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UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS
FALLS CHURCH, VIRGINIA

In the Matter of	)	
	)	
M[redacted], M[redacted] A[redacted]	)	**A# [redacted]**
	)	
In Removal Proceedings	)	

RESPONDENT'S BRIEF

To the Honorable Board:

Now comes [redacted], through undersigned counsel, and files this brief asking the Board of Immigration Appeals to remand this case to the Immigration Judge for a rehearing, arguing that the Immigration Judge violated Respondent's due process right to a fundamentally fair hearing when she failed to: 1) order a mental health evaluation to determine Respondent's competency 2) protect Respondent's rights as outlined by regulation and statute, 3) apply the procedure dictated by the Immigration Judge Benchbook and 4) follow the regulations at 8 C.F.R. § 1240.10(a) and 1240.11(a)(2).

[redacted]

Procedural History

The Immigration Record of Proceedings shows the following:

Respondent is a native and citizen of Jamaica, born on [redacted] in Jamaica. (I.J. at 1). Respondent was admitted to the United States on February 19, [redacted] as a lawful permanent resident. (I.J. at 1). On July 31, [redacted] in New York, the Government served Respondent with an NTA alleging that he had convicted two petty larcenies and was thereby removable pursuant to INA §237(a)(2)(A)(ii). (Exhibit 1). On August 7, [redacted], the Department of Homeland Security commenced removal proceedings against Respondent. (I.J. at 1). On September 14, [redacted] the Respondent had his first removal hearing with Judge [redacted] via televideo (Tr. at 1). The Respondent 's hearing was rescheduled in order to find his mother's naturalization certificate to see if Respondent was eligible for derivative citizenship (Tr. at 15). On October 21, [redacted] the Respondent had his second removal hearing with Judge [redacted] (Tr. at 18). Respondent requested a change of venue to New York, New York to be closer to his family, to receive help and support; however the Immigration Judge denied Respondent's request for a change of venue (Tr. at 20). The Immigration Judge then asked the Department of Homeland Security trial attorney to request Respondent's mother's file to check her naturalization date and confirm that it occurred after Respondent's 18th birthday. (Tr. at 22, 23, 24). The trial attorney agreed to retrieve the Respondent's mother's file (Tr. at 22).

On [redacted], the Respondent had his third removal hearing with Judge [redacted] (Tr. at 28). The criminal convictions that DHS submitted to the Court are not alleged on the NTA (Tr. at 33). Judge [redacted] granted a continuance to allow DHS to change the allegations on the NTA (Tr. at 34).

[redacted]

On December 7, [redacted], the Respondent had his fourth removal hearing before Judge [redacted] (Tr. at 36). DHS filed additional charges of inadmissibility/deportability (Tr. at 36). The Department of Homeland Security alleged that on [redacted] and [redacted] Respondent was convicted of petit larceny. Exh. 1A.

On January 25, [redacted] Respondent had his fifth removal hearing with Judge [redacted] (Tr. at 51). Judge [redacted] granted the Department of Homeland Security's request for a continuance in order to file an additional allegation and an additional charge (Tr. at 52-53).

On April 1, [redacted] Respondent had his sixth removal hearing with Judge [redacted] (Tr. at 54). The Department of Homeland Security submitted five more charges of removal. Exh. 1-B. The Immigration Judge found Respondent subject to removal under all the charges in the NTA (Tr. at 66). The Immigration Judge informed Respondent that he was not eligible for cancellation of removal, but that he was eligible for asylum/withholding of removal (Tr. at 67).

On June 16, [redacted] Respondent had his seventh and final removal hearing with a different judge, Judge [redacted], via televised conference (Tr. at 71). Due to a recently issued Supreme Court decision, *Carachuri-Rosendo v. Holder*, the Immigration Judge found Respondent eligible for cancellation of removal for certain permanent residents. *Carachuri-Rosendo v. Holder*, 130 S.Ct. 2577 (2010) (holding that the second offense of simple drug possession was not an "aggravated felony," so as to preclude cancellation of removal, where second conviction was not based on the fact of a prior conviction.) Respondent applied for Cancellation of Removal for Certain Permanent Residents, Asylum, Withholding of Removal, and relief under the Convention Against Torture (*See* Exh. 10-11). The Immigration Judge denied Respondent all forms of relief.

[redacted]

Respondent filed a Notice of Appeal, pro se, on [redacted]. Respondent found undersigned counsel to represent him pro bono through the BIA Pro Bono Project and undersigned counsel filed a Motion to Extend Time to File an Appeal Brief, which was granted. Respondent's brief is due on October 12, 2010. Respondent's brief on appeal is submitted concurrently with this motion.

Issues Presented

There are three issues presented here:

1. Did the Immigration Judge violate Respondent's due process rights and fundamental fairness when she failed:
    - to order a mental health evaluation to determine Respondent's competency,
    - to protect Respondent's rights as outlined by regulation and statute and,
    - to apply the procedure dictated by the Immigration Judge Benchbook?

2. Did the Immigration Judge violate 8 C.F.R. §§ 1240.10(a) and 1240.11(a)(2) when he failed to explain to Respondent that if his mother naturalized before his 18th birthday he might be a United States Citizen and therefore not subject to removal?

3. Was Respondent unable to present the attached evidence because it was unavailable to him due to his mental health disabilities and representation *pro se*?

Standard of Review

A motion to remand seeks to return jurisdiction of a case pending before the Board of Immigration Appeals to the Immigration Judge. *See* BIA Practice Manual, Chapter 5.8(b) (July 30, 2004); *see also* INA §241(c)(7); 8 C.F.R. § 1003.2(c)(4). A motion to remand is governed by the same substantive requirements as a motion to reopen. *See Matter of Coelho*, 20 I & N

[redacted]

Dec. 464 (BIA 1992). The Board should grant a motion to remand when: 1) the evidence sought to be offered is material and 2) the evidence was not available and could not have been discovered or presented at the former hearing. *Id. But see Cano-Merida v. INA*, 311 F.3d 960 (9th Cir. 2002) ("due process violations require that motions to reopen be granted even where new evidence was not presented"). As with motions to reopen, parties submitting new evidence should articulate the purpose of the new evidence and explain its prior unavailability. *See* BIA Practice Manual, Chapter 5.2(f) (July 30, 2004).

