

July 21, 2022

The Honorable Merrick Garland
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, D.C. 20530

RE: *Withdrawing Matter of Thomas & Thompson*, 27 I&N Dec. 674 (A.G. 2019)

Dear Attorney General Garland, Deputy Attorney General Monaco, and Associate Attorney General Gupta:

We respectfully request that your office immediately withdraw former Attorney General Barr's decision, *Matter of Thomas & Thompson*, 27 I&N Dec. 674 (A.G. 2019), which illegitimately reverses longstanding immigration precedent respecting state court sentencing determinations and exacerbates racial and national origin discrimination in the legal system. This decision has caused widespread disruption to criminal court and immigration court proceedings and is opposed by civil rights advocates and prosecutors nationally.

Reversing *Thomas & Thompson* Is a Necessary and Discrete First Step Toward Correcting Wrong and Damaging DOJ Precedents Failing to Give Full Respect to State Court Conviction and Sentence Determinations

The core holding of *Thomas & Thompson* is that state court clarifications or modifications of sentences will not be recognized for immigration purposes, except in narrow circumstances. This decision breaks with a century of administrative agency and federal court precedent that generally gives full effect to state court sentencing modifications and clarifications.

One of the gravest technical inaccuracies in *Thomas & Thompson* is conflation of two distinct INA provisions: INA § 101(a)(48)(A), defining "conviction," and INA § 101(a)(48)(B), defining "sentence." Both provisions were enacted in 1996. Until AG Barr's change in law, prior agency precedents treated these provisions as analytically distinct, as did most federal circuit courts and gave full effect to state court sentencing determinations, including clarifications and modifications of sentences.

Organizations of legal professionals, civil rights advocates, and state prosecutors, collectively representing hundreds of thousands of people across the country have written to you

about the devastating human and systemic impact of *Thomas & Thompson*, and also about its legal flaws.¹ Reversing it immediately will restore the correct rule—as Congress intended—of immigration respect for state court sentencing determinations.

Thomas & Thompson Exacerbates Racial and National Origin Bias and Discrimination in the Criminal and Immigration Systems

It is well-documented that state criminal justice systems across the country disproportionately impact community members who are Black, Latinx, Asian, or people of color. These racial disparities range from codified sentencing differentials such as the cocaine powder versus crack cocaine sentencing disparity to discretionary sentencing decisions tainted by racial animus and bias. The blunt truth is that community members who are Black, Latinx, and people of color are more likely to spend more time incarcerated than white community members, and this is an enormous moral problem that must be corrected. Post-conviction changes to sentencing—through modifications, clarifications, and legislative reforms—are a critical step toward alleviating these racist outcomes. *Thomas & Thompson* undeniably undermines these racial justice measures by substantially narrowing the circumstances where they will be recognized in immigration proceedings.

Not surprisingly, as a result of federal policies reflected in decisions such as *Thomas & Thompson* that undermine state criminal justice reform efforts, your Department’s own publicly released statistics reflect this same disproportionate impact within the immigration system. For example, each of the top countries of deportation where convictions are charged in immigration proceedings is a majority Black or Latinx country in Latin America or the Caribbean. By immediately withdrawing *Thomas & Thompson*, your Department will begin the process of undoing the decision’s ongoing discriminatory harms contributing to such disparities.

Thank you for our time and consideration. If you are interested in speaking with us further about these important issues, we can be reached through Andrew Wachtenheim at Immigrant Defense Project (andrew@immdefense.org, 212-725-6421).

Sincerely,

American Civil Liberties Union
American Immigration Council
American Immigration Lawyers Association

¹ See Addendum, Letters from American Bar Association, National Association of Criminal Defense Lawyers, and Fair and Just Prosecution to Attorney General Merrick Garland.

