EOIR REGULATION LIMITS RETROACTIVITY OF *MATTER OF THOMAS & THOMPSON* REGARDING SENTENCE MODIFICATIONS[1]

By Merle Kahn

Table of Contents

[1] Special thanks to Beth Chance, Katherine Brady, and Aruna Sury for their thoughtful edits.

I. Overview

In 2019, Attorney General William Barr issued a precedential decision holding that the Executive Office for Immigration Review (EOIR), which consists of the immigration courts and the Board of Immigration Appeals, and the Department of Homeland Security (DHS) would not recognize a state court order reducing a criminal sentence unless the court based the order on a procedural or substantive defect in the underlying proceeding. *Matter of Thomas & Thompson*, 27 I&N Dec. 675 (A.G. 2019) (*"Thomas & Thompson"*). In *Thomas & Thompson,* Attorney General Barr overruled prior BIA precedent that had held that immigration authorities must give effect to a qualifying state court order changing a sentence even if the order was not based on error. See *Matter of H. Estrada*;[2] *Matter of Cota-Vargas*;[3] *Matter of Song*.[4]

Advocates argued that *Thomas & Thompson* was wrongly decided and should be withdrawn.[5] They further argued that if *Thomas & Thompson* was allowed to stand, it should not be applied retroactively to sentence modifications from before its publication date of October 25, 2019.

A new EOIR regulation now addresses the retroactivity issue. It provides that *Thomas & Thompson* will not apply if the noncitizen requested a sentence modification on or before October 25, 2019, or if the noncitizen can establish that they detrimentally relied on the availability of a sentence modification when entering their plea on or before October 25, 2019, even if they did not request a sentence modification before that date. In those cases, the prior BIA decisions will govern. Additionally, EOIR will recognize any change to a sentence, regardless of date, that corrects a genuine ambiguity, mistake, or typographical error in the record. See 8 C.F.R. § 1003.55 (effective July 29, 2024).[6]

This Practice Advisory will further discuss what the regulation provides and its possible defense applications, using California law as a model.

Note: *Thomas & Thompson* governs changes to an imposed sentence, not a potential sentence. For immigration purposes, the sentence that a judge imposes (e.g., "I sentence you to 180 days in jail") is referred to as a "sentence" or "term of imprisonment" and defined at Immigration and Nationality Act (INA) § 101(a)(48)(B) as "the period of incarceration or confinement ordered by a court of law" for a conviction. *Thomas & Thompson* and the EOIR regulation govern the immigration effect of orders that reduce an imposed sentence. For example, they affect California Penal Code § 18.5(b), which permits a court to reduce a previously imposed sentence to 364 days. Such a reduction in sentence can help a noncitizen

[2] 26 I&N Dec. 749 (BIA 2016) (recognizing a clarification order issued by the sentencing judge to correct a discrepancy in the record).
[3] 23 I&N Dec. 849 (BIA 2005) (recognizing a criminal court's reduction of a sentence *nunc pro tunc* from one year to 360 days).
[4] 23 I&N Dec. 173 (BIA 2001) (recognizing a resentencing order vacating the original criminal sentence and resentencing the defendant *nunc pro tunc*).
[5] See, e.g., *Letter to Merrick Garland regarding Matter of Thomas and Thompson* (July 21, 2022), available at https://freedomnetworkusa.org/app/uploads/2022/08/Letter-re.-Matter-of-Thomas-and-Thompson-dated-July-21-2022.pdf
[6] DOJ, *Efficient Case and Docket Management in Immigration Proceedings*, 89 Fed. Reg. 46,742, 46,768-69 (May 29, 2024).

avoid deportability for an aggravated felony for which a sentence of 365 days is required. INA § 101(a)(43).

