

AMERICAN CIVIL LIBERTIES UNION FOUNDATION
IMMIGRANTS' RIGHTS PROJECT

DETAINED

Alice Clapman
Judy Rabinovitz
125 Broad Street, 18th Floor
New York, NY 10004
(212) 549-2676

ACLU FOUNDATION OF SOUTHERN CALIFORNIA
Ranjana Natarajan
Mark Rosenbaum
1616 Beverly Boulevard
Los Angeles, CA 90016
(213) 977-5236

Amici Curiae
Additional Amici Curiae - Next Page

**UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS**

In the Matter of:

File No.:

In removal proceedings

BRIEF OF AMICI CURIAE

ADDITIONAL AMICI CURIAE

CAPITAL AREA IMMIGRANTS' RIGHTS (CAIR) COALITION

Brittney Nystrom
1612 K Street NW, Suite 204
Washington, DC 20006
(202) 331-3320 ext. 20

NATIONAL IMMIGRATION PROJECT
OF THE NATIONAL LAWYERS GUILD

Paromita Shah
14 Beacon Street, Suite 602
Boston, MA 02108
(617)227-9727 ext.1

PENNSYLVANIA IMMIGRATION RESOURCE CENTER

Benjamin Yerger
50 Mount Zion Road
York, PA 17402
(717) 600-8099

INTRODUCTION

is a detained, mentally ill immigrant from in removal proceedings. He suffers from severe schizophrenia, which causes him to have delusions and, at least twice in the past, to attempt suicide. In his removal hearing, he appeared pro se, conceded removability, and applied for asylum, withholding of removal and relief under the Convention Against Torture. The immigration judge (IJ) denied his applications and ordered him removed. In reaching this conclusion, the IJ did not know about severe mental illness and therefore did not determine whether was competent to participate meaningfully in the hearing.

In his appeal to the Board of Immigration Appeals (“Board”), informed the Board of his mental illness and stated that because of his illness and delusions, he had not understood his hearing or testified properly. He also stated that his illness had led him to cause himself severe physical harm in the past, and that such harm would recur if he were deported to because he would not be able to obtain the medication he needs. The Board denied his appeal and affirmed the IJ’s decision. Despite his mental illness, and despite the fact that criminal proceedings against had been adjourned based on doubts about his competence, the Board did not remand to the IJ for a determination of competency.

moved to reopen or reconsider his case, submitting additional evidence of his mental illness. The evidence of his severe mental illness and possible disorientation at the hearing raises significant doubts about his competency to participate meaningfully in his hearing.¹ Therefore, the Board should remand the case for the IJ to determine

¹It is possible that mental condition has deteriorated further over the course of ten months spent in immigration detention. Mental health experts have found that United

competence. The IJ should consider all available evidence and make an explicit, written finding on competency. If the IJ finds _____ incompetent, the IJ should afford him additional procedural safeguards to enable him to exercise his rights to a full and fair removal hearing. Reopening is also warranted because _____, as a mentally ill person from _____, may be eligible for asylum, withholding of removal, or relief under the Convention Against Torture. The Board misapplied *Matter of J-F-F-* in denying his claims for relief.

The Immigration and Nationality Act (INA) and related regulations afford mentally incompetent non-citizens in removal proceedings certain procedural protections with regard to service of documents, admissions of removability, and presence in court. The statute and regulations also grant a panoply of procedural rights to all non-citizens in removal proceedings, including the rights to be advised of the charges, to retain counsel, to present evidence on one's behalf, to cross-examine government evidence, to present grounds for relief from removal, and to appeal an adverse IJ decision. An unrepresented incompetent person like _____, who cannot adequately understand the proceedings or present his defenses to removal, cannot exercise these rights without assistance. Therefore, the statute explicitly and implicitly authorizes procedural safeguards for incompetent non-citizens if necessary.

INTEREST OF AMICI

All of the amici have a direct interest in ensuring that the Constitutional, statutory, and regulatory rights of mentally ill non-citizens in removal proceedings are adequately safeguarded.

The ACLU is a nationwide, nonprofit, nonpartisan organization of more than 500,000 members dedicated to protecting the fundamental rights guaranteed by the Constitution and the

States immigration detention facilities fail to provide necessary mental health treatment and that, as a result, many immigrants experience a worsening of symptoms during their detention. See Rachel L. Swarns, *Asylum Seekers Suffer Psychological Setbacks in Detention, Study Finds*, N.Y. Times, Jun. 17, 2003, 2003 WLNR 5667595, at A22.

laws of the United States. The *Immigrants' Rights Project* of the ACLU engages in a nationwide program of litigation and advocacy to enforce and protect the civil and constitutional rights of immigrants. ACLU-IRP has a direct interest in ensuring that the rights of all non-citizens are protected in removal proceedings, including the significant number of non-citizens who are unrepresented and may be mentally incompetent.

The ACLU of Southern California (ACLU-SC) is a non-profit organization that promotes and protects constitutional and civil rights, including the rights of immigrants. The ACLU-SC assists and represents detained immigrants in Southern California, including those detained at the facility at which [redacted] is detained. Through this work, ACLU-SC has become familiar with the unique needs of detained, mentally ill non-citizens.

The Capital Area Immigrants' Rights (CAIR) Coalition represents detained immigrants in the Washington, D.C. area. CAIR provides immigrants detained by the Department of Homeland Security (DHS) with legal information, direct representation, and referrals to pro bono attorneys. Through this work, CAIR has encountered a growing number of mentally ill immigrants who face removal proceedings alone and are detained in conditions that exacerbate their illnesses.

The Pennsylvania Immigration Resource Center (PIRC) is a nonprofit, nonpartisan organization that advocates on behalf of immigrants detained in Pennsylvania prisons. PIRC provides direct legal services to mentally ill detained immigrants in immigration court, before the Board, and federal courts. PIRC also advocates for policy changes that would better protect mentally ill non-citizens in removal proceedings.

The National Immigration Project of the National Lawyers Guild is a legal support group specializing in defending the rights of immigrants facing deportation and incarceration. The

National Immigration Project provides legal support to immigration detainees and legal resources to detainees and the general public.

Amici present this brief in light of the importance of providing fair removal hearings to incompetent non-citizens and the urgent need to clarify appropriate procedures in this context. A significant number of non-citizens in removal proceedings are incompetent, unrepresented, and in need of protection. Incompetent non-citizens who lack assistance are particularly vulnerable to erroneous removal orders because their mental condition renders them unable to understand the proceedings and present their cases. Therefore, meticulous care must be taken to protect their statutory and constitutional due process rights, and additional procedural safeguards are appropriate. Immigration judges and the Board must ensure that the fairness of a non-citizen's removal hearing is not compromised because of his mental condition.

