



USING AND DEFENDING CALIFORNIA PENAL CODE § 1473.7 VACATURS IN IMMIGRATION PROCEEDINGS

Sample Memorandum of Law and Table of BIA Cases

By Andrew Wachtenheim and Rose Cahn¹

In 2016, California enacted Penal Code § 1473.7, a post-conviction relief vehicle that allows people no longer in criminal custody to vacate legally defective convictions.² Subsection (a)(1) provides people the opportunity to vacate convictions that were legally defective 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.” Cal. P.C. § 1473.7(a)(1). Under immigration law, an offense vacated under § 1473.7(a)(1) is therefore no longer a “conviction” for immigration purposes and may not form the basis for removability or a denial of immigration relief. See INA § 101(a)(48)(A); *Matter of Pickering*, 23 I&N Dec. 621 (2003); *Matter of Rodriguez-Ruiz*, 22 I&N Dec. 1378 (BIA 2011).³

Nevertheless, some attorneys for the Department of Homeland Security (“DHS”) have argued that, under *Matter of Thomas & Matter of Thompson*, 27 I&N Dec. 674 (AG 2019),⁴ convictions vacated under § 1473.7(a)(1) remain “convictions” for immigration purposes. DHS’s arguments are incorrect and violate federal immigration law. The attached “Sample Memorandum of Law” presents legally based responses, clarifying that convictions vacated under § 1473.7 are not “convictions” for immigration purposes, and includes Appendices of unpublished BIA cases finding that prior convictions vacated because they were undermined by ineffective assistance of counsel or secured through pleas that were not knowing, intelligent, and voluntary, are not “convictions” for immigration purposes, especially vacatur under § 1473.7. If you discover more cases, please notify us at rcahn@ilrc.org and awachtenheim@ilrc.org.

This briefing may be used in any legal proceeding where the “conviction” definition at INA § 101(a)(48), 8 U.S.C. § 1101(a)(48), is operable, including in motions to terminate removal proceedings, briefs in support of eligibility for relief from removal, motions for custody redetermination, motions to reopen, and affirmative applications for immigration benefits to U.S. Citizenship and Immigration Services.⁵

¹ Many thanks to Mattie Armstrong, Law Clerk, for outstanding research assistance.

² To read more about the law, see our previous advisories: *Amendments to 1473.7*, <https://www.ilrc.org/amendments-14737>; *New Law That Will Help Vacate Legally Invalid Convictions*, <https://www.ilrc.org/new-law-will-help-vacate-legally-invalid-convictions-advisory-about-ab-813>.

³ Subsection (a)(2) provides a vehicle for people to vacate convictions based on newly discovered evidence of actual innocence. See Cal. P.C. § 1473.7(a)(2). Vacatur under that subsection also meet the *Matter of Pickering* standard, but are beyond the scope of this advisory.

⁴ To read more about *Matter of Thomas & Matter of Thompson*, see our previous advisory: *AG Overturns Sentence Modification Rule: Matter of Thomas & Thompson*, <https://www.ilrc.org/practice-advisory-ag-overturns-sentence-modification-rule-matter-thomas-matter-thompson>.

⁵ The arguments may also be used in applications for visas at U.S. consulates abroad and to refute sentence enhancements made in federal illegal reentry sentencing proceedings (see 8 U.S.C. § 1326).

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.

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 vacatur 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).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

¹ 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 vacatur also meet the *Pickering* and *Nath* standards for when a vacated prior conviction is not a “conviction” under INA § 101(a)(48).

purposes, but “failed to carry its burden” here because § 1473.7 authorizes vacatur only in cases of procedural or substantive defect. *Nath*, 467 F.3d at 1189.

ARGUMENT

I. 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.

A. 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).

2. 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) vacatur rectify these constitutional and statutory errors.

B. 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., Wiedersperger 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_archives/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.

II. **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 vacatur of convictions. *Thomas/Thompson* created a new standard with respect to effective modifications of *sentences*, not a new standard governing vacatur 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).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 vacatur 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 vacatur, 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

² 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).

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.

APPENDIX A

| <u>TABLE OF CASES:</u> | | |
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| BIA DECISIONS HOLDING INA § 101(a)(48)(A) “CONVICTION” DEFINITION DOES NOT INCLUDE PLEAS VACATED DUE TO INEFFECTIVE ASSISTANCE OF COUNSEL OR PLEAS VACATED BECAUSE THEY WERE NOT KNOWING, VOLUNTARY, AND INTELLIGENT | | |
| Case Name | -Date of Decision -State Issuing Vacatur | Holding |
| <i>In Re: Victor Enrique Moran A.K.A. Victor Rivera</i> 2019 WL 5086717 (BIA) Board Member Molly Kendall Clark | September 17, 2019 California vacatur | “The respondent has also submitted the order of that court dated April 3, 2019, granting his motion to vacate his plea or sentence due to prejudicial error damaging his ability to meaningfully understand and knowingly accept the actual immigration consequences, and the order of that court dated May 29, 2019, dismissing his criminal proceedings. In view of the fact that the conviction underlying the respondent’s sole ground of removability has been vacated on the basis of a procedural or substantive defect in the underlying proceedings, the respondent is no longer removable and the motion to terminate will therefore be granted. <i>See Matter of Pickering</i> , 23 I&N Dec. 621 (BIA 2003).” |
| <i>In re: Samra Oric</i> 2018 WL 3045848 (BIA) Board Member Edward R. Grant | April 20, 2018 Kentucky vacatur | “The respondent’s motion is supported by evidence that the Jefferson Circuit Court, Commonwealth of Kentucky, has withdrawn the respondent’s guilty plea underlying her conviction pursuant to K.R.S. § 514.030, based on due process violations regarding ineffective assistance of counsel. Given the evidence presented, we find that the respondent’s vacated conviction may not be considered a conviction for immigration purposes. <i>Matter of Adamiak</i> , 23 I&N Dec. 878 (BIA 1006); <i>Matter of Pickering</i> , 23 I&N Dec. 621 (BIA 2003).” |
| <i>In re: Roberto Perez Chavez</i> 2018 WL 4692855 (BIA) Board Member Edward R. Grant | August 23, 2018 Washington vacatur | “Attached to the Government’s motion is a copy of the May 23, 2017, court order from the King County Superior Court, Washington, vacating the respondent’s conviction due to ineffective assistance of counsel resulting in a constitution violation pursuant to <i>Padilla v. Kentucky</i> , 559 U.S. 356 (2010). The respondent’s conviction is no longer valid for immigration purposes. <i>Matter of Pickering</i> , 23 I & N Dec. 621 (BIA 2003).” |
| <i>In re: Obioma J. Ezeocha</i> | April 5, 2018 Maryland vacatur | “With the instant motion, the respondent has proffered evidence that the 2008 Maryland state |