But different laws govern the immigration effect of the maximum *possible* sentence (exposure) for an offense, which is the longest period for which a defendant *could* be sentenced. See, e.g., California Penal Code §§ 17(b) (reduction of a felony to a misdemeanor) and 18.5(a) (maximum possible sentence for a misdemeanor on or after January 1, 2015).[7] Modification of the maximum possible sentence can help a noncitizen avoid deportability based on a single crime involving moral turpitude (CIMT) conviction occurring within five years of admission into the United States, for example, since that provision is based on the maximum possible sentence being one year or more. INA § 237(a)(2)(A)(i). *Thomas & Thompson* and the new EOIR regulation do not affect this issue and other sections in the INA that reference the maximum possible sentence. For more information, see ILRC, *California Sentences and Immigration* (Nov. 2020).[8]

II. The New EOIR Regulation

The new regulation, 8 C.F.R. § 1003.55, went into effect on July 29, 2024. It provides:

> Treatment of post-conviction orders.
>
> (a) Applicability of *Matter of Thomas & Thompson*, 27 I&N Dec. 674 (A.G. 2019).
>
> (1) *Matter of Thomas & Thompson* shall not apply to a criminal sentence:
>
> (i) Where a court at any time granted a request to modify, clarify, vacate, or otherwise alter the sentence and the request was filed on or before October 25, 2019; or
>
> (ii) Where the noncitizen demonstrates that the noncitizen reasonably and detrimentally relied on the availability of an order modifying, clarifying, vacating, or otherwise altering the sentence entered in connection with a guilty plea, conviction, or sentence on or before October 25, 2019.
>
> (2) Where paragraph (a)(1) of this section applies, the adjudicator shall assess the relevant order under *Matter of Cota-Vargas,* 23 I&N Dec. 849 (BIA 2005), *Matter of Song,* 23 I&N Dec. 173 (BIA 2001), and *Matter of Estrada,* 26 I&N Dec. 749 (BIA 2016), as applicable.
>
> (b) *Post-conviction orders correcting errors.* Adjudicators shall give effect to an order that corrects a genuine ambiguity, mistake, or typographical error on the face of the original conviction or sentencing order and that was entered to give effect to the intent of the original order.

[7] While Penal Code 18.5(a) states that the 364-day limit applies to all convictions regardless of date, the Ninth Circuit held that section 18.5(a) will not have federal immigration effect if the conviction was before January 1, 2015, the original effective date of section 18.5(a). *Velasquez-Rios v. Wilkinson*, 988 F.3d 1081 (9th Cir. 2020).

[8] Available at https://www.ilrc.org/resources/california-sentences-and-immigration.

After the Notice of Proposed Rulemaking (NPRM) was issued on this rule on May 29, 2024, many commenters, as previously stated, urged the Department of Justice (DOJ) to vacate the holdings in *Matter of Thomas & Thompson* and *Matter of Pickering* in their entirety. DOJ declined to respond to the comments as they were beyond the scope of the rulemaking as identified in the NPRM.[9] Commenters requested the DOJ to clarify how *Matter of Pickering* and *Matter of Thomas & Thompson* applies to orders under Cal. Penal Code § 1473.7 or other specific statutes as requested in the NPRM. DOJ declined to clarify this issue concluding that "the balance of interests militates in favor of issuing the rule now rather than delaying the rule in order to consider additional clarifications."[10]

III. Background on *Matter of Thomas & Thompson*

On October 25, 2019, Attorney General Barr issued a precedential opinion limiting when immigration authorities could give effect to a state court modification of an imposed sentence. The AG held that EOIR would only recognize a state court order modifying a conviction where the state court order was vacated due to procedural or substantive defect, in line with *Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003) *rev'd on other grounds Pickering v. Gonzales*, 465 F.3d 263 (6th Cir. 2003). *Matter of Thomas & Thompson*, 27 I&N Dec. 674. This decision overruled a long line of cases stretching back to 1982 where the BIA held that a sentence modification shall be given full effect, regardless of the rationale for the modification.[11] Prior to *Matter of Thomas & Thompson*, an individual could move to modify an imposed sentence solely to avoid immigration consequences, and that modification would be given full faith and credit by the immigration courts.[12] The BIA repeatedly reaffirmed that it would recognize a state court sentence modification after the enactment of the Illegal Immigration Reform and Immigration Responsibility Act of 1996 (IIRIRA).[13]