Summary of the Argument

The Board of Immigration Appeals should remand Respondent's case back to the Immigration Judge because the Immigration Judge violated Respondent's due process right to a fundamentally fair hearing when: she proceeded with the Merits Hearing without ordering a mental health evaluation to determine Respondent's competency; failed to protect Respondent's rights under the applicable statute and regulations; and failed to follow the Immigration Judge Benchbook. Respondent was prejudiced when the Immigration Judge violated 8 C.F.R. § 1240.10(a) and 1240.11(a)(2) by failing to explain that if Respondent's mother naturalized before his 18th birthday he could be a United States Citizen and would not be subject to removal. Respondent should be allowed to present the attached evidence, because the evidence was unavailable to him at the time of his first hearing because Respondent is mentally ill and represented himself *pro se*.

Statement of the Facts

Respondent, [redacted] is a citizen and national of Jamaica. (I.J. at 1). Respondent was born on [redacted] in Jamaica (Tr. at 30). Respondent was admitted to

[redacted]

the United States at New York, New York on [redacted] as a lawful permanent resident when he was 10 years old. (I.J. at 1) *See* Exh. 1. Respondent came to the United States after his mother, [redacted] and his brother [redacted] (I.J. 5). Respondent lived with them in [redacted], New York (I.J. 5). Respondent's biological father passed away (Tr. at 105). Respondent does not have any relatives living in Jamaica (Tr. at 104, 115). Respondent has a common law wife and a son who is currently about [redacted] (Tr. at 109-110). Respondent states that his son is his best friend. (Tr. at 109).

Respondent's mother, a United States Citizen, lives in [redacted], New York and works as an independent nurse (Tr. at 86). She has sent multiple letters to Respondent, and Respondent is on very good terms with his mother (Tr. at 86-87). Respondent's brother is lives in [redacted] County and works for the [redacted] Railroad (Tr. at 86-87).

Respondent attended high school in the United States and obtained his GED in [redacted] (Tr. at 98-99). Respondent moved out of his mother's home in [redacted] because he was not getting along well with his stepfather (Tr. at 99). However, he still maintains a very good relationship with his mother (Tr. at 99). Respondent's mother sends him money, letters, and postcards and provides him emotional support. (Tr. at 99). Respondent speaks to his mother over the phone. (Tr. at 99). Even though Respondent is in detention, he sends his mother letters on holidays, such as Mother's Day. (Tr. at 99).

Although Respondent's work history is not traditional he stated that he has been self employed for the last fifteen years, performing odd jobs such as picking up cans, mowing the lawn and landscaping for his neighbors. (I.J. at 16) He also stated that these jobs gave him enough money to support himself. (I.J. at 16).

[redacted]

Respondent has a long history of mental illness. Respondent submitted his prior mental health evaluations and testified as follows concerning his mental illness:

- In 1995, the Respondent was admitted for 5 days for depression at [redacted] in New York. (I.J. at 6); Exh. 17.
- In 1997, Respondent voluntarily committed himself to New York Hospital after his girlfriend had an abortion (Tr. at 88); Exh. 16. Respondent felt that he was losing his mind. (Tr. at 88).
- In [redacted] of 1998 Respondent was diagnosed with being dysphoric and psychotic. (Tr. at 88); *See* Exh. 15. Respondent was placed in a forensic in-patient unit where he was reported as hearing voices. *See* Exh. 15.
- On [redacted], 2001, Respondent was found to be psychotic while in jail after he reported hearing voices and told staff that he was receiving messages from the TV. (I.J. at 6); *See* Exh. 17.
- In 2001, the Respondent was given a GAF score of 45 out of 100 (I.J. at 6).
- In [redacted] 2004, Respondent was evaluated at the [redacted] and was described as disorganized, depressed, and reporting auditory and visual hallucinations (I.J. at 7). The psychiatrist found that the Respondent was unfit to proceed with trial (I.J. at 7).
- Respondent stated that he received his last mental health evaluation in [redacted] 2009 in [redacted] in New York and was evaluated by a doctor who diagnosed him with schizophrenia (I.J. at 9). However, Respondent was unable to provide evidence of this evaluation (I.J. at 9).

[redacted]

- Respondent stated that he was taking [H]aldol and Zoloft while in Immigration custody. (Tr. at 81). He also stated that he has not been evaluated by a psychiatrist or mental health official while in Immigration custody. (Tr. at 81).

Legal Argument

I. The Immigration Judge has a Constitutional Obligation to Protect the Rights of *Pro Se* Respondents Suffering from Mental Disabilities and the Immigration Judge Violated these Obligations when She Failed to Order a Mental Health Evaluation to Determine Respondent's Competency or Appoint a guardian *ad litem* to represent Respondent.

A. The Constitution Provides Procedural Protection for Mentally Disabled Respondents.

The Fifth Amendment of the Constitution requires that "no person shall...be deprived of life, liberty or property without due process of law." U.S. CONST. amend. V. The Fifth Amendment provides non-citizens due process in removal proceedings. *See, e.g., Demore v. Hyung Joon Kim,* 538 U.S. 510, 523 (U.S. 2003); *Reno v. Flores*, 507 U.S. 292, 306 (1993); *Zhang v. Gonzalez,* 432 F.3d 339, 346 (5th Cir. 2005). Non-citizens in removal proceedings are protected by the Fifth Amendment although they do not enjoy the full range of due process protections afforded by the Constitution. *INS v. Lopez- Mendoza,* 468 U.S. 1032, 1038 (1984). However, they are entitled to due process in the form of a "full and fair hearing." *Ahmed v. Gonzalez,* 398 F.3d 722, 725 (6th Cir. 2005). What is required by due process and fundamental fairness is not predetermined but is flexible and dependent on the particular facts of each case. *Matthews v. Eldridge,* 424 U.S. 319, 334 (1976). In order to show a violation of due process a Respondent in removal proceedings must show "actual prejudice" which occurs "where defects in the deportation proceedings may well have resulted in the deportation that would not have

otherwise occurred." *Mohamed v. TeBrake,* 371 F. Supp. 2d 1043, 1048 (D.Minn 2005) (*quoting United States v. Torres-Sanchez,* 68 F.3d 227, 230 (8th Cir. 1995)).

Neither the Immigration and Nationality Act ("INA") nor regulations define precisely what it means to be "competent" for purposes of removal proceedings. *See, e.g.,* INA § 240(b)(3); 8 C.F.R. § 1240.4; 8 C.F.R. § 1240.10(c) (providing no definition). The court in *Mohamed v. TeBrake,* stated "the law is undeveloped...with regard to the particular demands of 'fundamental fairness' in removal proceedings against a potentially incompetent alien. The court should therefore look to the requirements of due process in other similar contexts." *Mohamed,* 371 F. Supp. 2d at 1043.

