No. _____

In The Supreme Court of the United States

HAROON RASHID,

***Petitioner*,**

v.

ALBERTO GONZALES, Attorney General,

Respondent.

EMERGENCY MOTION FOR STAY OF DEPORTATION ORDER PENDING WRIT OF CERTIORARI

COMES NOW the Petitioner, Haroon Rashid, by and through his counsel, Andrew B. Reid, and pursuant to Supreme Court Rule 23 hereby makes this Emergency Motion for a Stay of the Order of the Immigration Judge of November 24, 2004, in this matter until resolution of the petition for Writ of Certiorari of the Mandate of the United States Court of Appeals for the Tenth Circuit to the United States Supreme Court. As grounds for the motion, Petitioner states as follows:

I. REQUEST FOR EMERGENCY RELIEF

1. A petition for Writ of Certiorari[1] from an opinion and judgment of the United States Court of Appeals for the Tenth Circuit in an immigration matter was submitted to this high Court on November 6, 2006.

2. On information or belief, the Respondent Government is preparing to and intends to imminently deport the Petitioner Haroon Rashid to Pakistan, even though a Writ is currently

[1] On November 7, 2006, the Clerk of the Supreme Court returned the copies of the Writ for reformatting of certain attachments and refilling within 60 days pursuant to Supreme Court Rule 13.5. The reformatted Writ will be submitted to the Court within the time provided by the Court.

pending before this Court and even though the Tenth Circuit Court of Appeals on November 8, 2006, granted Petitioner's Motion for Stay of the Mandate and issued its Order recalling the Mandate and staying its issuance pending review of the Writ of Certiorari.

3. A stay of the deportation order may be issued below by the Immigration Judge or the Board of Immigration Appeals only pursuant to a motion for reconsideration or to reopen made within 30 and 90 days, respectively of the deportation order. 8 U.S.C. § 1229a(c)(6) and (7); 8 C.F.R. § 1003.2. Since those deadlines have passed and due to the very short period of time remaining before the Petitioner's possible deportation by the Government, and since the Court of Appeals recalled the Mandate, it was impractical to first apply for the stay with the Immigration Judge or the Board of Immigration Appeals. Accordingly, Petitioner moved for and received a stay of deportation from the Court of Appeals on November 20, 2006. Attachment 2.

4. Yet, on an *ex parte* reconsideration of the order, the Court of Appeals vacated the stay and denied a request to reconsider its order vacating the stay. Attachments 3 and 4. The Government contended that the issue raised in the Writ of Certiorari had been waived in the proceeding before the Board of Immigration Appeals when the Petitioner conceded that the a simple misdemeanor offense with a possible sentence of greater than one year fell within the definition of a "felony" under the Immigration and Naturalization Act, 8 U.S.C. § 1101(a)(43). However, the Writ raises the issue of whether a simple state misdemeanor offense falls within with the definition of "felony" and "aggravated felony" under the federal criminal statute, 18 U.S.C. § 16(a) and (b). It is the definition under 18 U.S.C. § 16, ***not 8 U.S.C. § 1101(a)(43)*** that is at issue on appeal. That issue has not been waived and is *a priori* subsumed in the decision and judgment of the Court of Appeals when it held that the simple misdemeanor assault fell within the definition of 18 U.S.C. § 16(b) rather than 8 U.S.C. § 1101(a)(43), for the purpose of

an "aggravated felony" and a deportable offense. *Haroon Rashid v. Alberto R. Gonzales*, 190 Fed.Appx. 676, 679-80 2006 WL 2171522, **2 and **3 (10th Cir. 2006) attached hereto as Attachment 1. Petitioner must be provided a fair opportunity as provided under the Rules of this Court to fully and properly respond to Respondent's Motion.

5. Petitioner now seeks from this Court a stay of his imminent deportation.

II. MOTION

6. On November 29, 2004, the Immigration Judge issued an order of removal of Petitioner, Haroon Rashid, to Pakistan, based upon Mr. Rashid's conviction in county court of a third degree misdemeanor assault as being an "aggravated felony" for the purpose of deportation under the Immigration and Naturalization Act (INA). True copies of the Order of deportation and transcript are attached to the Writ of Certiorari which has been submitted to the Court. Mr. Rashid timely appealed the deportation order to the Board of Immigration appeals.

7. On April 14, 2006, the Board issued its final decision dismissing the Mr. Rashid's appeal, again finding that the state third degree misdemeanor assault was an "aggravated felony" for the purpose of deportation under the INA. A true copy of the Order of the Board of Immigration Appeals is attached to the Writ of Certiorari.