The Immigration and Nationality Act and corresponding regulations expressly protect the rights of incompetent non-citizens in removal proceedings. *See* INA 240(b)(3) (authorizing Attorney General to prescribe safeguards for non-citizens who cannot be present in court because of their mental incompetence); 8 C.F.R. § 1240.10(c) (prohibiting immigration judges from accepting admission of removability from an unrepresented, incompetent non-citizen, and requiring IJ's to hold a hearing on the issue); 8 C.F.R. § 1240.4 (allowing mentally incompetent non-citizen whose presence is made "impracticable" by reason of his mental incompetence, to have an attorney or other representative appear on his behalf); 8 C.F.R. § 103.5a(c)(2) (requiring DHS to serve charging documents upon known mentally incompetent person by service upon the most "responsible" person close to the incompetent person); 8 C.F.R. § 103.2(a)(2) (allowing legal guardians to sign court papers, including applications for relief, on behalf of mentally incompetent non-citizens).

The statute and regulations, however, do not define mental incompetence, set forth procedures for determining competence, or state what, if any, additional safeguards should be provided to a non-citizen found to be incompetent. Although the Department of Justice (DOJ) has acknowledged the need for further protections for incompetent non-citizens, both DOJ and DHS have failed to promulgate regulations providing any such protections. See Department of Justice, Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures, 62 Fed. Reg. 10312, 10322 (Mar. 6, 1997) (undertaking to “examine the issue [of providing guardians ad litem to incompetent respondents] and prepare a separate rulemaking at a later date”).

In this vacuum, the Board has issued unpublished decisions construing the statute and regulations to require immigration judges to take affirmative steps when doubts about a non-citizen’s competence arise. The Board, however, has not enunciated clear standards in these or other cases regarding the definition of incompetence, procedures for determining competency, or additional safeguards for incompetent non-citizens.² In one case to amici’s knowledge, the Board appeared to find that, even where an applicant’s demeanor raised significant doubts about his competence, the immigration judge had no obligation to inquire into competency absent “convincing evidence” of incompetence. Thus, there is no clear guidance for immigration judges as to how to proceed when faced with a possibly incompetent non-citizen.

² In previous decisions, however, the Board has affirmed the provision of procedural protections to an incompetent non-citizen, and held that incompetency may render an act giving rise to deportability involuntary. See *Matter of Stoytcheff*, 11 I.&N. Dec. 329, 1965 WL 12295 (BIA 1965) (approving hearing officer’s procedure of allowing committed incompetent non-citizen to be represented in exclusion proceedings by state hospital custodian, even though regulations only provided such protection to incompetent persons in deportation proceedings); *Matter of Sinclitico*, 15 I.&N. Dec. 320, 1975 WL 31509 (BIA 1975) (holding that non-citizen who was incompetent by virtue of mental illness had not voluntarily surrendered his U.S. citizenship because of his incompetence and terminating proceeding because government had failed to establish deportability on the basis of voluntary expatriation).

In light of the important statutory and constitutional due process interests at stake, this brief presents arguments regarding the appropriate standard for competence in removal proceedings, procedures for determining competence, and the procedural safeguards that may be necessary to protect a non-citizen found to be incompetent. Since these issues are raised by the facts of this case but not briefed by the parties, amici submit this brief to assist the Board in its determination of [redacted] motion to reopen the case.

ARGUMENT

I. STANDARD OF COMPETENCY AND PROCEDURES FOR DETERMINING COMPETENCY

Although the INA and regulations do not define competence to participate in removal proceedings, cases from the civil and criminal contexts make clear what it means to be competent in adversarial proceedings. A litigant is competent to participate in a court proceeding only if he has a rational and factual understanding of the proceedings against him *and* can present his case. *Dusky v. United States*, 362 U.S. 402 (1960) (defining competency in criminal cases); *Odle v. Woodford*, 238 F.3d 1084 (9th Cir. 2001) (using *Dusky* standard in criminal case); *United States v. 30.64 Acres of Land, More or Less, Situated in Klickitat County, Washington*, 795 F.2d 796, 805 (9th Cir. 1986) (defining competency in civil cases, relying in part upon *Dusky* standard). In criminal cases, where the litigant has appointed counsel, the litigant can “present his case” if he has the ability to rationally consult with counsel. *Dusky*, 362 U.S. at 402. In civil cases where the litigant is unrepresented, the litigant can “present his case” if he can represent himself effectively and present his arguments and defenses. *30.64 Acres of Land*, 795 F.2d at 805; *see also Blatch ex rel. Clay v. Hernandez*, 360 F. Supp.2d 595, 621-22 (S.D.N.Y. 2005) (requiring appointment of guardian or representative for public housing tenants incapable of “present[ing] [their] side of the issue”); *Bowen v. Rubin*, 213 F. Supp.2d 220, 223

(E.D.N.Y. 2001) (finding incompetent under the relevant state law civil litigants “incapable of adequately prosecuting or defending [their] rights”) (quotation marks omitted).

In addition, both civil and criminal cases makes clear that incompetency in adult litigants typically results from a mental disease, defect, or condition. *See, e.g., Pate v. Robinson*, 383 U.S. 375 (1966) (striking down criminal conviction, in light of defendant’s incompetency based on extensive history of mental illness); *Torres v. Prunty*, 223 F.3d 1103 (9th Cir. 2000) (same, in light of incompetency caused by defendant’s severe delusional disorder); *Allen v. Calderon*, 408 F.3d 1150 (9th Cir. 2005) (finding habeas petitioner incompetent based on schizophrenia and resulting symptoms). The presence of a mental disease or defect does not result in incompetency unless the condition results in the litigant’s inability to rationally understand the proceedings and to present his case. *See Nelson v. INS*, 232 F.3d 258, 262 (1st Cir. 2000) (finding that non-citizen’s allegations that she “forget[s] things and ... get[s] pain” did not amount to incompetency).

Competency is not satisfied by the litigant’s mere orientation to place and time and some recollection of events. *Dusky*, 362 U.S. at 402. It also requires “the mental acuity to see, hear and digest the evidence.” *Odle*, 238 F.3d at 1089 (citing *Dusky*, 362 U.S. at 402); *see also United States v. Veatch*, 842 F.Supp. 480, 482 (W.D. Okl. 1993) (finding criminal defendant to be incompetent because of paranoid disorder that prevented rational thought, despite evidence that he had a “calculating” factual understanding of the proceeding). Finally, because competency is fluid, courts must stay alert to circumstances suggesting that a litigant has become incompetent during the course of the trial. *Drope v. Missouri*, 420 U.S. 162, 181 (1975).