The BIA in *Matter of Pickering* had held that EOIR would only recognize state court order vacating a conviction where that conviction was vacated because of a "procedural or substantive defect" in the underlying proceedings. The BIA found that in applying the definition of a conviction at INA § 101(a)(48) there was a "significant distinction between convictions vacated on the basis of a procedural or substantive defect in the underlying proceedings and those vacated because of post-conviction events, such as rehabilitation or immigration

---

[9] *See Efficient Case and Docket Management in Immigration Proceedings*, 89 Fed. Reg. 46,742, 46,768-69 (May 29, 2024).
[10] *Efficient Case and Docket Management in Immigration Proceedings*, 89 Fed. Reg. at 46772.
[11] *Matter of Martin*, 18 I&N Dec. 226 (BIA 1982) (recognizing a Colorado court's modification in the interests of justice of a sentence from twelve years' imprisonment to three months' imprisonment and five years of probation).
[12] *Matter of Cota-Vargas*, 23 I&N Dec. 849, 852 (BIA 2005) (holding *Matter of Pickering* did not apply to sentence modifications. "[I]n the absence of a congressional directive to the contrary, we will follow *Matter of Song*, *supra*, and give full faith and credit to the decision of the California Superior Court modifying the respondent's sentence, *nunc pro tunc*, from 364 days to 240 days.")
[13] *Matter of H. Estrada*, 26 I&N Dec. 749 (BIA 2016) (recognizing a Georgia court's clarification order of a criminal sentence from twelve months of imprisonment to twelve months of probation). *Matter of Song*, 23 I&N Dec. 173 (BIA 2001) (recognizing a Maryland court's reduction of a sentence nunc pro tunc from one year to 360 days.)

hardship."[14] For the first time, in *Matter of Thomas & Thompson*, the Attorney General imported the reasoning from the vacatur-line of case law, into the case law governing sentence modifications. Under *Matter of Thomas & Thompson*, a sentence modification, like a vacatur, must be based on a ground of procedural or substantive invalidity.[15] *Matter of Thomas & Thompson* was a significant change in immigration law and in criminal/immigration practice.

In its proposed regulation to address *Thomas & Thompson*, the DOJ sought comments on whether *Thomas & Thompson* should apply retroactively to defendants who before October 25, 2019, had filed a motion to modify their sentence. There was a circuit split on the issue as to whether *Thomas & Thompson* was retroactive.[16] The final EOIR regulation addresses this split, providing that *Thomas & Thompson* does not apply (1) if the person *filed* a request to change the sentence before October 25, 2019, even if the court granted it after that date, or (2) if the person can prove that in a criminal proceeding before October 25, 2019, they had reasonably and detrimentally relied on being able to request a change to their sentence. EOIR will apply the regulation in all immigration courts and before the BIA.[17]

IV. Matter of Thomas & Thompson Does Not Apply if the Noncitizen Requested a Sentencing Modification On or Before October 25, 2019, and the Judge Granted the Request at Any Time

The new regulation provides that where a noncitizen sought a sentence modification on or before October 25, 2019, and the court granted it at any time, EOIR will apply the law that existed before *Thomas & Thompson*. The prior BIA rulings provided that a sentence modification will be given effect for immigration purposes regardless of whether the order was based on a substantive or procedural defect in the underlying criminal proceeding or was simply entered for rehabilitative or immigration purposes.

> **Example:** On January 19, 2014, LPR Daphne, pleaded guilty to California receipt of stolen property and was sentenced to 365 days in jail. On February 19, 2019, Daphne was placed in removal proceedings and charged with being removable for having been convicted of an aggravated felony (receipt of stolen property where the term of imprisonment is at least one year. INA § 101(a)(43)(G)). On October 15, 2019, her attorney, Simon, filed a motion asking the state criminal court to reduce Daphne's sentence to 364 days. The motion did not cite a substantive or procedural defect in the