Appellate Advocates
Asian Pacific Institute on Gender-Based Violence
ASISTA Immigration Assistance
Battered Women's Justice Project
Brooklyn Defender Services
California Partnership to End Domestic Violence
Caminar Latino - Latinos United for Peace and Equity
Capital Area Immigrants' Rights (CAIR) Coalition
Center for Gender & Refugee Studies
Crimmigration LLC
Esperanza United
Freedom Network USA
Gathering Strength: Immigrant + Refugee Women's Collective
Immigrant Defense Project
Immigrant Legal Resource Center
Iowa Coalition Against Domestic Violence
Kathryn O. Greenberg Immigration Justice Clinic, Benjamin N. Cardozo School of Law
James H. Binger Center for New Americans, University of Minnesota Law School
Kilpatrick Townsend
Law Office of the Cook County Public Defender
The Legal Aid Society (New York)
LSNJ (Legal Services of New Jersey)
Michigan Immigrant Rights Center
National Immigrant Justice Center
National Immigration Litigation Alliance
National Immigration Project (NIPNLG)
Nationalities Service Center
Northwest Immigrant Rights Project
Office of the Appellate Defender (OAD)
Oregon Justice Resource Center
Pima County Public Defender
Public Defender Coalition for Immigrant Justice
Rocky Mountain Immigrant Advocacy Network
Sunita Jain Anti-Trafficking Initiative
Ujima Inc., The National Center on Violence Against Women in the Black Community
UnLocal
ValorUS
Vermont Network Against Domestic and Sexual Violence

Washington State Coalition Against Domestic Violence

In their individual capacities:

Annie Lai

Clinical Professor of Law, UC Irvine School of Law

Donna Coker

University of Miami School of Law

Michael Churgin

University of Texas at Austin School of Law

Michael Vastine

Immigration Clinic, St. Thomas University College of Law

Philip L. Torrey

Harvard Law School Crimmigration Clinic

Addendum:

1. **Letter from American Bar Association President, Reginal M. Turner, Jr. (Nov. 17, 2021)**
2. **Letter from Fair and Just Prosecution Executive Director, Miriam Krinsky (Nov. 16, 2021)**
3. **Letter from National Association of Criminal Defense Lawyers President, Martín Antonio Sabelli (Feb. 17, 2022)**

November 17, 2021

The Honorable Merrick Garland
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, D.C. 20530

Re: Vacating *Matter of Thomas & Matter of Thompson*, 27 I. & N. Dec. 674 (A.G. 2019), and Restoring Long-Standing Precedent Respecting State Resentencing Determinations

Dear Attorney General Garland:

I write on behalf of the American Bar Association (ABA) regarding *Matter of Thomas & Matter of Thompson*, 27 I. & N. Dec. 674 (A.G. 2019), a decision issued by former Attorney General Barr declining to give effect to state court orders modifying, clarifying, or altering a criminal sentence for immigration purposes, except in narrow circumstances. This decision has profound implications for fair administration of immigration laws, respect for state sentencing determinations, and eliminating racial and national origin bias in the criminal and immigration systems. Its holding that federal immigration adjudicators will not recognize many state court resentencing decisions is without statutory authority, individually and systemically damaging, and should be immediately reversed.

Ensuring due process, uniformity, predictability, and fairness in immigration adjudications is a core concern of the ABA. Promoting these results through the fair and uniform assessment of criminal convictions in immigration adjudications advances the rule of law by providing for a fair legal process. We urge you to take swift action to vacate the decision and restore the prior rule where a modification to a sentence by a state court would be honored in immigration proceedings in deference to the state court's sentencing authority.

***Matter of Thomas & Matter of Thompson* reversed decades of consistent agency precedent.**

For nearly the entire modern immigration era, immigration courts and the Board of Immigration Appeals (BIA) have interpreted the Immigration and Nationality Act (INA) with deference to states' criminal legal systems. Where the state imposed a sentence of a period of incarceration, that sentence controlled for immigration purposes. Where the state modified the sentence, federal

immigration adjudicators recognized the modification and accepted the revised sentence for immigration purposes, regardless of the reasons.

