Trina Realmuto
Kaitlin Konkel, Student Extern
National Immigration Project of the
National Lawyers Guild
14 Beacon Street, Suite 602
Boston, MA 02108
(617) 227-9727 ext. 8 (tel)
(617) 227-5495 (fax)
trina@nipnlg.org

DETAINED

DEPORTATION IMMINENT

EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS
FALLS CHURCH, VIRGINIA

In the Matter of:	)	
	)	
[redacted],	)	A Number: A[redacted]
	)	
Respondent,	)	
	)	
In Removal Proceedings.	)	
	)	

MOTION TO REOPEN TO TERMINATE PROCEEDINGS AND

EMERGENCY MOTION FOR STAY OF DEPORTATION TO[redacted]

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I. INTRODUCTION

Pursuant to § 240(c)(7) of the Immigration and Nationality Act (INA), Respondent, [redacted], who received asylum from [redacted] in [redacted] and became a lawful permanent resident in 1989, hereby seeks reopening of this case and an emergency stay of deportation to [redacted], which is imminent. This case was last before the Board of Immigration Appeals ("BIA" or "Board") on a direct appeal. The Board dismissed the appeal and denied Respondent's motion to remand on May 22, 2013. Exhibit A (BIA Decision). Respondent petitioned for review pro se to the U.S. Court of Appeals for the Second Circuit. In November 2013, the Second Circuit appointed undersigned counsel with instructions to brief the reasonableness of the Attorney General's decision in *Matter of Y-L-*, *A-G-*, *R-S-R-*, 23 I&N Dec. 270 (AG 2002). Exhibit B (Court of Appeals Orders). Critically, in the course of reviewing the administrative record, undersigned counsel discovered that **Respondent is not deportable under either of the grounds charged in the Notice to Appear.**

As the Supreme Court held in *Dada v. Mukasey*, "[t]he purpose of a motion to reopen is to ensure a proper and lawful disposition." 554 U.S. 1, 18 (2008). *See also Kucana v. Holder*, 558 U.S. 233, 242 (2010) (reaffirming that a motion to reopen is an "important safeguard"). Because Respondent is not deportable as charged—a fact of which he was unaware until undersigned counsel's appointment and which prior counsel, whose representation constituted ineffective assistance, failed to contest—reopening is necessary to protect against an erroneous decision in this case. In addition, the Board should regard this as a timely filed statutory motion because Respondent merits equitable tolling under the current standard.

Therefore, the Board should reopen its decision and terminate proceedings against Respondent.

II. RELEVANT STATEMENT OF FACTS AND STATEMENT OF THE CASE

Respondent is a native and citizen of [redacted]. The former Immigration and Naturalization Service granted his affirmative application for asylum in [redacted], and he obtained lawful permanent resident (LPR) status on [redacted] 1989. Exhibit C (LPR card). On October 29, 2008, U.S. Immigration and Customs Enforcement (ICE) placed Respondent in removal proceedings by charging him with removability based on a [redacted] 2002 conviction in Connecticut for sale of hallucinogen/narcotics in violation of Connecticut Statutes § 21a-277a and an October 27, 2008 conviction in Connecticut for possession of narcotics in violation of Connecticut Statutes § 21a-279(a). Exhibit D (Notice to Appear and Form I-261). ICE charged Respondent with deportability under INA § 237(a)(2)(B)(i) and 237(a)(2)(A)(iii) for a controlled substance conviction and an aggravated felony conviction (as defined in INA § 101(a)(43)(B) (drug trafficking)), respectively. *Id.*

Respondent appeared pro se at his removal proceedings in Hartford, Connecticut on [redacted], 2008. When initially discussing the convictions that formed the basis of the charges against him, Respondent stated, "I don't consider it as aggravated felon. . . ." Exhibit E (Transcript at 15). Thereafter, ICE submitted conviction documents issued by the Connecticut Superior Court. Exhibit F (conviction documents). When asked by the Immigration Judge (IJ) whether it was true that he had been convicted on [redacted] 2002 for sale of a hallucinogenic and narcotics, Respondent stated "[redacted], 2002, yes." Exhibit E (Transcript at 25). When asked by the IJ whether it was true that he had been convicted on [redacted], 2008 for possession of narcotics, Respondent replied "Yes, sir." *Id.* Although he conceded the existence of said convictions, **the IJ never asked Respondent to admit or deny removability, and Respondent never conceded that the convictions constituted a controlled-substance offence or a drug-**

trafficking aggravated felony. Instead, he asked the IJ "I'm being charged for an aggravated felony?" to which the IJ responded "Yes, that's correct." *Id*. at 27. Respondent proceeded to ask whether there was a defense for the charge. *Id*. ("So there was no defense for that?"). **Before the IJ could respond, ICE trial counsel (incorrectly) told Respondent that there was no defense to an aggravated felony charge**. *Id*.