[14] *Matter of Pickering*, 23 I&N Dec. at 624.
[15] *Matter of Thomas & Thompson*, 27 I&N Dec. at 682.
[16] *See, Edwards v. U.S. Att'y Gen.*, 56 F.4th 951, 962 (11th Cir. 2022) (holding there was no retroactive application of a "new" rule because the Attorney General had determined "what the law always had meant"); *but see, Zaragoza v. Garland*, 52 F.4th 1006 (7th Cir. 2022) (applying a full retroactivity analysis and holding that the new rule in *Thomas & Thompson* should not apply retroactively to court rulings entered before October 25, 2019).
[17] After the Supreme Court's decision in *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024) (holding "courts need not and … may not defer to an agency interpretation of law…) it remains to be seen if the circuit courts will be following DOJ and DHS regulations. However, that issue is beyond the scope of this Practice Advisory.

underlying proceeding in its request for relief. On November 2, 2019, the criminal court granted the request for the sentence modification without citing a legal reason.

In this scenario, the Immigration Judge must employ the analysis set forth by the BIA in *Matter of H. Estrada, Matter of Cota-Vargas,* and *Matter of Song,* to determine whether the sentence modification that Simon obtained was valid for immigration purposes, because they sought the modification on or before October 25, 2019, even though it was granted after October 25, 2019.[18]

V. Matter of Thomas & Thompson Does Not Apply if the Noncitizen Reasonably and Detrimentally Relied on the Availability of a Sentence Modification in Entering Their Plea

The regulation provides protections to people who can show that they "reasonably and detrimentally relied on the availability of an order modifying, clarifying, vacating, or otherwise altering the sentence entered in connection with a guilty plea on or before October 25, 2019," even if they did not file a motion to change the sentence until after that date. 8 C.F.R. § 1003.55(a)(1)(ii). DOJ noted that there are likely noncitizens who pleaded guilty to an offense without knowing the likely sentence or agreed to a higher sentence than they otherwise would have agreed to with the belief that they could easily obtain an order altering their sentence in the future and that EOIR would recognize that order under prior BIA precedent such as *Matter of Cota-Vargas*.[19]. DOJ stated that immigration judges are well-positioned to evaluate the credibility of the applicant and the factual questions of reasonable and detrimental reliance.[20]

Depending on the state laws, this standard may be a difficult for noncitizens to meet. Using California law as an example, it might be rare for a noncitizen to have relied on the possibility that a judge would reduce their sentence later at the time they entered their sentence. A California criminal court judge does not have the authority to reduce a previously imposed sentence that was a material part of the negotiated plea agreement unless the parties consent to the modification.[21] There are sentencing reform rules that are exceptions to this general rule, but are unrelated to this topic.[22] In some scenarios, a defendant could not "reasonably" have relied on the ability of the court to later reduce the sentence. For example, if a noncitizen is removable because they were sentenced 365 days incarceration, rather than 364 days, often counsel could have obtained the one-day change at the original sentencing, *if* they had understood the importance of the 364-day sentence. Any subsequent sentence modification

[18] For a sentence modification to be valid under California law, it must not be entered solely to avoid federal immigration consequences and must be directed at a state error. *People v. Mendoza*, 171 Cal. App. 4th 1142, 1159, 90 Cal. Rptr.3d 315, 329 (Ct. App. 2009); *People v. Borja*, 95 Cal. App. 4th 481, 485, 115 Cal. Rptr. 2d 728, 732 (Ct. App. 2002).
[19] DOJ, *Efficient Case and Docket Management in Immigration Proceedings*, 89 Fed. Reg. at 46,783.
[20] DOJ, *Efficient Case and Docket Management in Immigration Proceedings*, 89 Fed. Reg. at 46,783.
[21] *People v. Segura*, 44 Cal. 4th 921, 935, 188 P.3d 649, 650 (Cal. 2008).
[22] For example, California has a felony murder rule which provides that a person convicted of felony murder may file a petition for resentencing to have the conviction vacated and to be resentenced on the remaining counts. Cal. Penal Code § 1172.6 (effective Jan. 1, 2019). California also has a specific provision allowing for felony resentencing on a discretionary basis. Cal. Penal Code § 1172.1.