1. Criminal Proceedings

The area of mental competency is more developed in criminal law. A defendant is competent to stand trial only if he has both a) "sufficient present ability to consult with a lawyer with a reasonable degree of understanding" and b) "a rational as well as factual understanding of the proceedings against him." *Dusky v. United States,* 362 U.S. 402 (1960). Both *Dusky* prongs are required to establish competency. *Id.* The Supreme Court has also ruled on a defendant's ability in a criminal case to represent himself *pro se.* In *Indiana v. Edwards,* the court held that although a defendant was able to satisfy *Dusky's* mental competence standard to stand trial, he could nevertheless be unable to "carry out the basic task needed to present his own defense without the help of counsel." *Indiana v. Edwards,* 128 S. Ct. 2379, 2386 (2008). Therefore, it is constitutional for a state to reject a defendant's waiver of counsel when the defendant is competent to stand trial under *Dusky* but cannot carry out a defense without the help of counsel. *Id.* at 2388. Although immigration proceedings are considered civil in nature, there is still a

[redacted]

private or liberty interest at stake that is exceptionally great. The Supreme Court has stated that removal is "a drastic measure...at times equivalent to banishment or exile." *Tan v. Phelan*, 333 U.S. 6, 10 (1948). Therefore, Immigration Judges should look to the criminal standard for competency to guide their assessment of a *pro se* Respondent's competence before proceeding with a hearing. In the instant case, Respondent waived his right to counsel but was not competent to understand the ramifications of appearing *pro se*.

2. Civil Proceedings

In civil proceedings the judge is required under Rule 17(c) of the Federal Rules of Civil Procedure to protect an incompetent Respondent by using any "measures deemed proper." *United States v. 30.64 Acres of Land, More or Less, Situated in Klickitat County, Washington*, 795 F.2d 796, 805 (9th Cir. 1986). Rule 17(c) requires a court to appoint a guardian *ad litem* to protect an incompetent defendant. FED R. CIV. P. 17(c). Although, Rule 17(c) does not impose a duty on a court to inquire "sua sponte into a pro se [litigant's] mental competency," when information is brought to the attention of the court that raises a question of competency "it likely would be an abuse of the court's discretion not to consider whether Rule 17(c) applied." *TeBrake*, 371 F. Supp. 2d at 1046 (citing *Ferrelli v. River Manor Health Care Ctr.*, 323 F.3d 196, 201 (2d Cir. 2003)). In order to determine whether a defendant should be protected by Rule 17(c) the court considers whether the defendant "suffers from a condition that materially affects his ability to represent himself *pro se*, to consult with a lawyer with a reasonable degree of rational understanding...or otherwise understand the nature of the proceedings." *Id.*

In *Mohamed v. Tebrake*, the District Court discussed Rule 17(c) in civil cases when evaluating what competency standard to apply to immigration proceedings. *Mohamed*, 371

[redacted]

F.Supp.2d at 1046. Since, immigration proceedings are civil in nature, the immigration judge should consider the protection afforded by Rule 17(c) and the requirement that an incompetent defendant have a guardian appointed to protect his interests when ensuring that a Respondent has received his due process right to a "fundamentally fair" hearing.

B. The Immigration Judge violated Respondent's due process rights

Dusky, Edwards and Rule 17(c) show the protections afforded incompetent defendants in criminal and civil proceedings. However, Respondent . s in immigration proceedings are not afforded any explicit protections and there is no procedure dictating how to evaluate a Respondent 's mental competency. Therefore, to provide a *pro se* Respondentdue process and a "fundamentally fair" hearing the Immigration Judge should have ordered a mental health evaluation to determine Respondent's competency before proceeding with the removal hearing.

As far as undersigned counsel has been able to determine, the issue in this case is a novel one and has yet to be decided by the Board of Immigration Appeals. Immigration Judge Tsankov wrote in the Immigration Law Advisor that "For Respondents who are adjudged by an Immigration Judge to be incompetent and who are unrepresented by an attorney or other prescribed representative there are no cases that consider how to conduct proceedings so that the safeguards of 8 C.F.R. § 1240.4 are met." Mimi E. Tsankov, "Incompetent Respondent s in Removal Proceedings," *Immigration Law Advisor 2* (Apr. 2009), http://www.justice.gov/eoir/vll/ILA-Newsletter/ILA%202009/vol3no4.pdf.

The Immigration Judge violated Respondent's due process when Respondent, actin g *pro se,* presented evidence sufficient to raise a doubt concerning his competence and when she failed to follow the procedure under statutes, regulations and the Immigration Judge Benchbook. The

Immigration Judge's failure to order a mental health evaluation to assess Respondent's competency, prejudiced Respondent and violated his due process right to a fundamentally fair hearing.

Although *Nee Hao Wong v. INS* held that deportation proceedings do not have to be suspended until a defendant becomes competent, Respondent's case can be distinguished. *Nee Hao Wong v. INS,* 550 F.2d 521, 523 (9th Cir. 1977). Nee Haoa Wong was represented by counsel and his state appointed conservator. However, Respondent represented himself *pro se* throughout the entirety of his proceedings. Therefore, the Respondent did not have the benefit of counsel and a guardian to make sure his interests were being protected. In *Brue v. Gonzales*, the court held that although Mr. Brue had a history of mental illness, medication and therapy, the Immigration Judge had no obligation under statute or regulation to consider the petitioner's mental competency because the procedural safeguards that were envisioned were already in place; he was represented by counsel. *Brue v. Gonzalez,* 464 F.3d 1227, 1233 (10th Cir. 2006). Respondent's case is distinguishable from *Brue* because again Respondent was not represented by counsel. Therefore, Respondent was disadvantaged from the beginning because he had no one representing his interest. Rather, Respondent was entirely dependent on the Immigration Judge to ensure that his due process rights were protected.

Although the law is less developed for what procedure is required under due process for *pro se* Respondents who may be incompetent, there are due process protections afforded non citizens in removal hearings. A Non-citizen in removal proceedings is entitled to a full and fair hearing of his claims and a reasonable opportunity to present evidence on his or her behalf. INA § 240(b)(4)(B). In *Zolotukhin v. Gonzalez*, the court held that the Immigration Judge violated

defendant's due process where the Immigration Judge refused to allow testimony from Mr. Zolotukhin's family members who would have testified about the persecution he would face if removed to his home country of Russia. *Zolotukhin v. Gonzales,* 417 F.3d 1073 (2005). The Immigration Judge also violated Mr. Zolotukhin's right to a full and fair hearing and a reasonable opportunity to present evidence because he did not allow him to develop the record through testimony. *Id.* In *Bosede v. Mukasey*, the Immigration Judge's flawed reasoning and reliance on improper consideration constitute a "fundamental failure of due process..." *Bosede v. Mukasey,* 512 F.3d 946, 952 (7th Cir. 2008). Respondent suffered much more egregious harm. Respondent was unable to properly protect his interests because of his mental illness. If it is a violation of due process when a Respondent cannot present evidence or when a judge uses improper reasoning, it must surely be a violation to require a mentally ill Respondent to argue his case *pro se* without even being afforded the opportunity to receive a mental health evaluation to determine his competency.