The procedures for determining competency likewise are widely accepted. When facts raise a bona fide doubt regarding a litigant’s competence, a court must inquire further and make

a determination of the litigant's competence. Federal courts apply this rule in civil cases. *Krain v. Smallwood*, 880 F.2d 1119, 1121 (9th Cir. 1989), *cert. denied*, 112 S.Ct. 78 (1991) (district court should conduct a hearing on competency if question exists regarding mental competence of party in civil proceeding); *30.64 Acres of Land*, 795 F.2d at 805 (same, applying Fed. R. Civ. P. 17(c)). Courts in criminal cases likewise apply this rule. *Drope*, 420 U.S. at 171 (trial court should have held competency hearing where evidence of mental illness raised bona fide doubt about defendant's competency); *Odle*, 238 F.3d at 1087 (same); *see also* 18 U.S.C. § 4241(a) (requiring trial court to grant competency hearing to criminal defendant upon a motion or sua sponte if there are reasonable grounds to believe that defendant is incompetent).³

Doubt about competency may be raised by a variety of evidence. Courts generally look to three types of evidence: a litigant's history of irrational behavior or mental illness, his demeanor in court, and any prior medical or official opinions as to his competency. *Drope*, 420 U.S. at 180; *Torres*, 223 F.3d at 1108-09. *See e.g. United States v. Loyola-Dominguez*, 125 F.3d 1315 (9th Cir. 1997) (doubt about competency raised by defendant's suicide attempt on the eve of trial and genuine confusion about the proceedings); *30.64 Acres of Land*, 795 F.2d at 797-98 (doubt raised by Social Security agency determination that civil defendant was completely mentally disabled); *Allen v. Calderon*, 408 F.3d 1150 (9th Cir. 2005) (doubt raised by allegations of incompetency by plaintiff and fellow inmate and letter from plaintiff's psychiatrist noting his diagnosis and treatment for schizophrenia); *United States v. Jones*, 336 F.3d 245 (3^d Cir. 2003)

³ Courts use a number of phrases to describe the quantum of doubt that gives rise to a requirement of further inquiry into competency. The Ninth Circuit has held, in the criminal context, that "sufficient doubt," "good faith doubt," "genuine doubt," "reasonable doubt," "reasonable grounds," and "substantial question" are functionally equivalent and "describe the same constitutional standard." *Chavez v. United States*, 656 F.2d 512, 516 n.1 (9th Cir. 1981).

(doubt raised by defendant's mental illness and failure to consistently take his psychiatric medications).

One type of evidence may, by itself, raise sufficient doubt to require a competency determination. *Drope*, 420 U.S. at 172 n.9; *Chavez v. United States*, 656 F.2d 512, 517-18 (9th Cir. 1981) ("One item of evidence, such as a psychiatric report, might be so probative of incompetence that its presence alone requires a hearing."). Moreover, courts must not place too much emphasis on calm courtroom demeanor, which can be misleading. *Odle*, 238 F.3d at 1088-89 (noting that court's "personal observations" could not overcome doubt raised by medical evidence). Nor may a court dismiss doubts about competency simply because the litigant can answer simple questions. *Miles v. Stainer*, 108 F.3d 1109, 1112-13 (9th Cir. 1997) (brief plea colloquy consisting mostly of yes-or-no answers insufficient to dispel doubts about competency); *United States v. Williams*, 113 F.3d 1155, 1160 (10th Cir. 1997) ("That defendant can recite the charges against her, list witnesses, and use legal terminology are insufficient for proper assistance in the defense requires an understanding that is rational as well as factual.").

The issue of competency need not be raised by the allegedly incompetent litigant. Since an incompetent litigant by definition cannot present his case, it would be illogical to require him to raise the issue of his own incompetence. *30.64 Acres of Land*, 795 F.2d at 805 (holding that pro se civil plaintiff's failure to request a guardian ad litem in light of his incompetence was not fatal because "an incompetent person cannot be held to compliance with technical rules"); *Pate*, 383 U.S. at 384 (noting that it would be impossible for incompetent criminal defendant to knowingly and intelligently waive his right to have the court determine his competency).

Procedures for determining competency vary somewhat between criminal and civil cases. At a minimum, however, courts must make a reasoned determination based on all relevant

evidence. In both criminal and civil cases, evidence of mental disease or defect is relevant. *See Drope*, 420 U.S. at 162-171; *Odle*, 238 F.3d at 1087; *Allen v. Calderon*, 408 F. 3d at 1152-53. The litigant's behavior in court is likewise relevant. *See Torres*, 223 F.3d at 1108-10 (defendant's "unusual and self-defeating" courtroom behavior indicated possible incompetence); *Blatch v. Hernandez*, 360 F.Supp.2d at 619 (noting that tenants' disturbed behavior during administrative eviction proceeding should have alerted hearing officer to possible incompetence). Prior determinations of incompetency are also relevant. *See United States v. Caplan*, 633 F.2d 534, 539 (9th Cir. 1980) (noting relevance of past and current psychiatric reports in determining competency of criminal defendant).

In criminal cases, courts may order a psychiatric evaluation of a defendant and consider the resulting report in the competency hearing. *See* 18 U.S.C. 4241(b) (authorizing court to order psychiatric examination of criminal defendant whose competence is at issue).⁴ They may allow the defendant to cross-examine adverse evidence. *See also* 18 U.S.C. 4247(d) (requiring courts to receive evidence and allow cross-examination of evidence at competency hearing for criminal defendants). Also, they may consider the opinion of counsel for the incompetent litigant. *Torres*, 223 F.3d at 1109 (noting that trial court should have considered statements by criminal defendant's counsel showing that defendant could not assist in conducting his defense). Courts must ensure that the incompetent defendant's statements made during a competency hearing are not held against him in his criminal proceeding. *Estelle v. Smith*, 451 U.S. 454 (1981) (statements made by criminal defendant in competency hearing could not be held against

⁴ An expert report must be viewed in the context of the evidence as a whole and cannot substitute for the court's determination of competency. *See Moore v. United States*, 464 F.2d 663 (9th Cir. 1972) (reversing where trial court relied on conclusory expert statement that defendant was competent despite strong evidence to the contrary); *Chavez v. United States*, 656 F.2d 512, 516-17 (9th Cir. 1981) (competency hearing and determination required where evidence as a whole raises doubt, even if expert medical report indicates competence).

him in liability or penalty phases of trial because he made no voluntary and intelligent waiver of privilege against self-incrimination).

In civil cases, although the procedures applied to determine competency are not as well-defined, the procedures used must satisfy due process. *See Thomas v. Humfield*, 916 F.2d 1032, 1035 (5th Cir. 1990) (holding that although federal court need not follow state procedure to determine competency, the procedure used must satisfy due process). Courts may require an adverse party to disclose to the court evidence of possible incompetence of the litigant. *See Blatch*, 360 F. Supp. 2d at 625-26 (noting housing authority's duty to inform court of possible incompetence of tenants it sought to evict). Finally, courts should protect the privacy of the allegedly incompetent litigant by holding information on incompetency confidential, under a protective order or under seal. *See generally* Fed. R. Civ. P. 26(c); *Blatch*, 360 F.Supp.2d at 626 (noting that incompetent tenants' privacy rights may be protected by allowing housing authority to present evidence of incompetence confidentially or in camera to court).

These rules regarding competency are applied to protect the procedural due process rights of both criminal defendants and civil litigants, in recognition of the fact that a proceeding held against a person who cannot understand or defend himself is fundamentally unfair. *See Drope*, 420 U.S. at 171 (explaining that common law prohibition against trying a criminal defendant during the period of his incompetence protects due process rights to a fair trial); *Cooper v. Oklahoma*, 517 U.S. 348 (1996) (same, explaining unfairness of conducting proceeding against someone who could not prepare his defense on account of mental condition); *30.64 Acres of Land*, 795 F.2d at 805 (noting that failure to appoint guardian ad litem for incompetent civil litigant jeopardized his due process rights).

