AG OVERTURNS SENTENCE MODIFICATION RULE: *MATTER OF THOMAS & MATTER OF THOMPSON*

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I. Overview

On October 25, 2019, Attorney General Barr issued a precedential opinion limiting when immigration authorities will give effect to a state court modification of an imposed sentence. See *Matter of Thomas* and *Matter of Thompson*, 27 I&N Dec. 674 (AG 2019), available at: https://www.justice.gov/eoir/page/file/1213201/download ("*Matter of Thomas/Thompson*").[1]

Matter of Thomas/Thompson purports to overturn a long line of case law that has 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). Under the new rule set forth in *Matter of Thomas/Thompson*, a change of sentence must be based on a ground of "procedural or substantive invalidity" to be given full effect by immigration authorities. 27 I&N Dec. 674, 675 (AG 2019).

While advocates plan to challenge this decision in the courts of appeals, it is now binding law. This advisory will summarize the case, provide advice to defenders, post-conviction practitioners, and immigrant advocates about its implementation, and suggest arguments to raise on appeal. Though this advisory is primarily written with California practitioners in mind, its theories are generally applicable to advocates nationally.

Note: This case does not affect the *potential* maximum sentence for an offense. It affects the *actual* sentence imposed. For an advisory about *potential* maximum sentences, see

[1] An AG decision on certification has the same force and effect as a BIA decision and supersedes any BIA decisions previously issued on the same matter.

ILRC, *BIA Rejects Retroactive Application of Cal. Pen. C. 18.5(a) 364-day Misdemeanor Law: Matter of Velasquez-Rios (October 2018)* at, https://www.ilrc.org/matter-velasquez-rios-and-364-day-misdemeanors.

II. The Ruling

In *Matter of Thomas/Thompson*, the AG refused to give effect to two Georgia court sentencing decisions that had held that the actual sentence imposed in the two cases amounted to something less than one year. Both underlying cases involved lawful permanent residents who were initially sentenced to 12 months imprisonment for Georgia family violence offenses. Both individuals were charged with being deportable under the "crime of violence" aggravated felony ground. 8 U.S.C. § 1101(a)(43)(F). Under that ground, a person is deportable if they (1) are convicted of a "crime of violence" and (2) have an actual sentence imposed of a year or more. In Mr. Thomas's case, the trial court granted his petition to "clarify" that the original sentence imposed was 11 months and 28 days of probation. Both the immigration judge and the BIA declined to credit that "clarification," and ordered Mr. Thomas removed. In Mr. Thompson's case, the Georgia trial court granted his motion for a sentence "modification," reducing his sentence to a term of 11 months and twenty-seven days. The BIA gave effect to the sentence modification and concluded that Mr. Thompson was not removable.

Dating back to at least 1982, the Board of Immigration Appeals has held that a sentence modification shall be given full effect, regardless of the rationale for the modification. *See, e.g., Matter of Martin*, 18 I&N Dec. 226 (BIA 1982). An individual could move to modify an imposed sentence solely to avoid immigration consequences, and that modification would be given full faith and credit by immigration courts. *See Matter of Cota-Vargas*, 23 I&N Dec. 849 (BIA 2005) (distinguishing sentencing changes from vacaturs of convictions: only the latter must contain a ground of legal invalidity to be valid for immigration purposes).

In contrast, the BIA has held that a vacatur of a *conviction* must be based on a procedural or substantive error in order to have effect for immigration purposes. See *Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003). With few exceptions,[2] a vacatur of a conviction based solely on rehabilitative grounds or to avoid immigration consequences will not be deemed valid in immigration court.

In the *Matter of Thomas/Thompson* decision, the AG imported the reasoning from the vacatur-line of case law, into the case law governing sentence modifications. The AG in *Thomas/Thompson* held

[2] The exceptions are that (1) rehabilitative relief ("expungement") will eliminate a conviction as an absolute bar to DACA, and (2) in the Ninth Circuit only, rehabilitative relief will eliminate a conviction of a minor drug offense from on or before July 14, 2011 for all immigration purposes, if the offense and applicant meet certain requirements; see *Nunez-Reyes v. Holder*, 646 F.3d 684, 690 (9th Cir. July 14, 2011) (en banc). See further discussion at ILRC, *Note: Definition of Conviction* (April 2019), 3-4, at https://www.ilrc.org/sites/default/files/resources/n.2_definition_of_conviction-0613.pdf

that 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 for the immigration authorities to give it full faith and credit. 27 I&N Dec. 674, 682. Therefore, the current rule governing modification of an imposed sentence is that:

> If the state court alters the [] sentence because of a procedural or substantive defect in the original proceeding, then the alteration has legal effect—regardless of the label the state court placed on the order. If the state court alters the [] sentence on the basis of something other than a procedural or substantive defect, then the alteration has no effect and the immigration judge need inquire no further.

Id. at 683—84.

III. Impact and Post-Conviction Strategies

A. Pursue a sentence vacatur instead of sentence reduction relief

While advocates plan to challenge *Matter of Thomas/Thompson* in federal court, for now this rule will be applied in immigration proceedings. People seeking to mitigate immigration consequences should not pursue a simple sentence modification, reduction, nunc pro tunc order, or clarification, but should instead seek to vacate the conviction, or modify or vacate the sentence, based on legal error.

In California, Pen. C. § 18.5(b) provides a vehicle to ask the court to reduce an imposed sentence to 364 days.[3] Under *Matter of Thomas/Thompson*, section 18.5(b) is no longer an effective vehicle to reduce an imposed sentence for immigration purposes, because the reduction is not based on a procedural or substantive defect.

People who are suffering, or could suffer, immigration consequences as a result of an imposed sentence should investigate whether they are eligible for a post-conviction vacatur of sentence due to a legal defect in the underlying proceeding. Many states have post-conviction vehicles that provide for a vacatur of judgment and/or sentences.

[3] Do not confuse California Penal Code § 18.5(b), which permits reduction of an *imposed* sentence and is affected by *Matter of Thomas/Thompson,* with Penal Code § 18.5(a), which sets out the maximum *potential* sentence for a misdemeanor and is not affected by this case. The BIA addressed section 18.5(a) in a prior case, *Matter of Velasquez-Rios*, 27 I&N Dec. 470 (BIA Oct. 4, 2018), where it held that it would only accept the definition of a potential sentence under section 18.5(a) prospectively, for convictions on or after January 1, 2015. To read more about that decision, see ILRC, *BIA Rejects Retroactive Application of Cal. Pen. C. 18.5(a) 364-day Misdemeanor Law: Matter of Velasquez-Rios* (October 2018) at https://www.ilrc.org/matter-velasquez-rios-and-364-day-misdemeanors.

California has a variety of post-conviction vehicles that will continue to have immigration effect after this decision. For example, Cal. Pen. C. § 1473.7 specifically extends to cover convictions *and sentences*. Section 1473.7(a) provides:

> (a) A person who is no longer in criminal custody may file a motion to vacate a conviction ***or sentence*** for either of the following reasons:
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> > (1) The conviction ***or sentence*** 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. A finding of legal invalidity may, but need not, include a finding of ineffective assistance of counsel.
> >
> > (2) Newly discovered evidence of actual innocence exists that requires vacation of the conviction ***or sentence*** as a matter of law or in the interests of justice.

If there is no sentence-specific vehicle for post-conviction relief, another option is to vacate the conviction itself on a ground of legal invalidity. For information about California post-conviction relief, for sentences or convictions, see online resources at ILRC. [4]

After a conviction is vacated, the defendant is placed in the same position that they were in in before the vacatur was granted: facing an open complaint with criminal charges. In some instances, the defendant may negotiate with the prosecutor to add a new charge or count and plead guilty or no lo contendere to obtain a new disposition. Take care to negotiate a new conviction and/or sentence that will not cause future immigration consequences.

Some individuals may also want to investigate eligibility for a gubernatorial pardon. A gubernatorial pardon can be effective at eliminating, at a minimum, the aggravated felony and crime involving moral turpitude grounds of deportability.[5]

B. How might this affect my client?

- ***My client already received an immigration benefit and/or immigration relief based on a sentence reduction.*** Though *Matter of Thomas/Thompson* has far reaching reverberations going forward, people who have already received a sentence reduction and been granted immigration relief by

[4] To read more about the California Post-Conviction Legal Landscape, see ILRC's free manual, *Helping Immigrant Clients with Post-Conviction Legal Options* (June 2019) at https://www.ilrc.org/helping-immigrant-clients-post-conviction-legal-options-guide-legal-services-providers.