Respondent proceeded to ask the IJ about his options for defending himself. The IJ did not inform Respondent that he could contest removability as charged. Instead, the IJ responded by telling Respondent that his only option was to apply for relief under the Convention Against Torture (CAT) and that he had little chance of prevailing on this claim. Exhibit E (Transcript at 27) (an aggravated felony is "a very bad thing under Immigration [sic] law"); at 28 ("I think we talked about the *only* option [CAT relief] that would possibly allow you to stay") (emphasis added); at 29 ("I don't believe [that the harm faced by Respondent's father, a [redacted] political figure] would make a difference in the case"); at 29 ("you've got a very difficult case"); at 29 ("[y]ou have a tough case"); at 29 ("[CAT relief is] your only option"); at 30 ("[T]he nature of your convictions makes it a very difficult situation for you. It eliminates most of the options that may allow you to stay here under the law.").[1] The IJ thereafter stated that, "based on the evidence and based on your admissions, it appears that I have no option but to order your removal to [redacted]." Exhibit E (Transcript at 30).

On [redacted] 2012, while detained in the custody of ICE, Respondent filed a motion to reopen to file an asylum application under INA § 240(c)(7)(C)(ii). Exhibit G. On September 4, 2012, the IJ granted reopening. *Id*. The IJ subsequently changed venue to Batavia, New York.

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[1] *See also* Exhibit E (Transcript at 20) ("I mean, the problem in your case is your convictions, okay? And for Immigration [sic] purposes, there is pretty serious consequences. Now, the *only* possibility under the law is an application called the Convention Against Torture. . .") (emphasis added).

In October 2012, Respondent orally retained former counsel, [redacted], to represent him. Exhibit H (Continuance Motion); Exhibit I (Respondent's Declaration). Based on Mr. [redacted] assurances, Respondent believed that the attorney "would handle [his] case in the best way possible to allow [him] to remain in the United States." Exhibit I (Respondent's Declaration). Mr. [redacted] had told him he qualified for withholding of removal and further assured him that he would be able to prevent his deportation. *Id.* Mr. [redacted] never asked Respondent to sign a formal retainer agreement. *Id.* Respondent's sister, [redacted], paid [redacted] $2,500 for his representation. Exhibit J (Declaration of [redacted]).

On October 22, 2012, Mr. [redacted], then recently retained, first appeared before the IJ on Respondent's behalf. At that hearing, the IJ put Mr. [redacted] on notice that he would grant Mr. [redacted] the opportunity to plead to the allegations in the Notice to Appear (NTA). Exhibit E (Transcript at 53) ("It does appear there was a pleading previously taken when the case was before the court in Hartford, but the matter has been reopened, so you can review it as you see fit."). At the conclusion of the proceeding, the IJ reminded Mr. [redacted] that he could review the record of proceeding in the case. Exhibit E (Transcript at 54) ("And again, Mr. [redacted], that will be a good idea for you to review the Court's ROP. All these exhibits are here and you can get some copies of what you need.").

On [redacted] 2012, Mr. [redacted] again appeared before the IJ on Respondent's behalf, and the following exchange occurred:

> JUDGE TO MR. [redacted]
> All right, sir. And, Mr. [redacted], as you may remember, I had advised you at the last hearing that there was previously a pleading taken to the Notice to Appear and the Form I-261 when the case was before the Hartford, Connecticut court. You are aware of that, is that correct, that there was previously a pleading taken? And the previous Immigration Judge had sustained removability.
>
> MR. [redacted] TO JUDGE

Yes.

JUDGE TO MR. [redacted]
I raise that simply because I remember potentially giving you the opportunity to revisit pleadings if you felt that was necessary. If you don't, then we will proceed with the relief application. But there was previously a pleading, I believe, when the respondent represented himself, and there was a finding of removability. I am not inclined to disturb that, but I did not mention that to you at the last hearing.