The immigration statute and regulations implicitly require determinations of competency in accordance with the standards and procedures set forth above. Because the INA and regulations thereunder explicitly protect the procedural rights of incompetent non-citizens, *see* INA Section 240(b)(3); 8 C.F.R. § 1240.10(c); 8 C.F.R. § 1240.4; 8 C.F.R. § 103.5a(c)(2); 8 C.F.R. § 103.2(a)(2), immigration judges must, as a threshold matter, determine competency to ensure that these statutory and regulatory protections are applied to those found incompetent.

Due process also requires immigration courts to apply competency rules and procedures in removal cases. The Fifth Amendment “entitles aliens to due process of law in deportation proceedings.” *Reno v. Flores*, 507 U.S. 292, 306 (1993). In removal proceedings, the touchstone of due process is “fundamental fairness.” *Saidane v. INS*, 129 F.3d 1063, 1065-66 (9th Cir. 1997); *Volkova v. Reno*, 232 F.3d 1042, 1045 (9th Cir. 2000). Due process requires “the opportunity to be heard at a meaningful time and in a meaningful manner.” *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). Non-citizens in removal cases have important due process interests in avoiding the grave, lifelong consequences of deportation. *Bridges v. Wixon*, 326 U.S. 135, 154 (1945). As in criminal and civil cases, the risk of erroneous judgment is greatly increased in a removal hearing with an incompetent litigant who has no assistance in presenting his case. The burden of holding competency hearings and making competency determinations is far outweighed by the non-citizen’s and the government’s interests in avoiding an erroneous order of removal. Therefore, due process requires immigration judges to apply the standards and procedures for determining competency in removal proceedings.

In this case, given the evidence of ongoing diagnosis and treatment for schizophrenia, the extent of his mental illness history, the prior adjournment of his criminal proceeding based on doubts about competence, and his statements regarding confusion at the

removal hearing, doubt has certainly been raised as to his competence. Therefore, the Board should reopen and remand to the IJ for a hearing and determination of his competence.

II. NON-CITIZENS WHO ARE FOUND TO BE INCOMPETENT SHOULD BE PROVIDED ADDITIONAL PROCEDURAL SAFEGUARDS AS NECESSARY

A. Statutory Protections for Incompetent Non-Citizens

The Immigration and Naturalization Act (INA) explicitly affords incompetent litigants certain protections. In addition, the statute provides all litigants a panoply of procedural rights to ensure full and fair removal hearings. As explained below, incompetent litigants cannot exercise these statutory rights without additional procedural protections. Taken together, these INA provisions require additional safeguards to ensure fair hearings to incompetent litigants.

Section 240(b)(3) of the INA provides that in cases where an alien cannot be present at his hearing because of mental incompetence, the Attorney General must “prescribe safeguards to protect the rights and privileges of the alien.” The Board has interpreted Section 240(b)(3) broadly to apply not only to cases where incompetence causes the physical absence of a non-citizen, but also to cases where incompetence causes mental absence from the hearing. *See Matter of ___* (BIA El Paso, Feb. 19, 2002), attached hereto as Exh. 1, at 1. This interpretation of Section 240(b)(3) accords with the well-settled understanding that an incompetent litigant is functionally absent from the court proceeding. *See Mohamed v. Gonzales*, 477 F.3d 522, 2007 WL 284337, at *3 (8th Cir. 2006) (“A mentally incompetent person, although physically present, is absent from the hearing for all practical purposes”) (quoting *Drope*, 420 U.S. at 171).

Regulations promulgated under INA Section 240(b)(3) provide additional procedural protections to incompetent non-citizens. First, an IJ may not accept an admission of removability from an unrepresented incompetent non-citizen and must hold a hearing on the

issue instead. 8 C.F.R. § 1240.10(c). Second, if the presence of a mentally incompetent non-citizen is made “impracticable” by reason of his incompetence, an attorney, custodian, or suitable representative may appear on his or her behalf. 8 C.F.R. § 1240.4. Third, when serving the charging document upon a known incompetent person, DHS must serve the document upon the most “responsible” person close to him or her. 8 C.F.R. § 103.5a(c)(2). Finally, legal guardians may sign court papers, including applications for relief, motions, and other requests, on behalf of incompetent non-citizens. 8 C.F.R. § 103.2(a)(2).⁵

In two unpublished decisions, the Board recognized that the INA protects incompetent non-citizens’ ability to participate meaningful in their removal hearings. *See Matter of ___*, appended hereto as Exh. 1 (El Paso Feb. 19, 2002) (holding that IJ had erred in failing to assess non-citizen’s competence where IJ had doubts about his mental condition based on non-citizen’s bizarre behavior in court); *Matter of ___*, appended hereto as Exh. 2 (Seattle Sept. 21, 2001) (remanding case to IJ based on evidence that non-citizen was incompetent to waive his right to counsel, and instructing IJ to “take any actions necessary to ensure a full and fair hearing”).

The INA also provides *all* non-citizens with procedural rights to ensure full and fair removal hearings. Mentally incompetent litigants cannot avail themselves of these rights without

⁵ In addition, the United Nations High Commissioner For Refugees’ *Handbook On Procedures And Criteria For Determining Refugee Status Under The 1951 Convention And The 1967 Protocol Relating To The Status of Refugees* (Geneva 1992) (hereinafter, *Handbook*) calls for additional protections for mentally incompetent asylum-seekers. The *Handbook*, which has been recognized by the Supreme Court as persuasive authority on asylum issues, *see INS v. Cardoza-Fonseca*, 480 U.S. 421, 439 n.22 (1987), recommends that when dealing with mentally incompetent asylum applicants, government officials should obtain expert medical advice regarding the applicant’s ability to fulfill the legal requirements of presenting her case. *Handbook*, ¶¶ 207-08. If the expert concludes that an applicant’s ability is limited, her burden of proof must be lightened, and officials should seek corroborating information from the applicant’s friends, relatives, guardians, or close acquaintances. *Id.* ¶ 210. Officials should make a more searching investigation into such a case, “using whatever outside sources of information may be available.” *Id.* ¶ 212.

additional procedural protections. INA Section 240(b)(4)(A) provides non-citizens the right to have counsel of their own choosing at no expense to the government. This statutory right, which stems from a constitutional guarantee of due process, *Hernandez-Gil v. Gonzales*, 476 F.3d 803, 806 (9th Cir. 2007); *Rios-Berrios v. INS*, 776 F.2d 859, 862-64 (9th Cir. 1985), includes a reasonable time to locate counsel and to permit counsel to prepare for the hearing, *Biwot v. Gonzales*, 403 F.3d 1094, 1098-99 (9th Cir. 2005). Any waiver of this right must be knowing and voluntary. *Biwot*, 403 F.3d at 1100; *Tawadrus v. Ashcroft*, 364 F.3d 1099, 1103 (9th Cir. 2004). An incompetent non-citizen may lack the ability to locate and retain counsel without assistance. Also, as the Board has recognized, he may be unable to make a “knowing and voluntary” waiver of his right to counsel because of his mental condition. *Matter of ___* (BIA Seattle Sept. 21, 2001), Exh. 2, at 2 (remanding in part for IJ to assess whether non-citizen was mentally competent to waive counsel).

