UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
1705 EAST HANNA ROAD, SUITE 366
ELOY, AZ 85231

IN THE MATTER OF)	
)	
)	**IN REMOVAL PROCEEDINGS**
aka .)	
aka)	
)	**FILE NO.:**
aka)	
aka)	
aka ,)	**DATE:** December 30, 2009
aka)	
)	
Respondent)	

CHARGE: INA § 237(a)(2)(A)(iii); Convicted of an Aggravated Felony as defined in Section 101(a)(43)(F) of the Act, a crime of violence for which the term of imprisonment ordered is at least one year.

APPLICATION: Termination of Removal Proceedings

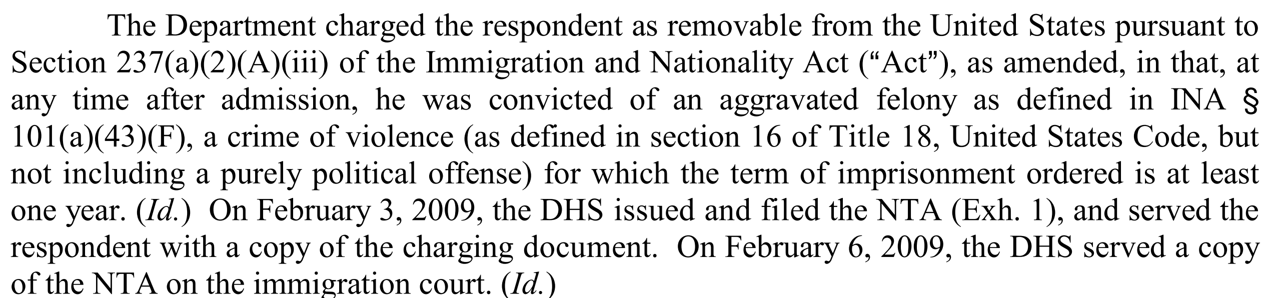
ON BEHALF OF THE RESPONDENT:
, *Pro se*
Eloy Detention Center
1705 East Hanna Road
Eloy, AZ 85231

ON BEHALF OF THE DEPARTMENT:
Assistant Chief Counsel
Department of Homeland Security
1705 East Hanna Road
Eloy, AZ 85231

DECISION AND ORDER OF THE IMMIGRATION COURT

I. JURISDICTION AND PROCEDURAL HISTORY

In the Notice to Appear ("NTA"), the Department of Homeland Security (the "Department" or "DHS") asserts that the respondent is a native and citizen of Liberia, and that he was admitted to the United States at New York, New York, on or about , 1974, as an immigrant. (Exh. 1, Form I-862, 1.) The Department further asserts that the respondent was, on , 2008, convicted in the California Superior Court, County of Los Angeles for the offense of Unlawful Sexual Penetration with Force, in violation of Section 289(A)(1), of the California Penal Code, for which he was sentenced to a term of imprisonment of three (3) years. (*Id.*)



The Department charged the respondent as removable from the United States pursuant to Section 237(a)(2)(A)(iii) of the Immigration and Nationality Act ("Act"), as amended, in that, at any time after admission, he was convicted of an aggravated felony as defined in INA § 101(a)(43)(F), a crime of violence (as defined in section 16 of Title 18, United States Code, but not including a purely political offense) for which the term of imprisonment ordered is at least one year. (*Id.*) On February 3, 2009, the DHS issued and filed the NTA (Exh. 1), and served the respondent with a copy of the charging document. On February 6, 2009, the DHS served a copy of the NTA on the immigration court. (*Id.*)

At Master Calendar hearings, the respondent was unable to acknowledge receipt of the NTA, or to address the allegations or charges. The respondent has filed documents clearly reflecting mental illness. (*See* Exhs. 2, 3, 8, 10, 12, 18.) On August 25, 2009, the Court entered an Order directing that the respondent be evaluated by the U.S. Public Health Service or any contract agency or individual charged with mental health services for immigration detainees; that said agency shall prepare a study and report on the respondent's mental condition and an evaluation of the respondent's competency to represent himself in removal proceedings; and that the report shall be confidential and made available only to the respondent, EOIR, Office of the Chief Counsel (DHS/ICE), and the respondent's appointed representative. (Exh. 14.) On November 4, 2009, the Court ordered that the Department of Homeland Security shall produce the report referenced in the Order of August 25, 2009, no later than November 18, 2009, or shall provide a full explanation as to why there has been a delay in compliance with the Court's prior Order. (Exh. 16.) On November 17, 2009, the DHS advised the Court that they would not be providing the report to the Court. (Exh. 17.)