MR. [redacted] TO JUDGE
Your Honor, I have not -- I do not have the new NTA for some reason.

JUDGE TO MR. [redacted]
Well, the NTA I am referring is not a new one. It is dated [redacted], 2008. That was Exhibit No. 1. And then the Government supplemented that with a Form I-261 which was marked into the record by the previous court as Exhibit No. 2. And that charging document was dated [redacted] 2008.

MR. [redacted] TO JUDGE
And they just supplemented -- or they changed the removal grounds?

MR. [redacted] TO JUDGE[2] [*Should be* JUDGE TO MR. [redacted]]
Right. They withdrew the original charge that appeared on the Notice to Appear and they substituted it with the controlled substance charge and the aggravated felony drug-trafficking charge. There was, as I mentioned, previously a pleading. There was findings, but I believe I did mention to you at the last hearing if you wanted or felt the need, if any, to readdress that, the Court would allow you to do that. If there is no need to readdress the pleading –

MR. [redacted] TO JUDGE
No, there is no need, Your Honor.

JUDGE TO MR. [redacted]
All right. Then you are proceeding on the relief applications --

MR. [redacted] TO JUDGE
Correct.

Exhibit E (Transcript at 57-59). Thus, despite having the opportunity to contest the classification of Respondent's 2002 and 2008 convictions as deportable offenses, Mr.

[2] This appears to be a transcription error and should read "JUDGE TO MR. [redacted]" rather than "MR. [redacted] TO JUDGE." The statement in question is responsive to a previous question from Mr. [redacted], and Mr. [redacted] subsequently responded to it.

T[redacted] did not do so. Rather, Mr. [redacted] pursued applications for withholding of removal under INA § 241(b)(3) and CAT relief on Respondent's behalf.

At an individual merits hearing on those applications on December 18, 2012, Mr. [redacted] inadequately questioned Respondent and his sister, [redacted], about the dangers he faced on account of his family's political activities in [redacted]. Exhibit I (Respondent's Declaration); Exhibit J (Declaration of [redacted]). Further, even though they had discussed it before the hearing, Mr. [redacted] did not ask Respondent questions that would allow him to address the detention policy [redacted] enforces against [redacted] nationals who have been convicted and deported from the United States. Exhibit I (Respondent's Declaration). This was a significant part of Respondent's claim, and Mr. [redacted]s did not ask him about it or even mention it in his closing argument.

Although Mr. [redacted] questioned Respondent about his convictions, these questions were not directed to overcome the presumption established in *Matter of Y-L-*, *A-G-*, *R-S-R-* that all drug-trafficking crimes are particularly serious, using the factors set forth in that precedent decision. On the contrary, Mr. [redacted] demonstrated that he was unaware of the decision, stating in his closing argument:

> I don't think the Court should find that his convictions for essentially simple possession or exchange of cocaine for personal use should constitute a particularly serious crime. Because if these are particularly serious crimes, they might as well change the law and say that all controlled substance convictions are particularly serious crimes, and they haven't done that.

Exhibit I (Transcript at 172-73). Thus, at the conclusion of the hearing, the IJ found Respondent ineligible for asylum and withholding, denied his CAT application on the merits, and ordered him removed to [redacted]. Exhibit K (IJ Decision).

Respondent, his sister, and his niece, who attended the hearing, were shocked and devastated by the IJ's decision, and they feared for Respondent's life. Exhibit I (Respondent's Declaration); Exhibit J (Declaration of [redacted]); and Exhibit L (Declaration of [redacted] Because Mr. [redacted] had failed to present Respondent's case to the IJ, Respondent did not to hire the attorney to represent him further before the Board of Immigration Appeals. Exhibit I (Respondent's Declaration).

Respondent, still detained, tried to find a new attorney to represent him on appeal, but neither he nor his sister, who had already had paid $2,500 for Mr. [redacted], could afford to pay for another lawyer. Exhibit I (Respondent's Declaration); Exhibit J (Declaration of [redacted]); and Exhibit L (Declaration of [redacted]). Moreover, despite the assistance of his [redacted], he could not find an immigrant rights organization to take his case on a pro bono basis. Exhibit L (Declaration of [redacted]). He filed a pro se appeal to the Board.

