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BRIAN PATRICK CONRY
(OREGON, WASHINGTON, AND FEDERAL BARS)

RAQUEL MARCOS DEL RIVERO
(BILINGUAL ASSISTANT)

December 20, 2009

Ninth Circuit Court of Appeals
Clerk's Office
95 Seventh Street
San Francisco, CA 94103-1518

*Via Federal Express*

Re: [redacted] Petitioner
Agency No. A [redacted]
Case No: Unassigned

Dear Clerk of the Court:

Enclosed please find for filing in the above-referenced case:

1. An original and 7 copies of Petitioner's **PETITION FOR REVIEW OF AN AGENCY DECISION,** Petitioner's **Emergency Motion to Stay Deportation Pending Review Pursuant to FRAP 27-3,** and Petitioner's **Memorandum in Support of Motion for Stay.**
2. A CD containing PDF versions of the above 3 documents.
3. A check for the Clerk of the Court in the amount of $450.00.

Thank you for your attention to this matter.

Very Truly Yours,

Brian Conry

cc: Attorney General Eric Holder
Office of Immigration Litigation (OIL)
ICE
[redacted]

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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| | ) | Case No: Unassigned |
| | ) | |
| [redacted] | ) | Agency No. A[redacted] |
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| | ) | |
| Petitioner, | ) | |
| vs. | ) | |
| | ) | |
| ERIC HOLDER, Attorney General, | ) | PETITION FOR REVIEW |
| | ) | OF AGENCY DECISION |
| Respondent, | ) | |
| | ) | |

**PETITION FOR REVIEW OF DECISION OF THE BOARD OF IMMIGRATION APPEALS**

[redacted] (hereafter Petitioner), by and through counsel Brian Conry, hereby petitions this Court for review of the December 16, 2009 order of the Board of Immigration Appeals (hereafter BIA) denying Petitioner's request to reverse his deportation order because the IJ failed to reasonably continue removal proceedings. The BIA's decision affirmed the Immigration Judge's decision denying Petitioner's request for continuance of immigration proceedings. The BIA also erred because it denied the Petitioner's request for a remand based upon new evidence and new facts of which the IJ was unaware.

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Petitioner reasonably believes that a continuance of proceedings or a remand of the immigration proceedings would have resulted in the termination of immigration proceedings in his favor. The BIA has entered a final order in Petitioner's case. A copy of the BIA's December 16, 2009 decision is attached.

Jurisdiction is asserted pursuant to INA §242(a)(1), 8 U.S.C. §1252(a)(1), and 8 U.S.C. § 1252(a)(2)(C) and (D).

Venue is asserted pursuant to INA §242(a)(1), 8 U.S.C. §1252(b)(2) because the Immigration Judge completed proceedings in Tacoma, Washington within the jurisdiction of this judicial circuit. This petition is timely filed pursuant to 8 U.S.C. §1252(b)(1) as it is filed within 30 days of the final order.

To date, no court has appealed the validity of the Board's order. INA§242(c)(2), 8 U.S.C.A. §1252(c)(2). Petitioner has not filed a Motion to Reopen with the Board of Immigration Appeals nor made a request to adjust status with the District Director. The petitioner is currently detained by the Department of Homeland Security at the Northwest Detention Center, at 1623 East J Street in Tacoma, Washington.

Respectfully submitted this 20th day of December, 2009.

By: ______________________

Brian Patrick Conry OSB#82224
534 SW Third Ave, Suite 711
Portland, OR 97204

File: A[redacted] - Tacoma, WA    Date: DEC 16 2009

In re:

IN REMOVAL PROCEEDINGS

APPEAL AND MOTION

ON BEHALF OF RESPONDENT: Brian Patrick Conry, Esquire

ON BEHALF OF DHS: Charles Neil Floyd
Assistant Chief Counsel

In an oral decision dated September 1, 2009, an Immigration Judge found the respondent removable; determined that he did not demonstrate eligibility for any relief from removal; and ordered him removed from the United States to Mexico. The respondent appealed from that decision. While his appeal was pending, the respondent submitted a motion to remand. The appeal will be dismissed, and the motion to remand will be denied.

