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The Eleventh Circuit Twists Georgia Law to Turn Probationers into Deportable Aggravated Felons

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Cover Page Footnote

J.D. Candidate, 2024, University of Georgia School of Law; B.S./B.A., 2021, Texas A&M University. I thank Associate Dean Jason Cade for his guidance, feedback, and support, which made this Note possible. I also give special thanks to Silvia, Caroline, and my parents for their constant love, understanding, and support.

THE ELEVENTH CIRCUIT TWISTS GEORGIA LAW TO TURN PROBATIONERS INTO DEPORTABLE AGGRAVATED FELONS

Jake Shatzer[*]

In 2001, Alfredo Talamantes-Enriquez was convicted in two cases of simple battery under Georgia Law. He was sentenced to twelve months of probation for each conviction. Over fifteen years later, the U.S. government sought to deport Mr. Talamantes, arguing that his Georgia convictions made him an "aggravated felon" for immigration purposes. The aggravated felon statute provides that a non-citizen who commits a crime of violence and is sentenced to imprisonment of at least one year is deportable.

It seems obvious that someone in Talamantes's position would not be an aggravated felon. Talamantes did not spend a day in jail but rather was only sentenced to probation. The government won in immigration court, however, arguing that his sentence was actually a term of imprisonment that "was allowed to be served" entirely on probation.

Talamantes appealed this ruling to the U.S. Court of Appeals for the Eleventh Circuit. While pending appeal, the Georgia trial court issued orders clarifying that he was only sentenced to probation. The Eleventh Circuit rejected these orders, however, and upheld the reasoning of the immigration court. This decision marks a significant injustice to non-citizens in the U.S. who are convicted of crimes. The Eleventh Circuit ignored the plain meaning of the aggravated felon statute, its own precedent, and respect for state courts' interpretations of state law.

This Note dissects the grave legal and logical errors in the Eleventh Circuit's decision. It then makes recommendations for all the actors who affect immigration proceedings—federal courts, state courts, Congress, and the Attorney General—in

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order to prevent the unjust application of the Eleventh Circuit's decision in the future.

TABLE OF CONTENTS

I. INTRODUCTION 1461

II. IMMIGRATION LAW'S DEFERENCE TO STATE LAW 1464
A. THE INA AND AGGRAVATED FELONIES 1464
B. WHEN IS A TERM OF IMPRISONMENT FINAL UNDER STATE LAW? 1466
C. THE ATTORNEY GENERAL'S DECISION IN *THOMAS & THOMPSON* 1468

III. THE ELEVENTH CIRCUIT'S DECISION IN *TALAMANTES* AND ITS FLAWS 1470
A. TALAMANTES WAS SENTENCED TO STRAIGHT PROBATION 1470
1. A Crime of Violence for Which the Term of Imprisonment Is at Least One Year 1470
2. What Is Probation Under Georgia Law? 1471
3. The Clarification Orders 1473
4. The Sentencing Orders and Eleventh Circuit Precedent 1477
5. Summary of the Eleventh Circuit's Logical Errors 1481
B. THE ELEVENTH CIRCUIT FAILED TO GIVE FULL FAITH AND CREDIT TO THE GEORGIA COURT 1482
C. THE ROLE OF FEDERAL COURTS AND THE ROLE OF CONGRESS 1487
1. Federal Courts Should Apply the Law, Not Stretch It 1487
2. Congress Can Change Immigration Statutes 1490

IV. MULTIPLE ACTORS CAN PREVENT UNJUST DEPORTATIONS 1494
A. STATE COURTS MUST CONTINUE TO RECOGNIZE THEIR ROLE IN IMMIGRATION 1494

B. FEDERAL COURTS SHOULD FOLLOW THE FIFTH CIRCUIT'S APPROACH 1496
C. CONGRESS MUST CHECK THE JUDICIAL BRANCH 1499
D. THE ATTORNEY GENERAL SHOULD REVERSE *THOMAS & THOMPSON* 1501

V. CONCLUSION 1502

I. INTRODUCTION

In 2001, Alfredo Talamantes-Enriquez was sentenced to serve twelve months of probation for two simple battery convictions under Georgia state law.[1] Talamantes is a citizen of Mexico who had been living in the U.S. since 1994.[2] In 2017, however, the federal government brought immigration proceedings against Talamantes on the basis that these convictions rendered him deportable under federal law.[3] The government sought to deport Talamantes under a statute providing that non-citizens convicted of aggravated felonies are deportable from the United States.[4] The particular aggravated felony that the government argued was applicable to Talamantes's criminal history was a "crime of violence . . . for which the term of imprisonment [is] at least one year."[5]

The government won its case in immigration court.[6] Talamantes appealed to the Board of Immigration Appeals (BIA), which affirmed the ruling.[7] The agency's rulings were incorrect, however, because a sentence of probation is not "imprisonment" at all. The evidence before the agency indicated that Talamantes did not receive any judicially imposed term of imprisonment, and he did not

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[1] *See* Talamantes-Enriquez v. U.S. Att'y Gen., 12 F.4th 1340, 1346 (11th Cir. 2021) (describing Talamantes's convictions); *see also* O.C.G.A. § 16-5-23 (providing Georgia's simple battery statute).

[2] *See Talamantes-Enriquez*, 12 F.4th at 1346 ("Talamantes is a native and citizen of Mexico who entered the United States without inspection in 1994.").

[3] *See id.* ("In 2017, the Department of Homeland Security finally initiated removal proceedings against [Talamantes]."). The court's use of the adverb "finally" in the above-quoted sentence is one of many instances where the court uses callous language that evidence its desire to see Talamantes deported. Readers are encouraged to read the opinion in its entirety to fully appreciate the hostility the court displays toward Talamantes and his legal arguments.

[4] *See* 8 U.S.C. § 1227(a)(2)(A)(iii) ("Any alien who is convicted of an aggravated felony at any time after admission is deportable."); § 1101(a)(43) (defining the different crimes that constitute an aggravated felony).

[5] *See* § 1101(a)(43)(F) (providing that "a crime of violence . . . for which the term of imprisonment [is] at least one year" is an aggravated felony).

[6] *See Talamantes-Enriquez*, 12 F.4th at 1345 (stating that the Immigration Judge (IJ) issued a removal order based on "the IJ's determination that [Talamantes] is ineligible for cancellation of removal because he has been convicted of an 'aggravated felony'").

[7] *See id.* (stating that the BIA dismissed Talamantes's appeal).

spend a single day in jail.[8] The errors of justice only continued after Talamantes appealed to the U.S. Court of Appeals for the Eleventh Circuit. While his appeal was still pending before the BIA, a Georgia state judge issued orders that clarified Talamantes's sentences.[9] The judge authoritatively stated that the sentences were for probation alone—any prior indication that the sentences were for imprisonment incorrectly followed from the standard language on a preprinted sentencing form.[10] The BIA nonetheless dismissed Talamantes's appeal.[11]

Remarkably, the Eleventh Circuit affirmed the erroneous decision of the BIA—even after considering the Georgia judge's clarifying orders. The court ruled that Talamantes "was sentenced to a term of imprisonment . . . even if he was permitted to serve part or all of that sentence on probation."[12] Absent any immigration consequences, this characterization of Talamantes's sentence could be dismissed as a difference of semantics. The consequences were very real, however, as the Eleventh Circuit's interpretation of Talamantes's sentence led to his deportation from the United States.[13]

The U.S. Supreme Court has "long recognized that deportation is a particularly severe penalty."[14] Even those who have spent nearly their entire adult lives in the U.S. can be banished from their homes. Deportation is even more severe in the context of an "aggravated felony" because the law bars aggravated felons from any discretionary relief that is available to those deported under other provisions.[15] Deportation as an aggravated felon also carries

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[8] *See id.* at 1346 (quoting the state judge's clarification orders that "none of that sentence was to be served in confinement insofar as he did not violate probation, which he did not").

[9] *See id.* at 1346–47 (describing the state judge's clarification orders).

[10] *See id.* at 1346 (quoting language in the clarification orders stating that "the Court's standard form language made it seem like [Talamantes's] sentence was a period of confinement when in fact it was only a sentence of probation").

[11] *See id.* at 1347 ("This time the BIA dismissed his appeal.").

[12] *Id.* at 1353.

[13] *See id.* at 1355 (noting that as a consequence of its holding, Talamentes was "render[ed] [] ineligible for cancellation of removal")

[14] Padilla v. Kentucky, 559 U.S. 356, 365 (2010).

[15] *See* 8 U.S.C. § 1229b(a)(3) (allowing cancellation of removal only if an immigrant is not an aggravated felon).

a permanent bar on reentry into the United States.[16] Therefore, for an individual in Talamantes's position, deportation amounts to mandatory and permanent exile from the U.S. with no legal mechanism for its reversal.

Given this extreme penalty, courts must not impose deportation lightly. Congress has established very specific circumstances under which non-citizens can be deported.[17] Deportation contrary to specific parameters of law, even of someone convicted of a crime, is a severe injustice. Courts must ensure that statutory requirements for deportation are met, and they should not go out of their way to subject individuals to this extreme consequence if Congress's intention is unclear. The Eleventh Circuit, however, has done just that in *Talamantes*.

Importantly, Georgia law allows judges to impose probation independent of any imprisonment or other criminal punishment.[18] The Eleventh Circuit's own caselaw establishes that sentences of "straight probation" are not terms of imprisonment under the aggravated felony statute.[19] In this case, the Georgia court's orders made explicit that this was the case for Talamantes's sentence—straight probation, nothing more.[20] Yet the Eleventh Circuit chose to disregard the state orders, belittle Talamantes's arguments, and stretch the law to deport someone that Congress did not make deportable.

For these reasons, the Eleventh Circuit's *Talamantes* decision was deeply flawed. Part II provides an overview of the legal history and policy underlying the *Talamantes* decision. Part III examines and critiques the *Talamantes* court's reasoning at length. Finally,

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[16] *See* § 1182(a)(9)(A)(i) (providing that aggravated felons are permanently inadmissible to the U.S.).

[17] *See* § 1227(a) (defining classes of non-citizens who are deportable).

[18] *See infra* section III.A.*2* (describing how probation operates as a standalone punishment under Georgia law).

[19] *See* United States v. Guzman-Bera, 216 F.3d 1019, 1021 (11th Cir. 2000) (adopting the Fifth Circuit's approach and holding that "when a court does not order a period of incarceration and then suspend it, but instead imposes probation directly, the conviction is not an 'aggravated felony'" (quoting United States v. Banda-Zamora, 178 F.3d 728, 730 (5th Cir. 1999)).

[20] *See* Talamantes-Enriquez v. U.S. Att'y Gen., 12 F.4th 1340, 1346 (11th Cir. 2021) (quoting the state judge's clarification order that Talamantes's sentence "was only a sentence of probation").

Part IV suggests steps that various actors should take to prevent unjust deportations like those in *Talamantes* from happening again.

II. IMMIGRATION LAW'S DEFERENCE TO STATE LAW

A. THE INA AND AGGRAVATED FELONIES

The Immigration and Nationality Act (INA) became law in 1952, codifying several prior patchwork immigration laws into one legislative act.[21] Among these provisions were those that established grounds for deportability, including several categories of crimes.[22] These included "offenses involving[] moral turpitude; narcotics trafficking and other drug-related crimes; firearms; prostitution; or violations of miscellaneous national security and immigration laws."[23] In 1988, the Anti-Drug Abuse Act added a new category of crimes—"aggravated felonies"— to this list.[24] Under the new law, a non-citizen who is convicted of an aggravated felony at any time after being admitted into the U.S. is deportable.[25] Aggravated felonies were limited to "murder, any drug trafficking crime . . . [,] or any attempt or conspiracy to commit such act . . . within the United States."[26]

Congress greatly expanded the definition of aggravated felony in 1996.[27] These changes remain in effect today, and "aggravated felony" now includes twenty-one different classes of crimes.[28] One listed class is "a crime of violence . . . for which the term of

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[21] *See* Jacqueline P. Ulin, *A Common Sense Reconstruction of the INA's Crime-Related Removal System: Eliminating the Caveats from the Statue of Liberty's Welcoming Words*, 78 WASH. U. L.Q. 1549, 1554 (2000) (describing the passage of the INA in 1952).

[22] *See id.* (describing the deportability provision and the categories of crimes in the original INA).

[23] *Id.*

[24] *See id.* at 1555 ("The 1988 Act created an entirely new class of deportable aliens by adding the 'aggravated felony' provision to the INA.").

[25] *See* 8 U.S.C. § 1227(a)(2)(A)(iii) ("Any alien who is convicted of an aggravated felony at any time after admission is deportable.").

[26] Ulin, *supra* note 21, at 1555.

[27] *See id.* at 1556 ("[T]he Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) reduced both the monetary thresholds and the sentencing requirements of the enumerated 'aggravated felonies' and other offenses. As a result, these acts increase the number of predicate crimes sufficient for removal." (footnote omitted)).

[28] *See* 8 U.S.C. § 1101(a)(43) (defining aggravated felony).

imprisonment [is] at least one year."[29] A "crime of violence" is "an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense."[30]

In addition to this "crime of violence" requirement, a conviction must carry a "term of imprisonment [of] at least one year."[31] A "term of imprisonment" is "the period of incarceration or confinement ordered by a court of law regardless of any suspension of the imposition or execution of that imprisonment or sentence in whole or in part."[32] With respect to "at least one year," the Eleventh Circuit "hold[s] that an aggravated felony is defined by the sentence actually imposed" on a defendant rather than the maximum sentence a court may impose.[33] The pre-1996 statute referred to the "term of imprisonment imposed," and the court cited the Third Circuit's reasoning that found "no evidence that Congress intended to depart from its prior position that an aggravated felony is determined by the imposed imprisonment."[34]

In Talamantes's case, it was not disputed that his convictions under state law were for crimes of violence.[35] At issue, however, was whether he was sentenced to a term of imprisonment as required by the federal statute.[36] If he was, then he was deportable as an aggravated felon.[37] If he was not, then another deportation provision may have applied, but it would not carry the finality of an

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[29] § 1101(a)(43)(F).

[30] § 16(a)–(b).

[31] § 1101(a)(43)(F).

[32] § 1101(a)(48)(B).

[33] United States v. Guzman-Bera, 216 F.3d 1019, 1020 (11th Cir. 2000) (following the Third Circuit's "holding that the statute means the sentence actually imposed" (citing United States v. Graham, 169 F.3d 787, 790–91 (3d Cir. 1999))).

[34] *Id.* (citing *Graham*, 169 F.3d at 790)).

[35] *See* Talamantes-Enriquez v. U.S. Att'y Gen., 12 F.4th 1340, 1347–52 (11th Cir. 2021) (determining that Talamantes's battery convictions were crimes of violence).

[36] *See id.* at 1352 (noting that it is "not enough that a prior conviction be a 'crime of violence'" but that it must also have resulted in a "term of imprisonment [of] at least one year" to qualify as an "aggravated felony").

[37] *See id.* at 1347 ("'An alien who is convicted of an aggravated felony at any time after admission' can be removed.").

aggravated felon's deportation, so Talamantes would still be able to apply for discretionary relief which would permit him to remain in the United States.

B. WHEN IS A TERM OF IMPRISONMENT FINAL UNDER STATE LAW?

A "term of imprisonment" is defined as "the period of incarceration or confinement ordered by a court of law regardless of any suspension of the imposition or execution of that imprisonment or sentence in whole or in part."[38] This definition notably relies on the sentence ordered by the court and does not consider a sentence to be shorter if it was subsequently suspended. Suspension is only one mechanism for changing a criminal sentence, though, and the federal statute is silent on how other mechanisms for altering a criminal sentence are treated for immigration purposes.[39] Other possible sentence-related orders include modification, vacatur, and clarification.[40] This silence in the federal statute presented an issue: how should federal immigration authorities and courts treat criminal convictions of non-citizens who had their sentences subsequently modified, vacated, or clarified by state courts? Did the original sentence condemn them to deportation or did the reduced sentence mean they were not deportable?

Traditionally, if a state court modified an immigrant defendant's sentence after initial sentencing, the modification would control for purposes of federal immigration law.[41] This comes from the fact that

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[38] § 1101(a)(48)(B).

[39] *See id.* (stating how the law applies in cases where a sentence is suspended but not explicitly stating what treatment occurs if, for example, a sentence is modified, vacated, or clarified).

[40] *See* ARTHUR W. CAMPBELL, LAW OF SENTENCING § 14:1 (2022) (discussing the authority of sentencing judges to reduce a sentence after the sentence is initially imposed); *id.* § 14:2 (describing how invalid sentences may be vacated). Sentence clarification is a less formal practice that, by its nature as a clarification rather than a modification, does not require much scholarly discussion. For an example of a clarification order, see generally State v. Thompson, No. 19-9-05723, 2020 Ga. Super. LEXIS 1151 (Super. Ct. Ga. Aug. 4, 2020). *See also* Griggs v. State, 723 S.E.2d 480, 481 (Ga. Ct. App. 2012) (stating that a trial court "possesses inherent power to correct its records at any time to show the true intent of the sentencing court at the time the original sentence was imposed" (internal quotation marks omitted)).

[41] *See In re* Thomas & Thompson, 27 I. & N. Dec. 674, 675 (B.I.A. 2019) (describing how, prior to the Attorney General's decision in this case, "[i]f [an] order 'modifie[d]' an alien's

federal law defines term of imprisonment as that "ordered by a court."[42] A modified sentence is still the sentence that a defendant was ordered to serve, and state law makes the determination as to what that sentence is.[43]

If a state court clarified a defendant's sentence but did not modify the sentence, BIA precedent required Immigration Judges (IJs) to consider the bases for clarification.[44] The state court needed authority to clarify the sentence, and there had to be an obvious error in the sentencing order that made clarification necessary.[45] This is also a highly deferential standard, even though not as completely deferential as with sentence modification. The first requirement is jurisdictional because, of course, a court must have authority to issue an order for it to have any legal effect. The second requirement is more stringent, but respect for state court orders should require deference unless the original sentence is so unambiguous that the clarification order is wrong on its face.

Finally, if a state court vacated a sentence, immigration courts would give the vacatur effect only if it was based on "a procedural or substantive defect in the underlying proceedings."[46] If the vacatur was based on rehabilitation or immigration considerations, it was not given effect for immigration law purposes.[47]

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sentence, then the modification [was] given 'full . . . faith and credit' for immigration purposes regardless of the reason" (quoting Matter of Cota-Vargas, 23 I. & N. Dec. 849, 850–52 (B.I.A. 2005))).

[42] § 1101(a)(48)(B).

[43] *See* David G. Blitzer, *Delegated to the State: Immigration Federalism and Post-Conviction Sentencing Adjustments in* Matter of Thomas & Thompson, 97 N.Y.U. L. REV. 697, 731 (2022) (arguing that § 1101(a)(48)(B) "explicitly links the length of the imprisonment to the amount of time the state court orders" and, because of the phrase "ordered by the court," that, "when a judge resentences a noncitizen to a reduced length of imprisonment, that is the sentence the noncitizen was '*ordered*' to serve by a court of law . . . and so the length of imprisonment is defined by the state law determination").

[44] *See Thomas & Thompson*, 27 I. & N. Dec. at 675 ("[I]f the order 'clarifies' an alien's sentence, then an immigration judge assessing the order's effect considers several characteristics of the order, such as whether the original sentencing order contained an obvious discrepancy and whether the clarifying court had jurisdiction to enter the order.").

[45] *See supra* note 44 and accompanying text.

[46] *Thomas & Thompson*, 27 I. & N. Dec. at 675.

[47] *See id.* (stating that a vacatur does not have legal effect for immigration purposes "if based on reasons 'unrelated to the merits,' like 'rehabilitation or immigration hardships'" (quoting *In re* Pickering, 23 I. & N. Dec. 621, 624 (B.I.A. 2003), *rev'd on other grounds*, 465 F.3d 263 (6th Cir. 2006))).

Paradoxically, for immigration purposes, an immigrant convicted of a crime would prefer to have his sentence modified rather than vacated. While a vacatur would be preferred in terms of criminal punishment, it carried the risk that immigration authorities would determine it was not granted for procedural or constitutional defects. The immigrant would thus still be deportable.

These post-sentencing orders were afforded different degrees of deference by federal courts. Modification was given full faith and credit, and clarification was similarly deferential. Only vacaturs were subject to complete review by immigration courts to determine the intent behind the vacatur. Having immigration courts, or even Article III courts, review a state action and determine its purpose is a difficult task—and a constitutionally dubious one. At least in the case of sentence modification and clarification, though, federal actors avoided this issue and deferred to state law. This changed, however, with a decision by the Trump Administration.

C. THE ATTORNEY GENERAL'S DECISION IN *THOMAS & THOMPSON*

President Trump's campaign platform and rhetoric presented anti-immigrant positions, and his Administration sought to advance those views.[48] One step was Attorney General William Barr's opinion in *Matter of Thomas & Thompson*, issued in 2019.[49] The Attorney General of the U.S. can issue opinions about how an administrative agency applies the law.[50] In the immigration context, the Attorney General's opinions are binding because the

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[48] *See Donald Trump Presidential Campaign, 2016/Immigration*, BALLOTPEDIA, https://ballotpedia.org/Donald_Trump_presidential_campaign,_2016/Immigration (last visited Mar. 6, 2023) (providing an overview of Trump's campaign positions and rhetoric calling for immigration bans from Muslim countries, strong deportation measures, and an overturn of previous administration immigration programs); *see also Immigration*, NAT'L ARCHIVES, https://trumpwhitehouse.archives.gov/issues/immigration (last visited Mar. 6, 2023) (preserving the Trump White House's website and providing the Trump Administration's immigration policy, goals, and actions).

[49] *See Thomas & Thompson*, 27 I. & N. Dec. at 674 (deciding to overrule previous BIA decisions, fundamentally changing how immigration decisions were made with respect to rehabilitation and collateral consequences); *see also supra* text accompanying notes 44–45 (introducing the wide-sweeping impacts of this order).

[50] *See* 28 U.S.C. § 512 (giving the Attorney General authority to issue opinions on questions of law to the head of an executive department).

immigration courts and the BIA are components of the Department of Justice, which the Attorney General heads.[51]

In *Thomas & Thompson*, Attorney General Barr drastically reduced the deference afforded to state sentencing decisions.[52] As was previously the case with vacatur, he directed the immigration courts to inquire into the reasons for sentence modification or clarification.[53] All three post-sentencing treatments would now be void for immigration law purposes if made under state law for rehabilitation or immigration purposes only.[54] Only an underlying procedural or substantive defect in criminal proceedings now makes a sentence modification or clarification the final sentence for purposes of immigration law.[55]

With respect to sentence modification, the Attorney General's decision upended at least eighteen years of precedent.[56] Until then, immigration courts showed some level of deference to state decisions regarding criminal sentences. The Attorney General chose to make it the province of the federal executive branch to determine what state courts had in mind when issuing these orders. Whether it was the sole motivation for the decision or not, *Thomas & Thompson* likely had the effect of expanding the number of deportable immigrants in the United States.