In its decision, dated May 22, 2013, the Board dismissed Respondent's appeal, construed his submission of new evidence on appeal as a motion to remand, and denied the motion. Exhibit A (BIA Decision). Notably, the Board only addressed one of the two convictions included in the charging documents: the charged 2002 conviction for the offense of sale of hallucinogen/narcotics in violation of Connecticut Statutes § 21a-277a. *Id*. at 1. The Board noted that "respondent does not appear to contest his removability." *Id*.

Additional bases for the Board's decision currently are the subject of a timely filed petition for review pending before the U.S. Court of Appeals for the Second Circuit. *See* 8

C.F.R. § 1003.2(e).[3] On November 26, 2013, the Second Circuit granted Respondent's motion to appeal in forma pauperis, ordered the appointment of counsel, and denied the stay motion he had filed with his petition for review. Exhibit B (Court of Appeals Orders). In the course of reviewing the administrative record to prepare a request to reconsider the stay denial, undersigned counsel discovered that Mr. [redacted] had failed to contest deportability and that Respondent has a strong argument that he is not deportable as charged. Exhibit M (Declaration of Trina Realmuto). Undersigned counsel mailed copies of the reconsideration pleadings to Respondent at the Buffalo Federal Detention Center. Exhibit M (Declaration of Trina Realmuto).

Upon reading the motion papers, Respondent learned that Mr. [redacted] should have denied removability for the first time. Exhibit I (Respondent's Declaration); Exhibit M (Declaration of Trina Realmuto); Exhibit N (letter from Respondent to undersigned counsel indicating that the motion to reconsider raised points of which he was previously unaware). On January 21 or 22, 2014, undersigned counsel received from Respondent authorization to pursue a motion to reopen on his behalf. Exhibit M (Declaration of Trina Realmuto). This motion to reopen follows.

III. ARGUMENT

A. THE BOARD SHOULD REOPEN PROCEEDINGS BECAUSE RESPONDENT IS NOT DEPORTABLE UNDER INA §§ 237(a)(2)(B)(i) OR 237(a)(2)(A)(iii).

1. Standard for Reopening

The purpose of a motion to reopen is to "ensure a proper and lawful disposition" of the case. *Dada v. Mukasey*, 554 U.S. at 18. A motion to reopen asks the Board to reopen proceedings so that the respondent may present new evidence, and a new decision can be entered

[3] Pursuant to 8 C.F.R. § 1003.2(e), Respondent is not currently the subject of a criminal prosecution or criminal proceeding under the Act.

following an evidentiary hearing. *Matter of Cerna*, 20 I&N Dec. 399, 403 (BIA 1991). A motion to reopen "shall state the new facts that will be proven at a hearing to be held if the motion is granted and shall be supported by affidavits and other evidentiary material." INA § 240(c)(7)(B); 8 C.F.R. § 1003.23(b)(3). A motion to reopen to provide a respondent an opportunity to apply for relief or a benefit under the Act may be granted where the Immigration Judge did not fully explain the right to apply for relief and did not afford the person an opportunity to apply for relief at the hearing. 8 C.F.R. § 1003.23(b)(3). The motion must be accompanied by the application for relief and all supporting documents. *Id.*

2. ICE Failed to Meet Its Burden of Proving Respondent Deportable Because the Conviction Documents Do Not Identify the Controlled Substance.

On the NTA and Form I-261, ICE charged Respondent with deportability under INA §§ 237(a)(2)(B)(i) and 237(a)(2)(A)(iii) for a controlled substance conviction and an aggravated felony conviction (as defined in INA § 101(a)(43)(B)), respectively. Exhibit D (NTA and Form I-261). As an initial matter, Respondent never conceded that his convictions constituted deportable offenses, *see* § II, *supra*, and § III.B.3.b, *infra*. The BIA's decision, which Respondent seeks to reopen here, addresses only Respondent's 2002 conviction for possessing a narcotic/hallucinogen with intent to sell. Exhibit A (BIA Decision).

Critically, however, both § 237(a)(2)(B)(i) and § 101(a)(43)(B) explicitly require a conviction for a substance defined in 21 U.S.C. § 802.[4] For both of Respondent's charged convictions, nothing in the deportability record identifies the Connecticut controlled substance

[4] Section 237(a)(2)(B)(i) provides that a noncitizen is deportable who ". . . at any time after admission has been convicted of . . . any law . . . relating to a controlled substance (*as defined in section 802 of Title 21*)" (emphasis added). