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NON DETAINED

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT - SAN ANTONIO

IN THE MATTER OF

██████████ ██████████ ██████████

Respondent

Immigration Judge McPhaul

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**RESPONDENT'S MOTION TO STAY HIS
DEPORTATION AND REOPEN HIS REMOVAL CASE
BASED UPON THE INEFFECTIVE ASSISTANCE OF PRIOR COUNSEL**

Respondent, [REDACTED] through undersigned counsel, respectfully moves the Court to accept this motion and to exercise its statutory and regulatory authority, see INA § 240(c)(7)(A) and 8 C.F.R. § 1003.23(b)(1), to stay his deportation and reopen his removal proceedings¹ due to the grossly ineffective assistance of his prior counsel, attorney [REDACTED]

Mr. [REDACTED] made willfully false representations to the Court and breached his ethical duties to Mr. [REDACTED] in several regards. Specifically Mr. [REDACTED]

- (i) falsely represented to the Court that the reason he was unprepared to identify relief on behalf of his client some six months after being hired was because his client had failed to maintain contact with him;
- (ii) falsely represented to the Court that that he had conducted a "thorough investigation" into relief available to his client;
- (iii) failed to meaningfully conduct any such investigation and remained so ignorant of basic elements of immigration law that he misrepresented that law to his client to his client's detriment;
- (iv) on account of such failure, he admitted and conceded the factual and legal allegations in the Notice to Appear, to the detriment of his client despite readily available and superior legal alternatives; and
- (iv) he failed to pursue available relief in the form of asylum and Withholding of Removal and relief under the Convention Against Torture to prevent Mr. [REDACTED] from meeting the same demise as his brother, murdered during Mr. [REDACTED] removal proceedings in Mexico by narco-traffickers.

¹ Mr. [REDACTED] is not the subject any pending criminal proceeding under the INA or other law. This motion, per 8 C.F.R. § 1003.23(b)(1), is timely because it is being brought within 90 days of this Court's September 11, 2012 order. See Tab A, pg. 7. The validity of this order is not, and has not been, the subject of any judicial proceeding.

Mr. [REDACTED] asks only that this Court reopen his case so that he can, with competent counsel, present an adequate defense and pursue all available relief.

Procedural and Factual History

The illegal arrest

Mr. [REDACTED] was arrested on or about January 31, 2012 by Border Patrol in an act of egregious racial profiling. See Tab B (Respondent's first declaration), pgs. 18 - 22. He was driving on Highway 84 just outside Santa Anna, Texas, heading north towards Abilene, Texas, in a location somewhere over 100 miles east of San Angelo. See id., pg. 18, ¶ 2. He was in a white Ford pick-up truck with four doors and four wheels. The truck was uncovered and carrying a tool box and a light generator. A Hispanic co-worker was sitting in the front seat on the passenger side and another Hispanic co-worker was in the rear seat behind him. See id., ¶ 3. The truck windows were clear and unobstructed. The truck was not modified in any unusual way nor was it riding abnormally low, see id., ¶ 3, and Mr. [REDACTED] was driving normally and in accordance with the traffic law. See id., ¶¶ 2, 4. The border patrol stopped them at around 7:30 in the morning. Two agents pulled up behind the truck, flashed their emergency lights, and pulled over Mr. [REDACTED] and the others in the truck. See id., ¶ 4. The agents then got out of their vehicle and walked up alongside the truck, one on each side. See id., ¶ 5. The first thing the officer on the driver's side did, even before asking any questions, was handcuff Mr. [REDACTED] to the person sitting in the rear. The other officer handcuffed the co-worker sitting next to Mr. [REDACTED] (to himself). See id., ¶ 6. Then the officer on the driver's side interrogated them as to whether they had any "papers," subsequent to