For a *pro se* Respondent to receive a full and fair hearing the Immigration Judge must fully develop the record of facts.

Regulation and Statute

The Immigration Judge violated the statutory and regulatory protections provided to Respondent s in immigration proceedings. Although there is no definition of competency in immigration proceedings there are statutory and regulatory guidelines for protecting incompetent Respondents. INA § 240(b)(3) states:

> If it is impracticable by reason of an alien's mental incompetency for the alien to be present at the proceeding, the Attorney General shall prescribe safeguards to protect the rights and privileges of the alien.

[redacted]

Under 8 C.F.R. §1240.4, the Immigration Judge was required to appoint a guardian *ad litem* in order to protect Respondent's rights.

> When it is impracticable for the Respondent to be present at the hearing because of mental incompetency, the attorney, legal representative, legal guardian, near relative, or friend who was served with a copy of the notice to appear shall be permitted to appear on behalf of the Respondent . If such a person cannot reasonably be found or fails or refuses to appear, the custodian of the Respondent shall be requested to appear on behalf of the Respondent .

In *Nelson v. INS,* the court held that statements made by Nelson during her Immigration Hearing stating that her "memory is bad, that she forgets things and gets pain" and she was "not capable of defending herself" did not rise to the level of incompetence contemplated by section 8 CFR § 240.4 (now 1240.4). *Nelson v. INS,* 232 F.3d 258, 260 (1st Cir. 2000). Ms. Nelson did not provide any further evidence of her mental disabilities. *Id.* Therefore, Respondent's case is distinguishable. Respondent presented more than a few sentences of testimony. Respondent testified multiple times about his mental disabilities, filed five prior medical evaluations and requested a psychiatric evaluation multiple times. Respondent's history and testimony are sufficient evidence.

In *Mohamed v. TeBrake,* a *pro se* non-citizen presented evidence during his removal hearing that a state court had found him mentally ill and committed him to a state hospital. *Mohamed,* 371 F.Supp.2d at 1045 (D. Minn. 2005). He also testified that he was being medicated; however the Immigration Judge never inquired about what medications he was taking. *Id.* at 1045. The court concluded that there was an abuse of discretion when the Immigration Judge, "faced with evidence of a formal adjudication of incompetence or medical evidence that an alien has been or is being treated for the sort of illness that would render him

incompetent, fails to make at least some inquiry as to whether 8 C.F.R. § 1240.4 ought to be applied." *Id.* at 1047.

Although Mr. Mohamed was not physically present at his removal proceedings because he was being held in a mental hospital, the policy purposes of 8 C.F.R. § 1240.4 should be applied to Respondent's case because although he was able to be present at his removal proceedings he was not "mentally present" and needed a guardian to represent his interest. Therefore, Respondent's case is very similar to *Mohamed v. TeBrake.* Respondent testified during his first hearing that he suffered from several mental disorders, including schizophrenia. (Tr. at 5). When the Judge asked Respondent whether he wanted an attorney to represent him he responded that he wanted to get the [hearing] over with. (Tr. at 11). Respondent was very concerned with getting out of detention and did not appear to have a full understanding of the proceedings. He also asked for a change of venue so that he would be closer to his family but the Immigration Judge denied his request. (Tr. at 19). During Respondent's third hearing on November 2, [redacted], he informed the Immigration Judge that he did not believe he was able to defend himself in court. (Tr. at 34-35). Respondent also presented five separate mental health evaluations and testified that he had received a mental health evaluation as recently as 2009 but could not get a record of the evaluation. Exh. 15-16; (Tr. at 81). Respondent also testified during his last hearing on June 16, [redacted] that he was on several types of medication including Zoloft and [H]aldol. (Tr. at 81). When the Judge asked him whether he could represent himself he responded that he could not. (Tr. at 83).

Respondent's prior medical evaluations show that he has a history of mental illness. In 1995, Respondent was admitted for five days at [redacted] in New

[redacted]

York, for depression. (I.J. at 6); Exh. 17. In 1997, Respondent voluntarily committed himself to [redacted] after his girlfriend had an abortion (Tr. at 88); Exh. 16. In May of 1998, Respondent was diagnosed with being dysphoric and psychotic. (Tr. at 88); *See* Exh. 15. Respondent was placed in a forensic in-patient unit where he reported to staff that he was hearing voices. Exh. 15. On March 1, 2001, Respondent was found to be psychotic while in jail after he reported hearing voices and told the staff that he was receiving messages from the TV. (I.J. at 6); Exh. 17. In March 2004, Respondent was evaluated and described as disorganized, depressed and reporting auditory and visual hallucinations. (I.J. at 7). The psychiatrist found Respondent unfit to proceed with trial. (I.J. at 7). Throughout Respondent's seven hearings neither Immigration Judge ever considered whether 8 C.F.R. § 1240.4 requires a guardian to appear on Respondent's behalf. Respondent presented sufficient evidence, including an extensive history of mental illness and one adjudication by a state court that he was unfit to stand trial. Therefore, like the Respondent in *Mohamed*, the Judge should have at least considered whether 8 C.F.R. § 1240.4 requires that a guardian appear on Respondent's behalf.

The Immigration Judge also violated 8 C.F.R. § 1240.10(c) when he accepted Respondent's admission of removability. 8 C.F.R. § 1240.10(c) states:

> "An immigration judge shall <u>not</u> accept an admission of removability from an unrepresented Respondent who is incompetent...and is not accompanied by an attorney or legal representative, a near relative, legal guardian or friend."

The Immigration Judge should not have accepted Respondent's admission of removability because Respondent was *pro se* and incompetent. Since, there is no definition of what it means in Immigration proceedings to be competent, the Immigration Judge should have

[redacted]

considered Respondent's extensive history of mental illness and his claim that at the time of proceedings on Haldol and Zoloft and concluded that there was at least an issue of competency. (T.R. at 81). This issue should have been resolved before the Immigration Judge accepted Respondent's admission of removability. *See* 8 C.F.R. § 1240.10(c) (stating that "when pursuant to this paragraph, the Immigration Judge does not accept and admission of removability, he or she shall direct a hearing on the issues.") Therefore, the Respondent was prejudiced and did not receive a fair hearing because the Immigration Judge violated 8 C.F.R. § 1240.10(c), which violated Respondent's due process right to a fundamentally fair hearing.