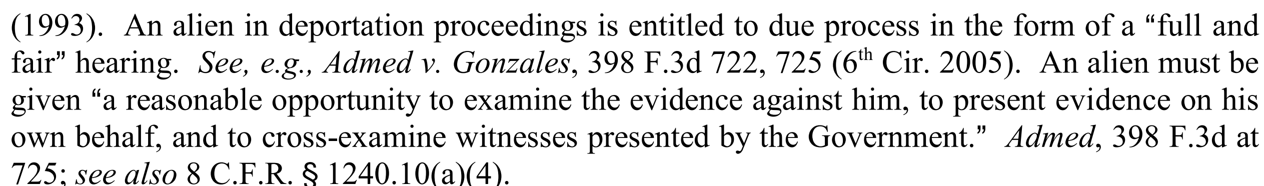
II. STATEMENT OF LAW

Once a Notice to Appear is filed with the Court, an Immigration Judge may terminate proceedings upon the request or motion of either party. 8 C.F.R. § 239.2(c) (the Department); *Matter of Cota-Vargas*, 23 I&N Dec. 849, 850 (BIA 2005) (aliens). An alien may request termination on various grounds, including the following: the charging document is defective; incongruity exists between the charge and the allegation; the Department has failed to meet its burden of proof; or the alien is eligible to pursue an application for naturalization. *See, e.g.*, 8 C.F.R. § 239.2(f) (pending naturalization); 8 C.F.R. § 245.1(c)(9)(ii)(D) & (iii)(C) (power of the Court to terminate proceedings); *Matter of Lopez-Barrios*, 20 I&N Dec. 203, 204 (BIA 1990) (insufficient notice of proceeding or charge). No decision on deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence. *See* INA § 240(c)(3)(A).

III. FINDINGS AND ANALYSIS

1. Due Process and Statutory Safeguards

"The Supreme Court has recognized that immigration proceedings, while not subject to the full range of constitutional protections, must conform to the Fifth Amendment's requirement of due process." Mimi E. Tsankov, *Incompetent Respondents in Removal Proceedings, 3 Immigration Law Advisor, No. 4, at 1 (April 2009)* citing *Reno v. Flores*, 507 U.S. 292, 306



(1993). An alien in deportation proceedings is entitled to due process in the form of a "full and fair" hearing. *See, e.g., Admed v. Gonzales*, 398 F.3d 722, 725 (6th Cir. 2005). An alien must be given "a reasonable opportunity to examine the evidence against him, to present evidence on his own behalf, and to cross-examine witnesses presented by the Government." *Admed*, 398 F.3d at 725; *see also* 8 C.F.R. § 1240.10(a)(4).

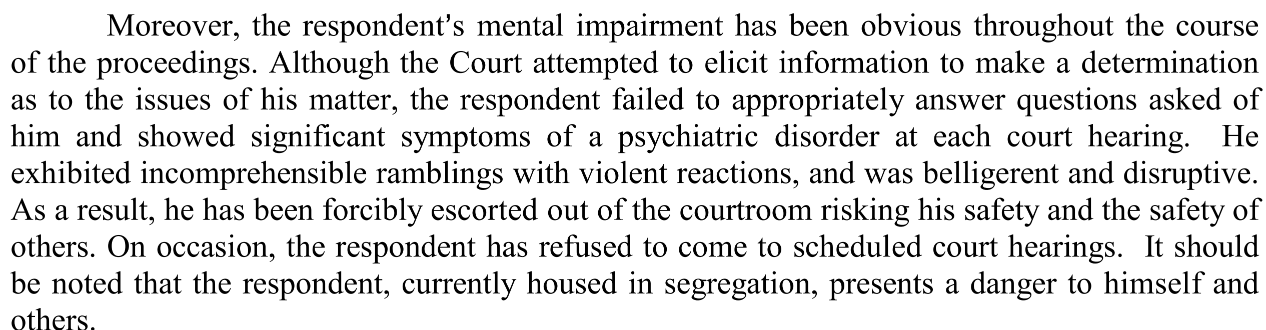
"An incompetent alien is entitled to additional procedural safeguards to help ensure the realization of his due process right to a fundamentally fair hearing." *Muñoz-Monsalve v. Mukasey*, 551 F.3d 1, 6 (1st Cir. 2008). "Fundamental fairness means in general terms that the alien must have a meaningful opportunity to present evidence and be heard by an impartial judge." *(Id.)*

