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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