Against this backdrop, the Eleventh Circuit issued its decision in *Talamantes*. The court's decision followed the trend of expanding aggravated felony deportation to reach more immigrants and not deferring to state courts. The next Part analyzes this decision. First,

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[51] *See Executive Office for Immigration Review*, DEP'T OF JUST., https://www.justice.gov/eoir/about-office (last visited Mar. 6, 2023) (describing how the IJs and BIA constitute the Executive Office for Immigration Review, a Department of Justice office).

[52] *See Thomas & Thompson*, 27 I. & N. Dec. at 674 (determining that "state-court orders will be given effect for immigration purposes only if based on a procedural or substantive defect in the underlying criminal proceeding").

[53] *See id*. at 675 (overruling the standards that applied in cases of sentence modification and clarification by requiring immigration judges to determine the motivation behind orders—with a particular focus on orders based on recidivism motivations).

[54] *See supra* note 53 and accompanying text.

[55] *See Thomas & Thompson*, 27 I. & N. Dec. at 675 (establishing that the *Pickering* test that considers whether a change was procedural or substantive in nature now applies to considerations of sentence modification and clarification).

[56] *See In re* Song, 23 I. & N. Dec. 173, 174 (B.I.A. 2001) (establishing that a modified state sentence would control for immigration purposes).

it explains why Talamantes was sentenced to probation and nothing more. This analysis focuses on the terms of the federal statute, the nature of probation as a sentence in Georgia, the clarification orders in Talamantes's case, and the Eleventh Circuit's interpretation and precedent. Second, it discusses how the Eleventh Circuit violated statutory requirements to afford full faith and credit to the state clarification orders. Finally, it discusses the role of Congress versus the role of federal courts and how the Eleventh Circuit's decision upsets the separation of powers.

III. THE ELEVENTH CIRCUIT'S DECISION IN *TALAMANTES* AND ITS FLAWS

A. TALAMANTES WAS SENTENCED TO STRAIGHT PROBATION

1. A Crime of Violence for Which the Term of Imprisonment Is at Least One Year. 8 U.S.C. § 1227 provides that "[a]ny alien who is convicted of an aggravated felony at any time after admission is deportable."[57] An aggravated felony can be a variety of crimes, but in the case of Talamantes, the applicable provision was a "a crime of violence . . . for which the term of imprisonment [is] at least one year."[58] Talamantes was convicted in Georgia for two separate instances of simple battery.[59] Both convictions were crimes of violence for the purpose of the federal statute.[60]

Talamantes's punishment for these crimes was the central issue to his case. In Georgia, simple battery is punishable by up to one year in prison, but this is not relevant to determining whether Talamantes committed an aggravated felony.[61] The Eleventh Circuit has recognized that "imprisonment of at least a year" refers to the actual sentence imposed on the defendant, not the maximum

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[57] 8 U.S.C. § 1227(a)(2)(A)(iii).

[58] § 1101(a)(43)(F).

[59] *See* Talamantes-Enriquez v. U.S. Att'y Gen., 12 F.4th 1340, 1346 (11th Cir. 2021) (describing the nature of Talamantes's two convictions in February and April 2001).

[60] *See id.* at 1351 (holding that Talamantes was sentenced under the "intentionally causes physical harm to another" portion of the Georgia statute and that his crimes were thus crimes of violence).

[61] *See* O.C.G.A. § 16-5-23(b) (defining simple battery as a misdemeanor in Georgia); O.C.G.A. § 17-10-3(a)(1) (providing for a maximum prison sentence of one year for a misdemeanor).

possible sentence for the crime.[62] In each case against him, Talamantes was sentenced to twelve months of probation.[63] Despite the statutory possibility for time in prison, Talamantes did not spend any time in jail after either conviction, and no record appears in the *Talamantes* opinion that he violated his probation and was subsequently imprisoned.[64] Talamantes served twelve months on probation for both of his convictions.[65]

How, then, did the Eleventh Circuit conclude that Talamantes was sentenced to imprisonment? The court reasoned that, based on the standard language of the state sentencing forms, Talamantes was sentenced to imprisonment "even if he was permitted to serve part or all of that sentence on probation."[66] Why a court would sentence someone to imprisonment and allow the entire sentence to be served on probation is questionable. Thus, an understanding of probation law is essential to answering this question.

2. What Is Probation Under Georgia Law? Probation as a criminal punishment became increasingly popular in American law during the nineteenth century.[67] Its rise in popularity was "spurred by egalitarian reforms which promoted the rehabilitative, rather than the retributive, approach to reducing crime."[68] Initially, probation was judicially implemented, and the first statute establishing probation as a punishment was not passed until 1878.[69] This judicial invention did initially resemble sentencing someone to "imprisonment" and then allowing "part or all of that sentence" to be served on probation.[70] Indeed, "even today states sometimes

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[62] *See supra* note 33 and accompanying text.

[63] The *Talamantes* court ruled that the convictions were for twelve months imprisonment, but this Note argues that Talamantes was only sentenced to probation. The length of his sentence, however, was indisputably twelve months. *See Talamantes-Enriquez*, 12 F.4th at 1346 (describing the length of the sentences imposed).

[64] *See id.* ("[N]one of [his] sentence was to be served in confinement insofar as he did not violate probation, which he did not.").

[65] *See id.* (stating that Talamantes was sentenced to twelve months probation and that he did not violate the terms of his probation).

[66] *Id.* at 1353 (acknowledging that a sentencing form was used).

[67] *See* CAMPBELL, *supra* note 40, § 5:1 (stating that, in the U.S., the practice of imposing probation "leapt to prominence in the 19th century").

[68] *Id.*

[69] *See id.* (stating that the first probation statute was passed in 1878).

[70] *Id.* ("[S]tate judges created de facto probation by sentencing offenders to 'conditional release' in the community.").

predicate probation upon 'suspending' or 'deferring' an offender's sentence."[71]

Georgia law, however, does not conceive of probation as imprisonment that is subsequently suspended. This is clear from O.C.G.A. § 42-8-60, which provides that a sentencing judge may, "upon a guilty verdict or plea of guilty or nolo contendere and before an adjudication of guilt, without entering a judgment of guilt and with the consent of the defendant," choose to "defer further proceedings and: (1) Place the defendant on probation; or (2) Sentence the defendant to a term of confinement."[72] Probation can therefore exist under Georgia law without the imposition of imprisonment or confinement.[73] The statute refers to "deferring" further proceedings, which is different from merely imposing a sentence of probation *after* an adjudication of guilt.[74] This still means, however, that a defendant is placed on probation following "a guilty verdict or plea of guilty or nolo contendere"[75] without being sentenced to imprisonment. If the law only provided for probation after the imposition of some other sentence, then probation would have no standalone effect.

In addition to imposing probation and deferring other proceedings, Georgia judges can also "suspend or probate all or any part of [an] entire sentence" under O.C.G.A. § 17-10-1.[76] Paired with O.C.G.A. § 42-8-60, two options exist under Georgia law: probation can be ordered without entering a judgment or an already imposed sentence can be probated. There may, however, be a third option—a *sentence* of probation. O.C.G.A. § 17-10-1 makes at least three

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[71] *Id.*

[72] O.C.G.A. § 42-8-60(a)(1)–(2); *see also* Winget v. State, 226 S.E.2d 608, 613 (Ga. Ct. App. 1976) (holding that the practice of deferring adjudication of guilt to impose probation is authorized by the State Probation Act).

[73] A counterargument to my position is that here the statute's language defining a sentence "regardless of any suspension of the imposition or execution" of imprisonment controls. 8 U.S.C. § 1101(a)(48)(B). Under Georgia law, however, no term of imprisonment is set to be implemented later. A *decision* as to imprisonment is deferred entirely. *See* O.C.G.A. § 42-8-60(a)(1) (stating that a judge may choose to "defer further proceedings and . . . [p]lace the defendant on probation"). Without any term of imprisonment to be suspended, this probation mechanism is wholly outside of § 1101's definition.

[74] *See* CAMPBELL, *supra* note 40, § 5:1 (explaining that, in some states, probation as a sentence operates as a punishment while deferring adjudication of guilt).

[75] O.C.G.A. § 42-8-60(a).

[76] O.C.G.A. § 17-10-1.

references to a "sentence of probation."[77] This usage shows that, in many cases, even the state legislature slips into the common thinking that probation is often the only sentence imposed and not merely a status held while true punishment is deferred until a later time.

What matters for Talamantes is that a Georgia court can impose probation absent a sentence of imprisonment. As previously mentioned, the Eleventh Circuit recognizes that "when a court does not order a period of incarceration and then suspend it, but instead imposes probation directly, the conviction is not an 'aggravated felony.'"[78] The *Talamantes* court appears to quibble with this idea even though it recites the above principle, which remains binding Eleventh Circuit precedent. When Talamantes put forward a state judge's clarification order stating that he was sentenced only to probation rather than a suspended sentence of imprisonment, the court wrote that "[o]ur response to that argument was, to put it in the vernacular, 'give us a break.'"[79] Why the Eleventh Circuit was openly hostile to an argument that its own precedent declares valid is hard to say. Some of the court's animosity seems to have been provoked by Talamantes's offer of state court clarification orders as evidence for his claim.

3. The Clarification Orders. After deportation proceedings were opened against him, Talamantes sought clarification orders from a Georgia state court to clarify that his convictions carried sentences of probation rather than imprisonment.[80] Without being sentenced to imprisonment, the government would not be able to deport Talamantes as an aggravated felon. A state judge signed two orders, one for each conviction.[81] They contained the same operative language:

> Standard sentencing forms were used in imposing [Talamantes's] sentence of probation; however, the Court's standard form language made it seem like

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[77] *Id.*

[78] United States v. Guzman-Bera, 216 F.3d 1019, 1020 (11th Cir. 2000) (quoting United States v. Banda-Zamora, 178 F.3d 728, 730 (5th Cir. 1999)).

[79] *See* Talamantes-Enriquez v. U.S. Att'y Gen., 12 F.4th 1340, 1354 (11th Cir. 2021).

[80] *See id.* at 1346 (describing the clarification orders).

[81] *See id.* (stating that a Georgia state judge issued two clarification orders).

> [Talamantes's] sentence was a period of confinement when in fact it was only a sentence of probation. Therefore, in light of the aforementioned mischaracterization of [Talamantes's] sentence, the Court hereby clarifies that the sentence imposed in this case . . . was a sentence of twelve months probation, and none of that sentence was to be served in confinement insofar as he did not violate probation, which he did not.[82]

The Eleventh Circuit took several issues with the clarification orders. The court pulled no punches when it declared that "it doesn't help Talamantes that each so-called 'clarification order' is a thinly veiled—or more like a buck naked—attempt to affect the result of a federal proceeding by altering the sentencing judge's sentence order more than a decade and a half after the sentence had been served."[83] The court also noted that the text of the orders was prepared by Talamantes's attorney and signed by a judge other than the one who had sentenced Talamantes.[84] I address these three points in turn.

First, the fact that Talamantes's attorney drafted the text of the order does not affect the order's validity in any way. The order was signed by a judge and is, therefore, an order of the court from which it was issued. Attorneys for both the government and private parties alike may draft orders to make a judge's job easier. Indeed, in many proceedings in both state and federal court, the rules of the court *require* attorneys to submit proposed orders to judges.[85] Even the Eleventh Circuit has recognized that the mere fact that an attorney drafted the order does not have any bearing on the order's validity or the credibility of the issuing judge.[86]

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[82] *Id.*

[83] *Id.* at 1354.

[84] *See id.* at 1346–47, 1353–54 (describing the circumstances surrounding the clarification orders).