6. A timely petition was then filed by Mr. Rashid in United States Court of Appeals for the Tenth Circuit on May 12, 2005. On August 3, 2006, a panel of the Circuit Court held that the state third degree misdemeanor assault conviction was an "aggravated felony" and denied the petition for review from final decision of the Board of Immigration Appeals and the Immigration Judge. *Rashid*, 190 Fed.Appx. 676, 2006 WL 2171533 attached hereto as Attachment 1. A Mandate from the Court of Appeals was issued on September 25, 2006.

7. On November 1, 2006, a Writ of Certiorari was mailed by Mr. Rashid to the

United States Supreme Court seeking review of this Court's Order and Judgment, of the Board of Appeals order, and of the removal order of the Immigration Judge.

8. On November 8, 2006, the Court of Appeals granted Mr. Rashid's Motion for Stay of Mandate Pending Writ of Certiorari to the United States Supreme Court and recalled the Mandate. However, the Court of Appeals has denied Petitioner's request for a stay of deportation pending resolution of the Writ of Certiorari. Attachments 3 and 4.

9. On information and belief, the Government is taking or will take the position that under 8 U.S.C. § 1252(b)(3)(B), the Order granting the stay of the Mandate does not prevent the deportation of Mr. Rashid while the Writ to this Court is pending.

A. Standards to Be Applied on Motion to Stay Removal Order

10. This Court has jurisdiction to issue a stay of a removal order. 8 U.S.C. § 1252(a)(1) incorporating 28 U.S.C. § 2349(b); Fed. R. App. P. 8; *Thapa v. Gonzales*, 460 F.3d 323, 329 (2nd Cir. 2006); *Obale v. Attorney General*, 453 F.3d 151, 155-7 (3rd Cir. 2006) (*see also*, list of citations at footnote 1). The standard to be applied in regards to a motion to stay a removal order by an Immigration Judge is the same as that used motion for preliminary injunctions which requires the Court to consider (a) the likelihood of success, (b) the threat of irreparable harm if the stay is not granted, (c) the absence of harm to opposing parties if the stay is granted, and (d) any risk to the public interest.. *Thapa*, 460 F.3d at 334; *Obale*, 453 F.3d at 160-1; *Tesfamichael v. Gonzales*, 411 F.3d 169, 171-7 (5th Cir. 2005).

B. Likelihood of Success on the Merits of the Writ

11. Of the four remaining considerations, the likelihood of success is arguably the most important. *Tesfamichael*, 411 F.3d at 176. The Court of Appeal's decision in its Order and Judgment on the merits was based upon a ruling that Mr. Rashid's conviction of third degree

misdemeanor assault was an "aggravated felony" under 18 U.S.C. § 16(b) for the purpose of the deportation statutes, 8 U.S.C. § 1227(a)(2)(A)(iii) and 8 U.S.C. § 1011(a)(43). The Court of Appeals found that the circumstances of Mr. Rashid's offense met the Section 16(b) requirement that the offense involve, by its nature, a substantial risk that physical force against the person or property of another may be used in the course of committing the offense. Attachment 1 (Order and Judgment, pages 6-8).

12. Implicit in the Circuit Court's Order and Judgment is also a ruling that the misdemeanor offense further meets the other requirement of Section 16(b), that it be a "felony." *Id*. This Circuit has previously found misdemeanor violations to be deportable offenses. *United States v. Rodriguez-Rojo*, 175 Fed. Appx. 982, 2006 WL 979303, **2 (10th Cir. 2006) (regarding a Texas offense) and *United States v. Saenz-Mendoza*, 287 F.3d 1101, 1103-4 (10th Cir. 2002) (regarding a Utah offense). However, these opinions relied upon on one part of the statutory definition of "aggravated felony," the one-year imprisonment clause, 8 U.S.C. § 1101(a)(43), and failed to make the detailed analysis of 18 U.S.C. § 16(a) and (b) expressly encompassed by § 1101(a)(43).

13. In direct contrast to these decisions and that of the Court in this matter, where the language of § 16(b) has been compared with that found in § 16(a), Circuit courts have ruled that Congress meant what it said - that misdemeanor convictions may be felonies under § 16(a) if the state misdemeanor statute possesses the required element of substantial risk of physical force, **but that *all misdemeanors are categorically excluded* from the definition of an aggravated felony under § 16(b).** *Sing v. Gonzales*, 432 F.3d 533, 538 (3rd 2006) (misdemeanor assault and reckless endangerment); *Francis v. Reno*, 269 F.3d 162, 168-69 (3rd Cir. 2001) (first misdemeanor manslaughter); *United States v. Villegas-Hernandez*, ___ F.3d ___, 2006 WL

3072558 (5th Cir. 2006) (misdemeanor assault); *Flores v. Ashcroft*, 350 F.3d 666, 669 (7th Cir. 2003) (misdemeanor battery; *Singh v. Ashcroft*, 386 F.3d 1228, 1231, n. 3 (9th Cir) (misdemeanor harassment); *see also*, *United States v. Ponce-Casalez*, 212 F.Supp.2d 42, 44-46 (D.R.I. 2002) (misdemeanor assault); *United States v. Villanueva-Gaxiola*, 119 F.Supp.2d 1185, 1190 (D.Kan. 2000) (misdemeanor unlawful weapons possession).