[5] See Fact Sheet About Gubernatorial Pardons in California, https://www.ilrc.org/fact-sheet-about-gubernatorial-pardons-california

relying on *Matter of Cota Vargas* should assertively argue that their cases should not be subject to being reopened and relitigated in light of this new ruling.

- ***My client is convicted of a California felony wobbler, and the felony is barring them from immigration relief.*** There are some forms of immigration relief, such as TPS and DACA, that are barred if an individual has a felony conviction on their record. Pursuing a reduction of a felony to a misdemeanor under, e.g., Cal. Pen. C. § 17(b) or Prop 47 will still be given immigration effect and will remove the felony bar to certain forms of immigration relief. This is because the bar to that particular type of immigration relief is not based on a sentence *imposed*—the issue addressed in *Matter of Thomas/Thompson*—but rather on the classification of the offense as a felony.

- ***My client is eligible for a felony/misdemeanor reduction and a sentence modification.*** If your client is eligible to reduce a felony to a misdemeanor *and* for a section 18.5(b) sentence reduction, you may certainly obtain that form of state relief. But advise your client that under *Matter of Thomas/Thompson*, this will not reduce their imposed sentence to 364 days for immigration purposes. Reducing a felony to misdemeanor reduction generally may put your client in a more advantageous posture to pursue a vacatur. For example, it might be easier to identify an immigration-neutral disposition to replace a misdemeanor than a felony. But keep in mind that you will need to follow up the redesignation with a vacatur motion and courts may be hostile to multiple post-conviction motions.

- ***My client is concerned about crimes involving moral turpitude.*** *Matter of Thomas/Thompson* might not affect your client. It's important to keep in mind the difference between an *imposed* sentence (the custody time, suspended or not, that the judge ordered in an individual's case) and a *potential* sentence (the maximum possible amount of custody time that can be imposed on anyone for the offense). *Matter of Thomas/Thompson* affects imposed sentences. It does not affect the potential sentence for an offense, which is what is often the issue with crimes involving moral turpitude (CIMTs). For example, some immigration benefits or defenses require a single CIMT to have a *potential* sentence of either 365 days or less, or 364 days or less.[6] In California, the *potential* sentence for a misdemeanor, or for a felony that is reduced to a misdemeanor, is governed by Penal

[6] For example, to qualify for the petty offense exception to the CIMT inadmissibility ground, the person must have committed only one CIMT, a sentence of six months or less must have been imposed, and the offense must have a *potential sentence of 365 days or less*. INA § 212(a)(2)(A)(ii)(II). To avoid being barred from eligibility for "10-year" cancellation of removal for non-permanent residents, the current rule is that the person must have committed only one CIMT, a sentence of six months or less must have been imposed, and the offense must have a *potential sentence of 364 days or less*. *Matter of Cortez,* 25 I&N Dec. 301 (BIA 2010), interpreting INA § 240A(b)(1)(C). If a person was convicted of a CIMT committed within five years of admission, the person will be deportable unless the offense has a *potential sentence of 364 days or less*. INA § 237(a)(2)(A)(i).

Code § 18.5(a) (not section 18.5(b)), and by a different BIA case, *Matter of Velasquez-Rios*, 27 I&N Dec. 470 (BIA 2018).[7] For more information on CIMTs, see online advisories.[8]

- ***My client has already received a new sentence and is now going to apply for an immigration benefit***. First, investigate whether your client is eligible for another post-conviction remedy, like a vacatur of the conviction or sentence for error. If your client is eligible, then consider filing for an alternative form of post-conviction relief to protect against the *Matter of Thomas/Thompson* decision. If your client is not eligible for any other post-conviction remedy, then review the arguments in Part IV, below. Assess whether, if your client is denied the immigration benefit, they will be eligible for other forms of immigration relief,[9] and make an informed decision with your client.

IV. Arguments to limit the reach of the AG's decision

Because litigators are likely to challenge this decision in the federal courts of appeal and may succeed in reversing it, advocates should preserve issues for appeal in every affected case, so that our clients can take advantage of any good litigation outcome. Here are initial suggestions for possible grounds to preserve for appeal and to subsequently raise on appeal to a U.S. Court of Appeals. ILRC will post an appellate brief on this issue as one becomes available.