which, the officers pulled all three of them out of the truck and put them into their own vehicle. See id., ¶ 7. The officers then spent some time driving around looking for other Hispanics in vehicles to stop and arrest. See id., ¶¶ 9 - 10. When they were done, they transported Mr. [REDACTED] and the others to an office. Mr. [REDACTED] was subsequently questioned by one of the same officers who arrested him, in violation of the regulation requiring, in the case of warrantless arrests, that the arresting officer be different from the interrogating officer, see 8 C.F.R. § 287.3(a), see Tab B, pg. 20, ¶14, and another officer falsely represented to Mr. [REDACTED] that he should accept voluntary departure because Mr. [REDACTED] "would be deported anyway." Id., ¶ 15. Mr. [REDACTED] was issued an NTA that day. See Tab A, pg. 4 (NTA). The NTA is signed by [REDACTED] [REDACTED] who is the supervising border patrol agent in charge of the San Angelo Border Patrol substation. Mr. [REDACTED] representation of Mr. [REDACTED]

On the same day as the arrest of Mr. [REDACTED] an uncle of his contacted and hired attorney [REDACTED] [REDACTED] to bond his nephew out and to represent him in the removal case. See Tab C (Respondent's declaration), pg. 24, ¶ 2. Mr. [REDACTED] was paid \$1500 cash up front but he gave no retainer agreement or receipt to the family. See id. Mr. [REDACTED] requested a bond hearing and it was set and held on February 15. See Tab A, pgs. 10 - 11. Around the same time, at least one detained, off the record, master hearing was held in February of 2012,² at which event Mr. [REDACTED] represented Mr. [REDACTED] See Tab C, ¶ 3; Tab A, pg. 8. The Court ordered that Mr. [REDACTED] be released on

² This hearing, which was only reset to a later date, was referred to by the Court on the record at next master hearing. This reference was, presumably, to the February 13, 2012 scheduled hearing. See Tab A, pg. 8.

payment of a \$2500. See Tab A, pg. 11. Mr. [REDACTED] - for reasons known only to him - requested of the [REDACTED] family that this money be paid to him so he could post the bond, see Tab C, ¶ 3, making himself the obligor. See Tab E, pg. 44 (bond release paperwork). The family complied, ignorant of their own ability to post the bond themselves. Mr. [REDACTED] posted the bond on February 16, 2012. See id.

Between February, when Mr. [REDACTED] was released, and August of 2012, Mr. [REDACTED] never called Mr. [REDACTED] or anyone else in his family. See Tab C, pg. 25, ¶ 4. Mr. [REDACTED] however, called Mr. [REDACTED] repeatedly during that time period. Mr. [REDACTED] simply would not answer the phone and he would not return messages. Mr. [REDACTED] remembers Mr. [REDACTED] answering his phone only once, around April, when [REDACTED] said to his uncle that he was "working" on the case but he said nothing else. Id. [REDACTED] did not ask any questions at that time about Mr. [REDACTED] family, immigration history, the initial border patrol arrest or any other subject. They spoke in English because [REDACTED] does not speak Spanish. See id.

About a month later, in May of 2012, Mr. [REDACTED] brother, [REDACTED] [REDACTED] was killed by the police in El Limon, Tiquicheo, Michoacan. See Tab D, pgs. 32 - 33 (death certificate); Tab C, pg. 58, ¶¶ 5 - 6 . Tiquicheo is a "small town ... which has seen some of the most brutal drug-related violence," because it is the "scene of a turf war between rival drug cartels, and smaller organized crime groups [that] operate there as well." Tab J, pg. 99 (CNN article). The exact reasons for his killing are as yet unknown. At least one news report alleges that he was affiliated with the La Familia Michoacana cartel and that he died in a gun battle with police, see Tab D, pgs. 37 - 38 (news article) , but the

family believes that there is more to the story and that the police, who are easily corrupted, had motives different than law enforcement in killing him. See Tab I (Affidavit of ██████ Respondent's aunt), pg. 95, ¶ 11. The brutal manner of his death indicates something more than merely being shot by police in a gun battle. The death certificate identifies the cause of death as "traumatic head injury and hemopneumothorax," Tab D, pg. 33, which is "a condition that can occur after an injury to the chest such as: a blow to the chest, stab wound, or gunshot wound." Tab D, pg. 35 (medical info. article³). The body was so brutalized that when the family finally obtained possession of the body, it warned not to open the casket. See Tab I, pg. 95, ¶¶ 9 - 10; see also Tab F, pg. 58, ¶¶ 6-8. La Familia rules Michoacan with relative impunity. In 2009, dozens of police officers resigned en masse after receiving death threats from La Familia. See Tab J, pg. 118. La Familia "has established its authority by murdering "dozens of mayors and city hall officials" and corrupting countless others. Id., pg. 121.