14. In *Francis*, the INS contended that a person convicted of two first degree misdemeanor counts of vehicular homicide and sentenced to two consecutive sentences of 18 to 60 months in prison had committed an aggravated felony for the purposes of deportation. On review, the Third Circuit stated in *Francis*:

> …Congress did not use the term "felony in § 16(a). Rather, § 16(a) is narrowly drawn to include only those crimes whose elements require the "use, attempted use, or threatened use of physical force." Although § 16(b) is specifically limited to felonies, it does not include all felonies. It is limited to those felonies that "by [their] nature involve[s] a substantial risk that …force …may be used." Clearly, Congress intended to include felonies and misdemeanors under subsection (a), but only intended certain felonies to be included under subsection (b)."

Francis, 269 F.3d at 168.

The *Francis* Court then recognized the discussion in the Senate Report for the Comprehensive Crime Control Act of 1984 that makes this clear:

> …The term "crime of violence" is defined, for purposes of all Title 18 U.S.C. in Section 1001 of the Bill… The term means an offense - *either a felony or a misdemeanor* - that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, *or any felony* that, by its nature, involves the substantial risk that physical force against person or property may be used in the course of its commission. S.Rep. No. 225 (1983).

Francis, 269 F.3d at 169 (emphasis in opinion). The Court also notes the purpose in recognizing the state categorization of the offense as a misdemeanor or felony:

> Thus, by relying upon state law to provide the categorization, we eliminate the redundancy that would otherwise result from including both a maximum of one

> year imprisonment under § 1101(a)(43)(F) and the condition precedent of "felony" in § 16(b) that is expressly incorporated in § 1101(a)(43)(F).

Francis, 269 F.3d at 170. This interpretation is consistent with the rule of lenity embodied in the longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien. *INS v. St. Cyr*, 533 U.S. 289, 121 S.Ct. 2271, 2290, 150 L.Ed.2d 347 (2001); *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10, 68 S.Ct. 374, 376, 92 L.Ed. 433 (1948); *Francis*, 269 F.3d at 170.

15. The Order and Judgment of the Court of Appeals is in direct conflict with the decisions of other circuits and jurisdictions regarding the application of 18 U.S.C. § 16(b) to misdemeanor offenses. Those decisions, discussed above, hold that by the clear language and intent of the statute misdemeanor offenses are *categorically* excluded from the § 16(b) definition of "aggravated felony". Fort that reason, this consideration - a likelihood of success on the merits - falls strongly in favor of the Petitioner.

C. Irreparable Harm If the Stay Is Not Granted

16. Mr. Rashid lawfully entered the United States in 1997. The misdemeanor offense was his first and only conviction for any violation of law. Mr. Rashid has been held in federal custody for over 3 and ½ years.

17. Under 8 U.S.C. § 1182(a)(9)(A)(i), any alien who has been ordered removed under 8 U.S.C. § 1229a (removal proceedings) may not be readmitted for a period of at least 5 years. The Government has a history of deporting aliens while appeals are pending - and even after deportation stays have been issued - and then arguing that the appeal and stay are moot. *See*, *e.g.*, *Patel v. Ashcroft*, 378 F.3d 610, 612-613 (7th Cir. 2004) (see citations and discussion therein). As the Seventh Circuit noted in *Patel*: "We doubt that Congress meant to empower the immigration authorities to thwart judicial review by removing the alien from the United States in

conscious attempt of a judicial decree." The removal of Petitioner prior to the completion of his appeal before this Court and his Writ before the United States Supreme Court will substantively interfere with his ability to conduct those appeals if not depriving this Court and the Supreme Court of jurisdiction altogether. *Id*. Mr. Rashid entered this country legally and has been a lawful permanent resident for almost 10 years. If Petitioner Rashid is removed in this manner by the Government, he will effectively deprived of substantive and procedural due process of law, as he has been for the many years he has been held in custody by the Government on charges that the Government ultimately dismissed on its own.