[85] *See, e.g.*, S.D. GA. R. CIV. CAS. R. 7.1(b) ("Every ministerial motion . . . shall be accompanied by a proposed order."); N.D. GA. LR APPX. H § I(A)(5) (requiring submission of a proposed order when an attorney moves to file conventionally rather than electronically); GA. UNIF. SUPER. CT. R. 44.11 (providing that, in briefing for habeas and death penalty cases, the court may direct the parties to file proposed findings of fact and proposed orders).

[86] *See* Chudasama v. Mazda Motor Corp., 123 F.3d 1353, 1373 n.46 (11th Cir. 1997) (expressing disapproval of the practice but recognizing that a "district court's adoption of . . .

Second, the court is skeptical of the orders because the judge who signed the order was not the judge who sentenced Talamantes.[87] Assuming that the sentencing judge was still on the bench at the time of the deportation proceedings, it is unclear whether the sentencing judge's analysis would substantially differ from the reviewing judge's analysis. After sixteen years, memories fade, and judges handle many, many cases. In 2020, an average Georgia superior court judge had 1,605 cases throughout the year.[88] In this case, the sentencing judge would likely have only been reviewing the order as well. This review is something that a subsequent judge can do without any issue. All relevant court records are present, and the subsequent judge is equally an authority on state law.

Because a different judge reviewed the sentences, the Eleventh Circuit is quick to point out that the judge who issued the order did "nothing more than review and interpret another judge's sentence . . . which we can do ourselves."[89] Though both the Eleventh Circuit and the state judge were reviewing a prior order, the Eleventh Circuit neglects to consider whether a state judge may be more familiar with state sentencing orders and the relevant state law. State judges also will have better access to state judicial records from the criminal case, including a judge's or clerk's notes in the case. The Eleventh Circuit brushes these concerns aside and declares that "we are not bound by a state judge's interpretation of a state court sentence order because we are dealing with federal law and federal statutes, not state law and state statues."[90]

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draft orders nearly verbatim does not affect our standard of review and does not automatically create an appearance of impropriety that would require the district judge to recuse" (internal citation and quotation marks omitted)).

[87] *See Talamantes-Enriquez*, 12 F.4th at 1354 ("We also pointed out in Garza-Mendez that the judge who signed the 'clarification' order had not been the sentencing judge, and she had done nothing more than review [the defendant's] sentence something we are quite capable of doing ourselves.").

[88] *See* JUD. COUNCIL GA. ADMIN. OFF. CTS., 2020 SUPERIOR COURT WORKLOAD ASSESSMENT (2021), https://research.georgiacourts.gov/wp-content/uploads/sites/3/2022/03/2020-Workload-Assessment.pdf (listing 1,605 cases as the statewide two-year average for a trial judge's caseload). Assuming this average is roughly constant over time, the judge who sentenced Talamantes would have had approximately 25,680 cases by the time deportation proceedings were brought against Talamantes.

[89] *Talamantes-Enriquez*, 12 F.4th at 1354.

[90] *Id.*

The absurdity of that statement should be plain. The federal law in question deals entirely with whether a certain decision was made pursuant to *state* law on a *state* sentencing form by a *state* judge. A state trial judge's decision on these issues carries far more weight than a federal appellate judge's decision. State judges are the ones routinely sentencing criminal defendants for state offenses. They use and are familiar with the standard state court sentencing forms. They will also be familiar with any situation where the sentencing form might not reflect the true action taken by the judge. The Eleventh Circuit did not explore this issue or inquire into the practice of Georgia judges at this particular court. Even if it were inclined to ignore the clarification orders, the Eleventh Circuit could have certified a question to the Georgia Supreme Court on sentencing practices and forms. The court, however, did not engage in analysis and summarily dismissed the clarification orders because it felt that it was "dealing with federal law" alone.[91]

Third, the court takes great issue with the timing of the clarification orders. Over fifteen years passed before Talamantes sought the orders, and he only did so after immigration proceedings were brought against him.[92] The court decried what it viewed as "a buck naked . . . attempt to affect the result of a federal proceeding."[93] This characterization of the orders ignores their practical nature, though. Both of Talamantes's convictions were the result of crimes he committed in 2001.[94] Talamantes served his year of probation.[95] Then, the Department of Homeland Security brought deportation proceedings against him in 2017.[96] It likely did not matter to Talamantes in the slightest whether his sentence was for probation or for imprisonment that he was "permitted to serve" entirely on probation at the time of his convictions.[97] He moved on with his life. Thus, obtaining a clarification order became a task that Talamantes would only undertake after deportation proceedings began and the

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[91] *Id.*

[92] *See id.* at 1346 (stating that the Georgia state judge issued the clarification orders when Talamantes's case was pending appeal to the BIA).

[93] *Id.* at 1354.

[94] *See id.* at 1346 (describing the procedural history of Talamantes's state convictions and immigration case).

[95] *Id.*

[96] *Id.*

[97] *Id.* at 1353.

technicalities of his sentence became vital to whether he would remain in the United States. The Eleventh Circuit failed to give these obvious and reasonable motivations any credence.[98] It instead derided Talamantes's attempt to obtain solid evidence to prove his theory of his case.[99]

The Eleventh Circuit, therefore, erred when it did not give more weight and deference to the state court's clarification order. The court's reasoning was also flawed in attacking the use of an order when doing so represented both a legitimate and reasonable way for Talamantes to offer evidence that he was not sentenced to imprisonment. Even disregarding the clarification order as the court did, however, should not have defeated Talamantes's argument. Indeed, the original sentencing orders alone should not have been construed as sentencing him to a year in prison which can be served on probation, as outlined below.

4. The Sentencing Orders and Eleventh Circuit Precedent. The Eleventh Circuit did not quote much of the initial sentencing orders in its opinion, nor did it include those orders in an appendix.[100] The court described the first order:

> After pleading nolo contendere, Talamantes was convicted and "sentenced to confinement for a period of 12 mo[nth]s," which he was allowed to serve on probation. The sentence order stated if Talamantes

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[98] The Supreme Court has also rejected the notion that "case-specific factfinding in immigration court" is appropriate because immigration law looks to the fact of an alien's conviction, not his conduct. *See* Moncrieffe v. Holder, 569 U.S. 184, 200 (2013). Though *Moncrieffe* discussed inquiries into conduct rather than review of state court legal conclusions, this case still indicates that reliance on state courts' orders is *more* appropriate than federal courts' review. *See id.* (stating that "*post hoc* investigation into the facts of predicate [criminal] offenses" has been "long deemed undesirable"). The Court's rationale in *Moncrieffe* that judicial efficiency is enhanced "by precluding the relitigation of past convictions in minitrials conducted long after the fact" is equally applicable to this context. *Id.* State courts have announced what convictions and consequences occurred, and federal courts must not redecide the issue long after the fact.

[99] *Talamantes-Enriquez*, 12 F.4th at 1353–56.

[100] This is in contrast to some other cases involving the effect of a state sentence on immigration proceedings. *See, e.g.*, United States v. Garza-Mendez, 735 F.3d 1284, 1293 (11th Cir. 2013) (including a copy of the sentencing form in an appendix to the opinion); United States v. Ayala-Gomez, 255 F.3d 1314, 1316–17 (11th Cir. 2001) (using a block quotation of the pertinent part of the sentencing order).

> violated the terms of probation the state court could revoke probation and "order the execution" of the original sentence of confinement.[101]

And the second order:

> After pleading guilty, [Talamantes] was convicted and "sentenced to confinement for a period of 12 mo[nth]s," which he was allowed to serve on probation. The sentence order stated if Talamantes violated the terms of probation the state court could revoke probation and "order the execution" of the original sentence of confinement. Just like the sentence order had in the first case."[102]

Beyond these brief quotations, the court quoted no other text of the sentencing orders, and it did not include an appendix to its opinion containing a copy of the order. From the text provided in the opinion and the state judge's clarification order, it appears that a standard sentencing form was used in both of Talamantes's convictions. The sentencing orders' boilerplate reference to a "period of confinement" does not establish that Talamantes was sentenced to imprisonment.[103] Standard forms, as described below, may not contain an option for straight probation. As previously discussed, though, Georgia judges have authority to impose straight probation.[104] Similarly, the term "order the execution" in the sentencing order does not have to refer to executing an *original* sentence of imprisonment because it could also refer to the sentence a judge will impose if the initial sentence of probation is violated.[105]

In examining the *Talamantes* sentencing orders, the court found that one of its prior cases, *United States v. Garza-Mendez*, was controlling authority.[106] *Garza-Mendez* also involved a defendant

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[101] *Talamantes-Enriquez*, 12 F.4th at 1346 (alteration in original).

[102] *Id.* (second alteration in original).

[103] *Id.*

[104] *See supra* note 72 and accompanying text.

[105] *See supra* note 72 and accompanying text.

[106] *See Talamantes-Enriquez*, 12 F.4th at 1353 (characterizing *Garza-Mendez* as "directly on point").

convicted and sentenced in Georgia who argued that his convictions were for probation rather than imprisonment.[107] In that case, the Eleventh Circuit helpfully included an appendix that showed the full sentencing form that the sentencing judge used.[108] The *Talamantes* court observed that "[t]he sentencing form . . . used to sentence Garza-Mendez is substantively the same as the ones the Georgia trial courts used to sentence Talamantes."[109] Like Talamantes, the petitioner in *Garza-Mendez* offered clarification orders from the state court, and the Eleventh Circuit similarly rejected his argument and held that he was sentenced to imprisonment.[110]

Applying that case in *Talamantes*, the Eleventh Circuit concluded that "[t]here is no daylight between the Georgia sentence imposed on the defendant in *Garza-Mendez* and the two Georgia sentences imposed on Talamantes."[111] This is incorrect. *Talamantes* is clearly distinguishable from *Garza-Mendez* in two key aspects. First, the defendant in *Garza-Mendez* unequivocally spent time in jail: the defendant "had served 30 hours in prison" prior to being sentenced.[112] On the sentencing form, he was clearly credited for the thirty hours served and ordered to serve the remainder of his sentence on probation.[113] Talamantes, on the other hand, served no time in prison before or after sentencing.[114] Though thirty hours is a fairly small portion of a one-year sentence, it still supports the idea that the *Garza-Mendez* defendant was actually sentenced to imprisonment and then allowed to serve some portion of that sentence on probation. For the same to be true of Talamantes, he

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[107] *See* United States v. Garza-Mendez, 735 F.3d 1284, 1286–87 (11th Cir. 2013) (arguing that an eight-level sentencing enhancement should not have applied because prior criminal conduct subjected the defendant to a probation sentence as opposed to an incarceration sentence that would render the crime an aggravated felony).

[108] *Id.* at 1293 app.

[109] *Talamantes-Enriquez*, 12 F.4th at 1353.

[110] *See Garza-Mendez*, 735 F.3d at 1287–88 (discussing why the court rejected the clarification orders in this case).

[111] *Talamantes-Enriquez*, 12 F.4th at 1353.

[112] *Garza-Mendez*, 735 F.3d at 1286.

[113] *See id.* at 1293 app. (showing the state sentencing form, which requires thirty hours of confinement and allows the remainder of the sentence to be served on probation).

[114] *See Talamantes-Enriquez*, 12 F.4th at 1346 (confirming that Talamantes-Enriquez served only probation for both of his criminal convictions).

would only have been imprisoned on paper with all of his sentence served on probation.

