Luis Angel Reyes Savalza (SBN 308109)
PANGEA LEGAL SERVICES
Nonprofit Organization
350 Sansome St, Ste 650
San Francisco, CA 94104
Tel: (415) 635-4931
Fax: (415) 593-5335
luisangel@pangealegal.org

Pro Bono Attorney for Respondent

NOT DETAINED

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS
FALLS CHURCH, VIRGINIA

In the Matter of:	
[]	**File No.: A[]**
Respondent,	
In Removal Proceedings	

RESPONDENT'S REPLY BRIEF TO DHS' RESPONSE TO RESPONDENT'S SUPPLEMENTAL EVIDENCE IN SUPPORT OF STATUTORY MOTION TO REOPEN AND NEW MOTION TO REOPEN UNDER 8 C.F.R. § 1003.2(C)(3)(V)

INTRODUCTION

Respondent, [] ("Mr. M."), a long-time lawful permanent resident ("LPR"), hereby submits this reply brief in response to the Department of Homeland Security ("DHS")'s opposition, filed around February 11, 2021. In its opposition, the DHS questions Mr. M.'s eligibility to reopen and the validity of his vacated convictions. The DHS' arguments misstate both law and fact and create new legal doctrine out of whole cloth. The Board should instead follow the plain language of the regulations, its own precedent, circuit case law, and the Supreme Court's binding decision in *Padilla v. Kentucky*, 559 U.S. 356 (2010).

First, the DHS misstates the record by asserting that a motion to reopen proceedings under new regulation 8 C.F.R. § 1003.2(c)(3)(v) is unavailable to Mr. M. 8 C.F.R. § 1003.2(c)(3)(v) became effective on January 15, 2021, Mr. M.'s convictions were vacated for legal defect on January 19, 2021, and he filed a *new* motion to reopen under the new regulation on January 28, 2021—well after the regulation's effective date. Second, the DHS' argument that Mr. M. lacked diligence under 8 C.F.R. § 1003.2(c)(3)(v) is flawed, as Mr. M. filed to reopen days after the "intervening change in … fact [that] render[ered] him no longer removable at all." 8 C.F.R. § 1003.2(c)(3)(v). Third, the DHS' argument that vacaturs under California Penal Code ("PC") § 1473.7 should be *presumed* "ameliorative"—a presumption the DHS invents out of whole cloth—is not supported by law, because vacaturs under PC § 1473.7 are *exclusively* granted for legal or procedural defect, and never for rehabilitative purposes. Indeed, the Board of Immigration Appeals ("Board" or "BIA") has consistently found that vacaturs under PC § 1473.7 satisfy the standard in *Matter of Pickering*, 23 I&N Dec. 621, 624 (BIA 2003). *See* Exh. B (collecting BIA unpublished cases). As explained further below, Mr. M. is entitled to reopening as his sole removable offenses have been vacated for legal invalidity – specifically, that he was

not meaningfully and adequately advised of the immigration consequences of his plea. *See* Exh. A (decision transcript). To find otherwise would contravene Board, circuit, and Supreme Court precedent.

ARGUMENT

I. MR. M.'S CONVICTIONS WERE VACATED UNDER PC § 1473.7 FOR LEGAL DEFECT, AND THUS ARE INVALID FOR IMMIGRATION PURPOSES.

The DHS' spills considerable ink arguing that criminal vacaturs under PC § 1473.7 "may be caused by a substantive or procedural defect," or they may not. DHS Opp. at 10. This is completely unmoored from extant law and from the facts of Mr. M.'s case. First, the Board is bound by Ninth Circuit precedent holding that in the motion to reopen context, the DHS bears the burden of proving by clear and convincing evidence that an LPR's vacated convictions were vacated "solely" for rehabilitative reasons. *See Nath v. Gonzales*, 467 F.ed. 1185, 1189 (9th Cir. 2006). Second, on the merits, the DHS is plainly wrong to characterize PC § 1473.7 as an "ameliorative" statute when the statute on its face vacates convictions *exclusively* for legal invalidity "due to prejudicial error damaging the noncitizen's ability to meaningfully understand, defend against, or knowingly accept the actual or potential adverse immigration consequence of a plea of guilty." *See* Cal. P.C. § 1473.7(a)(1). DHS invites the Board to contravene the plain language of the statute, overturn *Matter of Pickering* and its own well-established practices regarding PC § 1473.7(a)(1), and court a possibly unconstitutional result—the Board should not accept this invitation. Third, the DHS reliance on *Matter of Thomas and Thompson* 27 I&N Dec. 674, 685 (AG 2019) for its invented "rebuttable-presumption" rule is misplaced, as that case did nothing but affirm *Matter of Pickering* in the context of sentence alterations—which is not at issue here.