INA Section 240(b)(4)(B) grants all non-citizens in removal hearings the rights to examine adverse evidence, to present favorable evidence, and to cross-examine government witnesses. This statutory right also stems from the due process right to full and fair hearings through presentation, confrontation, and cross-examination of evidence. *Hernandez-Guadarrama*, 394 F.3d 674, 681, n.11 (9th Cir. 2005); *see also Kaur v. Ashcroft*, 388 F.3d 734, 737-38 (9th Cir. 2004) (IJ’s failure to allow non-citizen to present witness violated her due process right to full and fair removal hearing). Again, a mentally incompetent non-citizen likely cannot exercise these rights, due to his mental condition, without assistance.

Without additional procedural safeguards, incompetent non-citizens could not avail themselves of the protections Congress deemed crucial to the fair adjudication of removal proceedings. Therefore, additional procedural safeguards may be necessary for non-citizens

found to be incompetent. *Cf. Gagnon v. Scarpelli*, 411 U.S. 778, 786 (1973) (finding that, for procedural rights guaranteed parolees to be effective, courts must ensure that, if necessary, parolees receive assistance in exercising these rights).

Section 240(b)(1) of the INA implicitly authorizes IJ's to order additional procedural safeguards for incompetent non-citizen litigants. Section 240(b)(1) grants IJs broad authority to conduct hearings, receive evidence, subpoena witnesses and evidence, examine and cross-examine witnesses, and sanction parties. This section imposes upon IJ's the duty to "fully and fairly" develop the record to ensure fair removal hearings, especially when non-citizens appear *pro se*. *Jacinto v. INS*, 208 F.3d 725, 732-34 (9th Cir. 2000). Faced with an incompetent litigant who cannot present his defenses to removal, retain counsel, or present evidence supporting his case because of his mental condition, an IJ must order additional safeguards as necessary to ensure a "full and fair" hearing.

B. Construing The INA To Authorize Additional Safeguards For Incompetent Non-Citizens Would Avoid Serious Constitutional Due Process Concerns

If the statute were construed to permit IJ's to hold hearings with incompetent non-citizens without providing any additional procedural safeguards, serious Fifth Amendment due process questions would arise, as explained below. Any uncertainty in the scope and meaning of INA Section 240 and corresponding regulations should be resolved in favor of a construction that avoids constitutional due process questions. *See Zadvydas v. Davis*, 533 U.S. 678, 689 (2001) ("It is a cardinal principle of statutory interpretation . . . that when an Act of Congress raises a serious doubt as to its constitutionality, this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.")

The Fifth Amendment "entitles aliens to due process of law in deportation proceedings." *Reno v. Flores*, 507 U.S. 292, 306 (1993). Due process requires "the

opportunity to be heard at a meaningful time and in a meaningful manner.” *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). This general right encompasses several procedural rights, including the rights: to be advised of the charged grounds for removal, *Hirsch v. INS*, 308 F.2d 562, 567 (9th Cir. 1962); to retain counsel, *Rios-Berrios v. INS*, 776 F.2d 859, 862-64 (9th Cir. 1985); to present evidence on one’s own behalf, cross-examine government evidence, and present grounds for relief from removal, *Hernandez-Guadarrama v. Ashcroft*, 394 F.3d 674 (9th Cir. 2005); *Ladha v. INS*, 215 F.3d 889, 903-04 (9th Cir.2000); to receive effective assistance of counsel, *Lopez v. INS*, 775 F.2d 1015, 1017 (9th Cir.1985); and to appeal an adverse IJ decision, *Garcia-Cortez v. Ashcroft*, 366 F.3d 749, 753 (9th Cir. 2004).

Without any additional procedures to assist them, incompetent non-citizens likely would be deprived of these procedural due process rights, and would not receive a “full and fair” hearing, with a reasonable opportunity to present their cases, because of their mental condition. In light of the important statutory interests at stake, the risk of erroneous deprivation of a fair removal hearing, and the considerable benefit to the non-citizen of procedural safeguards and the negligible additional burdens to the government of providing such safeguards, it would violate due process to hold removal proceedings against incompetent non-citizens without providing additional safeguards. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). Therefore, to avoid an unconstitutional result, the INA and regulations should be construed to require additional procedural safeguards for incompetent non-citizens.⁶

⁶ The Ninth Circuit has never held that due process is satisfied when an incompetent non-citizen is subjected to a removal proceeding without any procedural safeguards. In *Nee Hao Wong v. INS*, 550 F.2d 521 (9th Cir. 1977), the Ninth Circuit rejected the claim of an incompetent non-citizen who claimed a due process violation based on the conduct of the removal proceeding during the period of his incompetence, even though he was represented by counsel, present in court, and assisted by his legal guardian. In that case, the Ninth Circuit concluded that due process was satisfied because he was adequately assisted and represented and because it found

C. Additional Safeguards Include Appointed Counsel And Guardian Ad Litem And May Include Relaxed Evidentiary Burdens

In criminal cases, a finding of incompetency results in the suspension of trial until such time as the defendant regains competency. Even though a criminal defendant has assistance from appointed counsel, because the consequences of an erroneous adverse judgment are too great, trial is suspended. No procedural changes are deemed sufficient to outweigh the risk of error. In contrast, a finding of incompetency in civil cases results in additional procedural safeguards, including the appointment of a guardian ad litem or counsel, and relaxing of the litigant's evidentiary burden.

In removal hearings, in light of the complexity of the proceeding and the grave consequences of an erroneous removal order, a strong case can be made for following the criminal approach and suspending removal proceedings until such time as the non-citizen regains his competency. Indeed, under existing administrative practice, an immigration judge may administratively close a case, thereby temporarily removing it from the court's calendar without a final determination, when appropriate. *Matter of Gutierrez-Lopez*, 21

that he had suffered no prejudice in presenting his claims for relief. *See also Sanchez-Salvador v. INS*, 33 F.3d 59 (9th Cir. 1994) (rejecting due process claim by incompetent non-citizen who had received a full and fair hearing because he had been represented by counsel and had presented strong claim for relief from removal). Similarly, no other circuit has upheld a removal proceeding against an unassisted, incompetent non-citizen who is not provided procedural safeguards. *See Nelson v. INS*, 232 F.3d 258 (1st Cir. 2000) (holding that immigration judge's failure to require custodian or other party to appear on behalf of non-citizen in accordance with regulations did not violate due process because the non-citizen's complaints of pain and forgetfulness did not rise to level of incompetence); *Brue v. Gonzales*, 464 F.3d 1227, 1233-34 (10th Cir. 2006) (rejecting non-citizen's due process claim based on immigration judge's failure to determine competency because non-citizen had been represented by counsel and because he suffered no prejudice in presenting his citizenship claim); *United States v. Mandycz*, 447 F.3d 951, 962 (6th Cir. 2006) (holding that conduct of denaturalization case against incompetent person did not violate due process because his interests were adequately protected by appointed guardian ad litem and because he assisted in his defense for several years prior to becoming incompetent).