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| <p>2018 WL 3007221 (BIA) Board Member Molly Kendall Clark</p> | | <p>conviction that formed the sole basis for his removability has been. . . . Based on the proffered evidence, we hereby grant the respondent's motion to reopen. <i>See Matter of Pickering</i>, 23 I&N Dec. 621, 624 (BIA 2003).”</p> |
| <p><i>In Re: Jose Luis Pazarin-Castrejon</i> 2017 WL 4946948 (BIA) Board Member John Guendelsberger</p> | <p>September 6, 2017 California vacatur</p> | <p>“The respondent has filed a motion to reopen and terminate, based on a state court vacating the conviction on constitutional grounds. <i>See Matter of Pickering</i>, 23 I&N Dec. 621 (BIA 2003); <i>Matter of Chavez</i>, 24 I&N Dec. 272 (BIA 2007). The court order indicates, inter alia, that the respondent’s defense counsel did not advise him that his guilty plea may have adverse immigration consequences. <i>See Padilla v. Kentucky</i>, 559 U.S. 356 (2010).... The motion is granted and the proceedings are terminated without prejudice.”</p> |
| <p><i>In Re: Jeannine Evelin Stevens A.K.A. Jeannine Justin</i> 2017 WL 1045513 (BIA) Board Member John Guendelsberger</p> | <p>January 19, 2017 Washington vacatur</p> | <p>“[T]he Superior Court’s order explains that the respondent did not knowingly and voluntarily enter her guilty plea because counsel failed to advise her of the immigration consequences of her guilty plea (Motion to Reopen at 6).”</p> <p>“Inasmuch as the conviction underlying the respondent's basis for removability has been vacated due to a defect in the underlying proceedings, we will grant the respondent’s motion to reopen and terminate proceedings. <i>See Matter of Pickering</i>, 23 I&N Dec. 621 (BIA 2003).”</p> |
| <p><i>In re: Richard Austin Palmer</i> 2016 WL 394022 (BIA) Board Member John Guendelsberger</p> | <p>June 9, 2016 New York vacatur</p> | <p>“The criminal court’s October 18, 2013, decision vacating the conviction was not entered “solely” to enable the respondent to avoid the immigration consequences of his conviction. The criminal court’s decision was also entered to correct a procedural defect in the criminal proceedings whereby the respondent was provided improper legal advice regarding the immigration consequences of his guilty plea prior to entering the plea. Accordingly the respondent's appeal will be sustained, and the motion to terminate will be granted.”</p> |
| <p><i>In re: Jafet E. Garcia-Diaz</i> 2016 WL 11158781 (BIA) Board Member John Guendelsberger</p> | <p>January 25, 2016 Florida vacatur</p> | <p>“The respondent’s motion is supported by evidence that the 11th Circuit Judicial Court in and for Miami-Dade County, Florida, vacated the respondent's nolo contendere plea underlying his conviction pursuant to Florida Statute 827.03(2), based on due process violations regarding ineffective assistance of counsel. Given the evidence presented, we find that the respondent’s vacated conviction may not be considered a conviction for immigration purposes. <i>Padilla v. Kentucky</i>, 559 U.S. 356 (2010); <i>Matter of</i></p> |

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| | | <i>Adamiak</i> , 23 I&N Dec. 878 (BIA 2006); <i>Matter of Pickering</i> , 23 I&N Dec. 621 (BIA 2003).” |
| <i>In Re: Rogelio Luna-Meza A.K.A. Sergio Aldaba</i> 2016 WL 946694 (BIA) Board Member David B. Holmes | February 18, 2016 Oklahoma vacatur | “The respondent has filed a timely motion to reopen based on an Oklahoma criminal court vacating the conviction. <i>See generally Matter of Pickering</i> , 23 I&N Dec. 621 (BIA 2003); <i>Matter of Chavez</i> , 24 I&N Dec. 272 (BIA 2007). The court order reflects that respondent's defense counsel did not advise him that his guilty plea may have adverse immigration consequences. <i>Padilla v. Kentucky</i> , 559 U.S. 356 (2010).” “The motion will be granted.” |
| <i>In re: Aziz Lokhandwala</i> 2014 WL 7508455 (BIA) Board Member Edward R. Grant | November 18, 2014 Georgia vacatur | “The respondent has moved for the termination of these removal proceedings as the Georgia state courts have vacated the aforementioned conviction due to ineffective assistance of counsel. <i>Padilla v. Kentucky</i> , 130 S. Ct. 1473 (2010); <i>Matter of Pickering</i> , 23 I&N Dec. 621 (BIA 2003). Considering the totality of the circumstances, the motion is granted.” |
| <i>In Re: Victor Manuel Martinez</i> 2014 WL 4259406 (BIA) Board Member Roger Pauley | July 30, 2014 Texas vacatur | “The court’s decision vacating the respondent’s conviction concluded that his 2007 plea was not knowing and voluntary because it was made without adequate notice of all its potential immigration consequences (Exh. 5, at 5). That decision is entitled to full faith and credit here because it does not purport to vacate the conviction on rehabilitative or immigration hardship grounds; rather, it focuses on a substantive legal defect in the underlying plea process. <i>See Matter of Adamiak</i> , 23 I&N Dec. 878 (BIA 2006).” |
| <i>In re: Jacinto Moises Carbonell-Desliz</i> 2014 WL 347664(BIA) Board Member Neil P. Miller | January 13, 2014 Maryland vacatur | “Here, the respondent has presented evidence indicating that his prior conviction was vacated because the trial and plea procedures did not comply with Maryland Rule 4-215 (see Motion, Exhs. A4, B1). <i>See Matter of Pickering</i> , 23 I&N Dec. 621 (BIA 2003)...; <i>see also Padilla v. Kentucky</i> , 130 S.Ct. 1473 (2010).” |
| <i>In Re: Mamoudou Camara</i> 2013 WL 3899704 (BIA) Board Member John Guendelsberger | June 17, 2013 Georgia vacatur | “In the March 2013 order, the criminal court determined that the respondent's guilty plea was not knowingly and voluntarily entered, as he was misinformed about the consequences of entering his guilty plea and was prejudiced, in violation of <i>Padilla v. Kentucky</i> , 559 U.S. 356 (2010).... This qualifies as a merits reason under <i>Matter of</i> |