For these reasons, and as shown below, the DHS' opposition lacks merit, and Mr. M.'s motion to reopen should be granted and his removal proceedings terminated, as there is no longer a basis for his removal.

A. The DHS Has Failed to Meet Its Burden by Clear and Convincing Evidence to Show that Mr. M.'s Convictions Were Vacated for Rehabilitative Purposes.

The DHS misstates Ninth Circuit precedent when it says that Mr. M. bears the burden of proof in this case. DHS Opp. at 2, 7 n.3. This question was resolved in *Cardoso-Tlaseca v. Gonzales*, 460 F.3d 1102, 1107 (9th Cir. 2006) and *Nath v. Gonzales*, 467 F3d 1185 (9th Cir. 2006), which placed the burden squarely on the government. In the motion to reopen context, *Nath* held that it's "the government [that] must prove with clear, unequivocal and convincing evidence that the Petitioner's conviction was quashed *solely* for rehabilitative reasons or reasons related to his immigration status." *Nath*, 467 F.3ed. at 1189 (internal citations omitted) (emphasis in original). This was a central holding in *Nath*. *Id.* ("The record before us does not reveal the reasons for setting aside the conviction. The government has, therefore, failed to carry its burden of proof on the question of the reasons the state set aside the first conviction."). DHS' citation to *Shin v. Mukasey*, 547 F.3d 1019, 1025 (9th Cir. 2008), misleads the Board, as it pertains to the general burden a noncitizen bears for motions to reopen, not the question of who bears the burden to demonstrate that convictions purportedly vacated for legal error were actually rehabilitative in nature. In the Ninth Circuit, *Nath* has never been overruled. *See, e.g.*, *Sutherland v. Holder*, 769 F.3d 144, 146 n.2 (2d. Cir. 2014) ("If an alien presents evidence that a predicate conviction has been vacated, we have not decided whether the government or the alien bears the burden of demonstrating the underlying basis for vacatur and, as a result, the continued validity of the conviction for purposes of establishing removability. The Sixth, Ninth, and Tenth Circuits have held that the government bears the burden.").

Contrary to the DHS' suggestion, *Matter of Chavez,* 24 I&N Dec. 272 (BIA 2007) does not alter *Nath*'s holding. *See* DHS Opp. at 7 n.3. For one, the BIA cannot unilaterally overrule the Ninth Circuit. *See Matter of Anselmo*, 20 I&N Dec. 25, 31 (BIA 1989) (explaining that the Board historically follows a court's precedents in cases arising in that circuit). For two, *Matter of Chavez* itself recognized that in the Ninth Circuit the burden is on the government, and there the Board did not (nor could it) hold that it was unsettling the Ninth Circuit's decision. *See* 24 1&N Dec. at 274 (citing *Nath*). Thus, the Board is unequivocally bound by *Nath*.

Here, the DHS has presented no evidence—let alone clear and convincing evidence—that Mr. M.'s criminal vacatur is for rehabilitative purposes. As shown below, the DHS does not seriously question that Mr. M.'s vacatur under PC § 1473.7 is, on its face, for legal invalidity or procedural defect. *See infra* Part III.B.[1] Instead, the DHS requests that the Board look beyond the state court judgement and apply an invented "rebuttable presumption" rule contrary to controlling case law. *See infra* Part III.C. Because the DHS presents no evidence that the vacatur in this case is for rehabilitative purposes, the burden question is dispositive in this case, and Mr. M.'s motion to reopen should be granted and his proceedings terminated.