would be to correct counsel's error, not due to initial reliance on the availability of sentence reduction. Fortunately, if there was error in the original sentencing, California has post-conviction relief options that can eliminate or change a sentence (or vacate the conviction or sentence) based on error, in a way that meets the requirements of *Pickering* and *Thomas & Thompson.* See discussion of Penal Code § 1473.7 and other options in ILRC, *Overview of California Post-Conviction Relief for Immigrants* (July 2022).[23] But it is possible that a defendant might have relied on a court's ability to reduce a misdemeanor or felony probation sentence – for example, to come within the petty offense exception to CIMTs, or the DACA (Deferred Action for Childhood Arrivals) requirement of a no more than a 90-day criminal sentence for a misdemeanor to qualify for DACA eligibility. ILRC, *Understanding the Criminal Bars to the Deferred Action for Childhood Arrivals* (2012).[24]

Where there was actual reliance on options to reduce the sentence later, the person can win under the regulation if they can establish reliance. Evidence such as a statement by the original defense counsel would be helpful in this situation. Showing actual reliance will likely be a challenge in most cases, since state laws do not generally make it reasonable to rely on the availability of a future sentence modification. Nevertheless, advocates should ask clients whether they were advised of the immigration consequences of the conviction and the sentence and whether they relied on the possibility of a sentence modification in the future.

As stated above, proving reliance may be very difficult. In many cases, it would be best to turn to a form of post-conviction relief that can reduce or eliminate a sentence based on procedural or substantive defect in the sentencing. Vacating a conviction and repleading (even if the defendant repleads to the same offense with a different sentence) will eliminate the original sentence for purposes of *Matter of Thomas & Thompson* and the regulations.

VI. *Matter of Thomas & Thompson* Does Not Apply to Modified Sentencing Orders that Correct a Genuine Ambiguity, Mistake, or Typographical Error on the Face of the Original Conviction or Sentencing Order

Immigration adjudicators must give effect to a sentencing order that corrects a genuine ambiguity, mistake, or typographical error on the face of the original conviction or sentencing order if the modification was entered to give effect to the intent of the original order. 8 C.F.R. § 1003.55(b).

> **Example**. In 2013, LPR Colin was sentenced for his conviction of misdemeanor theft. It was a busy day at the court and the clerk mistakenly listed 365 days as the sentence imposed instead of 364 days. In 2024, Colin was placed in removal proceedings and was charged with being deportable for an aggravated felony theft offense. Colin's attorney, Penelope, subsequently obtained a corrected record from the court, with a statement noting that the 365-day notation was a clerical error. The Immigration Judge must

[23] https://www.ilrc.org/sites/default/files/resources/ca_pcr_july_2022.pdf.
[24] https://www.ilrc.org/sites/default/files/documents/ilrc-2012-daca_chart.pdf.

recognize the sentence modification as it was entered to give effect to the original order.[25]

VII. Conclusion

The new EOIR regulation provides that EOIR will recognize a sentence modification entered on or before October 25, 2019, or where the defendant sought a sentence modification on or before that date. EOIR will also recognize a sentence modification where the noncitizen can establish that they reasonably and detrimentally relied on the availability of obtaining a sentence modification that would be recognized by EOIR, when they entered their plea. Finally, EOIR will always recognize a sentence modification where the new order corrects a genuine ambiguity, mistake, or typographical error on the face of the original conviction or sentencing order to give effect to the criminal court's original intention.

[25] 8 C.F.R. § 1003.55(b); *Efficient Case and Docket Management in Immigration Proceedings*, 89 Fed. Reg. at 46,784.

San Francisco
1458 Howard Street
San Francisco, CA 94103
t: 415.255.9499
f: 415.255.9792

Washington D.C.
1015 15th Street, NW
Suite 600
Washington, DC 20005
t: 202.777.8999
f: 202.293.2849

Houston
540 Heights Blvd.
Suite 205
Houston, TX 77007

San Antonio
10127 Morocco
Street
Suite 149
San Antonio, TX
78216

ilrc@ilrc.org
www.ilrc.org

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.