Second, the sentencing forms used in the two cases are "substantively the same" according to the *Talamantes* court.[115] The court, however, did not quote any language that is as strong as the terms of the *Garza-Mendez* form. The *Garza-Mendez* form says that "it is ORDERED that the defendant is sentenced to: Confinement in the Gwinnett County . . . Comprehensive Correctional Complex for a period of 12 months."[116] All of this language is typewritten with the exception of "12 months," and the checked boxes indicate that confinement and the particular correctional facility were ordered.[117] The *Talamantes* court does not point to any designation of a correctional facility at which Talamantes is supposed to serve his sentence. It quotes the *Talamantes* sentencing form saying that he was "sentenced to confinement for a period of 12 mo[nth]s."[118] It is odd that the "same" form would not include the correctional facility at which to serve the sentence.

No box appears on the *Garza-Mendez* sentencing form to mark "probation" after the printed language "the defendant is sentenced to."[119] Indeed, "probation" is only mentioned in three locations on the form. It first appears after "the remainder [of the sentence after credit for time served] to be served on."[120] Below the sentencing portion of the form is a checklist for "conditions of probation."[121] Most importantly, above the conditions of probation, a line reads that "[t]he [illegible] sentence of confinement may be served, subject to the conditions set out herein" and provides options for probation or suspension.[122]

If the construction of the *Talamantes* sentencing form were similar in this respect, a judge filling out this form could end up checking a box that purported to sentence a defendant to confinement when, in fact, that was not the judge's intention.

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[115] *See id.* at 1353 (explaining the sentencing forms used to sentence Garza-Mendez and Talamantes).

[116] *Garza-Mendez*, 735 F.3d at 1293 app.

[117] *See id.* (describing the contents of the order).

[118] *Talamantes-Enriquez*, 12 F.4th at 1346 (alteration in original).

[119] *Garza-Mendez*, 735 F.3d at 1293 app.

[120] *Id.*

[121] *Id.*

[122] *Id.*

Rather, it would be the only way to sentence a defendant to probation while still using the standard form. Deferred decision probation envisioned by O.C.G.A. § 42-8-60 otherwise could not be sentenced through standard forms.[123] The decision to use a standard form and whether a judge truly sentenced a defendant to imprisonment or probation is an intricate question of state law.

Without seeing the sentencing forms used for Talamantes's convictions, certainty about what his sentences were is impossible. From the information provided by the Eleventh Circuit's opinion, the circumstances around Talamantes's sentences, and the sentencing form in *Garza-Mendez*, however, standard form language can obviously obfuscate the actual sentence imposed. Garza-Mendez served time in jail, and the order specified a correctional facility for the defendant's imprisonment.[124] These important factors are not present in *Talamantes*. The Eleventh Circuit was wrong when it found "no daylight" between the two cases. Both are crucial differences that make Talamantes's sentence less likely to be for imprisonment. With the added evidence of the clarification order in *Talamantes*, it should have been clear that Talamantes was only sentenced to straight probation.

5. Summary of the Eleventh Circuit's Logical Errors. The above discussion details the logical failures of the Eleventh Circuit's decision in *Talamantes*. A crime of violence aggravated felony requires a term of imprisonment of at least one year.[125] The Eleventh Circuit recognizes that a sentence of probation alone does not count as imprisonment under the statute.[126] This position is consistent with logic and with the way probation operates in Georgia. Georgia law allows judges to impose a sentence of probation absent any other penalty.[127] No need exists to artificially impose a sentence of imprisonment and "allow" that sentence to be served on probation as the Eleventh Circuit posits.[128] The Eleventh

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[123] *See supra* note 72 and accompanying text.

[124] *See supra* note 113 and accompanying text.

[125] *See supra* note 5 and accompanying text.

[126] *See supra* note 19 and accompanying text.

[127] *See supra* section III.A.*2*.

[128] *See* Talamantes-Enriquez v. U.S. Att'y Gen., 12 F.4th 1340, 1353 (11th Cir. 2021) (ruling that Talamantes "was sentenced to a term of imprisonment . . . even if he was permitted to serve part or all of that sentence on probation").

Circuit rejected this straightforward reading of the law and Talamantes's sentencing orders.[129] It further ignored the clarification orders that would help judges understand the operation of Georgia law in this area.[130]

B. THE ELEVENTH CIRCUIT FAILED TO GIVE FULL FAITH AND CREDIT TO THE GEORGIA COURT

The Eleventh Circuit did not show any deference to state courts' authority over state law in deciding Talamantes's case. Rather, the court rejected the state judge's clarification orders, asserting that the panel was "quite capable" of reviewing the sentencing forms itself.[131] The court also explained that "we are dealing with federal law and federal statutes, not state law and state statutes."[132] It quoted an important excerpt from *Ayala-Gomez*, stating that "a federal judge is in a better position to interpret the state-sentence order regarding its effect on [the defendant's] federal sentence under federal law than another state judge who did not impose his sentence."[133]

These presumptions are questionable. The court exaggerates the extent to which federal statutes must be interpreted. Admittedly, state judges are not necessarily best positioned to decide federal questions. The Eleventh Circuit must determine if a given crime is a crime of violence according to federal law, but it takes little interpretation to find a sentence of imprisonment of at least one year. This is especially so given the Eleventh Circuit's recognition that a sentence of "straight probation" is not imprisonment.[134] The Eleventh Circuit has two options in a case like Talamantes's. It can find that, based on state sentencing records, the sentence was for probation or the sentence was for imprisonment and then allowed to be served on probation.

Though the Eleventh Circuit may want to frame this as a "question of federal law," state law is really at issue. State

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[129] *See supra* section III.A.*4*.

[130] *See supra* section III.A.*3*.

[131] *Talamantes-Enriquez*, 12 F.4th at 1354.

[132] *Id.*

[133] *Id.*

[134] *See supra* note 19 and accompanying text.

sentencing law, state sentencing forms, and a state judge determined what sentence was imposed. Federal law merely dictates an immigration outcome based on a state law decision. Georgia law recognizes that probation can be imposed without any imprisonment, and the Eleventh Circuit recognizes the same possibility and the different outcome under federal law.[135] But the essential question—probation or imprisonment—is determined entirely by state law. Put another way, the Eleventh Circuit judges and the clarifying state judge could only look at the same evidence and actions taken under state law to determine whether probation or imprisonment was ordered. State law does not become federal law just because federal judges are reviewing the state law question at the same time as considering federal law questions.

Where state law is at issue, federal courts should defer to state interpretations of that law rather than substituting their own. This is why procedures like certified questions exist.[136] The Eleventh Circuit also defers to state law routinely.[137] The court does so even in cases very similar to this one. In the unpublished case *De Jesus Cruz v. United States Attorney General*, the petitioner had been sentenced under North Carolina law to eight to nineteen months of imprisonment.[138] He had been convicted of two felonies, only one of which was a crime of violence that could render him deportable.[139] The state court's sentence consolidated the two felonies, and the Eleventh Circuit agreed that it was unclear if at least twelve

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[135] *See* O.C.G.A. § 42-8-60(a)(1) (allowing a sentence of straight probation under Georgia law); United States v. Guzman-Bera, 216 F.3d 1019, 1021 (11th Cir. 2000) (holding that straight probation is not a term of imprisonment under federal law).

[136] *See Certification of a Question of Law*, BOUVIER L. DICTIONARY, DESK EDITION (2012) (defining a certified question as "[a] court's submission of a question of state law to that state's high court").

[137] *See, e.g.*, United States v. Phillips, 120 F.3d 227, 231 (11th Cir. 1997) (holding that a federal district court could not reduce a sentence "based upon its concerns about the . . . County criminal justice system and its treatment of [defendant's] case" because the court had to give full faith and credit to the state conviction); United States v. Brand, 163 F.3d 1268, 1275 (11th Cir. 1998) ("[Defendant's] collateral attack of the state court order is not cognizable.").

[138] *See* De Jesus Cruz v. U.S. Att'y Gen., No. 21-11131, 2022 U.S. App. LEXIS 10639, at *1 (11th Cir. Apr. 20, 2022) (describing the defendant's sentence).

[139] *See id.* at *1–2 (stating that the Department of Homeland Security brought proceedings based on only one of the two crimes).

months of that sentence were for the crime of violence.[140] The court noted that "there appears to be tension in the law of North Carolina as to how the sentence in a consolidated judgment applies to each of the convictions."[141] The court granted the petition and remanded to the BIA to consider the application of state law more closely.[142]

The Eleventh Circuit should have taken a similar approach in *Talamantes*. Rather than dismiss Talamantes's arguments, the court should have recognized the possible uncertainty of whether probation or imprisonment has been ordered. Surveying the relevant Georgia statutes clearly shows that the sentencing judge may order "straight probation."[143] Unlike in *De Jesus Cruz*, the *Talamantes* court would not have to remand to the BIA. Here it had an authority on the relevant state law that had already done the clarifying work for the court.

Not only does deferring to state courts make practical sense, doing so is also a fundamental principle of the American federalist system. The Constitution requires that states give the judgments of other states "Full Faith and Credit."[144] In 1790, Congress directed that "judicial proceedings of the courts of any state . . . shall have such faith and credit given to them in every court within the United States, as . . . in the courts of the state from whence the said records are or shall be taken."[145] The current version of this statute was passed in 1948 and continues to require federal courts to afford state judgments the same full faith and credit.[146] Dismissing the state court clarification orders runs counter to this fundamental law.

Beyond this explicit command to respect state courts' orders, Supreme Court canons of statutory interpretation support

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[140] *See id.* at *2–4 (discussing the court's uncertainty and holding that through further analysis "the BIA can clarify the basis of its ruling and determine whether [defendant's] North Carolina felony breaking and entering conviction had a sentence of at least one year").

[141] *Id.* at *3.

[142] *See id.* at *4 (remanding and directing the BIA to consider the issue).

[143] *See supra* note 72 and accompanying text.

[144] *See* U.S. CONST. art. IV § 1. ("Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State.").

[145] Act of May 26, 1790, ch. 11, 1 Stat. 122.

[146] *See* 28 U.S.C. § 1738 ("Judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.").

upholding the state court orders. The Court's "federalism canon requires an unequivocal expression of congressional intent before interpreting a statute to impede or infringe on state sovereign powers."[147] In this context, criminal punishment is clearly a sovereign power of the states. Nothing in the text of the aggravated felony statute explicitly provides that this fundamental state power is overridden by federal law. To the contrary, the aggravated felony statute anticipates and purposely relies on state law determinations.[148] Thus, federal courts should respect the state law decisions that are well within the authority of the state courts to make.

As the dissent in *Garza-Mendez* argued, failing to honor state court clarification orders "is not consistent with the longstanding tradition in this Court of promoting comity between state and federal courts in criminal cases."[149] The dissent further points out that "[i]n the vast majority of criminal cases, deference to comity works to the detriment of federal defendants because it bars them from challenging their State Court convictions, which are used to enhance their federal sentences."[150] Here, granting deference to the state court would actually be beneficial to the individual—Talamantes would not be an aggravated felon. The outcome for the individual should not dictate whether comity applies, however. The doctrine exists to protect our federal system, not to reach a particular outcome.

The dissent further observes that the majority in *Garza-Mendez* conducted an unusually rigorous review of the issue, commenting that the "refusal to credit the State Court's clarification of its own sentence is perplexing, especially given that, in my experience, we do not scrutinize State Court judgments in the same way when they result in a harsher sentence for criminal defendants."[151] It continues, noting that "[a]lthough the Majority correctly points out that the state judge who issued the clarification order was not the sentencing judge, it cannot cite to any authority suggesting that an

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[147] Jason A. Cade, *Deporting the Pardoned*, 46 U.C. DAVIS L. REV. 355, 407 (2012).

[148] *See supra* note 43 and accompanying text.