In 1996, when Congress last amended the relevant provision of the INA, it did nothing to disrupt the recognition of a state court sentencing modification in Section 101(a)(48)(B).¹ In a series of precedential opinions, the BIA ruled, as a matter of statutory interpretation, that federal immigration law continued to defer to state sentencing determinations and modifications.² The BIA's position was that nothing in the plain language of Congress' 1996 statutory definition of a "sentence" at INA § 101(a)(48)(B) altered the relationship between state sentencing and federal immigration law.

In 2019, former Attorney General Barr unilaterally overturned the existing and long-held BIA and Federal Circuit Court precedent to create a new one, contrary to the plain language of the statute. Under this decision, a sentence modification would only be recognized if the state court did so to correct a "procedural or substantive defect" in the original sentencing proceeding. This result is contrary to law and should be immediately corrected by vacating *Thomas & Thompson* and restoring the Department of Justice's prior precedents.

Matter of Thomas & Matter of Thompson disrupts existing federalism boundaries by failing to extend federal agency deference to state sentencing judgements under their Tenth Amendment police powers.

The prior BIA and Federal Circuit Court precedents have long honored state sentencing determinations in immigration proceedings. This is based upon the distribution of powers between the states and the federal government enshrined in the Tenth Amendment of the U.S. Constitution. This built on a long-honored constitutional balance where the states oversee their criminal and sentencing laws as part of their Tenth Amendment police powers. As a general principle of immigration law, immigration courts are charged with reviewing state court sentences to determine *only* if the state conviction falls within the INA as a deportable offense. Accordingly, immigration courts, the BIA, and Federal Circuit Courts deferred to state court sentencing determinations. Given existing precedent, and absent congressional direction to the contrary, immigration courts should adhere to the simple framework that defers to state court decisions.

¹ See Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, div. C, § 322, 110 Stat. 3009, 3009-546, 3009-628 (1996).

² *Matter of Song*, 23 I&N Dec. 173 (BIA 2001); *Matter of Cota-Vargas*, 23 I&N Dec. 849 (BIA 2005).

Matter of Thomas & Matter of Thompson adversely impacts immigrants' right to receive accurate and reliable advice regarding the immigration consequences of state court criminal dispositions.

The Supreme Court in *Padilla v. Kentucky*, 559 U.S. 356 (2010), held that criminal defense attorneys must advise noncitizen clients about the immigration consequences of their criminal case resolutions. Under the prior sentencing precedents that former Attorney General Barr overturned, defense attorneys could confidently advise their noncitizen clients that the state sentence imposed would be the sentence considered for purposes of their immigration cases. This rule also permitted defense counsel and prosecutors to negotiate case resolutions referencing the INA and determining what the outcomes could be. This allowed for predictability and consistency across the criminal and immigration systems. *Matter of Thomas & Matter of Thompson* has eroded immigrants' due process rights by interfering with effective advice and counsel on which criminal and immigration system stakeholders and litigants have depended for decades, resulting in significant harm.

In *Matter of Thomas & Matter of Thompson*, the former Attorney General's decision was predicated on his view that sentencing modifications fall into one of two categories: (1) those that correct procedural and substantive defects; or (2) those that account for other errors or unjust or unforeseen consequences of the original sentencing. In practice, state sentencing proceedings do not align with this premise. Judges often use resentencing as a fluid tool to address a full range of errors or unforeseen consequences arising within a case before them. The former Attorney General's decision forces a false choice between procedural and substantive defects or other defects and is counterfactual. If resentencing, an essential tool for correcting errors to achieve justice, continues to be confusingly circumscribed in this way, more unjust deportations, detentions, and denials of immigration benefits will occur. In addition, the unpredictable and differing standards for when resentencing will be recognized make accurate advisals to defendants difficult to provide and will cause confusion and unnecessary post-conviction litigation. Without the ability to accurately predict the effect of resentencing, prosecutors and defense counsel cannot reliably negotiate a case resolution, which will lead to more post-conviction challenges to correct errors. This creates additional injustices, as many states do not provide post-conviction vehicles in such circumstances, meaning defendants will have received improper advice about immigration consequences and will be left with no recourse to rectify the errors.