I.&N. Dec. 479, 480 (BIA 1996); *Matter of Amico*, 19 I.&N. Dec. 652, 654 (BIA 1988).

Although administrative closure may be used only if both parties assent, it should be required in cases involving incompetent non-citizens, especially those cases in which, for example, a psychiatrist has indicated that an incompetent non-citizen soon will regain his competence, where a guardian ad litem requires a longer period of time to investigate the facts and present the incompetent non-citizen's claims for relief from removal, or where subjecting an incompetent respondent to removal proceedings is likely to further destabilize his/her condition.

Absent suspension of a removal proceeding via administrative closure, in order to minimize the risk of an erroneous removal order, immigration courts must at least appoint counsel and a guardian ad litem for a non-citizen found incompetent. In addition, for those cases where factual development is crucial, it may be necessary to relax evidentiary burdens.

First, appointment of counsel is necessary to ensure that incompetent non-citizens receive the fundamentally fair hearing to which they are entitled. Courts have recognized that appointment of counsel might be warranted in individual cases in order to ensure fairness in removal hearings. *Aguilera-Enriquez v. INS*, 516 F.2d 565, 568 & n.3 (6th Cir. 1975) ("Where an unrepresented indigent alien would require counsel to present his position adequately to an immigration judge, he must be provided with a lawyer at the Government's expense."). *See also United States v. Campos-Asencio*, 822 F.2d 506, 509 (5th Cir. 1987) (noting that "an alien has a right to counsel if the absence of counsel would violate due process under the fifth amendment") Because of the unique vulnerability of incompetent litigants, as well as the complexity of immigration law and the fundamental interests at stake in removal hearings, lack of appointed counsel for incompetent non-citizens in removal

proceedings would render their hearings fundamentally unfair in violation of both the statute and the Fifth Amendment.

Indeed, even when competence is not at issue, the complexity of immigration law means that counsel is often necessary to gather relevant facts and develop legal arguments. *See Castro-O’Ryan v. INS*, 847 F.2d 1307, 1312 (9th Cir. 1988) (observing that INA is “second only to the Internal Revenue Code in complexity” (quotation marks omitted)); *Reyes-Palacios v. INS*, 836 F.2d 1154, 1155 (9th Cir. 1988) (“[t]he importance of counsel, particularly in asylum cases where the law is complex and developing, can neither be overemphasized nor ignored”); *see also Partible v. INS*, 600 F.2d 1094, 1096 (5th Cir. 1979) (finding due process violation where IJ failed to convey to Partible “the complexity of her dilemma,” and where Partible waived her right to counsel “without any awareness of the cogent legal arguments which could have been made on her behalf). In other contexts as well, courts have indicated that the complexity of particular proceedings may warrant appointment of counsel. *See, e.g., Gagnon*, 411 U.S. at 786-87 (holding that in some parole revocation hearings, counsel must be appointed for parolees “where the presentation requires the examining or cross-examining of witnesses or the offering or dissecting of complex documentary evidence”).

The protections provided by counsel are even more important for incompetent persons, who are uniquely vulnerable to erroneous removal orders because of their mental condition. In other contexts, the Supreme Court has recognized that incompetent litigants are uniquely vulnerable and require legal assistance. Prior to establishing a blanket right to appointed counsel in criminal felony cases in *Gideon v. Wainwright*, the Court adopted a rule appointing counsel for incompetent criminal defendants based on the unique

circumstances of mental incompetence. *Massey v. Moore*, 348 U.S. 105, 108-09 (1954) (“No trial can be fair that leaves the defense to a man who is insane, unaided by counsel, and who by reason of his mental condition stands helpless and alone before the court.”); *see also McNeal v. Culver*, 365 U.S. 109, 114 (1961) (finding due process violation where defendant, despite his mental illness and “ignorance,” was forced to proceed *pro se*).

Finally, appointment of counsel for incompetent non-citizens in removal proceedings is needed because of the important interests at stake. It is undisputed that non-citizens facing deportation have important interests in remaining in the country if lawfully permitted. The interests at stake in removal proceedings are among the most fundamental. *See Bridges*, 326 U.S. at 154; *Landon v. Plasencia*, 459 U.S. 21, 34 (1982) (noting that removal may deprive an immigrant of his home, his work, and even his family, interests that “rank[] high among the interests of the individual”); *Wong Yang Sung v. McGrath*, 339 U.S. 33, 50 (1950) (recognizing that removal raises “issues basic to human liberty and happiness and, in the present upheavals in lands to which aliens may be returned, perhaps to life itself”). In other civil contexts, the Supreme Court has held that counsel should be appointed when necessary to protect an individual’s fundamental interests. *See Vitek v. Jones*, 445 U.S. 480, 496-97 (1980) (requiring appointed representative for prisoners facing involuntary psychiatric hospitalization given the prisoners’ fundamental interests in their physical liberty); *Lassiter v. Department of Social Services*, 452 U.S. 18, 26, 31 (1981) (holding that appointment of counsel may be necessary in some cases involving termination of parental rights given the parents’ fundamental interests in preserving their relationship with their children); *Gagnon*, 411 U.S. at 790-91 (requiring appointed counsel in parole revocation

hearings under certain circumstance, given parolees' fundamental interest in physical liberty).⁷

In addition to counsel, appointment of a guardian ad litem is necessary to safeguard an incompetent non-citizen's rights since otherwise the respondent will be unable to direct counsel as to his or her desires. Indeed, federal courts regularly appoint guardians ad litem for represented, incompetent civil litigants at counsel's request. *See, e.g.*, Fed. R. Civ. P. 17(c); *Bowen v. Rubin*, 213 F. Supp.2d 220, 224-25 (E.D.N.Y. 2001) (guardians ad litem appointed to direct counsel and make litigation decisions); *Blatch v. Hernandez*, 360 F. Supp. 2d at 595. Courts have also appointed guardians ad litem in removal cases involving infants who, like mentally incompetent adults, cannot defend themselves in court. *See Johns v. Department of Justice*, 624 F.2d 522, 524 (5th Cir. 1980) (appointing, on due process grounds, guardian ad litem for four-year old in deportation proceedings to protect child's interest in avoiding deportation). A guardian ad litem stands in the stead of the incompetent litigant to protect his or her interests in the litigation. *30.64 Acres of Land*, 795 F.2d at 805. *See also United States v. Mandycz*, 447 F.3d 951, 962 (6th Cir. 2006) (due process requires court in civil case to appoint guardian ad litem for incompetent party and to ensure that the guardian protects the party's interests); *Krain*, 880 F.2d at 1121. A guardian ad litem's role is limited to the specific litigation for which he is appointed and does not include any control over the litigant's other affairs.