An immigration judge must provide safeguards to protect the rights and privileges of an alien who is mentally incompetent. *See* 8 C.F.R. § 1240.4; *See also Dusky v. United States*, 362 U.S. 402 (1960) (per curiam) (holding that a defendant lacked the requisite mental competency when he or she lacked a rational and factual understanding of the proceedings against him or her). Section 240(b)(3) of the Act sets forth guidelines for the immigration judge to conduct proceedings for deciding the inadmissibility or deportability of an incompetent alien: "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." The Ninth Circuit, the jurisdiction in which this matter arises, has addressed the issue of incompetent respondents in removal proceedings and has held that aliens in deportation proceedings are not entitled to "the full trappings of procedural protections that are accorded criminal defendants. . ." *Nee Hao Wong v. INS*, 550 F.2d 521, 523 (9th Cir. 1977). Proceedings against incompetent respondents can be permitted so long as safeguards are in place to protect these respondents. (*Id.*)

Under 8 C.F.R. § 1240.4, an attorney, legal representative, legal guardian, near relative, friend or the custodian of the respondent may appear on his or her behalf. "When it is impracticable by reason of an alien's mental incompetency for the alien to be present, the presence of the alien may be waived provided that the alien is represented at the hearing by an attorney or legal representative, a near relative, legal guardian, or friend." 8 C.F.R. § 1003.25(a). "An agency has the duty to follow its own federal regulations, even when those regulations provide greater protection than is constitutionally required." *Nelson v. INS*, 232 F.3d 258, 262 (1st Cir. 2000) (citing *Accardi v. Shaughnessy*, 347 U.S. 260, 265-68 (1954)(applying doctrine to immigration case).

2. Respondent is Mentally Incompetent

The Court finds the respondent in these proceedings is mentally incompetent. The respondent is reportedly undergoing acute psychosis and is unable to comprehend the nature and purpose of the removal proceedings. (Exh. 11, Attach. A, Affidavit of James E. Seward, Ph.D.) The record contains significant probative evidence of a lack of competency on the alien's part. Key evidence of his incapacity includes his numerous written submissions (Exhs. 2, 3, 8, 10, 12, 18).



Moreover, the respondent's mental impairment has been obvious throughout the course of the proceedings. Although the Court attempted to elicit information to make a determination as to the issues of his matter, the respondent failed to appropriately answer questions asked of him and showed significant symptoms of a psychiatric disorder at each court hearing. He exhibited incomprehensible ramblings with violent reactions, and was belligerent and disruptive. As a result, he has been forcibly escorted out of the courtroom risking his safety and the safety of others. On occasion, the respondent has refused to come to scheduled court hearings. It should be noted that the respondent, currently housed in segregation, presents a danger to himself and others.

The Court ordered that a mental competency evaluation be conducted. The Department failed to provide the Court with a report, citing confidentiality requirements. The Department's failure to comply with the Court's Order and with the regulations has prejudiced the respondent's rights. The Court did not ask for a competency hearing, but rather ordered the DHS to conduct such a hearing and to provide the results to the Court. The DHS advised the Court that an evaluation was completed on September 28, 2009. (Exh. 17, Statement of Position, 2.) The Department maintains that it cannot provide the Court with any medical records. "Respondent is not represented in removal proceedings. . .[t]he release of a psychiatric evaluation requires the consent of respondent, his guardian, custodian, or designated representative. Thus, the Department of Homeland Security cannot comply with the Court's order to release respondent's psychiatric evaluation until such time as a valid consent to release this information can be executed by the respondent or on his behalf." (*Id.*)

The Department's argument is circuitous. The detained respondent is a lawful permanent resident who has lived in the United States for thirty-five (35) years; he may have numerous forms of relief available to him including a potential citizenship claim. (See Exh. 11, Attach. B, Affidavit of Cristina L. Powers.) Clearly, the respondent has shown that he is unable to understand the nature of the action to be taken against him and consistently showed obvious signs of mental illness. If the Court had been provided with medical records, the Court could have assessed the respondent's ability to proceed if properly medicated. But no records were provided to establish that the respondent either needs medication or is receiving medication.

3. Respondent Lacks Adequate Representation

The respondent is unrepresented in the present proceedings. Elderly relatives of the respondent appeared at one court hearing, but have not been seen since. The Florence Immigrant & Refugee Rights Project ("Florence Project") unsuccessfully attempted to represent the respondent. The Florence Project filed a Motion to Administratively Close Removal Proceedings citing the respondent's mental incompetency. (Exh. 11.)