Injustice is perpetuated by a rule that refuses to recognize state court resentencing determinations completed for any justice-restorative or rehabilitative purposes other than those deemed to be for a "procedural or substantive defect" in the original sentencing proceeding. Such a rule results in failure to honor state criminal justice efforts—whether in individual cases or systematically—to

address inequities and unforeseen consequences of original sentencing determinations. As an example, in one current case, a lawful permanent resident is uncertain whether it is safe to apply for naturalization because there is ambiguity in the official record of his resentencing, which does not fully document that his initial sentencing was defective due to underlying competency issues and inattention to collateral consequences. However, this ambiguity should not matter. A state court orders a resentence under the court's authority to rectify an error or unforeseen or unjust consequence of the original sentence, and therefore the resentence should be honored, whatever the basis, just like the original sentence.

Matter of Thomas & Matter of Thompson impacts the elimination of racial and national origin bias in the criminal and immigration systems.

The failure to respect state sentencing determinations exacerbates existing mistrust in the criminal legal system among immigrant communities. Under *Matter of Thomas & Matter of Thompson*, the benefit of resentencing to correct prior errors and injustices is unavailable for many immigrants. This results in many noncitizens no longer having access to the range of rehabilitative services and relief available to U.S. citizens, as these relief mechanisms frequently rely on promised sentencing modifications that are no longer honored due to *Thomas & Thompson*. This particularly impacts noncitizens who are immigrants of color, thereby exacerbating the well-documented inequities in the criminal and immigration systems based on race/national origin.

Conclusion

Matter of Thomas & Matter of Thompson is an abrupt departure from decades of prior precedent and disrupts proper respect for state court judgments as recognized by the plain language of INA § 101(a)(48)(B) and two decades of case law. It is within the power of the Attorney General to vacate this decision and revert to long-honored precedents that give effect to the constitutional balance whereby states receive deference on their sentencing decisions. The ABA urges you to take this critical step toward achieving fairness and justice within the immigration and criminal legal systems as soon as possible.

Thank you for your consideration of this matter.

Sincerely,



Reginald M. Turner, Jr.
President



November 16, 2021

The Honorable Merrick Garland
Attorney General of the United States
U.S. Department of Justice

cc:

Deputy Attorney General Lisa Monaco
U.S. Department of Justice

Associate Attorney General Vanita Gupta
U.S. Department of Justice

Re: Recommendation of Fair and Just Prosecution to vacate *Matter of Thomas & Matter of Thompson*, 27 I. & N. Dec. 674 (A.G. 2019).

Dear Attorney General Garland,

I am writing as the Executive Director of [Fair and Just Prosecution](#) (FJP), an organization that brings together elected prosecutors from around the country committed to promoting a justice system grounded in fairness, equity, compassion, and fiscal responsibility. We work with nearly 70 elected prosecutors from across the United States; collectively, they represent nearly 20% of the United States population. FJP also frequently brings together attorneys general, police chiefs, and elected sheriffs who share in our aim to improve our criminal legal systems. I myself previously served for 15 years as a federal prosecutor in Los Angeles and the Mid-Atlantic region, including as Chief of General Crimes and Chief of Criminal Appeals in the Central District of California and head of the Solicitor General's Appellate Advisory Committee. I also spent five years working in law enforcement, including one year inside the largest Sheriff's Department in the nation.

FJP believes that prosecutors and law enforcement officials have a key role to play in reforming a justice system that, for too long, has focused on "tough on crime" carceral punishments rather than data-driven strategies that rebuild trust and promote public safety and community well-being. With this starting point in mind, I am reaching out today to urge you to vacate *Matter of Thomas & Matter of Thompson*, 27 I. & N. Dec. 674 (A.G. 2019) ("*Thomas & Thompson*"), and thereby allow the law to be returned to its prior status. Prior to this troubling decision, federal immigration authorities appropriately honored state sentencing judgments and

modifications and gave effect to the constitutional division of powers between the states and the federal government.

For the entire modern immigration era, until former Attorney General Barr issued *Thomas & Thompson* in 2019, the Department of Justice via the BIA and the Office of the Attorney General established bright-line rules that afforded states necessary and appropriate deference as the primary actors charged under our federal system with administering and exercising the police power. This approach is endorsed by the purpose and structure of the Immigration and Nationality Act and is consistent with historical deference to state sovereignty. It also has practical benefits for the administration of justice by local prosecutors and avoids the need for immigration courts to engage in difficult fact-finding relating to underlying offenses in a context often far removed from the offense conduct. This approach should be restored and maintained, as it is both statutorily required and for decades functioned well within the state criminal court system.

There is also significant support in the prosecutorial and law enforcement community for vacating *Thomas & Thompson*. In 2019, **43 elected prosecutors and Attorneys General** joined an [amicus brief](#) coordinated by FJP asking then-Attorney General Barr to keep existing law in place with respect to federal immigration recognition of state sentence modifications. Although that request ultimately was declined by the prior administration and Attorney General Barr, there are compelling reasons to return the law to its prior state, as outlined in our amicus brief and as summarized below.

1. The *Thomas & Thompson* rule hampers prosecutors' ability to carry out their job of promoting public safety and imposes undue and unnecessary fact-finding burdens.

The rule established in *Thomas & Thompson* interferes with prosecutors' ability to effectively carry out their criminal-justice duties. Under the BIA's prior deferential rules to state sentencing determinations, prosecutors could correct sentencing errors and make modifications to sentences in a manner that allowed prosecutors to maintain community trust and to do their job in a way that resulted in the effective administration of justice. Under *Thomas & Thompson*, however, overriding local prosecutorial determinations and attaching immigration consequences to sentences modified by the state courts undermines transparency and a public sense of consistently applied legal principles, imperiling public trust and perceptions of legitimacy.

Prosecutors and law enforcement officials necessarily rely on the cooperation of crime victims and witnesses in solving crime and bringing responsible parties to justice. This cooperation depends on building trust between law enforcement and the community it seeks to protect, which in turn requires that people view the justice system as legitimate and procedurally fair. When a community sees the justice system as illegitimate, members of the community are less likely to cooperate with law enforcement, to assist in investigations, or to report crimes against them. By disregarding state and local decisions, the *Thomas & Thompson* approach undermines the legitimacy of justice system actors, and accordingly threatens public safety.

In addition, *Thomas & Thompson* creates unnecessary and burdensome fact-finding while displacing a previous approach that relied upon the exercise of valid prosecutorial discretion. State courts that are asked to modify a sentence should not have to conduct a searching inquiry into the reasoning for such a step if the court already believes, under existing rules, that the prosecutor is using her discretion in a valid manner. Federal officials, meanwhile, should not be faced with the difficult—if not impossible—job of reconstructing the underlying facts and discretionary judgments involved in the adjudication of criminal cases. Federal immigration officials are already under a heavy administrative burden; *Thomas & Thompson* only increases that burden with fact-finding steps previously committed to the discretion of state prosecutors. The BIA’s prior rules, before *Thomas & Thompson* went into effect, are not only required by Congress, they are the only way to enforce the law while not unfairly infringing on—and burdening—the autonomy of state criminal-law officials.

2. Communities leverage the democratic process to hold prosecutors accountable for their use of discretion; that starting point is undermined by *Thomas & Thompson*.

Prosecutors are not only stewards of public safety, but are also elected representatives or agents of elected representatives responsible for implementing and enforcing the law. Voters in 45 states elect the top prosecuting official in that state. These individuals run on promises and expectations of certain goals and values, including that they will be held accountable for their discretionary actions. Further, prosecutors play a key role in implementing the laws crafted by state legislatures by representing the state, their communities, and victims when there are challenges to or violations of the laws approved by voters and adopted by state governments. By refusing to give deference and adhere to state determinations, *Thomas & Thompson* essentially ignores the right of the local electorate to determine what constitutes a crime and who is responsible for enforcing that standard. Prosecutors must be accountable to the communities that elected them and not divorced from them, as can occur when their decisions are set aside by federal authorities.