- ***Matter of Thomas/Thompson is incorrectly decided, and wrongly overturns decades of established law***. The Attorney General states that longstanding precedent must be reversed, based on his reading of the plain language of the statute. However, the AG comes to incorrect conclusions, based on what he believes the language "suggests,"[10] and makes questionable use of tools of

[7] California Penal Code 18.5(a) provides that all California misdemeanors have a potential sentence of 364 days rather than 365 days, *regardless of date of conviction*. But in *Matter of Velasquez-Rios,* the BIA held that while California misdemeanor convictions from on or after January 1, 2015 have a potential sentence of 364 days for immigration purposes, due to section 18.5(a), convictions from before that date have a potential sentence of 365 days. Advocates are appealing this decision. See ILRC, *BIA Rejects Retroactive Application of Cal. Pen. C. 18.5(a) 364-day Misdemeanor Law: Matter of Velasquez-Rios* (Oct. 2018) at https://www.ilrc.org/matter-velasquez-rios-and-364-day-misdemeanors

[8] See the *Matter of Velasquez-Rios* advisory, above, and see ILRC, *All Those Rules About Crimes Involving Moral Turpitude* (2017, with 2019 forthcoming) at www.ilrc.org/crimes.

[9] See ILRC's Relief Toolkit, https://www.ilrc.org/sites/default/files/resources/relief_toolkit-20180827.pdf, (Jan 2018).

[10] *See, e.g., Matter of Thomas/Thompson*, 682 (emphasis supplied): "[T]he [conviction] definition . . . contains language making clear that the length of a 'term of imprisonment or a sentence' is calculated '*regardless of any suspension of the imposition or execution of that imprisonment or sentence in whole or in part*.' 8 U.S.C. § 1101(a)(48)(B). The length of a sentence . . . thus ignores 'suspensions' (whether occurring at the time of sentencing or thereafter), *suggesting* that other post-sentencing events—such as modifications or clarifications—should not be relevant under the immigration laws. Accordingly, the phrase 'term of

statutory interpretation. Immigration advocates should preserve arguments before IJs and the BIA (for subsequent review by a Circuit Court of Appeals) that, as matter of statutory construction, the term "conviction" at INA § 101(a)(48)(A)-(B), 8 USC § 1101(a)(48)(A)-(B) gives effect to sentencing modifications regardless of the basis for the modification. The Board's initial parsing of the "conviction" definition in *Cota-Vargas* was correct as a matter of law and should be adopted by the Court of Appeals on petition for review. *See Cota-Vargas*, 23 I&N Dec. at 852 (discussing the "language" and "stated purpose of section 101(a)(48)(B), examining the Board's prior case law on convictions and sentences pre and post-dating the enactment of section 101(a)(48)(B), and giving "effect to a sentence modification" for immigration purposes).

- ***The AG decision is not entitled to Chevron deference.*** The AG states that his decision is based on the plain language of the statute. *Matter of Thomas/Thompson*, 27 I&N Dec. 674, 682. Thus, according to this logic, federal courts do not owe *Chevron* deference to his interpretation.[11] Because his decision was based on "plain language," the AG effectively concedes that there is no ambiguity and therefore the courts of appeal must make their own analysis, based on applicable tools of statutory interpretation. Because *Chevron* deference is not implicated, *Matter of Thomas/Thompson* does not require federal courts to withdraw from their own prior precedent under *Brand X*. Therefore, if a federal court of appeals has held that state court sentence modifications have effect in immigration proceedings without requiring a finding of legal error, immigration authorities must follow the federal court's rule, despite *Matter of Thomas/Thompson.* The Ninth Circuit has stated that "a state court order to classify an offense or modify a sentence . . . is clearly construing the nature of the conviction pursuant to state law." *Garcia-Lopez v. Ashcroft*, 334 F.3d 840, 846 (9th Cir. 2003) (giving immigration effect to reduction of a felony to a misdemeanor), overruled in part on other grounds by *Ceron v. Holder*, 747 F.3d 773, 778 (9th Cir. 2014) (en banc). Therefore immigration advocates should argue before the IJ and BIA that *Matter of Thomas/Thompson* does not apply in the Ninth Circuit because the AG cannot invoke *Brand X* deference to apply its interpretation of a confessedly unambiguous statute, and the Ninth Circuit has already disagreed with the rationale of *Thomas/Thompson* in *Garcia-Lopez*. Should any ambiguities exist in the statutory text, these

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imprisonment or a sentence' in paragraph (B) is best read to concern an alien's original criminal sentence, without regard to *post-sentencing alterations that, like a suspension, merely alleviate the impact of that sentence*." But suspended execution of sentence is a distinct function, used mainly at the time of sentencing, in a different context and for different reasons than a sentence modification. Arguably, the AG's "suggested" reading of the law is not the plain meaning of the statute and does not justify overturning precedent.