The respondent was found removable as charged, as convicted of an aggravated felony under section 237(a)(2)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(A)(iii), in conjunction with section 101(a)(43)(B) of the Act, 8 U.S.C. § 1101(a)(43)(B). As substantiated by conviction documents (Ex. 7), he has a 2008 Washington conviction for the offense of "VUCSA – delivery of cocaine." For that crime, he was sentenced to imprisonment of 20 months. The record reflects that he was admitted to the United States as a lawful permanent resident in 1984.

On appeal, the respondent argues that the Immigration Judge erred in not granting his request for an additional continuance, which he sought so that his criminal attorney could pursue post-conviction relief. He maintains that his conviction may be invalid because of a defective guilty plea due to ineffective assistance from former criminal counsel. In his motion to remand, he asks for a remand of the removal case to await the outcome regarding his post-conviction relief petition in criminal court.[1]

We agree with the Immigration Judge's determination to go forward and conclude the proceedings without permitting another continuance. The decision to grant or deny a continuance is within the discretion of the Immigration Judge, and good cause must be shown for a continuance. *See Matter of Perez-Andrade*, 19 I&N Dec. 433 (BIA 1997); *Matter of Sibrun*, 18 I&N Dec. 354 (BIA 1983); 8 C.F.R. § 1003.29 (2009). The respondent was granted four previous continuances, from May 11, 2009, until June 25, 2009; from June 25, 2009, until July 20, 2009; from July 20, 2009, until August 18, 2009; and from August 18, 2009, until September 1, 2009. The first two continuances were allowed so that the respondent could locate an immigration attorney to represent

[1] The respondent also notes in the motion that a decision is pending in *Padilla v. Kentucky*, 130 S.Ct. 42 (memorandum) (Sept. 4, 2009), in which case the Supreme Court heard oral argument on October 13, 2009. He believes that a favorable decision in *Padilla* could lead to post-conviction relief for him.

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U.S. Department of Justice

Executive Office for Immigration Review

*Board of Immigration Appeals*
*Office of the Clerk*

*5107 Leesburg Pike, Suite 2000*
*Falls Church, Virginia 22041*

Conry, Brian, Esquire
534 S.W. Third, Suite 711
Portland, OR 97204-0000

DHS-Office of the Chief Counsel-NW Det. Ctr.
1623 East J Street, Ste. 2
Tacoma, WA 98421

Name [redacted]

A[redacted]

**Date of this notice: 12/16/2009**

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

Donna Carr

Donna Carr
Chief Clerk

Enclosure

Panel Members:
Adkins-Blanch, Charles K.

spignerc

him. The third continuance was given after the immigration attorney informed the Immigration Judge that the respondent would be pursuing post-conviction relief, and the fourth continuance was granted for case preparation purposes.

We find that the Immigration Judge acted correctly in denying the request for the fifth continuance. The fact that the respondent may be pursuing post-conviction relief in the form of a collateral attack on his conviction in state criminal court does not affect its finality for federal immigration purposes. *See Matter of Adetiba*, 20 I&N Dec. 506 (BIA 1992). The respondent has presented no evidence with this appeal that any attack on his conviction has resulted in any vacatur.

Under the facts and circumstances of this case, we find that the respondent has not demonstrated any error by the Immigration Judge in not granting a further continuance or in handling his hearing. We also find that the respondent has not demonstrated any resultant prejudice such as would constitute a due process violation. *See Uppal v. Holder*, 576 F.3d 1014 (9th Cir. 2009).

We also agree with the Immigration Judge's determinations concerning the respondent's removability and ineligibility for relief.

Finally, concerning the respondent's motion to remand, we do not find that a remand is warranted in this case, and we deny the motion to remand.

ORDER: The appeal is dismissed.

FURTHER ORDER: The motion to remand is denied.

FOR THE BOARD



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## CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of December, 2009, I served the attached PETITION FOR REVIEW OF AN AGENCY DECISION in Agency No. A [redacted] on the following by mailing true copies thereof via Federal Express, addressed as follows:

Eric Holder, Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Thomas W. Hussey, Director
Office of Immigration Litigation
U. S. D. O. J./Civil Division
1331 Pennsylvania Ave. N. W.
Washington, D. C. 20004

U.S. Immigration and Customs Enforcement
Department of Homeland Security
Office of the Chief Counsel
1623 East J Street, Suite 2
Tacoma, WA 98421

Chief Counsel
Immigration and Customs Enforcement
1000 Second Avenue, Suite 2900
Seattle, WA 98104

Respectfully submitted,

Raquel Marcos del Rivero
Legal Assistant to
BRIAN PATRICK CONRY, P.C.

