Kerry E. Doyle
Principal Legal Advisor
Office of Principal Legal Advisor
Immigration & Customs Enforcement
500 12th St. SW
Washington, DC 20536

March 15, 2022

Re: Post-Conviction Relief Policy

Dear Ms. Doyle:

We are leaders of national organizations with deep expertise in the subject of post-conviction relief and the interplay of immigration and criminal laws. We have trained judges, defense counsel, prosecutors, and immigration attorneys about this complex topic. We write today because we are deeply concerned with increasing arguments by attorneys in your department that seek to undermine a California post-conviction law, California Penal Code § 1473.7(a)(1)--a critical vehicle for remedying convictions that violated the legal rights guaranteed to people charged with criminal offenses. Some OPLA attorneys are advocating for interpretations that impermissibly expand the statutory definition of "conviction" at INA § 101(a)(48)(A) to include dispositions that state judges have eliminated as "legally invalid due to prejudicial error." OPLA is tasked with seeking fair and correct interpretations and applications of the statutes written by Congress, but in this instance they are doing the opposite: asserting arguments in direct conflict with existing precedent and undoing constitutional deference owed to state court judgments.

As experts called upon to testify before the California legislature in connection with these laws, we write to explain the scope of post-conviction relief in California and request you issue a memorandum to OPLA field offices clarifying that orders of California State Courts vacating convictions and sentences pursuant to California Penal Code § 1473.7(a)(1) meet the standard set forth in *Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003) and related case law. Though this letter principally focuses on OPLA's position in § 1473.7 cases, we are concerned that a similar sentiment is animating OPLA's position in other post-conviction cases and is being reiterated by OIL counterparts before other courts.

The California Legislature adopted Penal Code § 1473.7 in January 2017 to create a mechanism for people no longer in criminal custody to vacate legally invalid convictions.

Because the legislature recognized that the "writ of habeas corpus is generally not available" to people no longer in criminal custody, it created a separate remedy, Penal Code § 1473.7 to enable people no longer in custody to vacate unlawful prior convictions. *See* AB 813 (Gonzalez), Chap. 739, Assembly Legislative Findings.

The legal rights protected under Penal Code § 1473.7 are well established. "Deportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes." *Padilla v. Kentucky*, 559 U.S. 356, 364 (2010). Because of the distinct importance of immigration to noncitizen defendants, "both the Legislature and the courts have sought to ensure these defendants receive clear and accurate advice about the impact of criminal convictions on their immigration status, along with effective remedies when such advice is deficient." *People v. Vivar*, 11 Cal. 5th 510, 516 (2021) (interpreting Cal. Pen. C. § 1473.7).

Section 1473.7 creates a vehicle for people who are no longer in criminal custody to challenge a conviction alleging specific defects, including, of particular relevance here, that:

> "(a)(1) The conviction or sentence is legally invalid 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 conviction or sentence. A finding of legal invalidity may, but need not, include a finding of ineffective assistance of counsel."[1]

Even though the grounds for vacatur delineated in § 1473.7 exclusively cover legal defects, OPLA attorneys have argued that vacaturs pursuant to the statute fail to meet the standard set forth in *Matter of Pickering* and related cases. Some OPLA attorneys contend that, because claims brought under § 1473.7(a)(1) may, but need not necessarily, allege ineffective assistance of counsel, these vacaturs remain convictions under § 101(a)(48)(A). They argue that errors causing inability to understand, defend against, or knowingly accept the immigration consequences of a disposition are "rehabilitative" rather than procedurally or substantively defective.

These arguments fail to acknowledge that BIA precedent recognize vacaturs based on *any* "procedural or substantive defect." *Pickering,* 23 I&N Dec. at 624. Effective assistance of counsel is but one of the many legal and constitutional rights afforded to defendants. Defendants are also guaranteed the Fifth Amendment Due Process right to a knowing, voluntary, and intelligent plea. *See, e.g., Boykin v. Alabama*, 395 U.S. 238 (1969). Section 1473.7(a) offers a

[1] The other grounds for vacatur under Cal. Pen. C. § 1473.7 include: newly discovered evidence of actual innocence, (a)(2); and/or that the conviction or sentence was sought, obtained, or imposed on the basis of race, ethnicity, or national origin in violation of Cal. Pen. C. § 745(a), (a)(3).

potential remedy any time the defendant enters a plea in ignorance of the actual immigration consequences of a plea, whether or not that person has an attorney. This remedy is critical to correct numerous legal and procedural defects.

