional defect leading to a plea that was not knowing, intelligent, and voluntary, fall outside the INA’s definition of “conviction.”**

“[I]f a court with jurisdiction vacates a conviction based on a defect in the underlying criminal proceedings, the respondent no longer has a ‘conviction’ within the meaning of section 101(a)(48)(A).” *Pickering*, 23 I&N Dec. at 624. *See also Nath*, 467 F.3d at 1189 (“conviction vacated because of a procedural or substantive defect is not considered a ‘conviction’ for immigration purposes and cannot serve as the basis for removability”). Neither the BIA, the Ninth Circuit, nor any other governing authority has modified this rule. These decisions bind the Respondent’s case. A conviction procured through a guilty plea that was not knowing, intelligent, and voluntary or that was undermined by ineffective assistance of counsel violates state and federal constitutional standards and is not legally valid. *See, e.g.*, *Cardoso-Tlaseca v. Gonzales*, 460 F.3d 1102, 1104 (9th Cir. 2006) (“conviction was legally invalid” where “guilty plea was not knowing, intelligent, free or voluntary”); *In re. Lopez-Ochoa*, 2006WL1558703 (BIA 2006) (unpublished) (applying *Pickering* to hold a “criminal conviction [that] was vacated because the respondent's plea was not knowing and voluntary” was not a “conviction” under INA § 101(a)(48)(A)); *In re. Cazares Mendez*, 2006WL1455242 (BIA 2006) (unpublished) (same, citing *Matter of Rodriguez-Ruiz*, 22 I&N Dec. 1378 (BIA 2000), *Matter of Adamiak*, 23 I&N Dec. 878 (BIA 2006)). *See also, e.g.*, *In re. Eladio Soler a.k.a. Luis Bonilla Rivera*, 2009WL1863812 (BIA 2009) (unpublished) (“A conviction vacated due to ineffective assistance of counsel qualifies as a vacation on the merits.”) (citing *Pickering*, and *Rumierz v. Gonzales*, 456 F.3d 31 (1st Cir. 2006)); Table of Cases, attached at Appendix A, Appendix B. There are two bases for a 1473.7(a)(1) vacatur: (1) that a plea was not knowing, voluntary or intelligent, and (2) that the plea was undermined by ineffective assistance of counsel. Both bases are based on legal, not rehabilitative, grounds, and nullify a prior offense for immigration purposes.

1. **Vacatur for violation of constitutional and statutory due process rights**

A “guilty plea” that “has since been vacated” because a defendant “was not adequately informed of the immigration consequences of the plea” “can no longer serve as a basis for removability.” *Reyes-Torres v. Holder*, 645 F.3d 1073, 1075, 1077 (9th Cir. 2011) (citing *Cardoso-Tlaseca*, 460 F.3d at 1107). A defendant entering a guilty plea “stands as a witness against himself and he is shielded by the Fifth Amendment,” and for the plea to pass Fifth Amendment scrutiny, the “minimum requirement [is] that his plea be the voluntary expression of his own choice.” *Brady v. U.S.*, 397 U.S. 742, 748 (1970). By pleading guilty and thereby giving “consent that judgment of conviction may be entered without a trial” there has been “a waiver of his right to trial before a jury or a judge.” *Id.* “Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences.” *Id. See also Johnson v. Zerbst*, 304 U.S. 458 (1938) (waiver of fundamental right must be knowing and intelligent); *Faretta v. California*, 422 U.S. 806 (1975). Absent such protections and procedures, there has been a violation of the Fifth Amendment. *See U.S. v. Gonzales*, 884 F.3d 457, 462 (2d Cir. 2018) (defendant argued “his plea was not knowing and voluntary because he was unaware of the grave potential immigration consequences of the convictions,” and the court vacated the conviction because of the “failure to inform” the defendant “of the immigration consequences of his plea…, affect[ing] [his] substantial rights”); *U.S. v. Ataya*, 884 F.3d 318, 323, 326 (6th Cir. 2018) (court vacated conviction where defendant “argue[d] that his conviction should be vacated because his guilty plea was not knowing and voluntary due to his lack of notice regarding the immigration consequences of his plea”).