18. Mr. Rashid resides in this country with his naturalized American wife and four American-born minor children, ages 10 to 2, the youngest born while Mr. Rashid was been held in prison by the Government. Exhibit E, ¶s 2 and 5[2]. Over the years of his imprisonment by the Government, the only contact his wife and children have had with him have been in visitations to him at his places of imprisonment and by telephone. *Id*. at ¶s 5 and 7. His deportation would deprive Mr. Rashid of even these limited contacts with his family and deprive his wife and innocent small children of their husband and father. *Id*., ¶ 7. An affidavit from Mr. Rashid's wife describing the very severe harm his deportation would cause her children, her, and the Petitioner is attached hereto as Attachment 4.

19. Deportation is a drastic remedy that should be rarely applied.

> We resolve the doubts in favor of that construction because deportation is a drastic measure and at times the equivalent of banishment of exile. It is the forfeiture for misconduct of a residence in this country. Such a forfeiture is a penalty. To construe this statutory provision less generously to the alien might find support in logic. But since the stakes are considerable for the individual, we will not assume that Congress meant to trench on his freedom beyond that which is required by the narrowest of several possible meanings of the words used.

[2] Paragraphs 5 through 9 are inadvertently misnumbered and are referred to herein by the order in which they appear in the Affidavit.

Fong Haw Tan v. Phelan, 333 U.S. 6, 10, 68 S.Ct. 374, 376, 92 L.Ed. 433 (1948).

D. Harm to Opposing Party

20. The is no harm to the Government in the granting of a stay of deportation. Mr. Rashid has served, many times over, the 35-day jail sentence he received on the state simple misdemeanor assault conviction - the only grounds asserted by the Immigration Judge for his order of removal. If Petitioner Rashid is unsuccessful in his Writ to the Supreme Court, the process of deportation can proceed in the same manner then as it would now. The expense would be the same. Although Mr. Rashid is intent on staying with his family in the United States, the Government cannot even argue a risk of flight as the Government does not even want him in the United States. Mr. Rashid is no threat to anyone. He has served his 35-day sentence on the misdemeanor conviction. Since he does not want to leave the Untied States, there is no reason to keep him in custody even on an immigration hold as the Government is currently doing. By releasing him, taxpayer money would not be expended in keeping him in prison and he could also obtain work to support his family. There is not any even arguable harm to the Government in the granting of a stay by this Court of Mr. Rashid's deportation.

E. Risk to the Public Interest

21. As previously noted, Mr. Rashid has legally resided in the United States as a lawful resident alien since 1997 without incident other than the confrontation he had with the person who ethnically harassed him for which he was convicted of simple misdemeanor assault. That was his first, and only, offense of any kind.

22. The public has an interest in the fair and just treatment of its citizens and residents, including lawful resident aliens. The deportation of Mr. Rashid for a simple misdemeanor county court conviction after many years of federal imprisonment is not fair and is

not just, and is not in the public interest. As noted in the decisions above, if Mr. Rashid had come before the Third, Fifth, or Ninth Circuits, or even the District Court in Kansas, the Immigration Judge's order of removal would not have been upheld since in those jurisdictions a misdemeanor simple assault is categorically not a "felony," let alone an "aggravated felony," under 18 U.S.C. § 16(b) under the rule of those jurisdictions. The deportation of Mr. Rashid before he has had the opportunity to complete his appeal to this Court and to the United States Supreme Court, particularly as here where he has demonstrated meritorious grounds, would be unfair, unjust, and a violation of his rights to procedural and substantive due process of law, and not in the public interest.

23. The public has an interest in supporting and protecting the well-being of families and small children. As stated in the Affidavit of Mr. Rashid's wife, for the last three years, his children have only known him as a inmate in a federal prison. The psychological and emotional toll his imprisonment has taken on them individually and as a family is almost indescribable. Certainly, it is in the public interest to protect these children from the unnecessary effective loss of their father should he be deported.

WHEREFORE, for good cause shown, Petitioner Haroon Rashid respectfully requests that this Court stay the order of removal of the Immigration Judge in this matter pending resolution of the petition for Writ of Certiorari.

Respectfully submitted,

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ATTORNEY FOR PETITIONER

Certificate of Service

I hereby certify that true and correct copies of the Motion for Stay with attachments in writing were served by email and by US Mail on this 4th day of December, 2006 to:

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ATTACHMENTS

Attachment 1 - US Court of Appeals Order and Judgment of August 3, 2006.

Attachment 2 - US Court of Appeals Order of November 20, 2006.

Attachment 3 - US Court of Appeals Order of November 30, 2006.

Attachment 4 - US Court of Appeals Order of December 4, 2006.

Attachment 5 - Affidavit of Saima Saima in Support of Motion for Stay of Deportation Order.