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| | | <i>Pickering, supra</i> . We therefore find it appropriate to grant the motion to terminate.” |
| <i>In Re: Nowel Q. Dela Cruz A.K.A. Nowel Quito-Dela Cruz</i> 2013 WL 1933916 (BIA) Board Member David B. Holmes | February 8, 2013 | “The 2007 conviction...which formed the basis of the respondent’s removability, has been vacated due to ineffective assistance of counsel.” |
| <i>In Re: William Enrique Alvarado Melendez</i> 2013 WL 2608492 (BIA) Board Member Garry D. Malphrus | May 10, 2013 | “We will sustain the parties’ appeals because we agree that the respondent’s conviction, which was vacated pursuant to the Supreme Court’s decision in <i>Padilla v. Kentucky</i> , 559 U.S. 356 (2010) no longer constitutes a conviction within the meaning of section 101(a)(48)(A) of the Act.” |
| <i>In Re: Alindo Filipe Lima A.K.A. Arlindo F. Lima</i> 2013 WL 6921691 (BIA) Board Member Neil P. Miller | December 19, 2013 Massachusetts vacatur | “The court order reflects that respondent's defense counsel did not advise the respondent that his guilty plea may have adverse immigration consequences. <i>Padilla v. Kentucky</i> , 559 U.S. 356 (2010).” “The respondent’s removal proceedings are reopened.” |
| <i>In Re: Eduardo Garcia</i> 2012 WL 911834 (BIA) Board Member Roger A. Pauley | February 29, 2012 Oklahoma vacatur | “On appeal, the respondent has provided a document showing that the Oklahoma criminal court vacated the aforementioned conviction by its order of August 11, 2011. On July 14, 2011, the criminal court determined that the respondent's guilty plea was not knowingly and voluntarily entered and that post-conviction relief was not sought pursuant to any rehabilitative statute. This qualifies as a merits reason under <i>Matter of Pickering</i> .” |
| <i>In Re: Genara Castillo Batista A.K.A. Genara Castillo</i> 2012 WL 1495530 (BIA) Board Member Roger Pauley | April 6, 2012 Massachusetts vacatur | “The respondent’s motion is supported by a certified copy of the Massachusetts judgment vacating her guilty plea based on a showing that prejudice resulted from counsel’s misadvice regarding immigration consequences. <i>See Padilla v. Kentucky, supra</i> .” “Because the sole conviction underlying the charge of removability has been vacated, and there are no other charges currently pending against the respondent, the removal proceedings are hereby reopened and terminated without prejudice.” |
| <i>In re: Adonis Ramon Reyes</i> 2012 WL 6641688 (BIA) Board Member Elise L. Manuel | October 26, 2012 | “[T]he respondent submitted evidence demonstrating that the conviction which served as the basis for his removal was vacated under <i>Padilla v. Kentucky</i> , ___ U.S. ___, 130 S. Ct. 1473 (2010). Because the new evidence demonstrates that the respondent's conviction was vacated on the basis of a procedural |

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| | | or substantive defect in the underlying criminal proceedings, we find that the conviction has been eliminated for immigration purposes. <i>Matter of Pickering</i> , 23 I&N Dec. 621 (BIA 2003); <i>Matter of Rodriguez-Ruiz</i> , 22 I&N Dec. 1378 (BIA 2000).” |
| <i>In Re: Chun Lam Chan</i> 2011 WL 230757 (BIA) Board Member Jean King | January 6, 2011 Massachusetts vacatur | “In light of the state court orders vacating the respondent's convictions for failure to advise the respondent of the immigration consequences of his plea, we find that termination of the respondent’s removal proceedings is appropriate. <i>Matter of Pickering</i> , 23 I&N Dec. 621, 624 (BIA 2003);] <i>See also Padilla v. Kentucky</i> , __ U.S. __, 130 S. Ct. 1473 (2010).” |
| <i>In Re: Miguel Roman Brito</i> 2011 WL 6965209 (BIA) Board Member David B. Holmes | December 13, 2011 South Carolina vacatur | “[T]he motion for a new trial was based on after discovered evidence and his former counsel’s failure to advise the respondent of the immigration consequences of his guilty plea [<i>sic</i>].... Consequently, the sole conviction underlying the Immigration Judge’s order of removal in this case has been vacated due to a defect in the criminal proceedings. <i>See Rumierz v. Gonzales</i> , 456 F.3d 31 (1st Cir. 2006); <i>Matter of Pickering</i> , 23 I&N Dec. 621 (BIA 2003).” |
| <i>In Re: Oswald Joseph Belizaire</i> 2011 WL 1373413 (BIA) Board Member David B. Holmes | March 28, 2011 Maryland vacatur | “[T]he conviction was vacated because the respondent's entry of a plea on an agreed statement of facts was not knowingly and intelligently made. <i>See Matter of Pickering</i> , 23 I&N Dec. 621 (BIA 2003) (a conviction that has been vacated by the criminal court based upon a procedural or substantive defect in the underlying proceedings is no longer a conviction for immigration purposes). <i>See also Padilla v. Kentucky</i> , __ U.S. __, 130 S.Ct. 1473 (March 31, 2010); <i>Matter of Adamiak</i> , 23 I&N Dec. 878 (BIA 2006); <i>Matter of Rodriguez-Ruiz</i> , 22 I&N Dec. 1378, 1379-80 (BIA 2000).... Accordingly, the motion is granted and the proceedings are terminated.” |
| <i>In Re: Francisco Jose Alvarez Troncoso a.k.a. Francisco Alvarez Troncoso a.k.a. Tony Motana a.k.a. Francisco Troncoso</i> 2011 WL 230762 (BIA) Board Member Roger A. Pauley | January 6, 2011 Massachusetts vacatur | “In the matter before us, however, it is clear that the criminal court judge’s ruling, granting the respondent’s Motion to Withdraw Guilty Plea and Order a New Trial, was based on a procedural and substantive defect in the plea entered by the respondent at his criminal trial. Specifically, the respondent maintains that he was provided ineffective assistance of counsel, and that his plea was not knowingly, voluntarily, or intelligently made, in violation of state and federal due process.” |