[149] United States v. Garza-Mendez, 735 F.3d 1284, 1294 (11th Cir. 2013) (Martin, J., dissenting).

[150] *Id.*

[151] *Id.*

order entered under like circumstances is entitled to less deference than any other state court order."[152]

The *Talamantes* court similarly goes to great lengths to discount the state orders offered by the petitioner.[153] The reasons to apply scrutiny or to treat the orders with hostility are unclear. The court conceives of the orders as a "buck naked . . . attempt to affect the result of a federal proceeding" and impliedly asserts that the state judge sought to meddle in the federal case by clarifying Talamantes's sentence.[154] The *Talamantes* court also clearly takes issue with the role of the clarifying judge, but as in *Garza-Mendez*, it cites no authority other than its own skepticism to discredit the state order.[155]

The lack of credit given to the *Garza-Mendez* and *Talamantes* orders is even stranger since the Eleventh Circuit honored clarification orders in a prior case. In the court's unpublished opinion in *Botes v. United States Attorney General*, the petitioner offered a clarification order to prove that his crime was not an aggravated felony.[156] The clarification order did not contradict the original sentencing order in any way.[157] Both the original and clarifying orders showed that the petitioner was sentenced to twelve months, with sixty days served in jail and ten months of probation.[158] Here, the court did not raise any concerns about the clarification order and appears to give it full faith and credit.[159] Not doing so in other cases where the clarification order would warrant a different immigration outcome is simply unfair. Rather than apply respect and uniform standards of law for state court judgments, the court tailors its treatment of state court orders to fit the outcome it desires in a given case.

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[152] *Id.* at 1294–95.

[153] *See supra* section III.A.*3*.

[154] Talamantes-Enriquez v. U.S. Att'y Gen., 12 F.4th 1340, 1354 (11th Cir. 2021).

[155] *See id.* ("We also pointed out in Garza-Mendez that the judge who signed the 'clarification' order had not been the sentencing judge . . . . Precisely the same is true in this case.").

[156] *See* Botes v. U.S. Att'y Gen., 436 F. App'x 932, 934 (11th Cir. 2011) (describing the clarification order).

[157] *See id.* (describing the clarification order).

[158] *See id.* (detailing the imposed punishment).

[159] *Id.*

In sum, whether a state judge ordered probation or imprisonment is a question of state law. A state judge is best equipped to answer these questions, even if that judge can only review the sentencing order once the question becomes relevant in a federal case. Furthermore, a state clarification order is a judicial act entitled to full faith and credit in federal court. The *Talamantes* court fails to provide adequate reasoning as to why it should not defer to the state court's interpretation of the sentencing orders. It discards the order and ignores comity by incorrectly declaring that "we are dealing with federal law . . . not state law."[160] Even in the realm of federal law, however, the *Talamantes* court was acting improperly.

C. THE ROLE OF FEDERAL COURTS AND THE ROLE OF CONGRESS

1. Federal Courts Should Apply the Law, Not Stretch It. The Eleventh Circuit's decision in *Talamantes* is a continuation of a trend in the federal system of moving away from deference to the states in matters that relate to immigration law.[161] At first blush, this may seem like a reasonable tendency. Immigration is, after all, an area of federal control,[162] but a federal court stretching this law to deport more immigrants is deeply troubling, especially in the aggravated felony context, where deportation is permanent and discretionary relief is forbidden.[163]

Furthermore, as the above discussion shows, sometimes questions of state law still must be decided because the relevant federal law relies on state law determinations.[164] Within systems of state law, lawmakers and judges sometimes consider federal immigration consequences. For example, California amended its penal code so that misdemeanors in the state are punishable by a maximum of 364 days—rather than 365—in jail.[165] In Washington,

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[160] *Talamantes-Enriquez*, 12 F.4th at 1354.

[161] *See supra* section II.C.

[162] Federal domination over immigration law has not always been the norm in the United States. For a discussion of the history of state and federal control over immigration, see Blitzer, *supra* note 43, at 713–25.

[163] *See supra* notes 15–16 and accompanying text.

[164] *See supra* section III.B.

[165] *See* Michael Vastine, *An Immigration Lawyer Walked into a Barr . . . : The Impact of Trump's Justice Department on the Defense of Criminal Immigrants*, 25 BARRY L. REV. 57,

a state judge resentenced a non-citizen defendant to 364 days in jail rather than the original 365, remarking that "I can tell you in good conscience if I had known that [the additional day] would make a difference, I would have imposed 364 days."[166] In Georgia, O.C.G.A. § 17-10-1.3 authorizes state courts to "make inquiry into whether the person to be sentenced is lawfully present in the United States under federal law" in deciding whether to probate a sentence.[167]

Some argue that states should not have the ability to take actions that would affect immigration law outcomes,[168] but Congress chose to make certain immigration statutes dependent on state law. Without decisions made by judges under state law, no conviction for the aggravated felony statute could exist in the first place. Even when state convictions determine immigration consequences, state control over immigration is limited to an extent by the fact that federal statutes are written with their own definitions. Thus, federal courts can—when federal statute provides—ignore what might be a state attempt to influence an immigration law outcome. As seen previously, federal immigration law does not consider a subsequent suspension of a state sentence to change the effect of the original sentence for immigration purposes.[169]

Federal courts need to be careful, however, about going beyond express statutory limits on state influence over immigration. Courts cannot override Congress's decision to rely on the states' criminal proceedings to determine immigration consequences, but the Eleventh Circuit did precisely this in *Talamantes*. The statute provides that a non-citizen is deportable if he is convicted of a "crime of violence . . . for which the term of imprisonment [is] at least one year."[170] This language is unambiguous and, by the Eleventh Circuit's own decision, only applies to imprisonment, not "straight

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65–67 (2020) (describing the change in California sentencing law as motivated by concerns about immigration consequences for offenders).

[166] State v. Quintero Morelos, 137 P.3d 114, 116 (Wash. Ct. App. 2006).

[167] O.C.G.A. § 17-10-1.3.

[168] *See, e.g.*, David S. Keenan, *The Difference a Day Makes: How Courts Circumvent Federal Immigration Law at Sentencing*, 31 SEATTLE U. L. REV. 139, 142 (2007) (arguing that resentencing for the purpose of avoiding immigration consequences violates the Supremacy Clause of the Constitution).

[169] *See, e.g.*, 8 U.S.C. § 1101(a)(48)(B) (providing in statute that the suspension of a state sentence is not given effect for immigration purposes).

[170] § 1101(a)(43)(F).

probation."[171] The Eleventh Circuit, however, stretched law and logic to fit Talamantes's sentence into the statute through overzealous judicial interpretation, and the court necessarily ignored state law in the process.[172] Rather than effectuating the purpose of the statute, *Talamantes* now establishes a dangerous precedent that will lead to the deportation of non-citizens that Congress did not intend to have deported or classified as aggravated felons.

Whatever the motivation may be for a court to expand the number of non-citizens subject to deportation, the motivation does not lie in the appropriate role of courts—applying the law to cases. The *Talamantes* decision may well be part of a larger mood shift in the federal government that began with *Matter of Thomas & Thompson*. The Attorney General there made a decision for the executive branch to begin ignoring state post-sentencing modification to only focus on the original sentence imposed.[173] While the Attorney General may have intended this intervention to simplify the process for federal IJs, the test that now applies to all sentence modifications, suspensions, and clarifications requires IJs to determine for what purpose a state judge took a particular action.[174] This is a difficult interpretive task unless, of course, IJs will merely make a default finding that the post-conviction change was an attempt to affect immigration proceedings.

The *Talamantes* court essentially decided that the judicial branch should follow the Attorney General's lead. The panel felt that a federal court should review determinations of state law, declare what motivated those decisions, and then interpret the underlying state law on its own.[175] The *Talamantes* court gives *Thomas & Thompson* a brief mention in addressing Talamantes's final claim.[176] Talamantes argued that, under *Matter of Estrada*, his

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[171] *See supra* note 19 and accompanying text.

[172] *See supra* section III.B.

[173] *See supra* note 53 and accompanying text.

[174] *See supra* note 53 and accompanying text.

[175] *See* section III.A.*3*.

[176] *See* Talamantes-Enriquez v. U.S. Att'y Gen., 12 F.4th 1340, 1354–55 (11th Cir. 2021) (addressing *Matter of Thomas & Thompson* to rule against what the court called "the Hail Mary part" of Talamantes's argument).

clarification orders should be accepted.[177] The court rejected this argument because the *Estrada* original sentencing order was ambiguous, and it found that Talamantes's was not.[178] It also pointed out that *Thomas & Thompson* overruled *Estrada*, and the court "will not follow an administrative agency's decision that has been overruled instead of our own precedent, which has not been overruled."[179] This further shows the harmful effect of *Thomas & Thompson* and the power that the Attorney General can have over immigration cases. Both that decision and the Eleventh Circuit's choice not to defer to state law were significant mistakes.

2. Congress Can Change Immigration Statutes. Legitimate concerns about state-level actors exercising influence over immigration matters are not resolved by federal courts issuing misguided decisions like *Talamantes*. Extending deportation to more non-citizens by misapplying the law is not within the courts' proper role. Their doing so will also have a negligible effect on how states can impact immigration proceedings. For starters, state judges who feel strongly about immigration issues can be informed of the immigration consequences of their sentences and make decisions accordingly. Rather than changing their sentences after the fact, judges can begin to sentence defendants at the outset to 364 days or whatever other period of time that is less than one year.

If federal courts were the ones to address this "problem," they would enter an even murkier world of interpretation—one that is more akin to mind-reading. Attempting to interpret state judge motivations would set aside the notion that only the sentence imposed matters for immigration purposes. Rather, federal courts would attempt to peer into the minds of state judges and decide whether a 364-day sentence was based on avoiding immigration consequence or if the judge acted appropriately within his discretion. This is a task that cannot possibly be performed with consistent accuracy, and it would be an even more flagrant violation of federal-state judicial comity.

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[177] *See id.* at 1354 (stating that Talamantes argued the court should follow *Matter of Estrada*).

[178] *See id.* at 1354–55 ("[T]he B.I.A. believed the state court's original sentence order was ambiguous and needed clarification. Neither of the original sentence orders in Talamantes's two state court conviction cases is ambiguous" (internal citation omitted)).

[179] *Id.* at 1355.

Guessing at the motivations behind a sentence also undermines the authority of sentencing judges in the first instance. Sentencing is supposed to account for all factors of a particular defendant's case—both mitigating and aggravating.[180] The same is true in the plea negotiation context. When it comes to convictions having immigration consequences, the Supreme Court made clear that "informed consideration of possible deportation can only benefit both the State and noncitizen defendants during the plea-bargaining process."[181] Far from being inappropriate, no reason exists for a judge to not also be able to consider immigration consequences when sentencing a defendant.

And yet, mind-reading is what the Eleventh Circuit already did in *Talamantes*. It chose to deny comity to a state judge's order on the basis of the court's skepticism rather than on any legal principle.[182] The court apparently felt that the state judge was motivated by immigration concerns.[183] But the Eleventh Circuit can never be *certain* of a state judge's motivations. For the judicial branch, a much more tenable standard would defer to state sentencing determinations. Deference avoids an arbitrary and impossible inquiry into the minds of state judges, which will produce more consistent results in immigration cases.

Rather than courts giving themselves an unenviable task, they should step back and let Congress do its job if it believes states have too much control over immigration. If Congress deemed it necessary, it could change the crime of violence definition to "a crime of violence *punishable by* a term of imprisonment of at least a year." Creating a "punishable by" standard rather than a "sentence imposed" standard would instantly resolve concerns about state judges making sentencing decisions with immigration consequences in mind. A state judge could sentence a non-citizen defendant to

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[180] *See* CAMPBELL, *supra* note 40, § 9:3 (describing trial judges' discretion in sentencing and how typical discretionary factors include "the offender's prior criminal activity; the extent of harm caused; whether the offender intended to cause harm; the degree of inducement, facilitation, or provocation by a victim; the existence of particular mitigating or aggravating circumstances; and whether the offender has or can compensate the victim").