The Court attempted to assign *pro bono* counsel, but the respondent refused to see the attorney who offered to see him. "Even if someone [is] found to appear on behalf of Respondent, proceedings will be unable to continue, because in his current state, Respondent will be unable to assert or waive important rights such as his right to counsel." (Exh. 11, 2.) The DHS opposed the motion to administratively close the case. (Exh. 13.)

Pursuant to regulation, the Court specifically requested that the Department make arrangements for the warden to appear as the custodian for the respondent. *See* 8 C.F.R. § 1240.4. [redacted], the Warden of the (CCA) Eloy Detention Center never appeared, but an immigration official appeared and the Department advised the Court that his presence satisfied the regulatory requirement. The Department requested a continuance so that [redacted], the Assistant Field Office Director, would be able appear for the respondent. On the date when [redacted] was scheduled to appear, the Department presented [redacted], the Assistant Officer in Charge. This Court finds that there is an inherent conflict of interest when a supervisory deportation officer represents himself to be an appropriate custodial representative for an incompetent detainee when the same official is employed to accomplish the goal of removal of the alien. Therefore, this Court finds that the DHS failed to follow its own statutory regulations. *See* 8 C.F.R. § 1003.25(a).

The Act contemplates that removal proceedings may be had against mental incompetents, subject to the requirement that the Attorney General "prescribe safeguards to protect the rights and privileges of the alien." *Nee Hao Wong*, 550 F.2d at 523; *see* INA § 240(b)(3), 8 U.S.C. § 1229a(b)(3). The Department has argued that the Court may proceed with removal proceedings and in support of its argument has submitted numerous cases. (Exh. 15.) None of the cases that the Department presents in support of its argument establish that the Court should remove an *unrepresented* mentally incompetent alien; on the contrary, the cases discuss matters where the aliens *were represented* by counsel or an accredited representative. *See e.g.*, *Brue v. Gonzales*, 464 F.3d 1227, 1232-33 (10th Cir. 2006) (finding 8 C.F.R. § 1240.4 satisfied where an incompetent alien was represented by counsel).

Pursuant to statutory directive, regulations have been promulgated to ensure that mental incompetents are adequately represented during their removal proceedings. *See* 8 C.F.R. §1240.4. This Court concludes that without adequate representation, the requirements of due process and 8 C.F.R. § 1240.4 have not been satisfied.

4. Factual Allegations and Charge of Removability

The Court has carefully considered the entire record of proceeding, which includes exhibits 1 through 20. On February 6, 2009, the DHS served a copy of the NTA on the immigration court. Initially unaware of the respondent's mental illness, the Court attempted to advise the respondent of his rights and take pleadings. However, in response to the Court's questions, the respondent exhibited illogical speech and made delusional statements.

This Court is prohibited from accepting an admission of removability from a mentally incompetent alien, such as the respondent, who is not accompanied by an attorney or legal representative, near relative, legal guardian, or friend. 8 C.F.R. § 1240.10(c). On this basis, the Court does not sustain the factual allegations or charge of removal; if there is any suggestion of a finding as to removability in record, it is hereby withdrawn.

IV. CONCLUSION

Simply put, the respondent is unrepresented and is mentally incompetent. The Court finds that the respondent is unable to effectively participate in a coherent manner, to comprehend the nature and consequences of the proceedings, to communicate with the Court in any meaningful dialog, to assert or waive any rights, and to seek various forms of relief. The respondent has been detained and living in segregation since he was brought to the Eloy Detention Center. The respondent has repeatedly demonstrated his inability to adequately represent himself before this Court.

Therefore, the Court believes that allowing the respondent to proceed unrepresented in removal proceedings would not comport with basic notions of due process. Furthermore, this Court finds that to continue these removal proceedings, and the respondent's current detention, is a violation of his civil rights. Considering the respondent's apparent mental illness, and based upon the Department's unwillingness to provide the respondent with a custodian or the Court with a copy of the Court-ordered mental evaluation, the Court will exercise its discretion to terminate proceedings.

Accordingly, the following Order shall be entered:

IT IS HEREBY ORDERED that the respondent's Motion to Terminate be **GRANTED**.

Immigration Judge

APPEAL RIGHTS: Both parties have the right to appeal the decision of the Immigration Judge in this case. Any appeal is due in the hands of the Board of Immigration Appeals on or before thirty calendar days from the date of service of this decision.