3. The federal system’s refusal to accept state judgments to vacate, modify, or clarify sentences as binding interferes with prosecutors’ ethical obligations.

Prosecutors are often labeled “ministers of justice” and are considered to have dual roles: prosecuting within an adversarial system while also acting in the public interest.¹ Under nationally recognized standards, prosecutors have a duty to pursue justice and to “put the rights and interest of society in a paramount position in exercising prosecutorial discretion in individual

¹ *Berger v. United States*, 295 U.S. 78, 88 (1935) (stating that the prosecutor “is the representative . . . of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done”).

cases.’² This includes a duty to promote public safety, to advocate for victims’ rights, and to implement reforms to criminal laws or enforcement policy whenever appropriate and necessary.

In the context of immigration law, these duties require the prosecutor to consider the immigration consequences of penalties imposed and the impact of those penalties on the defendant’s family and community. This requirement was highlighted by the Supreme Court in *Padilla v. Kentucky*, 559 U.S. 356 (2010), which noted the common societal interest that prosecutors and defense attorneys have in coming to agreements informed by immigration contexts.³ By elevating immigration considerations during pleas and sentencing, the Supreme Court has obliged prosecutors to consider these consequences when deciding whether to support or object to a petition to modify or vacate a sentence. It is the prosecutor’s responsibility to determine how much weight to give to these considerations. The federal system imposed by *Thomas & Thompson* undermines these determinations by disregarding the decisions of local prosecutors.

4. Allowing instrumentalities of the federal government to override state sentencing determinations contravenes basic principles of federalism.

Federal officials should not speculate about the reasons behind a valid sentencing modification. At its core, federalism ensures mutual respect between the federal government and the states. When the states are acting within “a protected sphere of state sovereignty,” the federal government must yield to legitimate state interests.⁴ This respect derives from the concept of the federal and state governments as “separate sovereigns;” each has its own “inherent sovereignty” to which the other must defer.⁵ Because our federal system is built on notions of comity and respect, courts do not permit “speculation by federal agencies about the secret motives of state judges and prosecutors” to play any role in the decision whether to credit an otherwise valid modification.⁶ Until *Thomas & Thompson*, the federal government—from federal courts to immigration judges—presumed that state courts are acting in good faith, and simply asked whether the requirements for a valid vacatur or modification are otherwise met. This balance should be restored.

State courts and prosecutors should not have to worry about how their discretionary charging, sentencing, and post-sentencing decisions will be interpreted by federal officials. This careful federal balance is turned on its head now that state courts and prosecutors cannot be confident that their discretionary decisions will be respected by the federal government. This interferes with the ordinary course of sentencing proceedings, where prosecutors every day rely on the ability to recommend sentencing changes, often for reasons that have nothing to do with the

² National District Attorneys Ass’n, National Prosecution Standards, Rule 1-1.1 to 1.1.2 (3d ed. 2009); Standards for Criminal Justice: Prosecution Function and Defense Function Standard 3-1.2(c) (Am. Bar Ass’n 1993); ABA Model Rules of Professional Conduct Rule 3.8 cmt. 1 (Am. Bar Ass’n 1983).

³ *Padilla v. Kentucky*, 559 U.S. 356, 373 (2010).

⁴ *See U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 852 (1995) (Thomas, J., dissenting).

⁵ *Heath v. Alabama*, 474 U.S. 82, 89 (1985); *see Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991).

⁶ *See Pinho v. Gonzales*, 432 F.3d 193, 214-15 (3d Cir. 2005).

defendant's immigration consequences but are nonetheless evaluated under a federal immigration rubric that is in conflict with how state courts actually function.

Conclusion

A prosecutor's exercise of discretion plays a valuable and significant role in our constitutional and criminal justice systems.⁷ The state or local prosecutor—not the federal government—is best positioned to exercise discretion properly with regard to state criminal prosecution and the impact it has within the local community. Prosecutors are on the front lines of the criminal justice system, and state law has armed them with discretion in sentencing procedures so that they may promote public safety and provide protections for victims and defendants alike. In doing so, prosecutors, on a daily basis, make nuanced considerations and balance the “benefits of a prosecution against the evidence needed to convict, the resources of the public fisc, and the public policy of the State.”⁸ These decisions have political, social, and economic consequences for both the state and its residents, and are at the heart of the prosecutor's traditional role in the criminal justice system. Vacating *Thomas & Thompson* is critical to protecting and effectuating these societal interests.

We urge you to take swift action by vacating *Thomas & Thompson*, returning the state of the law to what it had been for decades. That starting point, that prosecutors and criminal justice system actors and defendants relied on, appropriately balanced state interests and enabled local criminal justice leaders to promote the safety and well-being of their communities.

Please let us know if we can be of assistance as you consider this important issue, or in any other area relating to advancing best practices in our criminal legal system.

Sincerely,



Miriam Krinsky

Executive Director

Fair and Just Prosecution (a sponsored project of the Tides Center)

mkrinsky@fairandjustprosecution.org

⁷ *Bond v. United States*, 572 U.S. 844, 864-65 (2014) (noting that the Supreme Court has “traditionally viewed the exercise of state officials’ prosecutorial discretion as a valuable feature of our constitutional system.”); *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978) (“In our system, so long as the prosecutor has probable cause to believe that the accused committed an offense defined by the statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.”).

⁸ *Bond*, 572 U.S. at 865.



MARTIN A. SABELLI
President

The Honorable Merrick Garland
Attorney General of the United States
U.S. Department of Justice

February 17, 2022

Re: **Matter of Thomas & Matter of Thompson, 27 I. & N. Dec. 674 (A.G. 2019)**

Dear Attorney General Garland,

On behalf of the National Association of Criminal Defense Lawyers (“NACDL”), the leading representative of the nation’s criminal defense bar, I write to urge you to withdraw former Attorney General Barr’s opinion in *Matter of Thomas & Matter of Thompson*, 27 I. & N. Dec. 674 (A.G. 2019). The decision has caused significant due process and practical damage to the criminal legal system and will continue to do so unless it is reversed.

1. *Thomas & Thompson* Departed from Highly Functional Longstanding Precedent

For decades, federal immigration law almost entirely deferred to state court sentencing and resentencing determinations. Criminal defense lawyers, judges, and prosecutors used this principle in practice every day. Where the state court imposed a sentence, defense lawyers knew that sentence would be accepted as the imposed sentence for immigration proceedings. Crucially, where the state court modified any previously imposed sentence, defense lawyers knew the sentencing modification would control. This simple rule allowed all of the parties to the proceedings, including state court judges, to communicate easily and consistently during plea negotiations, court appearances, and sentencing hearings.

Thomas & Thompson upended this system by imposing a new standard that declines to honor resentencing determinations outside of certain specified procedures and standards. This was a dramatic—not superficial—change from prior law. *Thomas & Thompson* created a category of resentencing determinations that correct a “procedural or substantive defect” in the underlying proceeding. *Matter of Thomas & Thompson*, 27 I. & N. Dec. 674, 674 (A.G. 2019). The problem is that there is no such category of resentencing determinations within criminal practice. Resentencing is done through a variety of mechanisms, which are not accurately described as either “procedural or substantive” on the one hand, or due to “rehabilitation or immigration



MARTIN A. SABELLI
President

hardships” on the other. *Id.* Further, different states use different terms and different practices. The criminal courts confer sentences in a more fluid, interconnected way that accounts for statutory violations in sentencing, impermissible excesses by sentencing judges, failures to identify germane mitigation factors, and integrated social services solutions. To forcibly divide resentencing into *Thomas & Thompson*’s two distinct categories depends on a false legal and factual premise that is contrary to the way the criminal courts actually function.