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| <p><i>In Re: Lufty Abraham Abassy Oqueli</i> 2011 WL 7071038 (BIA) Board Member Roger A. Pauley</p> | <p>December 30, 2011 Georgia vacatur</p> | <p>“He provided a copy of the Order of the Superior Court of Gwinnett County, dated June 9, 2009, which states that the judgment, plea, and sentence are vacated as void ab initio, on the ground that the respondent's Sixth Amendment right to counsel was violated and on the ground that the respondent's plea was not entered in knowing and voluntary fashion under state and federal constitutional standards of due process of law.”</p> <p>“Under the circumstances, it appears that the modification was based on procedural or substantive defects in the underlying proceedings. <i>See Matter of Pickering</i>, 23 I&N Dec. 621, 625 (BIA 2003).”</p> |
| <p><i>In re: Paulo do Rosario</i> 2010 WL 4035430 (BIA) Board Member David B. Holmes</p> | <p>September 17, 2010</p> | <p>“The convictions were vacated as constitutionally invalid due to a failure to warn the respondent of the immigration consequences of his guilty pleas. <i>Matter of Pickering</i>, 23 I&N Dec. 621 (BIA 2003).”</p> |
| <p><i>In Re: Raymond Alexander Royes-Riggs A.K.A. Raymond A. Royesriggs</i> 2010 WL 691270 (BIA) Board Member David B. Holmes</p> | <p>February 12, 2010</p> | <p>“With his motion, the respondent has offered evidence that on January 20, 2010, the criminal court vacated the conviction underlying the charge of removability based on the finding that the respondent's guilty plea was not knowingly, intentionally and voluntarily made. Upon review, it appears that the respondent's conviction was vacated for defects in the underlying criminal proceedings and not due to any post-conviction event. <i>See Cruz v. Attorney General of U.S.</i>, 452 F.3d 240, 242 (3rd Cir. 2006); <i>Matter of Pickering</i>, 23 I&N Dec. 621 (BIA 2003). <i>See also Matter of Chavez</i>, 24 I&N Dec. 272 (BIA 2007). As the vacated conviction was the sole conviction underlying the charges of removability, we will grant the respondent's motion to reopen and terminate the proceedings.”</p> |
| <p><i>In Re: Romer R. Peguero A.K.A. Rommel Richardson Peguero</i> 2010 WL 3157437 (BIA) Board Member David B. Holmes</p> | <p>July 28, 2010</p> | <p>“[T]he respondent’s conviction was vacated on the basis of the United States Supreme Court's recent decision in <i>Padilla v. Kentucky</i>, ___ U.S. ___, 130 S. Ct. 1473 (2010), and specifically that the respondent was denied effective assistance of counsel because he was not advised of the immigration consequences of his plea.”</p> <p>“[T]hese removal proceedings are terminated.”</p> |
| <p><i>In Re: Juan Jose Castilla A.K.A. Juan J. Cantra A.K.A. Ricardo</i></p> | <p>June 21, 2010 New Jersey vacatur</p> | <p>“The motion is supported by evidence that, on June 1, 2010, the Superior Court of New Jersey, Law Division, Criminal Part, vacated the criminal</p> |

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| <p><i>R. Cardenas A.K.A. Juan Castillo</i> 2010 WL 2846297 (BIA) Board Member Frederick D. Hess</p> | | <p>conviction underlying the respondent's removal order on the ground that his criminal defense counsel provided constitutionally defective advice regarding the potential immigration consequences of his guilty plea (MTR, Tab H)."</p> <p>"Accordingly, the motion will be granted."</p> |
| <p><i>In re: Valter Manuel Moura</i> 2010 WL 673478 (BIA) Board Member Linda S. Wendtland</p> | <p>January 28, 2010 Massachusetts vacatur</p> | <p>"In the matter before us, however, it is clear that the criminal court judge's ruling, granting the respondent's Motion to Withdraw Guilty Plea and Order a New Trial, was based on his finding that the record did not document that the plea entered by the respondent at his criminal trial was knowingly, voluntarily, and intelligently made, in conformance with the statutory requirements as set out in MASS. GEN. LAWS ch. 278, § 29D, which requires that, before accepting a guilty or nolo contendere plea, a judge must provide a defendant with an advisement as to what immigration consequences his or her plea may have. <i>See Commonwealth v. Rodriguez</i>, 876 N.E.2d 487, 490 (Mass. App. Ct. 2007). Therefore, the court's action was premised upon what it perceived to be a procedural defect in the underlying proceedings."</p> |
| <p><i>In Re: Patrick Thompson</i> 2010 WL 4500879 (BIA) Board Member Edward R. Grant</p> | <p>October 15, 2010 Georgia vacatur</p> | <p>"The respondent has offered evidence that on March 25, 2009, the Recorder's Court of Gwinnett County, Georgia, granted the respondent's motion to withdraw his guilty plea and vacated the respondent's conviction for possession of marijuana entered on August 21, 2006. The Recorder's Court indicated that the parties agreed that the respondent's plea was not entered freely, voluntarily, or intelligently in violation of his right to Due Process."</p> <p>"It is clear that the court's action in this case was premised upon what it perceived to be a constitutional infirmity in the underlying proceedings."</p> |
| <p><i>In re: Javier Sevilla-Lopez</i> 2009 WL 1800022(BIA)Board Member David B. Holmes</p> | <p>May 29, 2009 Illinois vacatur</p> | <p>"[T]he respondent's decision to plead guilty was based upon his attorney's assurances that he would face no consequences relating to his immigration status... Upon review, it appears that the respondent's conviction was vacated for defects in the underlying criminal proceedings and not due to any post-conviction event. <i>See Ali v. Ashcroft</i>, 395 F.3d 722, 728-29 (7th Cir. 2005); <i>Matter of Pickering</i>, 23 I&N Dec. 621 (BIA 2003). <i>See also Matter of Chavez</i>, 24 I&N Dec. 272 (BIA 2007)."</p> |