B. The DHS Cannot Go Behind Mr. M.'s State Court Judgement Because His Convictions Were Expressly Vacated Due to A Defect in the Underlying Criminal Proceeding.

i. The Board's Existing Precedent States That the Board Should Not "Wade Into the Intricacies of State Criminal Law" In Order to Determine Whether A Conviction Was Vacated For Legal Error.

[1] While PC § 1473.7 vacates convictions exclusively for legal or procedural defect, *see infra* Part III.B, it is noteworthy that even if the vacatur were granted on mixed bases—that is, the bases included grounds of legal invalidity *and* rehabilitative grounds—the DHS would still not meet its burden under *Nath*, which requires that the DHS "prove with clear, unequivocal and convincing evidence that the Petitioner's conviction was quashed *solely* for rehabilitative reasons." *Nath*, 467 F.3ed. at 1189 (emphasis in original).

Where a state's "criminal law provision under which the respondent's conviction was vacated [is] neither an expungement statute or a rehabilitative statute," the Board cannot "go behind the state court judgement." *See Matter of Rodriguez-Ruiz*, 22 I&N Dec. 1378, 1379 (BIA 2000). This rule was most recently reaffirmed in *Matter of Thomas & Thompson*, 27 I&N Dec. 674 (A.G. 2019). There, the Attorney General made clear that the *Matter of Pickering* standard requires "little interpretation of state law" because "whether a vacatur is valid for immigration purposes" is assessed in "the text of the order of vacatur itself or the alien's motion requesting the vacatur." *Id.* at 685-686 (noting that "immigration judges should not need to wade into the intricacies of state criminal law in applying this opinion's rule"). Yet, this is precisely what the DHS asks this Board to do here.

Specifically, the DHS asks this Board to "not accept a California court finding that a defendant suffered a prejudicial error from a misunderstanding of the consequences of the guilty plea." DHS Opp. at 18. According to DHS, the Board should instead wade into the state's criminal case law, the statute's legislative history, and amendments to assess the alleged "ameliorative intent of the California legislature." *Id.* at 15-17; *see also id.* at 11-18. This overreach is contrary to *Matter of Pickering*.

Under *Matter of Pickering*, the Board assesses whether a state vacatur is based on a substantive or procedural defect in the underlying criminal proceedings by looking at the plain meaning of the state vacatur statute, the vacatur order, or the motion to vacate. *See* 23 I&N Dec. 621, 625 (BIA 2003). "[I]f a court with jurisdiction vacates a conviction based on a defect in the underlying criminal proceedings," that's the end of the matter; "the respondent no longer has a 'conviction' within the meaning of section 101(a)(48)(A)." 23 I&N Dec. 621, 624 (BIA 2003).

ii. The Language of Mr. M.'s California State Court Vacatur Order, His Motion to Vacate, And P.C. § 1473.7 Make Clear That His Convictions Were Vacated for Legal Defect.

The actual language of the vacatur order, Mr. M.'s motion to vacate, and the vacating statute clearly demonstrate that Mr. M.'s convictions were vacated for legal invalidity, not rehabilitative purposes. On its face, the California Superior Court ordered Mr. M.'s convictions vacated for "prejudicial error damaging [his] ability to meaningfully understand, defend against, and knowingly accept the actual or potential immigration consequences of the plea and sentence in this case." *See* Resp't Supplemental Evidence and New Motion, Exh. A (vacatur order) (filed on January 28, 2021).

Likewise, Mr. M.'s motion to vacate exclusively sought relief "on the grounds that Mr. M. did not knowingly accept the actual immigration consequences of the plea and sentence" because "Mr. M.'s attorney affirmatively misadvised defendant telling him that because he was a lawful permanent resident he would not face deportation, which was egregiously incorrect." Resp't Motion to Reopen, Exh. F (motion to vacate) (filed October 6, 2020). While a specific finding of ineffective assistance of counsel is not required under the *Matter of Pickering* standard, the factual findings in Mr. M.'s case show that *in this case* there was a finding of ineffective assistance of counsel contrary to the DHS' erroneous claim that no ineffective assistance of counsel was found. *See* DHS Opp. at 23. Specifically, the California Superior Court made the following finding in its vacatur decision: "I didn't want to have to address this because I really like Mr. Hackett and I think he's a fine attorney, but I did find him brutally honest when he said he wasn't really sure if he would have discussed or explored the actual immigration consequences with Mr. M.." Exh. A (decision transcript), at 3. The Superior Court also found that "[Mr. M] was led to believe [by his attorney] that as a permanent resident he was okay." *Id.* at 4. These factual findings show that the Superior Court found not only that Mr. M.'s defense

attorney failed to advise him about the actual immigration consequences in his case, but that he affirmatively misadvised him. This is ineffective assistance of counsel. *Padilla v. Kentucky*, 559 U.S. at 360, 369. While the transcript is provided here for the Board's convenience, the previously submitted state court order and motion from Mr. M. themselves satisfy the *Matter of Pickering* standard. *See Matter of Thomas & Thompson* 27 I&N Dec. at 685-86 (A.G. 2019) (noting that "the text of the order of vacatur itself or the alien's motion requesting the vacatur" suffice).

Turning to the vacatur statute itself, the plain language of PC § 1473.7 authorizes a vacatur "only" where "[t]he conviction or sentence is legally invalid due to a prejudicial error." Cal. P.C. § 1473.7(a)(1); *see also* § 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*" (emphasis added)). "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); *Retuta v. Holder*, 591 F.3d 1181, 1188 (9th Cir. 2010). 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); *see also Wisconsin Central Ltd. v. U.S.*, 138 S. Ct. 2067, 2070-71 (2018) (citing Black's Law Dictionary to "interpret the words consistent with their "ordinary meaning…") (internal quotation omitted)).

Indeed, PC § 1473.7 specifies three discrete scenarios that render the underlying criminal proceedings invalid: (1) where the plea is not knowing or meaningfully understood, either

because of ineffective assistance of counsel or another reason; (2) where there's evidence of actual innocence, or (3) where the conviction or sentence was imposed on the basis of race, ethnicity, or national origin. *See* Cal. P.C. § 1473.7(a)(1)-(3); *see also People v. Camacho*, 244 Cal.Rptr.3d 389, 407 (Ct.App. 2019); *People v. Mejia*, 36 Cal.App.5th 859 (Ct.App. 2019). These are all grounds that render a conviction legally invalid under PC § 1473.7. None of these grounds are for ameliorative or rehabilitative purposes.

The DHS' arguments to the contrary lack merit. First, the DHS reliance on PC § 1473.7(e) is confused. DHS Opp. at 15. All that PC § 1473.7(e) says is that, in addition to finding a legal invalidity in the underlying criminal proceedings, the defendant must "also establish that the conviction of sentence being challenged is currently causing or has the potential to cause removal." Cal. P.C. § 1473.7(e). That the defendant under PC § 1473.7(e) must show that his plea carries an immigration consequence does not render the vacatur rehabilitative any more than *Padilla v. Kentucky*, 559 U.S. 356 (2010) renders a Sixth Amendment violation rehabilitative simply because the defendant must establish that his plea "clear[ly]" "carries a risk of deportation." *See id.* at 369, 374-75. Thus, the fact that the defect relates to immigration advice or failure to defend against immigration consequences is of no consequence. *See Matter of Adamiak*, 23 I&N Dec. 878 (BIA 2006) (holding that an Ohio conviction vacated because of a failure of the court to give required immigration advisals about potential immigration consequences is not a conviction for immigration purposes).

Second, the DHS' reliance on PC § 1473.7(a)(1) is equally flawed. *See* DHS Opp. at 11-12. Section 1473.7(a)(1) simply clarifies that a "finding of legal invalidity may, but need not, include a finding of ineffective assistance of counsel." By its plain terms, it requires a "legal invalidity." Cal. P.C. § 1473.7(a)(1). A criminal proceeding is legally invalid if the defendant

does not knowingly or meaningfully understand a plea due to "not only counsel error, but also including defendant's own error." *See People v. Camacho*, 244 Cal.Rptr.3d 389, 407 (Ct App 2019). That a *finding* of ineffective assistance of counsel is not always required, and can be based on the defendant's lack of knowledge, is grounded in due process jurisprudence, and does not make the statute rehabilitative.

It is an elementary notion of due process that a guilty plea that is not "knowing, intelligent, free, or voluntary" is legally invalid. *See Cardoso-Tlaseca v. Gonzales*, 460 F.3d 1102, 1104 (9th Cir. 2006). After all, a defendant entering a guilty plea "stands as a witness against himself," 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). A person's guilty plea constitutes "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). A plea that is not knowing of potential immigration consequences violates the Fifth Amendment. *See U.S. v. Gonzales*, 884 F.3d 457, 462 (2d Cir. 2018) (defendant's "plea was not knowing and voluntary because he was unaware of the grave potential immigration consequences of the convictions"); *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"). While DHS would like to reduce a cornerstone of due process jurisprudence by mischaracterizing it as a mere "subjective claim of a lack of understanding," *see* DHS Opp. at 18, this is not the law.

Furthermore, the DHS' pivot to Sixth Amendment federal *coram nobis* cases is misplaced. *See* DHS Opp. at 13-14. It is no controversy that Sixth Amendment *coram nobis* petitions must satisfy a different standard that requires a showing of incompetent representation. *See Strickland v. Washington*, 466 U.S. 668, 688 (1984). That is after all the nature of a "right to counsel" claim under the Sixth Amendment. *Id.* But that line of jurisprudence is inapposite here, where we are presented with an entirely different legal vehicle in an entirely different court challenging an entirely different jurisdiction's conviction. In fact, immigrants challenging *state* court convictions are not even permitted to use *coram nobis* petitions to raise Sixth Amendment claims. *See People v. Kim,* 45 Cal. 4th 1078, 1104 (Cal. 2009) ("Because a statutory remedy is now available… *coram nobis* cannot lie." (internal citations omitted)).

Needless to say, federal *coram nobis* petitions by no means encompasses the universe of substantive and procedural defects that can render a criminal conviction legally invalid under *Matter of Pickering*. Indeed, the DHS agrees that *Matter of Pickering* can be satisfied by a vacatur that finds the underlying criminal proceeding defective under state law. *See* DHS Opp. at 9-10, 14, 17, 25 (noting that a "substantive or procedural defect in the adjudication of guilt or sentencing is one that flows from a violation of a right under *state* or federal law" (emphasis added)). That California law allows people to raise due process violations under PC § 1473.7—recognizing that pleas must be knowing and meaningfully understood to be legally valid—is not for this Board to question. "[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." *Matter of Thomas & Thompson*, 27 I&N Dec. 674, 686 (AG 2019).

As discussed above, the California state court judgement on its face vacated Mr. M.'s convictions exclusively for a procedural and substantive defect: for "prejudicial error damaging [his] ability to meaningfully understand, defend against, and knowingly accept the actual or potential immigration consequences of the plea and sentence in this case." *See* Resp't Supplemental Evidence and New Motion, Exh. A (vacatur order) (filed on January 28, 2021). While *Matter of Pickering* does not require a specific finding of ineffective assistance of counsel to satisfy the substantive or procedural defect standard, in this case the California Superior Court *did find* ineffective assistance of counsel. *See* Exh. A, at 3-4 (decision transcript) (finding Mr. M.'s defense attorney "brutally honest when he said he wasn't really sure if he would have discussed or explored the actual immigration consequences with Mr. M." and that "[Mr. M.] was led to believe that as a permanent resident he was okay"). This clearly satisfies *Matter of Pickering*.

iii. The DHS's Reading of *Padilla v. Kentucky* Contravenes the Supreme Court's Holding.

The DHS' reliance on *Padilla v. Kentucky*, 559 U.S. 356 (2010) to question the finding of ineffective assistance of counsel in this case is fatally flawed. DHS Opp. at 21-23. First, the DHS is wrong to say that *Padilla* does not control here. *See* DHS Opp. at 23. Mr. M. entered his plea in December 2011, more than a year after *Padilla* was decided in 2010. Thus, Mr. M.'s criminal defense attorney had a duty to advise Mr. M. of the actual immigration consequences of his plea. *See Padilla*, 559 U.S. at 368-69, 374-75; *see Chaidez v. United States*, 568 U.S. 342, 358 (2013).