[11] For an introduction to *Chevron* issues, see ILRC, *Who Decides: Overview of Chevron, Brand X, and Mead Principles* (Oct. 2011) at https://www.ilrc.org/who-decides-overview-chevron-brand-x-and-mead-principles. For sample arguments regarding the application of the rules of statutory construction in the immigration context, including the rule of lenity and the presumption against deportation for statutory terms like "conviction," advocates can consult the *amicus* brief of the National Association of Criminal Defense Lawyers filed in *Luna Torres v. Lynch*, 136 S. Ct. 1619 (2016), *available at* https://www.scotusblog.com/wp-content/uploads/2015/08/14-1096_amicus_pet_NatlAsscnofCrimDefLawyers.authcheckdam.pdf.

ambiguities should be resolved in favor of the noncitizen under the presumption against deportation or rule of lenity.

- ***The AG decision should not apply retroactively*.** Because *Matter of Thomas/Thompson* is a new rule that can bring new adverse consequences to immigrants' past legal decisions, the new rule should not apply to modifications of sentence or to positive immigration rulings based on such modifications that occurred before the October 25, 2019 date of publication.[12] A majority of Courts of Appeals, including the Ninth Circuit, apply a five-factor test to determine whether a new agency rule established through administrative adjudication may be applied retroactively. *See Miguel-Miguel v. Gonzales*, 500 F.3d 941 (9th Cir. 2007) (applying *Montgomery Ward & Co., Inc. v. FTC,* 691 F.2d 1322 (9th Cir.1982) and declining to retroactively apply "particularly serious crime" bar to immigration relief); *Garcia-Martinez v. Sessions*, 886 F.3d 1291 (9th Cir. 2018) (declining to retroactively apply BIA's new definition of a crime involving moral turpitude theft offense).[13]

- ***Argue that the grounds for the sentence reduction are vague***. In the Ninth Circuit, the government has the burden of proving that a vacatur or reduction order is ineffective.[14] A vacatur or sentence reduction granted for mixed reasons—e.g., to address a ground of legal invalidity *and* to avoid immigration consequences, will therefore still meet the requirements for a valid vacatur. If the reduction is based on a mixed rationale, the immigrant should be able to meet their burden of proving an effective post-conviction sentence reduction or vacatur. Current Ninth Circuit case law correctly holds in a related context that removable noncitizens applying for relief satisfy their burden of proving eligibility where documents do not clarify whether the conviction is disqualifying or not. *See Marinelarena v. Barr*, 930 F.3d 1039 (9th Cir. 2019). *But see Pereida v. Barr*, 916 F.3d 1128 (8th Cir. 2019) (agreeing with Fourth, Sixth, and Tenth Circuits finding immigrants disqualified from proving relief eligibility under these circumstances).

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[13] For additional resources on how to apply this anti-retroactivity standard in cases impacted by *Matter of Thomas/Thompson*, advocates may consult *Exploring Applications of the Anti-Retroactivity Holding of* Obeya v. Sessions *Beyond the Larceny and Stolen Property Contexts*, Immigrant Defense Project and Kathryn O. Greenberg Immigration Justice Clinic (June 2018), *available* at https://www.immigrantdefenseproject.org/wp-content/uploads/2018-06-08-Obeya-Retroactivity-Advisory-Addendum-FINAL-1.pdf.

[14] See *Nath v. Gonzales*, 467 F.3d 1185 (9th Cir. 2006) (holding that the government must prove by clear and convincing evidence that an order vacating conviction was ineffective to eliminate conviction, an ambiguous order does not allow the government to meet its burden); *Cardozo-Tlaseca v. Gonzales*, 460 F.3d 1102 (9th Cir. 2006) ("for the government to carry its burden in establishing that a conviction remains valid . . . the government must prove . . . Petitioner's conviction was quashed solely for rehabilitative reasons or reasons related to his immigration status, i.e., to avoid adverse immigration consequences.'").