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| <p><i>In re: Dempsey J. Lucien a.k.a. Lucien Dempsey</i> 2009 WL 4899054 (BIA) Board Member Jim Hilz</p> | <p>November 27, 2009 Massachusetts vacatur</p> | <p>“The criminal court judge’s ruling granting the respondent’s Motion to Withdraw Guilty Plea and Order a New Trial, was based on his finding that the plea entered by the respondent at his criminal trial was not “knowingly, voluntarily, and intelligently made,” where it was the product of ineffective assistance of counsel. Therefore, the court’s action was premised upon what it perceived to be a constitutional infirmity in the underlying proceedings, rather than some form of post-conviction relief. <i>See Rumierz v. Gonzales</i>, 456 F.3d 31, 34-35 (1st Cir. 2006).”</p> |
| <p><i>In re: Angelo Varela</i> 2008 WL 243723 (BIA) Board Member Roger A. Pauley</p> | <p>January 9, 2008 Massachusetts vacatur</p> | <p>“In the matter before us, however, it is clear the criminal court judge’s ruling granting the respondent’s Motion to Withdraw Guilty Plea and Vacate His Conviction, was based on his finding the respondent’s former criminal counsel’s failure... constituted ineffective assistance of counsel.”</p> <p>“Therefore, the court’s action was premised upon what it perceived to be a constitutional infirmity in the underlying proceedings.”</p> |
| <p><i>In Re: Roberto Brito A.K.A. Roberto Brito-Batista</i> 2008 WL 5025245 (BIA) Board Member John Guendelsberger</p> | <p>November 5, 2008 New York vacatur</p> | <p>“The respondent provides evidence that in an August 21, 2008, decision the criminal court vacated his August 25, 1997, conviction based on the ineffective assistance of counsel which he received. Under <i>Matter of Pickering</i>..., if a court with jurisdiction vacates a conviction based on a defect in the underlying criminal proceedings, the alien no longer has a “conviction” within the meaning of section 101(a)(48)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(48)(A)[;] vacating the respondent’s conviction is given effect for immigration purposes.”</p> |
| <p><i>In re: Sajan Singla</i> 2007 WL 1724843 Board Member (BIA) Jeffrey L. Romig</p> | <p>May 23, 2007 Illinois vacatur</p> | <p>“In rendering his vacatur order, the criminal court Judge found support for the respondent’s claim of ineffective assistance of counsel and determined that the respondent’s plea was tendered involuntarily and was violative of constitutional due process.”</p> |
| <p><i>In re: Emmanuel Kewu Ameh</i> 2007 WL 1125704 (BIA) Board Member Roger A. Pauley</p> | <p>February 23, 2007 Maryland vacatur</p> | <p>“[T]he respondent’s criminal conviction was vacated following a petition for Writ of Error Coram Nobis, because the respondent was not advised of the collateral immigration consequences of his guilty plea under the Maryland Rules of Court section 4-242(e).” “[S]ince the respondent’s removability was solely predicated upon the vacated conviction...the proceedings are terminated.””</p> |

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| <p><i>In Re: Antonio Solis</i> <i>A.K.A. E Antonio</i> <i>A.K.A. Antonio J. Solis</i> <i>A.K.A. Antonio Salas</i> 2007 WL 2588612 (BIA) Board Member Roger A. Pauley</p> | <p>August 13, 2007 Illinois vacatur</p> | <p>“[T]here was no Spanish interpreter to interpret the required plea admonitions for the respondent and...the trial court judge did not sufficiently inquire as to whether the respondent understood fully the ramifications of a guilty plea, such that the parties agreed that the plea was not voluntary.... Accordingly, we agree with the respondent that this conviction was vacated for substantive or procedural defect, rather than rehabilitative post-conviction relief; and is therefore no longer valid for immigration purposes. <i>See Ali v. Ashcroft</i>, 395 F.3d 722, 728-29 (7th Cir. 2005), <i>discussing Matter of Pickering</i>, 23 I&N Dec. 621, 624-25 (BIA 2003). <i>See also Sandoval v. INS</i>, 240 F.3d 577, 578-79 (7th Cir. 2001).”</p> |
| <p><i>In Re: Peralta-Valadez,</i> <i>Yuridia</i> 2006 WL 2391275 (BIA)</p> | <p>June 22, 2006 Wisconsin vacatur</p> | <p>“[T]he Court found that the respondent had been deprived of her Sixth Amendment rights as she was afforded ineffective assistance of counsel.”</p> <p>“The conviction which formed the sole basis for the charges of removability has been vacated “on the basis of a procedural or substantive defect in the underlying criminal proceedings.”</p> <p>“As such, his conviction can no longer support the charges of removability. Accordingly, the appeal is sustained and the proceedings in this case are terminated.”</p> |
| <p><i>In Re: Elser Roel</i> <i>Escobar-Guerra</i> 2006 WL 3485830 (BIA)</p> | <p>October 12, 2006 Pennsylvania vacatur</p> | <p>“In granting the motion, the court accepted the respondent’s contention that he had been misinformed by prior counsel as to what effect the entering a plea of nolo contendere would have on his immigration status, and that as a result, it was not entered voluntarily or knowingly.”</p> <p>“[T]he court's action was premised upon what it perceived to be a constitutional infirmity in the underlying proceedings.”</p> |
| <p><i>In re: Reynaldo Ibarra</i> <i>Casarez</i> 2006 WL 3922304 (BIA)</p> | <p>December 26, 2006 Iowa vacatur</p> | <p>“The respondent has presented evidence that his conviction was vacated based on allegations that his plea violated the Iowa Rules of Criminal Procedure, he did not waive his right to make a motion and arrest of judgment, and his plea was inadequate due to no factual basis, ineffective assistance of counsel, and failure to understand the elements of the crime.”</p> <p>“Accordingly, the respondent's conviction is no longer valid for immigration purposes. <i>See Matter of Adamiak</i>, 23 I&N Dec. 878 (BIA 2006).”</p> |