Second, the DHS is wrong to suggest that Mr. M.'s prior counsel was absolved of his *Padilla* obligation to properly advise Mr. M. of the immigration consequences of his plea because the consequences of the convictions were unclear. DHS Opp. at 22-23. At the time of Mr. M.'s plea in 2011, a conviction for robbery under PC § 211 with a sentence imposed of one

year or more was clearly an "aggravated felony" as a "crime of violence" and as a "crime of theft." *See* INA § 101(a)(43)(F); INA § 101(a)(43)(G). Likewise, a conviction for possession of a controlled substance with intent to sell under Health & Safety Code § 11378 was clearly an "aggravated felony" for drug trafficking under INA § 101(a)(43)(B) regardless of the length of the sentence, just like it was clearly a removable offense relating to a controlled substance under INA § 237(a)(2)(B)(i)—the same removable ground that the Supreme Court found "succinct, clear, and explicit in defining the removal consequences for Padilla's conviction." *Padilla*, 559 U.S. at 368 (noting that "[t]he consequences of Padilla's plea could easily be determined from reading the removal statute").

Similarly, the DHS' reliance on PC § 1016.5, which governs criminal court advisements, to argue that PC § 1473.7 is "redundant," confounds the different duties, rights, and responsibilities held by criminal courts, attorneys, and defendants in criminal proceedings. *See* DHS Opp. at 12. While PC § 1016.5 requires criminal *courts* to provide *general* advisements, defense counsel, not the court, carries the obligation of providing case-specific advice about the actual immigration consequences of a conviction. *In re Reyna Perez Hernandez,* 33 Cal.App.5th 530 (Cal. 2019) (holding that PC § 1016.5 advisement "is not designed, nor does it operate, as a substitute for such advice of defense counsel regarding the applicable immigration consequences in a given case" (internal citations omitted)). Indeed, "[o]ne of the purposes of the section 1016.5 advisement is to enable the defendant to seek advice from counsel about the *actual* risk of adverse immigration consequences." *People v. Patterson*, 2 Cal.5th 885, 897 (Cal. 2017) (emphasis added). As the California Supreme Court explained there, "the actual risk that the conviction will lead to deportation—as opposed to general awareness that a criminal conviction 'may' have adverse immigration consequences—will undoubtedly be a material matter that may

factor heavily in the decision whether to plead guilty." *Id.* at 896 (noting that while "I know every time that I get on an airplane that it could crash, [] if you tell me it's going to crash, I'm not getting on" (internal citations omitted)). The rights and duties found in PC § 1016.5 and PC § 1473.7 therefore work in tandem, and are not mutually exclusive. To find otherwise would be to eradicate the constitutional protections erected by the Supreme Court in *Padilla*, which expressly required criminal defense attorneys to advise about the immigration consequences of a plea agreement. *See Padilla*, 559 U.S. at 368-69, 374-75. Indeed, what the DHS ignores is that the petitioner in *Padilla* was in fact given a general court advisement about "possible immigration consequences." *See Padilla*, 559 U.S. at 374 n.15 (noting that the "plea form currently used in Kentucky courts provides notice of possible immigration consequences"). Yet, as the Supreme Court held, this did not absolve the defense attorney from providing accurate advice about the actual immigration consequences in the case. *Id*. at 368-69, 374-45. The DHS' arguments to the contrary are thus inherently flawed and misstate the law.

In summary, the vacatur order, the vacatur motion, and the vacatur statute by their plain terms show that Mr. M.'s convictions were vacated for a legal defect in the underlying criminal proceeding, and therefore they are no longer convictions for immigration purposes. *See Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003).

C. The DHS Seeks to Undermine Binding, Extant Case Law by Asking the Board to Invent a Novel Legal Rule.

Unable to prove that Mr. M.'s vacatur order was for rehabilitative purposes, the DHS requests that this "Board should apply a rebuttable presumption" against all vacaturs under PC § 1473.7 granted after January 1, 2019. *See* DHS Opp. at 17. It is noteworthy that since that date the BIA has continued to find that vacaturs under PC § 1473.7 eliminate convictions for

immigration purposes. *See* Exh. B (collecting unpublished BIA decisions). What's more, the DHS cites no authority in support of its invented rule.