By the beginning of August 2012, Mr. ██████ had yet heard nothing from Mr. ██████ over the prior last five months nor had he received any hearing notice. See Tab C, pg. 25, ¶ 5. Mr. ██████ was told by a friend that he should could call a hotline number for the immigration court to inquire about hearing date. He called and discovered the scheduled August 21, 2012 hearing date.⁴ He immediately started to call ██████ using the help of a friend who speaks English. They called over the course of

³ This article is available at <http://pvhs.org/documents/Trauma/PneumothoraxHemothorax.pdf>.

⁴ The hearing notice for the August master hearing was dated in March. It was sent by the Court to ██████ alone, and even ██████ copy was forwarded to a different address by the postal service. See Tab A, pgs. 13 - 14.

several days, several times each day. His uncle also called numerous times and they were not able to get a hold of him. They left messages but he would not respond. See id.

They finally got a hold of [REDACTED] about a week before the August 21, 2012 hearing. He spoke to Mr. [REDACTED] friend in English. [REDACTED] demanded \$300 as payment for attending the hearing but he did not say what would be the plan for his defense. Mr. [REDACTED] remembers him asking only how many kids he had. He did not ask at that time about Mr. [REDACTED] immigration history, his initial border patrol arrest or about anything else other than the money. Mr. [REDACTED] agreed to pay the \$300 the day of the hearing. Id. ¶ 6. On the day of the hearing in August, Mr. [REDACTED] showed up at the Court with his friend (whose name is [REDACTED]). They paid [REDACTED] the \$300 but got no receipt in return. Once again, [REDACTED] asked him how many kids he had even though he had asked him that before. For the first time, Mr. [REDACTED] also asked whether Mr. [REDACTED] had any criminal history, which he does not, and about his immigration history. Mr. [REDACTED] did not ask him about any fear of being sent to Mexico and he did not ask about his initial border patrol arrest. Id. ¶ 7.

The Tuesday, August 21, 2012, master hearing was the first recorded hearing held.⁵ Mr. [REDACTED] appeared and was presented by Mr. [REDACTED]. The Court took pleadings: Mr. [REDACTED] admitted alienage and conceded the illegal entry charge on behalf of his client. When asked to identify relief, Mr. [REDACTED] was nonresponsive. He

⁵ This portion of the recitation of facts relating to what was said during the hearing between Mr. [REDACTED] and the IJ is derived from the undersigned having listened to the audio recordings of the removal proceedings.

reported to the Court that Mr. [REDACTED] has three minor U.S. citizen children but that he was unsure of Mr. [REDACTED] immigration history and of the status of Mr. [REDACTED] wife. He then blamed his unpreparedness on Mr. [REDACTED] having only contacted him the preceding Thursday and on Mr. [REDACTED] having been out of touch with him for the preceding six to seven months. The Court pointed out that that the case had been reset from the preceding February (referring to a scheduled detained master hearing), implying that Mr. [REDACTED] had represented Mr. [REDACTED] for many months and had no excuse. The Court ordered Mr. [REDACTED] to talk to his client to figure out his immigration history and his wife's status. Mr. [REDACTED] immediately turned to his client, spoke to him for a few seconds, and then reported to the Court a purported date of entry. Mr. [REDACTED] repeated his claim that his client had failed to contact him for months and he sought a continuance from the Court to inquire into relief and to pursue prosecutorial discretion from the government. The Court then reset the master hearing to September 11, 2012 and tasked Mr. [REDACTED] with having any application for relief on that date. During the hearing, Mr. [REDACTED] understood only some of what was being said. He understood that his attorney was telling the judge that he - Mr. [REDACTED] - was to blame for the lack of communication between them but that was false. See Tab C, pg. 26. ¶ 8. There was no lack of communication on the part of Mr. [REDACTED]. The day of that hearing, Mr. [REDACTED] friend told [REDACTED] that if he needed any documents, he only had to ask for them and they would be provided. [REDACTED] said he would get back to them on that. See id.