Immigration Judge Benchbook

The Immigration Judge Benchbook is "intended to inform an immigration judge's decision-making process by highlighting relevant authority and persuasive references, suggesting best practices, and offering links to external reference tools." *See* Press Release, EOIR Expands Immigration Judge Benchbook: Releases New Section on Mental Health Issues (April 23, 2010). In this case, the Immigration Judge who presided over the hearing on the merits, failed to follow those procedures, thus prejudicing the Respondent and violating his right to a fundamentally fair hearing.

The Immigration Judge Benchbook states, "if sufficient doubt exists as to a Respondent's present mental health, the Immigration Judges should address a number of difficult questions." In this case Respondent presented ample evidence that he suffered in the past, and was currently suffering, from mental health disorders to create a sufficient doubt concerning his present mental health. The Immigration Judge Benchbook lists several factors that should be considered when assessing a Respondent's mental health for example: 1) evidence of participation in programs for

individuals with mental illness, 2) documents from medical providers regarding diagnoses, 3) prior medications with dosages and 4) whether the medications were effective in controlling the symptoms.

The Respondent presented evidence of multiple instances of participation in treatment facilities for the mentally ill. In 1995, Respondent was admitted to [redacted] in New York for depression (I.J at 6); Exh. 17. In 1997, Respondent voluntarily committed himself to [redacted] (Tr. at 88). In [redacted] of 1998, Respondent was placed in a forensic in-patient unit. *See* Exh. 15. On March 1, 2001 he was placed in [redacted] Exh. 17. The discharge summary stated that he had three admissions to that facility since 1995. Exh. 17. In March 2004, Respondent was evaluated again at [redacted] (I.J. at 7). Respondent claimed he was evaluated at [redacted] County Jail in June of 2009. (I.J. at 9). The Immigration Judge failed to account for the amount of times Respondent has been treated at mental health facilities but rather only focused on the last medical evaluation and the fact that Respondent had been discharged. (I.J. at 8-9).

Respondent also submitted evidence of the mental health evaluations he received while at the treatment facilities. These evaluations document the multiple types of medication he was given while at the facilities. Respondent had been treated with Serzone, Trazodone, Thioridazine, Prozac, Zoloft, Setraline and Risperdal. *See* Exh. 15-17. The Immigration Judge completely disregarded Respondent's testimony that he was given Haldol while in custody. (I.J. at 9). The Immigration Judge only stated that Respondent was receiving Zoloft and sleeping pills. (I.J. at 9). However, during Respondent's last hearing he stated that while he was in detention he was given Zoloft and [H]aldol. (Tr. at 81). Had the Immigration Judge "googled"

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Respondent's medications, based on his testimony and his medical records, she would have easily found the United States National Library of Medicines, National Institutes of Health (NIH) website which shows that Haldol, Thioridazine and Risperdal are prescribed for psychotic disorders such as schizophrenia which Respondent testified that he suffered from. Tr. at 80 Exh. 4. The Immigration Judge would have also found that Zoloft and Trazadone are used to treat depression which Respondent from which Respondent also stated that he suffered. Tr. at 80 Exh. 4. Since Respondent was a pro se applicant, the Immigration Judge should have researched some basic information on the prescription drugs to help assess whether Respondent suffered from mental illness making it vital to secure a psychiatric evaluation.

The Immigration Benchbook also suggests that Immigration Judges should "exercise flexibility when dealing with Respondents who may have mental health issues" and suggests actions an Immigration Judge can take to ensure the Respondent receives a fair hearing. This includes:

- "secure[ing] representation in the form of counsel or a guardian ad litem",
- "contact[ing] the Legal Orientation and Pro Bono Program at the BIA to request that a contracting organization administer a Legal Orientation Program (LOP) to such a Respondent," and
- "directing DHS to submit evidence relating to the Respondent 's mental health, whether this requires conducting one or more mental health evaluation(s) or obtaining prior evaluations, to explore treatment options, and/or to find or obtain adequate representation for the Respondent .

The Immigration Judge who presided over the Merits Hearing failed to follow any of these procedures after Respondent provided extensive evidence of his history of mental illness.

Respondent also testified during his proceedings about his mental health issues. On September 14, [redacted] Respondent testified in front of Judge [redacted] that he was diagnosed with schizophrenia, phobia and other things. (Tr. at 12). He also testified that he needed his medication however the officers (at the detention center) would not give him his medication. (Tr. at 12). During Respondent's second hearing, October 21, [redacted], he again told the Judge that he suffered from mental illness. (Tr. at 22). The Judge told Respondent that he could request medical treatment at the facility, however the Respondent replied that it had not happened, that he had not received medical treatment. (Tr. at 20). At Respondent's third hearing, on November 2, [redacted], the Respondent told the Immigration Judge that he did not believe he was able to defend himself in court. (Tr. at 34-35). At Respondent's fourth hearing, on December 7, [redacted] Respondent told the Judge that he was unable to submit his medical documents to the court because he was not given access to them. (Tr. at 41). Again Respondent requested medical help in the form an evaluation by a psychiatrist. (Tr. at 44). The Immigration Judge told Respondent that he had no authority over the matter but that the Department of Homeland Security counsel would make a note in the file that Respondent requested to see a psychiatrist. (Tr. at 44). The Immigration Judge also stated that he did not see why Respondent would be unable to see a psychiatrist if he requested it. (Tr. at 44). Although the Immigration Judge asked the Department of Homeland Security attorney to make a note that Respondent requested a mental health evaluation, he incorrectly stated that he did not have the authority to order one. The EOIR Immigration Judge Benchbook explicitly lists, mental health evaluations as a device Immigration

[redacted]

Judges can direct the Department of Homeland Security to conduct when there is a question of the Respondent's mental health.

At the Respondent's next hearing, on January 25, [redacted] there was no mention of Respondent's medical/psychiatric problems. It was not until Respondent's last hearing on June 16, [redacted] in front of Judge [redacted] that Respondent's mental competency was discussed again. When the Judge asked the Respondent why he was taking medication, he responded for mental health reasons, schizophrenia and depression. (Tr. at 80). The Judge also asked him whether he was taking any anti-depressants and he responded that he was taking [H]aldol and Zoloft. (Tr. at 81). The Judge asked the Respondent who proscribed the medication and whether he had been evaluated by a psychiatrist or mental health professional. (Tr. at 81). Respondent replied that the people down here (at the detention facility) had proscribed him the medication but that he had requested a mental health evaluation and had been refused. (Tr. at 81).