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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|---|---|
| [redacted]<br><br>Petitioner,<br>vs.<br><br>ERIC HOLDER, Attorney General,<br><br>Respondent, | Case No: Unassigned<br><br>Agency No. A [redacted]<br><br>EMERGENCY MOTION TO STAY DEPORTATION PENDING REVIEW PURSUANT TO FRAP 27-3 |

**Introduction**

Petitioner [redacted] hereafter Petitioner, by and through counsel Brian Conry, hereby requests an emergency stay of the deportation order authorizing petitioner's removal from the United States. Petitioner is facing immediate deportation from the United States.

Petitioner request an emergency stay of his imminent deportation to Mexico because the Board of Immigration Appeals (BIA) entered a flawed decision because Petitioner has a pending Motion to Vacate Judgment filed in the Walla Walla Superior Court in which prior criminal defense counsel admits constitutional ineffectiveness of counsel as the cause of Petitioner's conviction for Delivery of a Controlled Substance (DCS).

Petitioner reasonably anticipates the conviction will be set aside by the Walla Walla Superior Court by the end of January 2010, if not sooner. The sole basis for the Petitioner's removal order is his conviction for drug trafficking, which is the subject of the Motion to Vacate Judgment.

In light of prior criminal defense counsel's admission to ineffective assistance, there is a strong likelihood that the Petitioner's conviction for DCS will be set aside due to constitutional error. Once the conviction is set aside, due to a violation of United States and Washington effective assistance of counsel constitutional guarantees, the Board of Immigration Appeal (hereafter BIA) will have no choice but to grant a motion to remand on the basis that the judgment upon which Petitioner's removal order depends has been vacated on constitutional grounds and is null and void.

My understanding is that upon filing of the petition for review, the stay by the Ninth Circuit will issue. Deleon v. INS, 115 F3d 643 (9th Cir. 1997).

**Standard for Granting Stay Motions**

Petitioners fulfill the requirements under Abassi v. INS 143 F.3d 513 (9th Cir. 1998) for the issuance of a stay: "either (1) a probability of success on the merits and the possibility of irreparable injury or (2) that serious legal questions are raised and the balance of hardships tips sharply in the petitioner's favor." Abassi, 143 F.3d 514.

The accompanying Memorandum in Support of this motion details petitioners' specific circumstances presenting the likelihood of irreparable injury should petitioner be deported.

The hardships that Petitioner will face if the stay is not granted significantly outweigh any hardship on the Respondent. The Petitioner is, moreover, extremely unlikely to ever be able to return to

the United States if deported even if his conviction is set aside because inadmissibility grounds would likely include a claim that the immigration authorities have a reason to believe that Petitioner is a "drug trafficker" under INA §212(a)(2)(C). This is a much lower standard of proof than a conviction for drug trafficking. Attempts to bring the Petitioner back into the United States, even following a vacation of the conviction if his unlawful deportation order required his removal at this time, is a very steep uphill battle for the Petitioner that will probably prove impossible to overcome.

Petitioner has lived in the United States for approximately 25 years. Petitioner came to the United States in October 4, 1984, when he was 23 years old. He has strong family ties in this country, and he is very close to his four U.S. citizen children and his many U.S. citizen grandchildren.

If [redacted] is deported based on the fact of an unconstitutional obtained conviction and therefore becomes inadmissible as a "reason to believe a drug trafficker" grounds thereafter; this is a tragic result in light of his 25 years of Legal Permanent Resident (hereafter LPS) status which violates Petitioner's right to due process, e.g. to have a meaningful hearing at a meaningful time.

The request for a stay while the Ninth Circuit Petition for Review is pending is emergency in nature. Any failure to grant the stay would result in irreparable harm to petitioners.

Respectfully submitted this 20th day of December, 2009.