A week after the hearing, Mr. ██████ wanted to know what Mr. ██████ was going to do. So he and his friend continued to call him to ask what the attorney needed for the case. See id. ¶ 9. When ██████ answered, they specifically asked him about how he was going to defend the case. Mr. ██████ stated that he was doing something, but did not give details. They informed him that they really wanted to give him some documents about the recent death of Mr. ██████ brother, which included a death certificate. Mr. ██████ agreed and said that they could meet between an intersection of streets in downtown Austin, Texas. This was necessary because the attorney had no physical office. The exact streets Mr. ██████ does not recall but he remembers that the intersection was near 11th or 12th Street in downtown Austin. They met and gave Mr. ██████ a copy of the death certificate. He said he would present it to the judge at the next hearing. See id.

Minutes before the September 11, 2012 hearing, Mr. ██████ met up with Mr. ██████ outside the courtroom in the hallway. See id., ¶ 10. Mr. ██████ through his friend, again explained again to the attorney that his brother had been murdered in Mexico and they again showed him his brother's death certificate to prove to him that he had reason to fear being sent to Mexico. Mr. ██████ told that it was too late to apply for asylum, because the time for doing so had expired. (This, of course, was legally inaccurate because the brother had been murdered only some five months before.) Mr. ██████ gave him no other options or suggestions. See id. During the master hearing, when asked to identify relief, Mr. ██████ attested to the Court that he had conducted a "thorough investigation" and Mr. ██████ had no relief other than

voluntary departure. He sought six months pre-merits voluntary departure. This Court pointed out that that his request was beyond the statutorily available time period but granted four months.⁶ Mr. ██████ request for voluntary departure was a surprise to Mr. ██████ See Tab C., pg. 27, ¶ 11. The attorney had not explained to him that he was going to do this and Mr. ██████ did not authorize him to do this. Mr. ██████ sat there stunned. He did not know what to say. No one asked him at the hearing whether this is what he wanted.⁷ After the hearing, Mr. ██████ told Mr. ██████ that there was nothing that could be done and that he had to leave to Mexico by January. See id.

On Friday, October 26, 2012, Mr. ██████ personally called Mr. ██████ in order to ask for his file. See id., pg. 28, ¶ 12. When Mr. ██████ finally answered the phone, he made Mr. ██████ talk to someone who was there with him, a man, who spoke Spanish. Mr. ██████ does not think he worked for Mr. ██████ he just happened to be there. See id. Mr. ██████ was first questioned as to why he needed his file and then he was told that he would be called on Monday to pick up the records. No one called on Monday so on Tuesday, he called and got no answer. On Wednesday, he was desperate to get his records so he went to the address listed on the bond documents. That was the only address he had for the attorney because Mr. ██████ has no physical office. Mr. ██████ went to that address, a house, and knocked on the door. A man who identified himself as Mr. ██████ father answered the door. He just took a message for his son. See id. On that same day Mr. ██████ kept calling Mr. ██████ but he never

⁶ See footnote 4, supra.

⁷ The undersigned confirmed this by listening to the audio tapes and the Court is invited to do the same.

answered. See id., ¶ 12. The next day, November 1, 2012, the attorney finally answered and suggested they meet at a gas station in Austin that day. At the gas station, the attorney gave him what few documents he had. See id., ¶ 13.