California’s legislature and courts have further enshrined these due process rights in state law. *See* Cal. P.C. § 1016.8(2) (citing *Boykin v. Alabama*, 395 U.S. 238 (1969)) (“[B]ecause of the significant constitutional rights at stake in entering a guilty plea, due process requires that a defendant's guilty plea be knowing, intelligent, and voluntary.”); Cal. P.C.. § 1016.8(3) (citing *Estelle v. Smith*, 451 U.S. 454, 471, fn. 16 (1981)) (“Waiver is the voluntary, intelligent, and intentional relinquishment of a known right or privilege.”) “[A] plea of guilty may be withdrawn ‘for mistake, ignorance or inadvertence or any other factor overreaching defendant’s free and clear judgment.’” *People v. Superior Court (Giron)*, 11 Cal.3d 793, 797 (Cal. 1974) (In Bank) (quoting *People v. Butler,* 70 Cal.App.2d 553, 561 (Cal. Ct. App. 1945)). This includes where the defendant is “unaware that dire consequences, in addition to any punishment the court might impose, could result from a plea of guilty.” *Id.* At 798 (“When, as here, the accused entered his plea of guilty without knowledge of or reason to suspect severe collateral consequences, the court could properly conclude that justice required the withdrawal of the plea on motion therefor.” (citing *People v. Coley*, 257 Cal.App.2d 787 (Cal. Ct. App. 1968))). It also includes the “recognized the unfairness inherent in holding noncitizens to pleas they entered without knowing the consequent immigration risks.” *People v. Bautista*, 115 Cal.App.4th 229, 241 (Cal. Ct. App. 2004) (citing *In re Resendiz*, 25 Cal.4th 230, 250 (Cal. 2001) (internal quotation marks omitted).

1. **Vacatur for violation of constitutional and statutory right to effective assistance of counsel**

The other basis for a § 1473.7(a)(1) is where “counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result,” *Strickland v. Washington*, 466 U.S. 668, 686 (1984), and where a defendant “was not adequately advised of the immigration consequences of his plea [and] has been prejudiced.” *People v. Soriano*, 194 Cal.App.3d 1470, 1482 (Cal. 1987). Such a “defendant was deprived of effective assistance of counsel in entering his guilty plea and should be allowed to withdraw that plea.” *Id.*

A critical part of the Sixth Amendment “right to counsel is the right to effective assistance of counsel.” *Strickland*, 466 U.S. at 686 (quoting *McMann v. Richardson*, 397 U.S. 759, 771 (1970)). The right exists to protect the “fundamental right to a fair trial.” *Strickland*, 466 U.S. at 684. For noncitizen defendants, “[i]t is quintessentially the duty of counsel to provide her client with available advice about an issue like deportation.” *Padilla v. Kentucky*, 559 U.S. 356, 370 (2010). Otherwise defense counsel has “fail[ed] to render ‘adequate legal assistance.’” *Strickland*, 466 U.S. at 686(quoting *Cuyler v. Sullivan*, 446 U.S. 335, 344 (1980)).

A conviction is constitutionally defective where the defendant “was not properly advised of the immigration consequences of his plea,” “there was more than a remote possibility that the conviction would have one or more of the specified adverse immigration consequences,” and he was prejudiced by the nonadvisement.” *People v. Bautista*, 115 Cal.App.4th 229, 241 (Cal. Ct. App. 2004). Such cases “require[] reversal of…conviction” because “counsel’s performance was deficient” and the defendant “was prejudiced by that deficiency.” *Soriano*, 194 Cal.App.3d at 1479 (citing *Strickland*, 466 U.S. at 687; *People v. Fosselman*, 33 Cal.3d 572, 583-584 (Cal. 1983)). California has also codified this right. *See* Cal. P.C. § 1016.2(a) (“Defense counsel shall provide accurate and affirmative advice about the immigration consequences of a proposed disposition, and when consistent with the goals of and with the informed consent of the defendant, and consistent with professional standards, defend against those consequences.”

Section 1473.7(a)(1) vacaturs rectify these constitutional and statutory errors.