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| <p><i>In Re: Durid Bahjat Hana</i> 2006 WL 901310 (BIA)</p> | <p>February 22, 2006</p> | <p>“A conviction vacated due to ineffective assistance of counsel qualifies as a vacation on the merits.”</p> |
| <p><i>In re: Juan Carlos Cazares Mendez</i> 2006 WL 1455242 (BIA) Board Member Frederick D. Hess</p> | <p>March 31, 2006 Georgia vacatur</p> | <p>“We conclude that this state action vitiates the respondent's conviction for immigration purposes, necessitating termination of the removal proceedings... The respondent’s conviction was vacated because of constitutional and procedural errors during the criminal proceedings.”</p> |
| <p><i>In Re: Daniel Irineo Colunga-Dominguez a.k.a. Daniel I. Colunga</i> 2006 WL 3485821 (BIA)</p> | <p>October 11, 2006 California vacatur</p> | <p>“The trial court order dated May 12, 2005, states that ‘Defense counsel motioned that this matter to vacate the conviction and guilty plea because defendant states that he was not properly advised regarding the immigration consequences. The People do not oppose the motion.’ With that, the court granted the respondent’s motion. On May 19, 2005, the court entered an order vacating the respondent’s misdemeanor conviction.” “Because the respondent’s conviction is no longer valid for immigration purposes and it was the sole basis for the removal order, we find it appropriate to reopen and terminate these removal proceedings.”</p> |
| <p><i>In Re: Roque Antonio Mora-Alvarado</i> 2006 WL 901497 (BIA)</p> | <p>March 9, 2006 Maryland vacatur</p> | <p>“In the instant case, the language of the vacating order suggests that a procedural or substantive defect occurred (Exh. R2 at 70 (writ of error <i>coram nobis</i> granted based on a finding that the respondent was not voir dired as to the voluntariness of his guilty plea, as required by Maryland Rule 4-242(c))). Matter of Pickering, supra, only applies where the court's order clearly shows that the conviction was vacated for reasons purely related to immigration hardships or nonlegal defects.”</p> |
| <p><i>In Re: Juan Carlos Cazares Mendez</i> 2006 WL 1455242 (BIA)</p> | <p>March 31, 2006 Georgia vacatur</p> | <p>“The record reflects that on August 22, 2003, the Georgia State court vacated the respondent's conviction in violation of V.G.C.S.A. Possession of Cocaine on the grounds that the respondent's Sixth Amendment right to counsel was violated and that the guilty plea was not entered in a knowing and voluntary fashion of both state and federal constitutional standards of due process of law. We conclude that this state action vitiates the respondent's conviction for immigration purposes, necessitating termination of the removal proceedings. <i>See Matter of Rodriguez-Ruiz</i>, 22 I&N Dec. 1378 (BIA 2000); <i>see also Matter of Adamiak</i>, 23 I&N Dec. 878 (BIA 2006) (finding that a conviction vacated for failure of the trial court to advise the</p> |

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| | | alien defendant of the possible immigration consequences of a guilty plea is no longer a valid conviction for immigration purposes).” |
| <i>In Re: Jose Felipe Martinez-Hernandez</i> 2006 WL 2391244 (BIA) | July 10, 2006 Texas vacatur | “The Texas court determined that the respondent's plea was not entered into freely and voluntarily because he was not advised that he could be deported as a result of his plea. We have consistently held that there is a significant difference between having a conviction vacated because of an underlying defect in the conviction and having a conviction vacated because of post-conviction events such as rehabilitation or immigration consequences. <i>Matter of Pickering</i> , 23 I&N Dec. 621 (BIA 2003); <i>Matter of Rodriguez-Ruiz</i> , 22 I&N Dec. 1378 (BIA 2000); <i>Matter of Roldan</i> , 22 I&N Dec. 512 (BIA 1999).” “Therefore, the vacatur of the respondent's conviction in this case effectively eliminated the conviction for immigration purposes. <i>See Matter of Rodriguez-Ruiz, supra.</i> ” |
| <i>In re: Sun Hee Bang</i> 2006 WL 2008212 (BIA) | May 18, 2006 New Hampshire vacatur | “In its order, the criminal court specified that its reason for vacating the conviction was a substantive, constitutional defect because it was unable to find that the respondent entered into her plea agreement on a knowing, intelligent, and voluntary basis. <i>See Matter of Pickering</i> , 23 I&N Dec. 621 (BIA 2003).” “Accordingly, we will grant the motion and will terminate the removal proceedings, since the conviction has been vacated due to a substantive defect.” |
| <i>In Re: Anacleto Roberto Trevino-Villarreal</i> 2005 WL 698447 (BIA) | March 2, 2005 Texas vacatur | “The respondent notes in his appellate brief that his conviction has been vacated because his guilty plea was not “knowing and voluntary,” and suggests that it is no longer a “conviction” under section 101(a)(48)(A) of the Act, 8 U.S.C. § 1101(a) (48)(A) (Respondent's Brief at 5-16). Under Board precedent, the respondent's statement of the law is correct. <i>See Matter of Pickering</i> , 23 I&N 621 (BIA 2003).” |
| <i>In Re: Hai Ngoc Ha</i> 2005 WL 698395 (BIA) | March 10, 2005 Florida vacatur | “The order vacating the conviction in this case provides that it was vacated pursuant to section 3.850(5) of the Florida Rules of Criminal Procedure because the respondent's ‘plea was involuntary due to his misconception of the deportation consequences of his plea.’” “[W]e find that the respondent's conviction was vacated because the underlying conviction was deemed to be substantively defective. <i>See Matter of Pickering, supra.</i> We, therefore, conclude that the |