By: ______________________________

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CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of December, 2009, I served the attached MOTION FOR STAY OF DEPORTATION PENDING REVIEW in Agency No. A [redacted] on the following by mailing true copies thereof via Federal Express, addressed as follows:

Eric Holder, Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Thomas W. Hussey, Director
Office of Immigration Litigation
U. S. D. O. J./Civil Division
1331 Pennsylvania Ave. N. W.
Washington, D. C. 20004

U.S. Immigration and Customs Enforcement
Department of Homeland Security
Office of the Chief Counsel
1623 East J Street, Suite 2
Tacoma, WA 98421

Chief Counsel
Immigration and Customs Enforcement
1000 Second Avenue, Suite 2900
Seattle, WA 98104

Respectfully submitted,

Raquel Marcos del Rivero
Legal Assistant to
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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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|---|---|
| [redacted] | Case No: Unassigned |
| | Agency No. A [redacted] |
| Petitioner, | |
| vs. | |
| ERIC HOLDER, Attorney General, | MEMORANDUM IN SUPPORT OF EMERGENCY MOTION FOR STAY DEPORTATION PENDING REVIEW PURSUANT TO FRAP 27-3 |
| Respondent, | |

**Introduction**

Petitioner, [redacted], raises before this Court constitutional claims and questions of law. 8 U.S.C. §1252(a)(2)(d). The lead questions of law presented in this case is, did the Board of Immigration Appeal (hereafter BIA) commit an error of law by failing to find the Executive Office of Immigration Review (hereafter EOIR) erred by not allowing a continuance on this case, or by not granting Petitioner's motion to remand filed based upon new facts presented to the Board of which the EOIR court was unaware, until a pending motion to vacate judgment is decided by the Walla Walla Superior Court. We reasonably anticipate a decision within the next 30 days. The BIA erred by not permitting a remand of the case to the EOIR court for a master calendar hearing, at which time it would likely be reported to the EOIR court that the motion to vacate judgment was successful and Petitioner no

1 longer stood convicted of a drug trafficking offense. The immigration proceedings against Petitioner would then have to be terminated as a matter of law.

The Ninth Circuit Court of Appeals has also held that it is an abuse of discretion to deny a stay of deportation when an alien raises a non-frivolous constitutional issue which has not yet been decided by either this Circuit or by the Supreme Court. Blancada v. Turnage, 891 F.2d 688, 690 (9th Cir. 1989). The 9th Circuit Court has jurisdiction to review constitutional challenges and questions of law. 8 U.S.C. § 1252(a)(2)(C) and (D).

Petitioner alleges failure to grant so short a continuance or to allow so short a remand to prevent the removal of a Legal Permanent Resident (hereafter LPR) on a basis of a flawed conviction is a violation of due process under the Fifth Amendment of the United States Constitution. Due process applies to immigration proceedings as a matter of well established immigration law. Cf. Vargas-Garcia v. INS, 287 F.3d 882 (2002); notice of appeal form was insufficient to provide the alien with due process. See also Morrissey v. Brewer, 408 U.S. 471 (1972), which states at page 481 in pertinent part as follows:

> "As MR. JUSTICE BLACKMUN has written recently, "this Court now has rejected the concept that HN2 constitutional rights turn upon whether a governmental benefit is characterized as a 'right' or as a 'privilege.'" Graham v. Richardson, 403 U.S. 365, 374 (1971). Whether any procedural protections are due depends on the extent to which an individual will be "condemned to suffer grievous loss." Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring), quoted in Goldberg v. Kelly, 397 U.S. 254, 263 (1970). The question is not merely the "weight" of the individual's interest, but whether the nature of the interest is one within the contemplation of the "liberty or property" language of the Fourteenth Amendment. Fuentes v. Shevin, 407 U.S. 67 (1972). Once it is determined that due process applies, the question remains what process is due. It has been said so often by this Court and others as not to require citation of authority that due process is flexible and calls for such procedural protections as the particular situation demands.[…]
>
> We turn to an examination of the nature of the interest […]"

Here the nature of interest has been described by the U.S. Supreme Court as follows:

> "The truth is Petitioner could be banished by ICE from "all that makes life worth living" because of his plea to PCS. US Supreme Court jurisprudence recognizes that deportation is punishment. See Bridges v. Wixon 326 US 135,147 (1945) ("Although deportation technically is not a criminal punishment, it may nevertheless visit as great a hardship as the deprivation of the right to pursue a vocation or a calling"). Olim v. Wakinekona, 461 US 238, 253 Note 1 (1983) ("Whether it is called banishment, exile, deportation, relegation or transportation, compelling the person 'to quit a city, place, or country, for a specified period of time or for life' has long been considered a unique and severe banishment, exile, deportation, relegation or transportation, compelling the person 'to quit a city, place, or country, for a specified period of time or for life' has long been considered a unique and severe deprivation and was specifically outlawed by 'the twelfth section of the English habeas corpus act, 31 CAR.II, one the three great muniments of English liberty"[J. Marshall]). ; Ng Fung Ho v. White, 295 US 276, 284 (1922) (deportation may result in the loss of "all that makes life worth living" [J. Brandeis])."