Although the first Immigration Judge asked the Department of Homeland Security to make a note that Respondent requested a mental health evaluation it does not appear that the Immigration Judge who presided over the Merits Hearing took any note of the request. The Immigration Judge should have followed the procedure outlined by the Immigration Benchbook and either ordered a mental health evaluation or appointed a guardian to ensure that Respondent's rights were adequately protected.

The Immigration Judge's failure to adhere to the regulations, Immigration Judge Benchbook and case law prejudiced Respondent and resulted in a fundmentally unfair hearing.

III. The Immigration Judge violated Respondent's right to a full and fair hearing under 8 C.F.R. § 1240.10(a) and § 1240.11(a)(2).

[redacted]

Under 8 CFR §1240.10(a), a Respondent must be informed of his rights, including the right to counsel, to free legal services, to present evidence-cross-examine witnesses, and to appeal. Furthermore, due process may be violated where Immigration Judge fails to assist pro se applicant to develop his claim. *Lacsina Pangilinan v. Holder,* 568 F.3d 708 (9th Cir. 2009). Also, pursuant to 8 CFR §1240.11(a) the Immigration Judge must notify the Respondent of "all benefits enumerated in this chapter," including all relief available, particularly cancellation, adjustment and registry, if the Respondenthas "apparent eligibility" for such relief. *Matter of Cordova,* 22 I&N Dec. 966, 970 n.4 (BIA 1999); 8 CFR §1240.11(a)(2). "Apparent eligibility" arises where the record fairly reviewed by an individual who is intimately familiar with the immigration laws – as Immigration Judges no doubt are – raises a reasonable possibility and give him the opportunity to develop the issue. *Asani v. INS,* 154 F.3d 719, 727-28 (7th Cir. 1998).

The Immigration Judge did explain to the Respondent that if his mother became a naturalized citizen before Respondent turned 18 years old, then he might have derived United States citizenship from her (Tr. at 15) However, due to his mental illness, Respondent failed to understand the Immigration Judge's instructions regarding the possibility that Respondent may be a citizen. This is evident from Respondent's response that he did not want to reschedule the hearing in order to get a copy of his mom's naturalization certificate (Tr. at 15).

Respondent stated that he's not clear whether his mom naturalized before or after he turned 18 years of age (Tr. at 21), which is what prompted the Immigration Judge to ask DHS to find his mom's naturalization certificate (Tr. at 22). Even though the DHS attorney stated that the information on the I-213 indicates that the mother naturalized after the Respondent's 18th birthday, the Immigration Judge still requested the file for documentary proof (Tr. at 22).

However, afterwards, neither the Immigration Judge nor the DHS attorney revert back to the issue of finding the Respondent's mom's naturalization certificate and her official date of naturalization. The DHS attorney erroneously used the I-213 to determine whether the Respondent 's mom naturalized before or after his 18th birthday (Tr. at 14). The Immigration Judge further abused his discretion by not following up with DHS as to the Respondent 's mom's precise naturalization date. The doctrine of apparent eligibility supports the conclusion that the Immigration Judge and the DHS trial attorney –people who are both intimately familiar with immigration laws – did not give the Respondent an opportunity to develop the issue since they did not check their records for the Respondent's mom's naturalization date, thereby leaving the Respondent bereft of discovering that he might have attained derivative U.S. citizenship. The instant case should also be remanded back to the Immigration Judge to determine whether the Respondent has attained derivative United States citizenship status.

III. Respondent was unduly prejudiced because he was unable to present evidence to support his asylum, withholding of removal, cancellation and CAT applications because he was a *pro se* mentally disabled Respondent and therefore did not have access to supporting evidence.

New evidence may be submitted with a Motion to Remand. 8 C.F.R § 1003.2 (2002). A motion to remand is governed by the same substantive requirements as a motion to reopen. *See Matter of Coelho*, 20 I&N Dec. 464 (BIA 1992). A motion to reopen proceedings shall state the new facts that will be proven at a hearing to be held if the motion is granted and shall be supported by affidavits or other evidentiary material. 8 C.F.R. § 1003.2(c). In the instant case, Respondent is filing Exhibits A-N which corroborate Respondent's testimony that he will be persecuted in Jamaica on account of his membership in a particular social group (i.e. mentally ill

[redacted]

individuals) and hardship to himself for Cancellation of Removal because, he will not be able to receive the medical care he needs to treat his mental disabilities. Respondent's case should be remanded back to the Immigration Judge because he has presented material evidence, with this Motion to Remand that was unavailable to him due to his lack of representation and mental health disabilities. The attached exhibits show that the conditions in Jamaica for the mentally ill are dire. The exhibits present evidence that there is little medical care and funding available for mentally ill Jamaicans and that government does little to help this disabled population. The following evidence supports Respondent's applications for asylum, withholding of removal, CAT and Cancellation for LPRs:

- Mental Health facilities in Jamaica are poorly maintained, have little funding and have inadequately trained staff. [redacted] Tab E (438); [redacted] Tab G (87.) There are only a handful of occupational therapists on the island and no specific training programs in rehabilitation nursing. [redacted] Tab B (82). Most treatment is handled by 41 mental health officers who are responsible for around 14,000 cases. [redacted], Tab B (85).
- Limited budget and allocation to mental health and substance abuse results in limited resources. [redacted] Tab I.
- The largest mental health facility in Jamaica, Bellevue Hospital, is described as having "goats grazing outside [and] it is not uncommon to see an out patient sitting on the grass hand cuffed or hand and feet bound, waiting to be seen." [redacted], Tab E (437).
- Access to medication varies by district and newer medication is hard to find because of its high cost. [redacted], Tab B (81).

[redacted]

- Mental health facilities are stigmatized by poverty and madness. Hickling, Tab G (87). Jamaicans with mental health disabilities suffer from this stigma, which negatively affects the care they receive. [redacted] Tab E (438).
- The Jamaican Constitution does not prohibit discrimination based on disability or health status. The Independent Jamaican Council for Human Rights, Tab C (2).
- The legal system makes a mentally ill person a criminal and in many cases does not allow mentally ill defendants a hearing. The Independent Jamaican Council for Human Rights, Tab C (4).
- The criminal laws control mentally ill Jamaicans by "treatment by incarceration" in a prison. The Independent Jamaican Council for Human Rights, Tab C (4).
- Jamaicans with mental disabilities who are suspected or convicted of a crime are not held in separate psychiatric institutions but are detained in a special area of jails and prisons. The United Nations recommended that mentally ill detainees be placed in a separate secure psychiatric institution for treatment. United Nations, Tab F.
- Schizophrenia accounts for 49% of patients seen at mental health clinics. World Health Organization, Tab H (3). However, there are no acute psychiatric inpatient units outside of Kingston and psychotic patients are frequently admitted to general medical wards without specialist psychiatric care. [redacted] Tab E (437).
- It is estimated that in 2010 there will be an increase of 1500 homeless Jamaicans. [redacted] Tab J. The rise in the homeless rate is due to the current economic conditions that have left many Jamaicans without work. [redacted] Tab J.