To the extent that the DHS relies on *Velasquez-Rios v. Barr*, 979 F.3d 690 (9th Cir. 2020) and *Matter of Thomas & Thompson*, 27 I&N Dec. 674 (AG 2019) to prop up its novel rule, *see* DHS Opp. at 24-25, those cases are inapposite here. First, *Velasquez-Rios v. Barr*, 979 F.3d 690 (9th Cir. 2020) is a case about the retroactive application of a state's sentencing reduction law, and not about vacaturs of convictions based on legal error. *Id.* at 691. In *Velasquez-Rios*, the state statute in question did not require a legal defect in the underlying criminal proceeding in order to reduce a sentence. *See* id. at 691, 697 (holding that "California's amendment to § 18.5 of the California Penal Code, which retroactively reduces the maximum misdemeanor sentence to 364 days for purposes of state law, cannot be applied retroactively"). Most significantly, *Velasquez-Rios* does not call for, establish, or even imply the creation of the rebuttable presumption rule that the DHS proffers here.

Second, the Attorney General's decision in *Matter of Thomas & Thompson*, 27 I&N Dec. 674 (AG 2019), likewise did nothing to upend extant case law regarding the standard for effective vacaturs of convictions. In fact, *Matter of Thomas & Thompson* extended the standard already applicable to vacaturs of convictions to modifications of sentences. 27 I&N Dec. at 674 (overruling three of "the Board's decisions…on the effect of state-court orders that modify, clarify, or otherwise alter a… *sentence*") (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*." *Matter of Thomas & Thompson*, 27 I&N Dec. at 675 (emphasis added).

Not only does *Matter of Thomas & Thompson* not provide support for the DHS' invented "rebuttable presumption" rule, it actually undermines it. That's so because *Matter of Thomas & Thompson* reaffirms the BIA's statutory interpretation in *Matter of 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.'" *Matter of Thomas & Thompson*, 27 I&N Dec. at 675 (quoting *Matter of Pickering*, 23 I&N Dec. at 624). As discussed above, the California Superior Court vacated Mr. M.'s convictions for legal defect in the underlying criminal proceedings. *See supra* Part III.B. In *Matter of Thomas & Thompson*, the Attorney General warned that in applying *Matter of Pickering*, the adjudicator is not to reevaluate or question "the validity of the state-court judgment." *Matter of Thomas & Thompson*, 27 I&N Dec. at 686 (noting that "immigration judges should not need to wade into the intricacies of state criminal law in applying this opinion's rule"). The rule that DHS proposes here however, would do just that, and thus contravenes *Matter of Thomas & Thompson* and *Matter of Pickering*.

Because the DHS has fashioned a new rule out of whole cloth, with no support in the case law, the Board should reject it.

CONCLUSION

For the foregoing reasons, the DHS's opposition lacks merit and the Board should reopen and terminate Mr. M.'s proceedings, as his sole removable offenses have been vacated for immigration purposes.

Dated: March 1, 2021

Respectfully submitted,

Luis Angel Reyes Savalza
Pro bono Attorney for Respondent

EXHIBITS

[] A []

PROOF OF SERVICE

On March 1, 2021, I, Luis Angel Reyes Savalza, filed a copy of this RESPONDENT'S REPLY BRIEF TO DHS' RESPONSE TO RESPONDENT'S SUPPLEMENTAL EVIDENCE IN SUPPORT OF STATUTORY MOTION TO REOPEN AND NEW MOTION TO REOPEN UNDER 8 C.F.R. § 1003.2(C)(3)(V) to the following by mail:

Board of Immigration Appeals
Clerk's Office
5107 Leesburg Pike, Suite 2000
Falls Church, VA 22041

I also caused a copy of the above to be served electronically on the Department of Homeland Security, Office of Chief Counsel, at https://eservice.ice.gov, their designated address for service.

_____

Luis Angel Reyes Savalza