The Ninth Circuit should reverse and remand due to the clearly erroneous determinations of law by the BIA, which would deprive this LPR of 25 years a reasonably requested timely opportunity to set aside an unconstitutionally obtained conviction in order to set aside a constitutionally flawed deportation order that relies on this unconstitutionally obtained conviction.

The failure to allow this LPR an additional thirty days, either by remand or by determining that the EOIR court had erred by finding the Immigration Judge's (hereafter IJ) failure to allow a further continuance is constitutional error because it deprives this LPR of due process of law under the Fifth Amendment of the United States Constitution.

**Jurisdiction**

The Ninth Circuit has jurisdiction to review decisions of the Board of Immigration Appeals (BIA) for an abuse of discretion; and to stay the deportation of the Petitioner pending

review of the agency decision. 8 U.S.C. §1152(b)(3)(B). Shaar v. INS, 141 F3d 953, 955 (9th Cir. 1998), Varela v. INS, 124 F3d 1237 (9th Cir. 2000). The applicable standard is the one that this court has traditionally employed for discretionary stays of removal. Andreiu vs. INS, 253 F.3d 477 (9th Cir. 2001) (en banc). In Abbassi v. INS, 143 F3d 513, 514 (9th Cir. 1998), this court explained that

> "[W]e evaluate stay requests under the same standards employed by district courts in evaluating motions for preliminary injunctive relief." That is, the petitioner must show "either a probability of success on the merits and the possibility of irreparable injury, or that serious legal questions are raised and the balance of hardships tips sharply in petitioner's favor." Id."

Petitioner's circumstances fit squarely within the Abbassi standard for the granting of a stay request.

**Statement of the Case/Procedural History**

Petitioner, a native and citizen of Mexico, first entered the United States in October 4, 1984, at the age of 23, and was admitted as a Legal Permanent Resident of the United States in October 4, 1984. He has considerable family and social ties to the United States, including four (4) U.S. citizen children and many U.S. citizen grandchildren. On December 3, 2008, Petitioner was convicted by guilty plea of VUCSA- Delivery of Cocaine in violation of RCW 69.50.401 (1)(2)(a), after having been incorrectly advised of the immigration consequences of his guilty plea by his criminal defense counsel. Counsel does not recall telling Petitioner that he could be deported. The plea petition indicated that Petitioner could be deported. The immigration consequence warning in the plea petition was not reviewed by the court taking the plea. Counsel does not recall reviewing the plea petition with Petitioner. If Petitioner read the plea petition, this

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1 is misadvise of the immigration consequences of a conviction because this conviction requires
2 this Petitioner be banished from the United States.

3 On April 28, 2009, a Notice to Appear was issued charging Respondent as removable for a
4 conviction of an "aggravated felony" under INA § 101(a)(43)(B). A Motion for Continuance of
5 the immigration proceedings was filed with the IJ on May 22, 2009. On May 26, 2009, the
6 motion was granted by IJ Tammy Fitting, and the Master hearing before the Immigration Court
7 was schedule for June 25, 2009. A second Motion for Continuance was filed by Respondent on
8 June 11, 2009, and the Master hearing was rescheduled for August 18, 2009.

9 Counsel filed a motion to vacate judgment in Walla Walla Superior Court on November
10 28, 2009. The allegations are that Petitioner was denied his right to effective assistance of
11 counsel under the Sixth Amendment, Right to Counsel of the U.S. Constitution and under the
12 corollary section of the Washington State Constitution. Petitioner expects that this case will be
13 heard by the Walla Walla Superior Court within the next thirty days.

14

15

16 **DUE PROCESS REQUIRES THIS CASE TO BE CONTINUED OR REMANDED FOR**
17 **AT LEAST A MERE ADDITIONAL 30 DAYS.**

18 The Ninth Circuit retains power to review constitutional due process challenges to immigration
19 decisions. INA §242(a)(1), 8 U.S.C. §1252(a)(1), Ramirez-Alejandro v. Ashcroft, 319 F.3d 365, 367 (9th
20 Cir 2003) (en banc).