[redacted]

- A psychiatrist from the University of West Indies stated that out of the 650 homeless adults 60% are mentally ill and drug abusers while 10% are deportees. [redacted], Tab J.
- One to five percent of deportees who return to Jamaica have no remaining family ties; therefore many of them become homeless and lack a social safety net. [redacted], Tab J.
- There is also a lack of housing availability for homeless Jamaicans. [redacted], Tab J.
- There have been instances of mentally ill Jamaicans who are incarcerated without ever having a hearing. [redacted], Tab K (7). A famous example is of a man named Alfred Nettleford, who is a schizophrenic who was incarcerated after breaking a window for 29 years without ever receiving a hearing. [redacted], Tab K (7); BBC News, Tab L. He was "incoherent and frail; he ate scraps from a garbage bag, slept ob filthy concrete floors and was abused by both inmates and guards." [redacted], Tab K (7).
- Human rights organizations claim that hundreds of mentally ill men and women are "warehoused" in nightmare conditions in Jamaican prisons. [redacted], Tab K (7).
- Roger Neill an MCC psychiatric social worker witnessed the abuses mentally ill inmates face including sexual abuse, deprivation of basic hygiene supplies and lack of food. Many of these mentally ill prisoners have never been convicted of a crime. [redacted], Tab K (8).

[redacted]

- The United Nations Special Rapporteur was appalled by the conditions of detention, "which reflect a complete disrespect for human dignity of persons in conflict with the law." United Nations, Tab F (2).
- Police custody was considered as inhuman. Detainees are locked up in "overcrowded, filthy cells, infested with rats, cockroaches and lice, and with an unbearable stench to them. Many cells were in complete darkness, resembling caves with poor ventilation." United Nations, Tab F (2).
- Detainees are dependent on police officers for their ability to use the bathroom. When officers refused to allow detainees to use the restroom, they often urinate and defecate in plastic bags in front of other detainees. United Nations, Tab F (2).
- Detainees are held for long periods of time, including one detainee who was held in police custody for five years. United Nations, Tab F (2).
- The UN Rapporteur, Manfred Nowak, reported that the uprising at a maximum-security prison, Horizon Adult Remand Center, in February 2010 was due to the excessive force by officials at the prison against detainees. He also reported that many of the inmates had defensive injuries. Detainees told Mr. Nowak that police use pipes to beat them. Caribbean Daily News, Tab N.
- In a 2010 decision by the Third Circuit Court of Appeals, *Johnson v. Attorney General of the United States*, Dr. Irons Morgan testified that in her experience, "many persons who are deported and [who] suffer from mental illness...become[e] homeless...and sometimes...some of them get into trouble with the law." [redacted], Tab M (*2, Footnote 1).

[redacted]

- In *Johnson v. Attorney General*, Ms. Anderson testified that "a lot of mentally ill [inmates who are placed in hospital unit at a prison in Kingston] are abused...by other prisoners even sometimes by the warders." In a prison in Spanish Town, the mentally ill are "fence[d] off from the other prisoners because there were so many incidences of...sexual and physical abuse." Ms. Anderson also testified that "mentally ill prisoners are sexually abused and beaten 'more frequently than the regular inmates simply because [the mentally ill prisoners] would be less likely to lodge a complaint.'" [redacted] Tab M (*2, Footnote 2).

<u>Cancellation for Certain Permanent Residents</u>

The above evidence supports Respondent's claim for Cancellation of Removal for Certain Permanent Residents pursuant to INA § 240A(a). The Immigration Judge should balance the equities when determining whether a Respondent merits this relief. The Respondent was unable to present the attached evidence because he was both *pro se* and suffering from mental illness. The conditions of mental health facilities in Jamaica is a very significant factor that should be considered when the Immigration Judge balances the equities. In the instant case, the Immigration Judge considered only the U.S. Dept. of State Country Report on Human Rights, submitted by the DHS attorney, which, as the exhibits attached to this Motion to Remand indicate, is woefully insufficient to assess mental illness treatment in Jamaica.

Mental health facilities in Jamaica are poorly maintained, have little funding and have inadequately trained staff. [redacted] Tab E (438). There is only a handful of occupational therapist on the island no specific training programs in rehabilitation nursing. [redacted] Tab B (82). Most treatment is handled by 41 mental health officers who are responsible for around 14,000

[redacted]

cases. *Id.* at 85. The largest mental health facility in Jamaica, Bellevue Hospital, is described as having "goats grazing outside [and] it is not uncommon to see an out patient sitting on the grass hand cuffed or hand and feet bound waiting to be seen." [redacted] Tab E (437). Mental health facilities are stigmatized by poverty and madness. [redacted] Tab G. Also access to medication varies by district and newer medication is hard to find because of its high cost. [redacted] Tab B (81). There are no acute psychiatric in patient units outside of Kingston and psychotic patients are frequently admitted to general medical wards without specialist psychiatric care. [redacted], Tab E (437). In the order, the Immigration Judge made note that the last mental health evaluation Respondent received recommended follow-up visits from psychiatrist and the use of medications. (I.J. at 8). However, the attached evidence shows that there are little to no resources for this type of treatment. Therefore, on Remand, the Immigration Judge should consider the evidence that the mental health facilities in Jamaica are severely inadequate and the Respondent will have a low likelihood of receiving the care he needs. This should increase the positive factors in his favor and outweigh his negative factors.

When considering Respondent's family ties in the United States (his mother, brother, grandmother and son live in the United States) the Immigration Judge should consider that the Respondenthas no family in Jamaica. Therefore it is highly likely that Respondentwill become homeless due to his lack of family and a social safety net. [redacted], Tab J. Respondentalso has a history of homelessness. *See* Exh. 16, I.J. at _. Homeless Jamaicans suffer from a lack of housing availability and resources. *Id.* Respondent 's mental illness will likely cause him to become one of the many deported Jamaicans who are mentally ill and become homeless which leads to trouble with the law. [redacted], Tab M. Therefore, on Remand the

[redacted]

Immigration Judge should consider the attached evidence which strengthens Respondent's claim for Cancellation and tips the balance of the equities in his favor.