⁷ Section 292 of the INA, which allows non-citizens to be represented by counsel of their own choice "at no expense to the government," does not in any way imply a prohibition against appointed counsel in particular cases. This provision merely clarifies that there is no general statutory right to appointed counsel paid for by the government in all removal hearings. It does not exclude the possibility of appointed counsel in particular cases where fundamental fairness would require it. Moreover, it would raise serious constitutional concerns were the Board to read § 292 as prohibiting the appointment of counsel in cases involving incompetent non-citizens.

Even if the Board concludes that the appointment of counsel and a guardian ad litem are not necessary in every case involving incompetent non-citizens, courts must at least determine whether these are necessary safeguards based on the facts of particular cases. In addition, courts must consider whether relaxing the evidentiary burdens may be necessary to safeguard an incompetent non-citizen's rights. For example, if an incompetent non-citizen, despite being represented, cannot gather the factual evidence necessary to support his claims for relief from removal because of his mental condition, it would be unfair to hold him to the same evidentiary burdens to which other litigants are held. In such cases, an immigration judge may "fully and fairly" develop the record by taking judicial notice of country conditions or facts known to the court regarding a particular claim for relief, or a judge may ease the incompetent non-citizen's evidentiary burden.⁸ *Cf. Agyeman v. INS*, 296 F.3d 871, 877 (9th Cir.2002) (quoting *Key v. Heckler*, 754 F.2d 1545, 1551 (9th Cir.1985)) (stating "it is critical that the IJ 'scrupulously and conscientiously probe into, inquire of, and explore for all relevant facts' "); *Jacinto v. INS*, 208 F.3d 725, 733-34 (9th Cir. 2000) (IJs have particular obligation to develop the record where a non-citizen is pro se, because non-citizens generally lack legal knowledge and face language barriers); *Secaida-Rosales v. INS*, 331 F.3d 297, 306 (2d Cir.2003) ("IJ has an affirmative obligation to help establish and develop the record" in asylum proceedings involving pro se aliens).

In _____ case, the Board should make clear that if he is found incompetent, the immigration judge should provide him additional safeguards, including appointed counsel and a

⁸ The Asylum Handbook also contemplates the easing of evidentiary burdens for incompetent asylum-seekers. See *Asylum Handbook* ¶ 210 ("Where the expert concludes that an applicant's ability is limited, it is "necessary to lighten the burden of proof normally incumbent upon the applicant, and information . . . may have to be sought elsewhere, e.g. from friends, relatives, and other persons closely acquainted with the applicant, or from his guardian, if one has been appointed.").

guardian ad litem. In addition, if his mental condition prevents his representatives from gathering crucial facts in support of his claims for relief, the Board should make clear that the IJ may relax the relevant evidentiary burdens.

III. CASE SHOULD BE REMANDED

case should be remanded for three reasons. First, he may not have had a fair hearing, since his competency was not determined and since, if he is incompetent, he was not provided any procedural safeguards. Second, on his motion to reopen, he submitted new evidence indicating that he may be eligible for asylum, withholding of removal, and /or relief under the Convention Against Torture as a mentally ill person from .⁹ Amici submit additional evidence on that issue herein, which should be considered despite its lateness in light of impaired mental condition, which prevented him from submitting more evidence previously. Third, the Board misapplied *Matter of J-F-F-* to incorrectly deny his claims for relief.

First, remand is appropriate because hearing was unfair. Failure to determine competency once it is in doubt and failure to provide additional safeguards to an incompetent non-citizen are inherently prejudicial in that they render a hearing fundamentally

⁹ satisfied the requirements of a motion to reopen by submitting additional evidence casting further doubt on his competence and new evidence regarding his eligibility for asylum and withholding. 8 C.F.R. § 1003.2(c)(1). To the extent the Board believes that he did not satisfy the motion to reopen regulation because the evidence was not newly discovered, it should nevertheless remand the case on equitable grounds. It would be unfair to require an unassisted mentally incompetent litigant to satisfy technical rules. The Ninth Circuit has made clear that equitable considerations sometimes may trump the motion to reopen regulation. *See, e.g., Rodriguez-Laris v. INS*, 282 F.3d 1218, 1224 (9th Cir. 2002) (numerical limit on motion to reopen equitably tolled because non-citizen suffered ineffective assistance of counsel); *Iturribarria v. INS*, 321 F.3d 889, 897-99 (9th Cir. 2003) (time limit on motion to reopen equitably waived because non-citizen was subject to ineffective assistance of counsel). Given his mental illness and history, the equities weigh heavily in favor of remanding case.

unfair. Thus, no further prejudice needs to be shown.¹⁰ However, even if the Board believes that prejudice must be shown, [redacted] easily meets the prejudice standard. As set forth below, [redacted] has a bona fide claim for asylum and withholding of removal based on his membership in a group of mentally ill persons from [redacted]. The IJ's failure to determine competency, and to provide him with the procedural safeguards which a finding of incompetence would require, prevented him from pursuing and presenting these claims for relief. Because the outcome of his proceedings "may have been affected" by these errors, he has established prejudice. *Maravilla-Maravilla v. Ashcroft*, 381 F.3d 855, 858-59 (9th Cir. 2004).¹¹

Second, remand is appropriate to consider more fully, in light of additional evidence, [redacted] s claims for asylum, withholding of removal, and CAT relief. The Board and DHS have recognized that mentally ill persons may be eligible for asylum and withholding of removal

¹⁰ In an analogous context, other circuits have held that a non-citizen whose right to counsel was denied need not show prejudice because such a right is to "important and fundamental" to a fair hearing, and so grounded in statutory and constitutional due process rights, that prejudice may be presumed from a violation. See *Snajder v. INS*, 29 F.3d 1203, 1207 (7th Cir. 1994) (quoting *Castaneda-Delgado v. INS*, 525 F.2d 1295, 1300 (7th Cir. 1975)); *Cheung v. INS*, 418 F.2d 460, 464 (D.C. Cir. 1969); *Montilla v. INS*, 926 F.2d 162, 168 (2d Cir. 1991). The Ninth Circuit has not approved or rejected this rule. *Hernandez-Gil v. Gonzales*, 476 F.3d 803, 808 (9th Cir. 2007). Like the denial of counsel, the denial of a determination of competency and procedural safeguards for an incompetent litigant make a hearing fundamentally unfair, *Drope*, 420 U.S. at 171-72, and therefore are inherently prejudicial.