[181] Padilla v. Kentucky, 559 U.S. 356, 373 (2010).

[182] *See Talamantes-Enriquez*, 12 F.4th at 1353–54 (noting the clarification order was submitted by a different judge than the original order).

[183] *See id.* at 1354 (characterizing the clarification orders as an "attempt to affect the result of a federal proceeding").

only twenty-four hours in jail, and so long as the crime was one that statutorily permitted a sentence of a year or longer, the non-citizen would be deportable.

Congress has revised immigration statutes in similar ways before. In 1996, Congress lowered the term of imprisonment that makes a crime of violence an aggravated felony from five years to one.[184] The crime of violence is also only one type of aggravated felony.[185] In other instances, Congress did not include a term of imprisonment requirement at all.[186] For the aggravated felonies of murder, rape, sexual abuse of a minor, and trafficking a controlled substance, no minimum imprisonment term is included in the statute.[187] In still other aggravated felonies, Congress defined the crime as an aggravated felony depending on whether the crime was punishable by a term of imprisonment of a certain length. One example is failure to appear to answer a felony charge "for which a sentence of 2 years' imprisonment or more may be imposed."[188]

To be clear, this Note is not advocating that Congress adopt a harsher statute. Rather, it seeks to point out that Congress is the body that should decide whether or not to be more strict—not federal courts. Furthermore, given that Congress has already modified the term of imprisonment provision in the past,[189] Congress likely considered the possibility that state judges would modify their sentences in some instances based on immigration consequences. If it had been so concerned, Congress could have changed the statute in 1996 to the "punishable by" standard rather than just shortening the period of imprisonment from five years to one. But Congress did not make that change. Whether that was a sound policy decision is for the people and Congress to debate, but courts should not stretch the existing statute to cover cases that it feels Congress should have included under the statutory umbrella.

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[184] *See* Ulin, *supra* note 21, at 1556–57 n.50 (explaining the changes to sentencing thresholds for aggravated felonies in the 1996 IIRIRA).

[185] *See* 8 U.S.C. § 1101(a)(43) (listing which crimes are aggravated felonies).

[186] *See* § 1101(a)(43)(A)-(B) (listing crimes that do not have a term of imprisonment requirement).

[187] *See id.* (defining these crimes as aggravated felonies and making no reference to a term of imprisonment).

[188] § 1101(a)(43)(T).

[189] Ulin, *supra* note 21, at 1556–57 n.50.

Even if Congress were to adopt the "punishable by" standard, an avenue still remains for states to affect the outcomes of immigration proceedings under the crime of violence aggravated felony. Use of a "punishable by" standard would merely remove the state judiciaries' ability to impact immigration outcomes. State legislatures, on the other hand, still could. If simple assault were punishable by up to a year of imprisonment in Georgia, the state could change its law so the same crime could now only be punished by six months in jail.[190] Now, the state crime is not punishable by a term of at least one year.

This hypothetical cycle could theoretically continue with Congress lowering the "punishable by" time period and states responding by lowering the punishments that can be imposed for various state crimes. This could continue, *ad absurdum*, until the states no longer have any criminal punishment and Congress can only articulate conduct (that used to be criminal in the states) that renders non-citizens deportable. What stops this from happening? The people. Congress and the several states are not solely focused on immigration, and that makes the above hypothetical a virtually certain impossibility. The people living in the various states have concerns about crime as well as about immigration law.

Similarly, the people of the several states elect representatives of Congress that determine how much deference to give to state sentencing in immigration law. Currently, the people's representatives have chosen to set that standard at "when a state imposes a sentence of imprisonment for a year or more for a crime of violence."[191] The term of years could be raised or lowered; the crime of violence provision could be eliminated; or a "punishable by" standard could be imposed. Congress has declined to do any of those things. Courts like the Eleventh Circuit, therefore, need to respect Congress's authority and policy judgments. Courts must apply the law as written and not stretch it to make more immigrants deportable.

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[190] *See supra* note 165.

[191] *See* 8 U.S.C. § 1101(a)(43)(F) (defining a crime of violence "for which the term of imprisonment [is] at least a year" as an aggravated felony).

IV. MULTIPLE ACTORS CAN PREVENT UNJUST DEPORTATIONS

Deep concern certainly follows when a federal court of appeals goes out of its way to render an immigrant an aggravated felon. The immigration court also failed to consider the sentence as straight probation in the first instance, and the BIA affirmed this ruling in spite of the clarification orders.[192] Multiple adjudicators failed to prevent this injustice.

Though Talamantes's case is lost, a change by any one of these actors could make a difference in future cases. In addition to federal actors, state-level actors can also take immigrant-conscious steps to prevent these unjust deportations. The following sections explore what state actors, federal courts, Congress, and the executive branch can do to stop any future unjust deportations.

A. STATE COURTS MUST CONTINUE TO RECOGNIZE THEIR ROLE IN IMMIGRATION LAW

State law and state courts undoubtedly have a significant impact on immigration outcomes. When sentencing convicted immigrants, state courts should take account of immigration consequences. Effective defense counsel already requires advising defendants of possible immigration consequences of their convictions.[193] Judges need to be informed about immigration consequences for immigrant defendants as well for various reasons. They need to be cognizant of both the length and type of sentence they impose. State judges further need to be clear in their rulings in the first instance to avoid inviting misinterpretation by federal agents or courts later on.

First, judges need to be aware that their decisions can carry immigration consequences. The *Quintero Morelos* case is a clear example of immigration consequences attaching to a conviction where knowledge of the consequences would have led to a different outcome.[194] State legislatures should expressly approve of judges considering immigration consequences in sentencing, just as

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[192] *See supra* notes 6–7.

[193] *See* Padilla v. Kentucky, 559 U.S. 356, 360 (2010) (holding that "constitutionally competent counsel" must advise immigrants of possible immigration consequences to a conviction).

[194] *See supra* note 166 and accompanying text.

Georgia has done.[195] But approval and authority does little without knowledge. Attorneys must strive to inform state judges about the consequences of their decisions. This is consistent with the Supreme Court's recognition in *Padilla v. Kentucky* that sometimes the immigration consequences may be the single biggest concern for an immigrant defendant.[196] Defense counsel may have extra work to do, but the consequences of that work greatly benefit their client. Even if not required by *Padilla*, informing judges and making arguments at sentencing is critical in that judges have all the information they need to impose a just sentence.

Second, judges must account for both the length of the sentence and the type of sentence imposed. In *Talamantes*, the only issue was whether Talamantes was imprisoned since his sentences were indisputably for twelve months.[197] If the sentencing judge had only sentenced Talamantes to eleven months, the Eleventh Circuit would have had no basis for finding that he was an aggravated felon. Judges must remain cognizant of the duration of a sentence, whether imprisonment or probation is ordered, and the effect of a subsequent change to sentence. A judge could impose a five-year sentence expecting it to be later suspended, but the suspended sentence would not matter for immigration law since the federal statute explicitly ignores suspended sentences.[198] Judges need to be aware of the precise consequences of their sentences, and defense counsel should push for sentencing that avoids immigration consequences in the first instance.

Third, the record of a criminal sentence needs to be crystal clear. Judges should learn from *Talamantes* that a sentencing form may become incredibly relevant over a decade later during an immigration proceeding. Georgia counties in particular need to update standard sentencing forms. These forms should reflect an option for probation without imprisonment. Prosecutors and

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[195] *See supra* note 167 and accompanying text.

[196] *See Padilla*, 559 U.S. at 368 (recognizing that "[p]reserving the client's right to remain in the United States may be more important to the client than any potential jail sentence" and that "preserving the possibility of discretionary relief from deportation . . . would have been one of the principal benefits sought by defendants deciding whether to accept a plea offer or instead to proceed to trial" (internal citations and quotation marks omitted)).

[197] *See* Part I.

[198] *See* 8 U.S.C. § 1101(a)(48)(B) (providing that the sentence imposed is considered for immigration law purposes regardless of any suspension of that sentence).

defense attorneys should also aid the court by suggesting clearer language at the time of sentencing. By avoiding standard language that speaks of "confinement" and nothing more, cases like *Talamantes* can be avoided. All these steps are prudent for state courts, but they do not eliminate the need for federal courts to appropriately analyze state convictions.

B. FEDERAL COURTS SHOULD FOLLOW THE FIFTH CIRCUIT'S APPROACH

The best way for the federal judiciary to correct the Eleventh Circuit's error is for the U.S. Supreme Court to consider a case like *Talamantes* and definitively overturn that erroneous decision. Courts should give full faith and credit to state court findings when those decisions are determinative under federal immigration law. The actual decisions made, rather than stretched federal interpretations, should be the rule of decision. The Supreme Court, however, seems unlikely to take up the issue. Talamantes did appeal to the Court, and it declined to hear his case.[199] A future case with similar facts and poor reasoning could arise, but the Court's denial of certiorari does not inspire optimism that the issue will be heard in the near future.

Aside from the Supreme Court route, the Eleventh Circuit should overrule the *Garza-Mendez* and *Talamantes* precedents en banc in a future case. The deficiencies of the *Talamantes* court's reasoning have been meticulously laid out in this Note.[200] Now that a panel of the court has held that twelve months probation without any jail time constitutes imprisonment, only an en banc decision would be able to reverse this bad precedent.[201]

Few cases in other circuits address the issues dealt with in *Talamantes*. The vast majority of aggravated felony immigration cases involve either criminal sentencing enhancements and situations where petitioners did serve part of their sentences in

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[199] *See* Talamantes-Enriquez v. Garland, 142 S. Ct. 1119, 1119 (2022) (denying certiorari).

[200] *See supra* Part III.

[201] *See* United States v. Archer, 531 F.3d 1347, 1352 (11th Cir. 2008) (stating that a prior panel's ruling is "binding on all subsequent panels unless and until it is overruled or [abrogated] by the Supreme Court or this court sitting *en banc*").

prison.[202] The reasoning in some opinions still directly apply to the unique situation in *Talamantes*, and other circuits' approaches provide clear rules for how the law should apply in cases of straight probation.

The Tenth Circuit also follows a rule that the actual sentence imposed determines whether a defendant was sentenced to imprisonment of at least one year.[203] In *United States v. Gonzalez-Coronado*, the Tenth Circuit held that "the district court erred in treating Gonzalez's prior Kansas conviction as an aggravated felony" because "the [state] court sentenced Gonzalez directly to probation."[204] Like in *Guzman-Bera*, however, the government conceded in *Gonzalez-Coronado* that the defendant had been sentenced "directly to probation."[205] The court had no need to include reference to the language of the sentencing order, and no indication arises in the opinion of any ambiguity or standard sentencing form. These types of cases, while reaffirming that the statute refers to the sentence actually imposed, do not aid courts in cases where the government disputes whether straight probation was imposed.

Decisions from the Fifth Circuit are more instructive. Like the Tenth and Eleventh Circuits, the Fifth Circuit "distinguishes between sentences of imprisonment that are imposed but then suspended, and sentences that are for probation in the first instance without any imprisonment contemplated."[206] In *United States v. Mondragon-Santiago*, the defendant was sentenced in Texas state court to "four years of deferred adjudication probation."[207] Deferred adjudication probation in Texas is the same operation by which judges in Georgia state courts can impose probation directly on

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[202] *See, e.g.*, United States v. Viezcas-Soto, 562 F.3d 903, 905 (8th Cir. 2009) (explaining the sentencing enhancement); United States v. Ayala-Gomez, 255 F.3d 1314, 1317 (11th Cir. 2001) (detailing a sentence for imprisonment that was then probated).

