



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



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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



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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.



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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