Errors impacting a defendant's ability to meaningfully understand the immigration consequences of a conviction could include, for example, a translator's error, a defendant's mental incompetence, prosecutorial or judicial mistatements, or a defendant's uninformed pro se plea to a removable disposition. Any of these examples may, in some instances, violate the defendant's Fifth Amendment right to a knowing, voluntary, and intelligent plea, notwithstanding the absence of a Sixth Amendment violation. Penal Code § 1473.7(a) may be used to correct these defects as well as claims of defense counsel's ineffectiveness.

In addition to the federal constitutional rights that § 1473.7 protects, it is well established that states can determine their own legal and procedural standards for convictions. When those state standards are violated, the conviction is defective and its subsequent vacatur meets *Pickering*. *See, e.g., Matter of Adamiak*, 23 I&N Dec. 878 (BIA 2006) (finding that a state vacatur based on the court's failure to provide the requisite statutory advisement about immigration consequences met *Pickering*). In creating § 1473.7, California recognized a noncitizen defendant's legal right to "meaningfully understand, defend against, or knowingly accept" the immigration consequences of a disposition and concurrently created a remedy for the violation of that legal right. When a court vacates a judgment "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.

In *Matter of Rodriguez-Ruiz*, 23 I&N Dec. 1378 (2000), the BIA held that a vacatur was not rehabilitative and met the requisite standard where the order stated:

> [I]t is ORDERED, that pursuant to CPL 440, the judgment . . . and the sentence . . . are in all respects vacated, on the legal merits, as if said conviction had never occurred and the matter is restored to the docket for further proceedings.

Section 1473.7 vacaturs go significantly further: identifying the statutory and constitutional basis, specifying the error as prejudicial, and explicitly finding the convictions legally invalid. These vacaturs are consistent with those long-recognized as removing the effects of a conviction under immigration law.

The Supreme Court of California has emphasized the exacting standard necessary for a Court to grant vacatur under § 1473.7. What the defendant "must show is more than merely an error…. The error must also be 'prejudicial.'" *People v. Vivar*, 11 Cal. 5th 510, 528 (Cal. 2021). Under California law, the defendant must *not only* show legal defect, but also "demonstrat[e] a reasonable probability that the defendant would have rejected the plea if the defendant had correctly understood its actual or potential immigration consequences." *Id.*

In fact, the word "rehabilitative" never once appears within § 1473.7. Post-conviction factors of the type discussed in *Matter of Roldan* and *Matter of Pickering*--e.g., successful compliance with the terms of probation and good conduct while in custody--are never part of the court's determination of a § 1473.7 error. *See Matter of Roldan*, 22 I&N Dec. 512, 523 (1999) ("Our decision is limited to those circumstances where an alien has been the beneficiary of a state rehabilitative statute."). To issue a vacatur under § 1473.7, the reviewing judges must find the underlying conviction "legally invalid" due to "prejudicial error." This vacatur remedy is not the "rehabilitative relief" the BIA has rejected. Courts do not consider post-conviction equities or conduct, but are tasked instead with identifying a prejudicial legal error. *See* Cal. Pen. C. § 1473.7(e)(1) ("The court shall grant the motion to vacate the conviction or sentence if the moving party establishes, by a preponderance of the evidence, the existence of any of the grounds for relief").