21 It is well established that the Fifth Amendment entitles aliens to the Due Process of law in
22 deportation proceedings, and furthermore, that Due Process for an immigrant threatened with
23 deportation includes the right to a full and fair hearing. See Landon v. Plasencia, 459 U.S. 21 (1982).
24 Further, due process challenges to final orders of deportation are reviewable *de novo*. Colmenar v. INS,
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210 F.3d 967, 971 (9th Cir. 2000).

Further, "[m]atters of doubt should be resolved in favor of the alien in deportation proceedings." Fong Haw Tan v. Phelan, 333 U.S. 6 (1948), Matter of G., 9 I& N Dec. 159, 164 (AG 1961). Deportation statutes must be narrowly construed in favor of aliens. Rosenberg v. Fleuti, 374 U.S. 449, 459 (1963); Bonetti v. Rogers, 356 U.S. 691, 699 (1958); Barber v. Gonzalez, 347 U.S. 642-3 (1954); Lennon v. INS, 527 F.2d 187, 193 (2nd Cir 1975); Matter of Chartier, 16 I&N Dec. 284, 287 (BIA 1977).

**Errors Made by the Immigration Judge Not Remedied by the Board of Immigration Appeals**

The error of the IJ was failure to allow the Petitioner adequate time to collaterally attack his constitutional flawed prior conviction.

**Errors by the BIA**

The BIA erred by finding that Petitioner :

> "We find that the Immigration Judge acted correctly in denying the request for the fifth continuance. The fact that the respondent may be pursuing post-conviction relief in the form of a collateral attack on his conviction in state criminal court does not affect its finality for federal immigration purposes. *See Matter of Adetiba*, 20 i&n Dec. 506 (BIA 1992). The respondent has presented no evidence with this appeal that any attack on his conviction has resulted in any vacatur.
>
> Under the facts and circumstances of this case, we find that the respondent has not demonstrated any error by the Immigration Judge in not granting a further continuance or in handling his hearing. We also find that the respondent has not demonstrated any resultant prejudice such as would constitute a due process violation. See Uppal v. Holder, 576 F.3d 1014 (9th Cir. 2009).
>
> We also agree with the Immigration Judge's determination concerning the respondent's removability and ineligibility for relief.

Finally, concerning the respondent's motion to remand, we do not find that a remand is warranted in this case, and we deny the motion to remand."

The BIA decision is badly flawed where it claims that the new evidence did not warrant a remand. See Matter of Coelho, 20 I&N Dec. 464, 471 (BIA, 1992). The new evidence presented to the BIA includes the fact that a motion to vacate judgment had been filed. In the Motion for late brief filing and motion to remand filed by Petitioner's counsel with the BIA, counsel stated:

> "Respondent believes that late filing should be allowed because Respondent was just able to hire counsel on November 11, 2009, and it was not until November 13, 2009 that counsel learned that Respondent's brief was due to the BIA on November 12, 2009. Respondent is not sophisticated whatsoever in matters of law, nor does he have good English reading skills. Respondent has just located counsel who is willing to assist him in this litigation. Moreover, Respondent has already advised this court of the basis of this appeal. The basis for the appeal has not changed by the appellate brief being filed on his behalf but only elaborated upon in a manner that only an attorney could do so for him. The appellate brief is being filed the same day that counsel in Portland, Oregon, learned that it was due yesterday. Yesterday, of course, was a holiday and it could not have been filed yesterday.
>
> Attached to this motion are records that I have been able to obtain in support of Mr. Martinez Ruiz's position that he was convicted of a crime improperly."

Records provided to the BIA included:

> "[...] a letter and affidavit from his Criminal Defense Counsel discussing the weakness of the evidence against the Respondent leading to his unconstitutionally obtained conviction in Walla Walla.

Counsel also advised the BIA as follows:

> "I understand that Mr. Martinez Ruiz was not advised of the required banishment immigration consequences of his conviction, and as such he received ineffective assistance under the Sixth Amendment of the United States Constitution. His Criminal Defense Counsel, Mr. McCool, has stated as much to me. Respondent's conviction should be set aside on that basis as well as on the basis of the failure of his criminal defense counsel to properly investigate the charges against him.
>
> Another fact supporting Mr. Martinez's prima facie Personal Restraint Petition is that he had not been provided with the necessary factual background related to the charges against him prior to his plea entry If he had been apprised of the relevant facts by his criminal defense counsel, he would have realized that he had a solid "alibi" for the

allegation that he delivered cocaine on April 10, 2008 and/or April 17, 2008. On April 10, 2008, he was working. On April 17, 2008, he was with Petra Sandoval. Ms. Sandoval has filed a declaration with the Walla Walla County Court to that effect. Petra Sandoval's daughter has as well."