1. **The Respondent’s state court order, and the statutory text of Cal. P.C. § 1473.7, conclusively and irrefutably establish that the basis for vacatur of the prior conviction was due to legal defect; the Respondent’s personal motivation for seeking vacatur is irrelevant and not reviewable.**

When determining whether a vacated prior conviction is a “conviction” under the INA, “the inquiry must focus on the state court’s rationale for vacating the conviction.” *Reyes-Torres*, 645 F.3d at 1077*.* The adjudicator may not “go behind the state court judgment.” *Rodriguez-Ruiz*, 22 I&N Dec. at 1379. If the state “court’s order permitting withdrawal of the respondent’s guilty plea is based on a defect in the underlying proceedings,” that is the end of the inquiry; the vacated offense is not a conviction for immigration purposes. *Adamiak*, 23 I&N Dec. at 879. “Congress has made deportability depend up on a state’s action in convicting…of a state-defined crime… [or] a state’s action vacating or totally nullifying that conviction.” *Wiedersperger*, 896 F.3d at 1182. Though the looming immigration consequences may be the impetus for a noncitizen to file a motion to vacate a defective conviction, the basis for a § 1473.7 vacatur is always legal in nature. The vacatur order in the Respondent’s case reflects that the presiding Superior Court judge determined that the legal standard for a § 1473.7 vacatur had been met. Under clearly established law, the defendant’s “motive” in seeking to vacate the conviction is irrelevant. *Reyes-Torres*, 645 F.3d at 1077.

Section 1473.7, by its plain language, authorizes vacatur of a conviction or sentence only where “[t]he conviction or sentence is legally invalid due to a prejudicial error.” Cal. P.C. § 1473.7(a)(1). It is “plain and unambiguous” that a conviction vacated for these reasons meets the standards stated in *Nath* and *Pickering*. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997). “It is elementary that the meaning of a statute must, in the first instance, be sought in the language…, and if that is plain, ... the sole function of the courts is to enforce it according to its terms.” *Caminetti v. United States*, 242 U.S. 470, 485 (1917); *see also Robinson*, 519 U.S. at 340 (“[o]ur inquiry must cease if the statutory language is unambiguous”); *Retuta v. Holder*, 591 F.3d 1181, 1188 (9th Cir. 2010) (“When dealing with a matter of statutory interpretation, we look first to the plain language of the statute…to ascertain the intent of” the legislature.). There is “no more than one meaning,” *Caminetti*, 242 U.S. at 485, of the statutory terms “legally invalid” and “prejudicial error.” Black’s Law Dictionary defines “error” as a “mistake of law or of fact in a tribunal’s judgment, opinion, or order,” defines “prejudice” as **“**[d]amage or detriment to one’s legal rights or claims,” and defines “invalid” as “[n]ot legally binding” or “[w]ithout basis in fact.” *See* Black’s Law Dictionary (2019). *Cf. Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562, 1569 (2017) (using “reliable dictionaries” from 1996 to construe the words of a statute passed in 1996); *Wisconsin Central Ltd. v. U.S.*, 138 S. Ct. 2067, 2070-71 (2018) (citing, *inter alia*, Black’s Law Dictionary, to “interpret the words consistent with their “ordinary meaning…at the time Congress enacted the statute”) (internal quotation omitted).

Prior convictions vacated for these reasons unambiguously meet the standards stated in *Nath* and *Pickering*, reflecting Congress’s intent that legally invalid convictions not be treated as “convictions” for immigration purposes. *See, e.g.*, *Wiedsperger v. I.N.S.*, 896 F.3d 1179, 1181 (9th Cir. 1990) (“deportation based on an invalid conviction could not be deemed legally executed” where court vacated “conviction on ground that” defendant “had entered his plea in ignorance of the collateral consequence of deportation”). *See also Pinho v. Gonzales*, 432 F.3d 193, 208 (3d Cir. 2005) (“The distinction between substantive and rehabilitative vacaturs is rooted in the history of immigration enforcement. That history is relevant…because the statutory language,” the conviction definition at INA § 101(a)(48)(A), “was adopted against the background of consistent agency practice with respect to vacated convictions.”); *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 85-86 (2006) (“when judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates . . . the intent to incorporate its . . . judicial interpretations as well”).

The Respondent’s personal motivation for pursuing vacatur of a defective conviction is wholly irrelevant to the analysis: “the petitioner's motive is not the crucial inquiry.” *Reyes-Torres*, 645 F.3d at 1077. “A postconviction proceeding provide[s] relief…for meritorious claims challenging judgments of conviction and sentence, including cognizable claims… that the conviction was obtained or sentence imposed in violation of the Constitution of the United States or the constitution or laws of the state in which the judgment was rendered.” American Bar Association, Criminal Justice Section Standards, Post Conviction Remedies, Standard 22-2.1, Grounds for relief encompassed (2020), *available at* <https://www.americanbar.org/groups/criminal_justice/publications/criminal_justice_section_archive/crimjust_standards_postconviction_blk/> (last visited Apr. 14, 2010). Defendants may pursue such relief “in light of immigration consequences,” *Reyes-Torres*, 645 F.3d at 1077, or to shed “the stigma and hardships of a criminal conviction.” *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring). All that is relevant is “the state court’s rationale for vacating the conviction,” which here is legal defect due to prejudicial error. *Reyes-Torres*, 645 F.3d at 1077–78.

For the government to carry its burden of proving that a vacated conviction remains valid for immigration purposes, the government must prove “with clear, unequivocal and convincing evidence, that the Petitioner’s conviction was quashed *solely* for rehabilitative reasons or to avoid immigration hardships.” *Cardoso-Tlaseca*, 460 F.3d at 1107 n. 3 (internal quotation omitted) (emphasis original); *Nath*, 467 F.3d at 1189. *See also Pickering v. Gonzales*, 465 F.3d 263, 269 (6th Cir. 2006) (“When a court acts pursuant to a law that allows it to act based only on the merits of the underlying position, it is presumed not to have acted contrary to that law, solely to enable the Petitioner to avoid adverse immigration consequences.”); *Rodriguez–Ruiz,* 22 I&N Dec. at 1379–80; *Cruz–Garza v. Ashcroft,* 396 F.3d 1125, 1131–32 (10th Cir. 2005) (holding that where state court acted pursuant to legal authority that allowed reduction of conviction based on reasons unrelated to adverse immigration consequences, the government failed to demonstrate that the petitioner was deportable even though evidence on the record allowed for the reasonable inference that the court was motivated, at least in part, by a desire to avoid said consequences).

Any vacatur ordered under 1473.7 is necessarily based on a substantive or procedural defect. “]T]he conviction is itself erased,” *Cardoso-Tlaseca*, 460 F.3d at 1107, the defendant “stands neither convicted nor charged,” *id.*, and therefore cannot, as a result of the vacated offense, be “properly found removable under the INA.” *Reyes-Torres*, 645 F.3d at 1078. To seek to impose immigration consequences on the basis of a vacated conviction, DHS would have to prove that the Superior Court order was “*solely* for rehabilitative reasons.” *Cardoso-Tlaseca*, 460 F.3d at 1077. Here that is not possible, as § 1473.7 does not authorize vacatur unless there has been a statutory or constitutional violation of due process or the right to assistance of counsel, and the state court’s vacatur order reflects vacatur “at least in part” pursuant to § 1473.7. *Pickering*, 465 F.3d at 268.

1. ***Matter of Thomas/matter of Thompson* only reinforces that prior convictions vacated under § 1473.7(A)(1) ARE NOT “CONVICTIONS” UNDER Ina § 101(a)(48)**

The Attorney General’s recent decision in *Matter of Thomas/Matter of Thompson*, 27 I&N Dec. 674 (AG 2019), did nothing to upend extant case law regarding the standard for effective vacaturs of convictions. *Thomas/Thompson* created a new standard with respect to effective modifications of *sentences*, not a new standard governing vacaturs of *convictions*.To the extent that it is relevant, *Thomas/Thompson* only reinforces that *Matter of Pickering* is the governing BIA case rule for whether a vacated conviction is a “conviction” under INA § 101(a)(48), and under *Pickering* and *Nath* it is unambiguous and clear that a § 1473.7(a)(1) vacatur nullifies a prior conviction for immigration purposes.