Numerous courts have held that "an administrative agency is not competent to inquire into the validity of state criminal convictions." *Contreras v. Schiltgen*, 122 F.3d 30, 32 (9th Cir. 1997) (*citing De la Cruz v. INS*, 951 F.2d 226, 228 (9th Cir. 1991); *Ocon-Perez v. INS*, 550 F.2d 1153, 1154 (9th Cir. 1977)). That "is the reason behind our well-established rule that criminal convictions may not be collaterally attacked in deportation proceedings themselves." *Id*. (*citing Urbina-Mauricio v. INS*, 989 F.2d 1085, 1089 (9th Cir. 1993); *see Pinho v. Gonzales*, 432 F.3d 193, 213 (3d Cir. 2005) (holding that DHS may not "arrogate to itself the power to find hidden reasons lurking beneath the surface of the rulings of state courts"); *Matter of Rodriguez-Ruiz,* 22 I&N Dec. 1378 (BIA 2000) (declining to "go behind the state court judgment and question whether the New York court acted in accordance with its own state law."); *Matter of Thomas* and *Matter of Thompson* 27 I. & N. Dec. 674, 685-86 (A.G. 2019) (explaining that *Pickering* simply requires IJs to "make determinations about the reasons that state-court orders were entered" without "wad[ing] into the intricacies of state criminal law," with which IJs "have little familiarity"). But when contesting § 1473.7 vacaturs, OPLA attorneys nevertheless attempt to relitigate the very post-conviction cases a state court judge already ruled upon, frequently asking immigration judges to look beneath the state court orders and review the underlying motions, continuing a troubling trend begun under the prior presidential administration of undercutting state reforms designed to ameliorate legally defective convictions.

It is axiomatic that states are sovereign with respect to the enforcement of their own criminal laws. As the Supreme Court has emphasized, "[u]nder our federal system, the States possess primary authority for defining and enforcing the criminal law." *United States v. Lopez*, 514 U.S. 549, 561 n.3 (1995) (internal quotation marks omitted); *see Torres v. Lynch*, 136 S. Ct. 1619, 1629 n.9 (2016). States exercise the discretion permitted them to make decisions on criminal violations, sentencing, and post-conviction matters that affect a broad swath of individuals, including non-citizen criminal defendants. *See Ochoa v. Bass*, 181 P.3d 727, 731 (Okla. Crim. App. 2008); *State v. Quintero Morelos*, 137 P.3d 114, 119 (Wash. Ct. App. 2006); *see also Padilla v. Kentucky*, 559 U.S. 356, 360-64 (2010) (discussing the transformation of

discretion by state judges to prevent deportation). OPLA should respect, rather than undermine, state court efforts to remedy legally defective convictions.

Unsurprisingly, virtually every BIA opinion to have considered § 1473.7 has found that the vacaturs it authorizes entirely remove a prior disposition from the INA § 101(a)(48)(A) statutory definition of "conviction." See Appendix A (listing 22 cases all holding vacaturs under § 1473.7 are issued to correct procedural or substantive defects, as per *Pickering*). Troublingly, however, we are seeing OPLA attorneys across the country raise identical objections. Immigration advocates who have questioned this approach have been told that it is based on a directive coming from headquarters. Portions of OPLA's briefing have now been cut and pasted into OIL briefing in federal courts of appeals as well as in US Attorney briefing before the federal district courts--never finding favor.

Instead of exhausting the government's and advocates' already scarce resources in an effort to subvert state court decisions and state legislative actions designed to ameliorate legally defective convictions, we encourage OPLA to issue a directive clarifying the government's posture with respect to Penal Code § 1473.7 and other vacatur remedies.

In view of the above, we respectfully request that a memorandum be sent to OPLA field offices that: (1) any prior directive to challenge motions to vacate pursuant to Penal Code § 1473.7(a)(1) is rescinded; (2) a conviction or sentence vacated pursuant to Penal Code § 1473.7(a)(1) is no longer a "conviction" or "sentence" for purposes of INA § 101(a)(48); and (3) directing attorneys to join motions to reopen filed by people who may have been ordered removed based on OPLA's erroneous litigation position.

We are happy to meet to discuss this further.

Very Truly Yours,

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Immigrant Legal Resource Center

Greg Chen
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