Compliance with Matter of Lozada

Mr. [REDACTED] recently hired the hired the undersigned to represent him. The undersigned sent Mr. [REDACTED] several communications about this case, requesting explanations for his conduct. On November 29, 2012, Mr. [REDACTED] was sent a letter by USPS overnight Express Mail and by facsimile which asked that he explain:

- (i) why, at the August 21, 2012 master hearing, did he admit alienage on Mr. [REDACTED] behalf and concede deportability if [REDACTED] was, as he admitted to the Court, ignorant of basic facts relating to his client's case;
- (ii) why did he not dispute alienage and dispute the admissibility of any evidence that resulted from Mr. [REDACTED] arrest by CBP, which appears to have been an illegal race-based roving patrol stop;
- (iii) why did he fail to pursue asylum, withholding and CAT relief on behalf of his client based upon the then-very recent murder of Mr. [REDACTED] brother in May of 2012;
- (iv) why did he represent to the Court on the record at the August 21, 2012 hearing that Mr. [REDACTED] had not maintained contact with him when this claim conflicts with Mr. [REDACTED] detailed testimony to the contrary;
- (vi) why did he represent to the Court on the record at the September 11, 2011 master hearing that he had conducted a "thorough investigation" regarding relief when this claim conflicts with his failure to pursue available and readily apparent relief.

See Tab H, pgs. 73 - 74. The letter also asked that he produce the retainer agreement and receipts for all payments made. On December 5, 2012, a second letter was sent to Mr. [REDACTED] by facsimile requesting a response to the first letter and also requesting

any documents held in connection with the bond payment. See Tab H, pg. 82.⁸ Also on December 5, 2012, a second letter was sent to Mr. [REDACTED] by facsimile with an attached copy of a declaration from Mr. [REDACTED] containing substantially all of the allegations against him in this case. This letter requested that Mr. [REDACTED] state whether he disputed any of the allegations. See Tab H, pg. 85.⁹ On December 5, 2012, undersigned counsel personally spoke with Mr. [REDACTED] by phone, calling his attention to the aforementioned correspondence. Mr. [REDACTED] said he would review it and that he was willing to do what was needed to assist Mr. [REDACTED] with his case. However, Mr. [REDACTED] also claimed that he took the course of action that he did because he claimed that Mr. [REDACTED] lacked the money to defend his case and because he purportedly wanted to leave as quickly as he could. Mr. [REDACTED] has provided to date no written response to the aforementioned correspondence. Mr. [REDACTED] current counsel has submitted to the appropriate state bar authorities a complaint regarding Mr. [REDACTED] unprofessional services and breach of ethics, as required by Matter of Lozada, 19 I&N Dec. 637 (BIA) See Tab G.

Argument

There is enough evidence here to believe that Mr. [REDACTED] did not receive a minimally competent defense and that, if the case is reopened, the end result of this case may be very different.

⁸ This letter was misdated as November 29, 2012. The actual date of it having been sent out - December 5, 2012 - is reflected on the facsimile receipt. See Tab H, pg. 81.

⁹ This letter was also misdated as November 29, 2012. The actual date of it having been sent out - December 5, 2012 - is reflected on the facsimile receipt. See Tab H, pg. 83.

- I. Mr. ██████ made several false representations to the Court; failed to conduct a meaningful investigation into available relief; and failed to pursue such relief despite its near self-evident availability.

Mr. ██████ falsely represented to the Court that the reason he was unprepared to identify relief on behalf of his client some six months after being hired was because his client had failed to maintain contact with him. Mr. ██████ repeatedly tried to maintain contact with Mr. ██████ but Mr. ██████ has no physical office and no answering service other than voice mail, to which messages Mr. ██████ never - not once - responded. Mr. ██████ also falsely represented to the Court that that he had conducted a "thorough investigation" into relief available to his client and his client had no relief. This claim conflicts squarely with indisputable facts. Mr. ██████ was arrested by CBP in what can be only be described as an egregious act of racial profiling. Consider the fact that Mr. ██████ - one of three Hispanics in a truck - was not only stopped for no apparent reason but he and his companions were handcuffed even before he was questioned about alienage by the arresting officer. The law with regard to the exclusion of evidence derived from egregious acts of racial profiling is well known to the Court, see e.g., Tab K, (IJ order, dated February 14, 2008, ██████ ez, ██████ - ██████ - ██████).¹⁰ and it need not be restated here. Mr. ██████ did not investigate this course of legal defense and his failure to do so was a breach of his duties to his client. Mr. ██████ reports that Mr. ██████ never once asked him about the manner of his initial arrest.