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| | | respondent no longer has a 'conviction' under section 101(a)(48)(A) of the Act.” |
| <i>In Re: Ricardo Antonio Cueva-Amaya A.K.A. Ricardo Antonio Cueva</i> 2004 WL 2374280 (BIA) | September 10, 2004 Maryland vacatur | <p>“The Maryland Circuit Court Judge's decision dated August 3, 2004, to vacate the conviction states that the court failed to advise the defendant of his rights to a jury trial, presumption of innocence[sic], proof beyond a reasonable doubt, his right to testify or remain silent, ‘and all other trial and appellate rights.’”</p> <p>“The DHS contends that the motion to reopen should be denied because the vacatur of the respondent's conviction was done solely to avoid immigration consequences rather than on the basis of any procedural or substantive defect in the underlying criminal proceedings.”</p> <p>“In the instant case the court order does identify a basis for questioning the integrity of the underlying criminal proceedings. The Board will not look behind that decision. <i>Matter of Rodriguez, supra</i>. We grant the motion based upon the criminal court's order vacating the respondent's conviction due to fundamental defects underlying the conviction.”</p> |
| <i>In Re: Angel Abad Solano-Chicas</i> 2004 WL 2374312 (BIA) | September 3, 2004 Minnesota vacatur | <p>“The reasons for the vacation of the respondent's conviction can be ascertained from the wording of the order and the motion requesting post-conviction relief. In this case, the motion requesting withdrawal of the guilty plea references the state law pursuant to which the respondent seeks his remedy (Exh. 3).”</p> <p>“We concur in the Immigration Judge's decision concluding that the respondent's 2003 conviction for criminal sexual conduct has not been vacated for immigration purposes.”</p> <p>“It is the criminal court's reasoning in vacating the conviction that is controlling.”</p> |
| <i>In re: Joao Luis Tavares</i> 2004 WL 2418620 (BIA) | October 5, 2004 Rhode Island vacatur | <p>“In this case, the respondent has submitted a July 6, 2004, order from the Rhode Island court of conviction vacating his conviction...because the respondent's guilty plea was not “voluntary or knowingly made.” The respondent suggests that a conviction vacated for substantive or procedural reasons is no longer a “conviction” under section 101(a)(48)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(48) (A). Under Board precedent, the respondent's statement of the law is correct. <i>See Matter of Pickering</i>, 23 I&N 621 (BIA 2003).”</p> |

APPENDIX B

| TABLE OF CASES: | | |
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| BIA DECISIONS HOLDING INA § 101(a)(48)(A) “CONVICTION” DEFINITION DOES NOT INCLUDE PRIOR CONVICTIONS VACATED PURSUANT TO § 1473.7 | | |
| Case Name | Date of Decision | Holding |
| <i>In re. C-H-C-</i> , AXXXXXX630 (BIA 2020) Board Member Deborah Goodwin | March 30, 2020 | “Though collaterally related to immigration enforcement, vacatur under section 1473.7(a)(1) renders a conviction ineffective for immigration purposes because ineffective assistance of counsel or ‘prejudicial error’ in plea proceedings are ‘procedural or substantive defects’ under California law.” “[T]he vacatur of the respondent’s 1995 conviction under 1473.7 must be given effect for immigration purposes because a conviction can be vacated under that section only because of a ‘procedural or substantive defect’ in underlying criminal proceedings.” |
| <i>In re. Arutyun Demirchyan</i> , 2019 WL 7168795 (BIA 2019) Board Member Edward R. Grant | October 31, 2019 | “[I]t appears to the Board that vacatur under Cal. Pen. Code § 1473.7 is available only in cases of legal invalidity or actual innocence.” |
| <i>In re. J-B-</i> , AXXXXXX252, (Immigration Court, Eloy, AZ, 2019) Immigration Judge Irene Feldman | November 11, 2019 | “[A] textual reading of CPC § 1473.7 indicates that a vacatur is available only in cases of legal invalidity or actual innocence.” |
| <i>In re. Ernesto Rios Rodriguez</i> , 2019 WL 7859271 (BIA 2019) Board Member Earle B. Wilson | December 2, 2019 | “[I]t appears to the Board that a <i>vacatur</i> under CAL. PENAL CODE § 1473.7(a)(1) is available only in cases of legal invalidity or actual innocence.” (citing <i>Padilla v. Kentucky</i> , 559 U.S. 356 (2010); <i>Matter of Marquez Conde</i> , 27 I&N Dec. 251 (BIA 2018); <i>Matter of Pickering</i> , 23 I&N Dec. 621 (BIA 2003)). |
| <i>In re. Jose Jesus Arredondo Gomez</i> , 2018 WL 3007175 (BIA 2018) | October 19, 2018 | “The respondent's motion is supported by evidence that the Superior Court of California, County of Los Angeles, withdrew the respondent's 2013 guilty pleas underlying his convictions in response to the respondent's motion to vacate under California Penal |

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| Board Member John Guendelsberger | | Code § 1473.7 based on due process violations. Given the evidence presented, we find that the respondent's vacated convictions may not be considered convictions for immigration purposes. <i>Matter of Adamiak</i> , 23 I&N Dec. 878 (BIA 2006); <i>Matter of Pickering</i> , 23 I&N Dec. 621 (BIA 2003).” |
| <i>In re. Albert Limon Castro</i> , 2018 WL 8333468 (BIA 2018) Board Member Adkins-Blanch | December 28, 2018 | <p>“With his motion, the respondent presents evidence that on June 8, 2018, a California court vacated his criminal conviction pursuant to CAL. PENAL CODE § 1473.7. <i>See Mot.</i>, Tab A.”</p> <p>“While the state court's order does not indicate the specific reason for the state court's action, it appears to the Board that vacatur under CAL. PENAL CODE § 1473.7 is available only in cases of legal invalidity or actual innocence. <i>See Padilla v. Kentucky</i>, 559 U.S. 356 (2010); <i>Matter of Marquez Conde</i>, 27 I&N Dec. 251 (BIA 2018); <i>Matter of Pickering</i>, 23 I&N Dec. 621 (BIA 2003).”</p> |
| <i>In re. Oscar George Thetford</i> , 2017 WL 4418352 (BIA 2017) Board Member John Guendelsberger | July 17, 2017 | <p>“The respondent has filed a motion with evidence reflecting that a state criminal court vacated the respondent’s conviction as legally invalid under Cal. Penal. Code § 1473.7. <i>See generally Matter of Pickering</i>, 23 I&N Dec. 621 (BIA 2003); <i>Matter of Chavez</i>, 24 I&N Dec. 272 (BIA 2007).”</p> <p>“Under the circumstances, we will grant the respondent's motion to reopen. Moreover, we will terminate the proceedings without prejudice, given that the conviction forming the basis of the respondent's removability has been invalidated and vacated.”</p> |

APPENDIX C

TABLE OF EXAMPLES OF CIRCUMSTANCES GIVING RISE TO PREJUDICIAL LEGAL ERROR

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| <p>John Camacho</p> | <p>Mr. Camacho successfully vacated his conviction under section 1473.7(a)(1).</p> <p>Mr. Camacho has lived in the United States since he was two-years old. He went to high school in Los Angeles County and the United States is the only country he has ever known. In 2009, when Mr. Camacho was in his early 20s, he was charged with violating California Health and Safety Code section 113598 - possession of marijuana for the purposes of sale. At the time of his plea, Mr. Camacho was married to a U.S. citizen with whom he had a son, also a U.S. citizen. He was gainfully employed and had not been to Mexico in over twenty years.</p> <p>Despite the severe consequences of deportation to Mr. Camacho and his family, Mr. Camacho’s counsel never advised him of the immigration consequences of his plea, including that it would subject him to mandatory deportation and serve as a bar to relief. Instead, Mr. Camacho’s attorney further misadvised him of the effect of expungement in immigration cases and failed to explore possible alternatives. Because of his counsel’s behavior, Mr. Camacho did not meaningfully understand the consequences of his plea and was unable to knowingly accept or defend against them. Had Mr. Camacho understood the consequences of his plea, he would not have entered the plea. On this basis, the California court of appeals vacated Mr. Camacho’s plea. The court found that Mr. Camacho had endured an error in his original proceedings and that he was prejudiced by that error.</p> |
| <p>Juanita Diaz*</p> | <p>Ms. Diaz successfully vacated an unlawfully obtained conviction under Penal Code section 1473.7(a)(1).</p> <p>Ms. Diaz is a longtime lawful permanent resident of the United States. She lives in California with her husband of more than 40 years, 7 children, and 16 grandchildren. From a very young age, Ms. Diaz worked to support her family. She never attended formal school and only received sporadic teaching in her tiny Mexican hometown. She does not understand English and cannot read or write in any language. An expert educator evaluated Ms. Diaz and determined that her reading and listening comprehension skills in Spanish were at the level of a kindergartener in their fourth month of school.</p> |

* Name changed to protect the individual’s privacy.

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| | <p>More than two decades ago, Ms. Diaz pled guilty to two offenses related to food stamp violations after she and her husband applied for and obtained food stamps to feed their family. Ms. Diaz appeared for her hearing without counsel. The Spanish interpreter in the court room read documents to Ms. Diaz but because of her kindergarten reading level, she was unable to grasp the complex legal concepts contained in the documents. Without full understanding of the charges against her, her rights, or the assistance of counsel, Ms. Diaz agreed to plead guilty to two charges. As a result of her convictions, Ms. Diaz was placed in removal proceedings and prevented from pursuing relief.</p> <p>Nearly two decades later, a California court vacated Ms. Diaz’s conviction under Section 1473.7(a)(1) because she experienced a prejudicial legal error that damaged her ability to “meaningfully understand, defend against, or knowingly accept the immigration consequences” of her plea.</p> |
| <p>Vanessa Rodriguez</p> | <p>Ms. Rodriguez successfully vacated her conviction under Section 1473.7(a)(1)</p> <p>Rodriguez was brought to the United States when she was just one-year-old, and has lived in Napa, California her entire life. In 2005, Ms. Rodriguez pled guilty to possession for sale of a controlled substance. At the time of her plea, she had two U.S. citizen children and was pregnant with a third child. Her U.S. citizen mother and legal permanent resident father also lived in the United States, along with Ms. Rodriguez’s five sisters, and she had no close family or community ties in Mexico. Ms. Rodriguez sought a vacatur under Section 1473.7 fourteen years after her plea, when she learned of the immigration consequences after ICE detained her as she returned from a trip abroad. When she pled, her defense counsel did not investigate or advise her about the potential and actual immigration consequences of her plea. But for the conviction, Ms. Rodriguez may have been eligible for adjustment of status based on her extensive family ties. Defense counsel’s error was prejudicial because it prevented Ms. Rodriguez from making an informed choice to accept the consequences or attempt to avoid them by fight against the charge.</p> <p>Ultimately, Ms. Rodriguez successfully petitioned for a Section 1473.7 vacatur, allowing her to remain in the United States with her U.S. citizen spouse and four U.S. citizen children.</p> |
| <p>Joel Sanchez*</p> | <p>Mr. Sanchez successfully vacated his conviction under section 1473.7.</p> <p>Mr. Sanchez is a U.S. Army veteran who was two-years-old when he arrived in the United States from England in 1956 as a lawful permanent</p> |

resident. He resided in the United States continuously for the next forty-five years. Between 1973 and 1976 during the period of the Vietnam hostilities, Mr. Sanchez served in the U.S. Army. For his service, he earned a National Defense Service Medal and was honorably discharged in 1976. Mr. Sanchez's entire life was in the United States, including his U.S. citizen children, U.S. citizen mother and father, and his U.S. citizen brother and sister.

In 1999, Mr. Sanchez pled guilty to two marijuana-related offenses. Mr. Sanchez was deported as a result of his convictions. Prior to entering his plea, Mr. Sanchez was not advised that his criminal conviction would make him deportable and forever ineligible for citizenship. In 2019, Mr. Sanchez successfully petitioned for a vacatur under Section 1473.7, providing his community ties and length of residence in the United States as evidence of prejudice. He was thus able to return to the United States, the country he had honorably served and where he spent the majority of his life.



San Francisco

1458 Howard Street
San Francisco, CA 94103

t: 415.255.9499

f: 415.255.9792

ilrc@ilrc.org www.ilrc.org

Washington D.C.

1015 15th Street, NW
Suite 600

Washington, DC 20005

t: 202.777.8999

f: 202.293.2849

Austin

6633 East Hwy 290
Suite 102

Austin, TX 78723

t: 512.879.1616

San Antonio

500 6th Street
Suite 204

San Antonio, TX 78215

t: 210.760.7368

About the Immigrant Legal Resource Center

The Immigrant Legal Resource Center (ILRC) works with immigrants, community organizations, legal professionals, law enforcement, and policy makers to build a democratic society that values diversity and the rights of all people. Through community education programs, legal training and technical assistance, and policy development and advocacy, the ILRC's mission is to protect and defend the fundamental rights of immigrant families and communities.