Petitioner has made out a very strong prima facie case of ineffective assistance that it is unlikely the State of Washington can defeat. The Sixth Amendment of the U.S Constitution applies to the states under the Fourteenth Amendment[1]. The 6th Amendment effective assistance clause test is set forth in Strickland v. Washington, 466 U.S. 668, 698 (1984) and has two components:

> "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense."

Strickland Id. at 694, defendant ordinarily must demonstrate a "reasonable probability that, but for counsel's unprofessional errors, the result of proceedings would have been different" to obtain relief. A reasonable probability is a probability sufficient to undermine confidence in the outcome. In the plea context, prejudice is established if the defendant can show that he would not have plead but for the ineffective assistance. Hills v. Lockhart, 474 US 54, 57 (1985) (prejudice is established where there is a reasonable probability that, but for counsel's errors, the defendant would not have pleaded guilty, and would have insisted on going to trial.)

[1] No State "shall...deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." 14th Amendment, U.S Constitution.

## Remand Request

Petitioner also requested that the BIA remand the appeal because of anticipated intervening circumstances. During the pending appeal, the United States Supreme Court heard oral argument on October 13, 2009, in Padilla v. Kentucky, 174 L. Ed. 2d 627; 2009 U.S. (2009). In Padilla, the U.S. Supreme Court is considering a case in which Mr. Padilla's counsel's failure to apprise him that he would be deported as a result of his plea to Delivery of Controlled Substance requires that his conviction be set aside. Padilla's counsel mistakenly told Mr. Padilla he would not be deported. It is anticipated that Mr. Padilla's conviction will be set aside due to the affirmative misadvise of the immigration consequences of his conviction by criminal defense counsel. It is anticipated that Padilla would be decided as early as January 2010.

The BIA failed to consider Petitioner's argument that in the Matter of Ahmed v. Holder, 569 F.3d 1009 (9th Cir.), decided on June 24, 2009, the court held that the denial of a continuance to await the decision on an appeal from a denial of an I-140 visa petition filing prevented the petitioner from exercising his right to present evidence during removal proceedings. There is no rational basis for a continuance to be granted in Ahmed and for not to be granted or remand to be permitted in Petitioner's case for either the conclusion of his motion to vacate judgment and/or to wait the Supreme Court's decision in Padilla.

Petitioner anticipates providing the Immigration Court with the document showing that his conviction has been set aside due to ineffective assistance of counsel. This would require that the immigration proceedings against him be terminated in his favor. Petitioner surely demonstrates prejudice or potential prejudice through this submission. The BIA erred in concluding otherwise.

## Possibility of Irreparable Harm

The hardships the petitioner and his family face if the stay is not granted significantly outweigh any hardships on the Respondent. The Petitioner may never be able to return to the United States if he is deported even if his conviction is set aside. He will become subject to grounds of inadmissibility. There is no waiver for a reason to believe that Petitioner is a "drug trafficker[1]," ground of inadmissibility which obviously would be made by Immigration and Customs Enforcement (hereafter ICE) if, following the conviction being set aside, this Petitioner has already been removed out of the country.

Petitioner has been in the United States for approximately 25 years and his lifetime ties in the United States.

## CONCLUSION

The balance of hardships in this case tips sharply in petitioner's favor, and in the interest of justice, the stay of deportation must be entered.

Respectfully submitted this 20th day of December, 2009.

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[1] INA §212(a)(2)(C) provides that: "Any alien who the consular or immigration officer knows or has reason to believe is or has been an illicit trafficker in any such controlled substance or is or has been a knowing assister, abettor, conspirator, or colluder with others in the illicit trafficking in any such controlled substance, is inadmissible."

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CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of December, 2009, I served the attached MEMORANDUM IN SUPPORT OF MOTION FOR STAY OF DEPORTATION PENDING REVIEW in Agency No. A [redacted] on the following by mailing true copies thereof via Federal Express, addressed as follows:

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U.S. Department of Justice
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Respectfully submitted,

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