See Tab C, pgs. 25 - 26, ¶¶ 4, 7.

¹⁰ In the ██████ case, which also involved an arrest arising from a roving patrol stop, this Court concluded "that the only basis for the agent's stop was that [Mr. ██████ 'looked like an alien,'" and that, in arresting Mr. ██████ pursuant to an act of racial profiling, the BP agent had "deliberately violated the law or acted in conscious disregard of the Constitution," as a consequence of which the resulting evidence was properly excluded and proceedings terminated. See Tab K, pg. 215 - 216.

Setting aside the issue of the exclusion of evidence and a challenge to alienage, Mr. ██████ failed Mr. ██████ in an even more egregious and ordinary manner: he falsely represented to the Court that Mr. ██████ had no relief from removal when Mr. ██████ had been reminded the very day of the September 11, 2012 master hearing that Mr. ██████ brother had been murdered only months before. If Mr. ██████ had actually done any investigation into relief, he would have known that the murder of Mr. ██████ brother constitutes a "changed circumstance" exception to the one year from entry filing deadline for asylum, see INA § 208(a)(2)(D), and he would not have affirmatively misstated the law with regard to the same to his client and he would not have misled the Court into believing that Mr. ██████ had no relief. Moreover, regardless of the one year deadline, the murder of Mr. ██████ brother meant that Mr. ██████ - if he had actually done any investigation into relief - would have considered Mr. ██████ eligibility for withholding of removal or relief under CAT. He failed to do so and his claim to the contrary to the Court was patently false.

If the Court harbors any questions about the facts in this case, it should err on the side of caution, reopen this case, and conduct an evidentiary hearing into Mr. ██████ allegations against Mr. ██████ ordering him to be present by subpoena if necessary. The extent of the "right" to counsel for persons in immigration proceedings is grounded in the Fifth Amendment guarantee of due process, and ineffective assistance of counsel is a denial of due process where the proceedings were fundamentally unfair such that the alien was prevented from reasonably presenting his or her case. Matter of Lozada, 19 I&N Dec. 637, 638 (BIA) (citing Magallanes-Damian v.

INS, 783 F.2d 931 (9th Cir. 1986); Paul v. United States INS, 521 F.2d 194 (5th Cir. 1975));
Goonsuwan v. Ashcroft, 252 F.3d 383, 385 n.2 (5th Cir. 2001).

Mr. [REDACTED] never had a chance at a meaningful defense. His lawyer had no office and no support staff. He does not Spanish and Mr. [REDACTED] does not speak English well. His lawyer knowingly misrepresented certain facts to the Court in an attempt to excuse his own incompetence and failed to apprise the Court of other essential facts, which would have revealed relief, in an attempt to wash his hands of his client's case. This cannot stand.

Conclusion

Wherefore, Mr. [REDACTED] respectfully submits that this Court should reopen his case so that he can, with competent counsel, present an adequate defense and pursue all available relief.

Respectfully submitted,

David Antón Armendáriz

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Dated: April 3, 2017

CERTIFICATE OF SERVICE

I hereby certify that on the understated date a copy of the attached RESPONDENT'S MOTION TO STAY HIS DEPORTATION AND REOPEN HIS REMOVAL CASE BASED UPON THE INAFECTIVE ASSITANCE OF PRIOR COUNSEL and accompanying Tabs A through K:

 X were sent by first class regular mail to:

U.S. Immigration & Customs Enforcement
Office of the Chief Counsel
8940 Fourwinds Drive, 5th Floor
San Antonio, Texas 78239

David Antón Armendáriz

Dated: April 3, 2017