[203] *See* United States v. Gonzalez-Coronado, 419 F.3d 1090, 1093 (10th Cir. 2005) ("To determine whether a prior conviction involved at least a one-year prison sentence, this court looks to the actual sentence imposed.").

[204] *Id.* at 1093–94.

[205] *See id.* at 1093 (describing how the government conceded the crime was not an aggravated felony).

[206] United States v. Mondragon-Santiago, 564 F.3d 357, 368 (5th Cir. 2009).

[207] *Id.*

defendants.[208] Because the Fifth Circuit actually explored this issue, it held that "[f]ederal law counts Texas's deferred adjudication probation as a conviction" but "when a court does not order a period of incarceration and then suspend it, but instead imposes probation directly, the conviction is not an 'aggravated felony.'"[209] Thus, despite being a conviction for federal immigration law purposes, deferred adjudication probation "is not a term of imprisonment . . . and thus is not an aggravated felony."[210] The Fifth Circuit has affirmed that deferred adjudication probation is not imprisonment in a subsequent case.[211]

Another Fifth Circuit case is directly on point for the issues in *Talamantes*. In *United States v. Herrera-Solorzano*, an ambiguity arose as to what sentence the state judge ordered. The judgment "contain[ed] a reference to adult probation next to the term of confinement, which suggests that the state court may have been directly sentencing [petitioner] to ten years of adult probation."[212] The court also recognized that the "distinction carries significance because if [petitioner] was placed on probation without first being sentenced to prison, his prior conviction does not constitute an aggravated felony."[213] Unlike the Eleventh Circuit, the Fifth Circuit recognized the ambiguity of the sentencing form as "inconsistent on its face[because as r]ead literally it purports to sentence [petitioner] to confinement by placing him on adult probation for ten years."[214] The forms used in *Talamantes* were indeed from different jurisdictions, but the Eleventh Circuit declined to include the sentencing form for others to examine in its *Talamantes* opinion.

In *Herrera-Solorazno*, "[t]he sole evidence before the district court was the state court judgment."[215] The defendant did not present any state court clarification orders. Even without an affirmative order from the state court, the Fifth Circuit held that

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[208] *See supra* note 72 and accompanying text.

[209] *Mondragon-Santiago*, 564 F.3d at 368 (quoting United States v. Banda-Zamora, 178 F.3d 728, 730 (5th Cir. 1999)).

[210] *Id.* at 369.

[211] *See* United States v. Castaneda-Lozoya, 812 F.3d 457, 459 (5th Cir. 2016) (holding that the petitioner "received only deferred adjudication probation, and not a prison sentence").

[212] United States v. Herrera-Solorzano, 114 F.3d 48, 50 (5th Cir. 1997).

[213] *Id.*

[214] *Id.*

[215] *Id.*

the judgment on its own "[was] not sufficient to meet the government's evidentiary burden" of proving by a preponderance of the evidence that the petitioner had been sentenced to imprisonment of at least a year.[216]

The Fifth Circuit's decision reflects a much more balanced approach to deciding the aggravated felony question. The government must meet its burden, and the court should hold the parties to their burdens. If a sentencing order was ambiguous enough for a state judge to deem issuing a clarification order necessary, it seems inappropriate for federal judges to find no ambiguity. It is even less appropriate for them to show open hostility to the petitioner's arguments rather than—as the Fifth Circuit did—recognize that straight probation can be ordered and ambiguous orders do not equal imprisonment.

Given the Fifth Circuit's rulings as a guide and the logical discrepancies in *Talamantes*, the Eleventh Circuit should overrule its decision en banc. Any other circuit that is met with the issue for the first time should also follow the Fifth Circuit's approach. While these approaches should be used in the judicial branch, Congress can also serve as a check on the Eleventh Circuit's impermissible reading of the law.

C. CONGRESS MUST CHECK THE JUDICIAL BRANCH

As mentioned in Part III of this Note, Congress is the appropriate body to amend immigration law.[217] The Eleventh Circuit should not have construed the statute as it did in the first place, but Congress can still check the court's misapplication by passing legislation that clearly disapproves of the ruling. Legislation could also serve as a directive to the executive branch as to how state law should be handled in the immigration context.

Congress could make the aggravated felony statute more restrictive. As mentioned above, the statute could use a "punishable by" standard rather than an "at least a year" standard.[218] This Note does not necessarily endorse that approach, however. Congress could also move away from defining increasingly less severe conduct

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[216] *Id.*

[217] *See supra* section III.C.*2*.

[218] *See supra* note 187 and accompanying text.

as an "aggravated felony" for federal immigration purposes. Congress could raise the term of imprisonment back to the previous five years or even higher. The focus of this Note is not to advocate for a preferred policy outcome. Rather than undertake a more significant policy change, Congress should at a minimum spell out via statute that state court determinations are dispositive for immigration law purposes.

Clarifying the statute is necessary to correct errant courts. Doing so will only make more explicit what the statute already anticipates—that states deal with the vast majority of criminal cases, states will inevitably be sentencing non-citizens for criminal conduct, and certain results under state law result in an immigration consequence (namely deportation).[219] The Eleventh Circuit has now erred by saying that what a state court called probation was actually imprisonment.[220] Congress can remedy this problem by adding a catchall clause to 8 U.S.C. § 1101(a)(43), stating that "in the above provisions that require a sentence of a certain length for an alien to be deportable, state court sentencing orders—and any subsequent orders relating to the sentence—shall be entitled to full faith and credit by federal courts."

In all these cases, no interpretive question arises as to what occurred at the state law level. The state court initially imposed a sentence, and it later modified, vacated, or allowed a portion to be served on probation. But in the context of clarification orders, a federal court that does not accept the order is deciding to engage in interpretation of state law rather than applying federal law to undisputed facts. The court is essentially choosing to hold the validity of the state court's order in dispute, and its interpretive inquiry is directly contrary to federal-state comity.[221]

Congress should, therefore, codify a simple, bright line—show comity to state courts just like in the other contexts.[222] Doing so respects the decisions of state courts while also simplifying the work that federal courts engage in. Rather than interpreting state law, while somehow claiming greater expertise and reaching the

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[219] *See supra* note 43 and accompanying text.

[220] *See* Talamantes-Enriquez v. U.S. Att'y Gen., 12 F.4th 1340, 1346 (characterizing Talamantes's sentence as "imprisonment allowed to be served on probation").

[221] *See supra* section III.C.*2*.

[222] *See supra* section III.B.

opposite conclusions than a state judge, federal courts and agencies could readily apply determinations under state law to relevant immigration statutes.

Would greater comity increase the frequency of state judges making clarification orders? State judges who are mindful of immigration consequences might do so. As discussed, however, Congress can always adopt the "punishable by" standard if a great influx of state judges were truly undermining congressional intent.[223] More importantly, cases like Talamantes's would reach the correct results under this law. Stopping wrongful deportations far outweighs the risk of state judges abusing the system. Further, the risks of undue influence by state judges are greatly mitigated because clarification orders would only be issued when ambiguity exists in sentencing.[224] A subsequently modified, suspended, or vacated sentence would not require clarification.

D. THE ATTORNEY GENERAL SHOULD REVERSE *THOMAS & THOMPSON*

The executive branch can have the biggest impact on reducing unjust deportations because it brings deportation cases against immigrants. Though the Biden Administration is more immigrant friendly than the Trump Administration was, *Thomas & Thompson* remains the binding law on immigration courts and the BIA. As discussed, *Thomas & Thompson* increased the number of deportable immigrants by refusing to defer to state law determinations of criminal sentences.[225] Reversing the decision would protect immigrants who should not be subject to deportation under the plain terms of the aggravated felony provision.

The current Attorney General should not just restore the pre-*Thomas & Thompson* status quo, he should make it clear that—for modification, clarification, and vacatur—the executive branch must give full faith and credit to state orders. Only in this way will the immigration courts and the BIA apply the same standards that circuit courts would apply when reviewing immigration decisions. Harmonizing the Executive's approach with the statutory

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[223] *See supra* section III.C.*2*.

[224] *See supra* note 44 and accompanying text.

[225] *See supra* section II.C.

requirements of federal courts would prevent wasting resources litigating cases that the executive branch should have gotten right in the first place.

Finally, assuming the Eleventh Circuit follows its approach in *Talamantes* in the future or that other circuits behave similarly, overruling *Thomas & Thompson* will resolve immigration cases before they reach courts that are applying deeply flawed reasoning. Directing IJs and the BIA to behave appropriately can avoid intransigent Article III courts altogether.

V. CONCLUSION

The Eleventh Circuit's decision in *Talamantes* sentenced an immigrant to an extreme punishment without any possibility of redress.[226] The court did so despite the fact that Talamantes's state law sentence did not render him deportable as an aggravated felon, and a state court even clarified his sentence.[227] The rights of criminal defendants and non-citizens subject to government control are among the most important rights that our system of government should protect. The government carries high burdens, and its actions have lasting and profound consequences on individuals' lives. Immigration statutes also raise important questions of federalism when they operate based on state law criminal convictions. In most contexts, federal courts owe state court judgments full faith and credit.[228] In the American dual-sovereign system, respecting the decisions of another sovereign is vital to upholding the rule of law. Here, the Eleventh Circuit gave itself an outsized role contrary to these principles.

Unfortunately, *Talamantes* has already been applied by the Eleventh Circuit in a subsequent case. In December 2022, the court determined that a lawful permanent resident was an aggravated felon despite the fact that he was sentenced to straight probation.[229] The court cited *Talamantes* and wrote that the non-citizen challenged the term of imprisonment "despite the fact that under

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[226] *See supra* section III.A.

[227] *See supra* section III.A.

[228] *See supra* section III.B.

[229] *See* Edwards v. U.S. Att'y Gen., 56 F.4th 951, 951 (11th Cir. 2022) (applying *Talamantes* to determine that a lawful permanent resident was an aggravated felon).

[*Talamantes*] his original sentence of 12 months confinement allowed to be served on probation is undoubtedly a term of imprisonment of at least one year."[230] The court followed *Talamantes* despite state court modification orders showing that the state court understood the non-citizen's sentence to be probation and nothing more.[231]

The Eleventh Circuit's reasoning has been sufficiently dissected in this Note to show that it has serious legal and logical flaws. Action needs to be taken to prevent further cases following *Talamantes*. Given the low likelihood the Supreme Court will take up the issue, the Eleventh Circuit should reverse this precedent in a future case considered en banc. It should instead follow the Fifth Circuit's approach that follows state clarification orders and recognizes when state judges impose probation and no other sentence.[232] The court should also dispense with hostility toward immigrants' offers of proof absent legal grounds to do so.

Beyond the federal courts, state courts, Congress, and the executive branch can also take steps to prevent unjust application of immigration law. All these steps would recognize the plain text and intent of Congress in the current aggravated felony statute. Upholding federalism is critical to both our system of government and to the rights of individuals in the immigration law system. Only by countering bad law like *Talamantes* on all fronts will we ensure these protections remain in place, and only with these protections will we effect equal justice under the law.

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[230] *Id.* at 961.

[231] *See id.* at 956–57 (describing how the state court modified the defendant's sentence "from 12 months probation to 11 months probation" and that the IJ determined the orders "were entitled to full faith and credit," though the IJ mistakenly held that the modified sentence was for confinement "suspended in favor of probation").

[232] *See supra* section IV.B.