¹¹ Indeed, if an incompetent non-citizen claiming a due process violation based on no determination of competency and no procedural safeguards needs to show prejudice at all, the standard may in fact be lower than that set forth in *Maravilla-Maravilla*. In the case of a due process claim based on ineffective assistance of counsel, where ineffective assistance prevented a non-citizen from reasonably presenting his case, the non-citizen can show prejudice merely by demonstrating that he has a "plausible ground for relief." *Lin v. Ashcroft*, 377 F.3d 1014, 1027(9th Cir. 2004). See also *Ray v. Gonzales*, 439 F.3d 582, 587 (9th Cir. 2006) (noting that prejudice may be presumed when ineffective assistance deprives non-citizen of right to appeal, but requiring showing of "plausible ground for relief" in such a case). As in ineffective assistance cases, it would be unfair to require a incompetent non-citizen to show prejudice, when by definition he is unable to adequately present his case without assistance on account of his mental condition. Therefore, the relaxed standard of prejudice applied in ineffective assistance cases should apply here as well. [redacted] demonstrates prejudice based on either standard.

based on their illness. In one unpublished decision, the Board reopened the case of an immigrant who claimed fear of persecution and torture in Peru on account of his mental illness. *In re. Moscoso-Zuniga*, A72-110-031 (BIA Oct. 6, 2005), available at <http://www.lexisnexis.com/practiceareas/immigration/pdfs/web918b.pdf>. Similarly, in a recent unpublished decision, the Asylum Office in Chicago granted asylum to a 10-year-old boy with autism based on the persecution he would face in his home country of Pakistan because of his condition. Julie Deardorff, *Mom Wins Asylum for Son with Autism: INS Agrees Boy Faced Persecution in Pakistan Because of His Disability*, Chi. Trib., Feb. 21, 2001, 2001 WLNR 10615171, at A1.

In _____, there is no social services network that would help _____ obtain the necessary outpatient treatment or medication. See World Health Organization's *IESM-OMS Report on the Mental Health Systems in _____* (2006) [hereinafter WHO Report], attached hereto as Exh. 3, at 48. If institutionalized, as is likely, _____ will be subjected to conditions that may amount to persecution and/or torture. The World Health Organization has reported that "Human Rights Commissions found 'appalling and unacceptable' conditions when they visited several psychiatric hospitals in _____ and _____ during the last five years [prior to 2001]." World Health Organization *2001 Report—Mental Health: New Understanding, New Hope Chapter 3*, available at <http://www.who.int/whr/2001/chapter3/en/index.html>, attached hereto as Exh. 4, at 2-3. This report found that psychiatric hospitals had "filthy living conditions, leaking roofs, overflowing toilets, eroded floors, and broken doors and windows," as well as lack of appropriate clothing (or in some cases any clothing at all) for patients, lack of adequate space, exposure to urine and feces, common use of physical restraints and seclusion rooms in a jail-like setting, and lack of trained personnel.

According to a report titled *Work Group: Diagnostic of the State of Human Rights of Persons with Mental Illness in* (1998) by Pan American Health Organizations [hereinafter Human Rights Report], attached hereto as Exh. 5, the National Psychiatric Hospital is the only treatment option in available to the indigent. *Id.* at 20-21. This hospital suffers from severe lack of resources, and two-thirds of its patients are long-term patients for whom treatment does not include rehabilitation or any hope of reintegration into the community. *Id.* Moreover, the health care system lacks any monitoring or mechanism to ensure compliance with the law or with basic human rights. Neither the Health Code, the General Hospital Procedures, nor the National Psychiatric Hospital Procedures contain any language about the rights of mentally ill patients or to ensure the quality of care they receive. *Id.* at 21. Thirty-five percent of admissions into the National Hospital are involuntary. WHO Report at 49. Although a provision of the Family Code provides for the assignment of a legal guardian to those who have been involuntarily committed who do not have any family members, no such assignments are ever made. Human Rights Report at 21. And between six to ten percent of patients were physically restrained or isolated at least once in the past year. WHO Report at 49.

may also be arrested, detained, and jailed by police after a schizophrenic episode (as has happened to him in the past here in the United States). According to the 2006 State Department Country Report on Human Rights Practices in , attached hereto as Exh. 6, at 3, “prison conditions remained dangerous and harsh. Overcrowding constituted a serious threat to prisoners’ health and lives. The prison population increased for the sixth consecutive year.” Gang violence is rampant, and pretrial detainees are mixed with violent criminals. *Id.* at 4. If detained, not only would be subjected to inhumane conditions

but, because he is obviously mentally ill, he would be particularly vulnerable to inmate violence, a problem that is beyond the government's control.

These few sources make plain that [redacted] may face persecution and harsh mistreatment on account of his mental illness if he is removed to [redacted]. With further research and assistance, [redacted] likely will be able to present strong claims for asylum and withholding. Therefore, his case merits remand for fuller consideration of these claims.

Finally, [redacted] remand is warranted because the Board misapplied *Matter of J-F-F-*. With only the benefit of a single-page pro se letter from [redacted], who may be incompetent, the Board found that this case was controlled by *Matter of J-F-F-*, 23 I. & N. Dec. 912 (BIA 2006), a case in which the Attorney General rejected as overly speculative a claim for relief under the Convention Against Torture. The Board misapplied *Matter of J-F-F-* in two ways. First, while J-F-F- applied only for CAT relief, for which he had to establish a *probability* of torture,

[redacted] has also applied for asylum, which requires only a "well founded fear" of persecution, see *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987). *Matter of J-F-F-* is not relevant to, and cannot be the basis for, denying [redacted] asylum claim. Second, the harm established here—even without the benefit of representation or assistance—already is far less speculative than that in *Matter of J-F-F-*.

In *Matter of J-F-F-*, the Attorney General found that the respondent had not met the "more likely than not" standard for CAT relief because his claim depended on a chain of speculative, unproven, and necessary assumptions: "that respondent needs medication in order to behave within the bounds of the law; that such medication is not available in the Dominican Republic; that as a result respondent would fail to control himself and become 'rowdy'; that this behavior would lead the police to incarcerate him; and that the police would torture him while he

was incarcerated.” *Id.* at 917. J-F-F- had not presented any evidence to support the IJ’s finding, despite the IJ’s extensive and thorough probing. By contrast, in the very short time that amici have been aware of this case, and with the limited resources available, amici have found evidence indicating that [redacted] has a bona fide claim for asylum and withholding based on his mental illness. [redacted] suffers from severe schizophrenia, a mental illness for which he requires treatment and continuous medication. He has stated that, in the past, whenever he was off his medication, he attempted suicide. It is thus not speculative in the least to predict that, if deprived of his medication, he will attempt suicide and thereby come to the attention of mental health authorities. Remand is therefore appropriate to consider more fully [redacted] claims for relief.

Dated: April 27, 2007

Respectfully submitted,

A handwritten signature in black ink that reads "Alice Clapman". The signature is written in a cursive style and is positioned above a horizontal line.

Alice Clapman
Judy Rabinovitz
American Civil Liberties Union
Immigrants' Rights Project
125 Broad Street, 18th Floor
New York, NY 10004
(212) 549-2676

PROOF OF SERVICE

On Friday, April 27, 2007, I, Alice Clapman mailed or delivered a copy of this Brief of Amici Curiae and any attached pages to:

Pro se counsel

U.S. DHS/SPD
Anne Holter
2001 Seaside Ave.
San Pedro, CA 90731

by FederalExpress for Monday, April 30, 2007 delivery.


Alice Clapman

Dated: April 27, 2007