As a result of *Thomas & Thompson*, defense lawyers, judges, and prosecutors have been left to figure out how to approach sentencing and resentencing through a new, artificial lens. These actors must now identify specific statutory and common law vehicles for moving for resentencing, reach agreement over use of those vehicles, reach agreement over the specific contents of sentencing orders, and insist on generation of certain documents in resentencing cases that we otherwise would never even think to request. While resentencing is otherwise a routine, streamlined process with which all court system stakeholders are familiar, the insertion of new standards in cases of noncitizens is disruptive to this system. This is exacerbated by overburdened courts and dockets that strain state and local resources at all levels. A resentencing matter that in the case of a U.S. citizen could be resolved within hours now often requires a significant period of investigation, negotiation, and pleadings in cases of noncitizens. This problem overflows into removal proceedings, where immigration judges are struggling with record-breaking backlogs. *Thomas & Thompson* adds to immigration judges’ burden in having to parse cases under this confusing standard.

Moreover, as noted above, state sentencing procedures and terminology differ greatly from one state to another state. Thus, persons re-sentenced in one state may be treated differently from persons given essentially the same treatment in another state.

2. *Thomas & Thompson* Causes Worse Pleas and Sentences in the Criminal Legal System.

Thomas & Thompson means that noncitizen defendants can no longer rely on resentencing to be given effect under federal immigration law. This excludes noncitizens from dispositions that involve resentencing, resulting in worse case outcomes. For example, it is common for judges and prosecutors to offer sentencing reductions in combination with completion of drug treatment programs, restitution payments, mental health treatment, and other public health measures. Noncitizens are now treated in immigration proceedings as if those resentencing orders were



MARTIN A. SABELLI
President

never given. Fewer noncitizens will now access these resentencing agreements, reducing overall participation in critical social services and public health measures that benefit families and communities. Additionally, noncitizens' cases will take longer to resolve because of the reduced changeability of initial sentencing orders. In the cases of U.S. citizens, resentencing plays a critical role in facilitating negotiations and case resolutions. It includes a number of different sentencing options, leaving all parties with more negotiation tools and a greater chance of achieving a compromise that serves the ends of justice.

3. *Thomas & Thompson* Betrays Established Legal Norms on Which Criminal System Stakeholders Rely to Function Appropriately and to Satisfy Constitutional Duties.

For decades before *Thomas & Thompson* was issued in 2019, the Department of Justice and immigration agencies deferred to state sentencing determinations. This has a sound constitutional basis, to wit state criminal court adjudications are accepted in subsequent federal proceedings in light of the states' police powers. State criminal court practitioners and judges depend on this principle in order to understand the implications of individual case resolutions. This principle of comity is required, as Congress has given no indication in the Immigration and Nationality Act that it wishes to override sentencing powers from the states in the way that *Thomas & Thompson* has. The abandonment of this constitutionally respectful scheme has been a blow to fairness and required process in the criminal legal system.

Criminal defense lawyers have constitutional and statutory duties to provide adequate representation and counsel to all defendants. *Thomas & Thompson*, if allowed to stand, leaves defense lawyers unmoored in our ability to predict how immigration authorities will treat state court orders. The former Attorney General issued the decision over objections of criminal and immigration system stakeholders and experts, and in doing so changed what had been a stable body of law that defense lawyers had been trained to understand and implement.

NACDL is also deeply concerned about the potential influence of *Thomas & Thompson* on other issues involving collateral and enmeshed consequences of criminal system cases in immigration proceedings and other arenas as well. We are required to investigate and defend against immigration and collateral consequences, negotiate for better outcomes, and ultimately provide accurate and dependable advice to our clients. If federal immigration authorities can change precedents in a manner that flouts federalist norms, defense efforts to satisfy these duties are impaired.



MARTIN A. SABELLI
President

Because *Thomas & Thompson* is an unauthorized precedent that is causing widespread disruption to the criminal legal system, we respectfully urge Attorney General Garland to vacate the decision and restore the state of the law to what it had been for decades.

Sincerely,

Martín Antonio Sabelli
President, National Association of Criminal Defense Lawyers