In the opening paragraphs of *Thomas/Thompson*, the Attorney General specifies that he is overruling three of “the Board’s decisions…on the effect of state-court orders that modify, clarify, or otherwise alter a… *sentence*.” 27 I&N Dec. at 674 (emphasis added). That is the case’s explicit and exclusive holding: that “[g]oing forward, immigration courts should apply the test articulated in *Matter of Pickering* in determining the immigration consequence of any change in a state *sentence*.” *Thomas/Thompson*, 27 I&N Dec. at 675 (emphasis added).[[3]](#footnote-2)

Prior to *Thomas/Thompson*,BIA law required immigration authorities to accept as valid a court order modifying a sentence, regardless of the reasons for that modification. *See, e.g.*, *Matter of Estrada*, 26 I&N Dec. 749 (BIA 2016), *Matter of Cota-Vargas*, 23 I&N Dec. 849 (BIA 2005) (distinguishing sentencing changes from vacaturs of convictions which must contain a ground of legal invalidity to be valid for immigration purposes); *Matter of Song*, 23 I&N Dec. 173 (BIA 2001) (holding that the newest sentence on the reduction of a sentence determines the immigration consequences); *Matter of Martin*, 18 I&N Dec. 226 (BIA 1982) (same). This rule stood in contrast to the rule governing conviction vacaturs, which requires that a vacatur of a conviction must be based on a procedural or substantive error in order to have effect for immigration purposes. *Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003). Under the new *Thomas/Thompson* rule immigration courts will no longer give effect to sentence modifications made solely to avoid immigration consequences. Instead, a sentence modification, like a vacatur, must be based at least in part on a ground of procedural or substantive invalidity to fall outside the INA’s definition of conviction. 27 I&N Dec. at 682.

If *Thomas/Thompson* is at all relevant to the Respondent’s case, it is only because *Thomas/Thompson* reiterates the holding of *Pickering*, adopting it to the sentence modification context. *Thomas/Thompson* reaffirms the BIA’s statutory interpretation in *Pickering* that if a “state-court…order ‘vacates’” a noncitizen’s “conviction, then the order has legal effect if based on ‘a procedural or substantive defect in the underlying proceedings.’” *Thomas/Thompson*, 27 I&N Dec. at 675 (quoting *Pickering*, 23 I&N Dec. at 624). “Under *Pickering*, ‘if a court with jurisdiction vacates a conviction based on a defect in the underlying proceedings, the respondent no longer has a ‘conviction’ as that term is defined in the INA.’” *Thomas/Thompson*, 27 I&N Dec. at 676 (quoting *Pickering*, 23 I&N Dec. at 624). “[I]n deciding whether a vacated conviction remains effective for immigration purposes, an immigration judge or the Board merely applies and upholds the definition of conviction in the INA. The adjudicator is not reevaluating or otherwise questioning the validity of the state-court judgment.” *Thomas/Thompson*, 27 I&N Dec. at 686.

Because the § 1473.7(a)(1) order used here vacate both the conviction and sentence on legal grounds, it is not affected by, and in fact meets, the standard set forth in *Thomas/Thompson.*

**CONCLUSION**

Under all governing legal authority in the Respondent’s case, the prior conviction at issue is not a “conviction” for immigration purposes because it was vacated pursuant to Cal. P.C. § 1473.7(a)(1). Convictions vacated under this statute are necessarily vacated for substantive or procedural error and meet the BIA standard in *Pickering* and Ninth Circuit standard in *Nath* for when a vacated conviction falls outside the INA’s statutory definition at INA § 101(a)(48). The Respondent’s vacated conviction is not a “conviction” for immigration purposes.

1. [↑](#endnote-ref-1)
2. The other basis for vacatur under § 1473.7 is under subsection (a)(2), which authorizes vacatur where “[n]ewly discovered evidence of actual innocence exists.” These vacaturs also meet the *Pickering* and *Nath* standards for when a vacated prior conviction is not a “conviction” under INA § 101(a)(48). [↑](#footnote-ref-1)
3. It is the Respondent’s position that *Thomas/Thompson* misreads federal immigration law and violates the text of the INA. *See Garcia-Lopez v. Ashcroft*, 334 F.3d 840, 846 (9th Cir. 2003). [↑](#footnote-ref-2)