Asylum

The above evidence supports Respondent's claim for Asylum because it corroborates his testimony that he has a well-founded fear of future persecution based on his mental illness. Respondent will be persecuted by the government based on his membership in a particular social group (i.e. mentally ill Jamaicans). 8 C.F.R. § 1208.13 Respondent testified, "when people have nothing or are at a disadvantage, other Jamaicans will 'jump' you" (Tr. at 100). He also described himself as a "marked person" due to his mental illness. (Tr. at 115). Jamaicans with mental illness are stigmatized by Jamaican society. [redacted] Tab E (438). Respondent will likely become homeless because of his lack of family ties and his mental illness. [redacted] Tab J. A psychiatrist from the University of West Indies stated that out of the 650 homeless adults 60% are mentally ill and drug abusers while 10% are deportees. *Id.* Many of these mentally ill homeless Jamaicans end up in police custody. The Independent Jamaican Council for Human Rights, Tab C (2); [redacted] Tab M.

In one famous case a schizophrenic man, Alfred Nettleford, was incarcerated for 39 years after breaking a window without ever receiving a hearing. [redacted] Tab K (7); BBC News, Tab L. He suffered egregious treatment while in prison, he was reported as "incoherent and frail, he ate scraps from a garbage bag, slept on filthy concrete floors and was abused by both inmates and guards." [redacted], Tab K (7). His case is not abnormal. Roger Neill an MCC (Mennonite Central Committee) psychiatrist social worker witnessed the abuses mentally ill inmates face including sexual abuse, deprivation of basic hygiene supplies and lack of food. [redacted], Tab K

[redacted]

(8). Mr. Neill also reported that many of these mentally ill prisoners have never been convicted of a crime. [redacted] Tab K (8). The criminal laws control mentally ill Jamaicans by "treatment by incarceration", and many times mentally ill defendants do not receive a hearing. The Independent Jamaican Council for Human Rights, Tab C (4). The United Nations found that mentally ill Jamaicans who are suspected of a crime are not held in separate psychiatric institutions but are detained in a special area of a jail. United Nations, Tab F. The United Nations recommended that mentally ill detainees should be held in a separate secure psychiatric facility to receive treatment. *Id.* The Respondent only has to prove that there is a "ten percent chance that the [he] will be persecuted in the future" to establish a well-founded fear of persecution. *Al-Harbi v. INS,* 242 F.3d 882, 888 (9th Cir.2001). The attached evidence is sufficient to prove that Respondent has at least a 10% chance of persecution if he is removed to Jamaica because there is a pattern and practice of persecution of mentally ill Jamaicans on account of their status as Jamaicans who suffer from mental illness. The evidence also shows that the persecution is inflicted by the government, in particular police in prisons and police stations.

Withholding of Removal

The attached evidence also supports Respondent's application for withholding of removal. 8 C.F.R. § 1208.16. To be eligible for withholding of removal, Respondent must show there is a pattern or practice of persecution of mentally ill Jamaicans and that it is more likely than not that Respondent's freedom and life would be threatened upon return to Jamaica. *Id.* Although the "more likely than not" standard is a higher standard, the Immigration Judge does not have discretion to deny a valid application for withholding. *Matter of Lam,* 18 I&N Dec. 15 (BIA 1981). The same evidence that should be used to support Respondent's asylum claim

[redacted]

should be used to support his application for withholding of removal. (*See* Asylum section above). Therefore, it is morel likely than not that Respondent's freedom and life would be threatened because he will be detained by the police due to his mental illness.

Convention Against Torture

The attached evidence also supports Respondent's application for deferral of removal under the Convention Against Torture. To be eligible for withholding of removal under CAT, the burden of proof is on the applicant to establish that it is more likely than not that he will be tortured if removed to Jamaica. 8 C.F.R. § 1208.16(c)(2); *See also; Johnson v. Attorney General of the United States*, 2010 WL 1998785, 1* (3rd Cir. 2010). Torture is defined as the intentional infliction of severe pain or suffering by or at the acquiescence of public official or other person acting in an official capacity. *Johnson,* 2010 at *1.

In *Johnson v. Attorney General of the United States,* a mentally ill citizen of Jamaica who was a long time Legal Permanent Resident like Respondent was granted relief under CAT. *Id.* The Immigration Judge determined that upon removal to Jamaica, Mr. Johnson would "quickly regress and his symptoms will return, including hallucinations, hearing voices...His behavior will bring him to the attention of the police, who are not trained to deal with mentally ill individuals" and as a result "he will be arrested and detained." *Id.* at *2. The Immigration Judge also stated that the Jamaican government officers, in performance of their official duties, frequently and intentionally inflict severe pain or suffering upon mentally ill detainees and prisoners and do so in the knowledge that they will not be held accountable for their transgressions. *Id.* The Board of Immigration Appeals reversed the Immigration Judge however the Third Circuit reversed the

[redacted]

BIA because it did not explain why the Immigration Judge's conclusion was clearly erroneous. *Id.*

This holding can be supported by the attached evidence. Mr. Malfred Nowak, the United Nations Special Rapporteur to Jamaica, stated in his report that police custody was considered as inhuman. United Nations, Tab F (2). Detainees are locked up in "overcrowded, filthy cells, infested with rats, cockroaches and lice, and with an unbearable stench to them. *Id.* Many cells were in complete darkness, resembling caves with poor ventilation." *Id.* Detainees are dependent on police officers for their ability to use the bathroom. *Id.* When officers refused to allow detainees to use the restroom, they often urinate and defecate in plastic bags in front of other detainees. *Id.* Detainees are held for long periods of time, including one detainee who was held in police custody for five years. *Id.* Mr. Nowak also reported that the uprising at a maximum-security prison, Horizon Adult Remand Center, in February 2010 was due to the excessive force by officials at the prison against detainees. Caribbean Daily News, Tab N. He also reported that many of the inmates had defensive injuries and that detainees told him that police use pipes to beat them. *Id.*

This report is evidence of the abuse and suffering Respondent would receive if he was detained by the police in Jamaica. Therefore, Respondent's case should be remanded to the Immigration Judge for a new hearing so that he can present additional evidence that supports his CAT application.

Conclusion

For all of the foregoing reasons, Respondent, through counsel, prays that the Board of Immigration Appeals remand this case for a new hearing on the merits.

Respectfully submitted,

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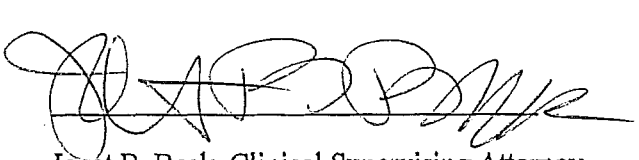
[redacted]

PROOF OF SERVICE

On October 7, 2010, I, Janet B. Beck, mailed a copy of this Motion to Remand via certified mail to the Office of the District Counsel/PIS, [redacted], TX [redacted].



10/7/10

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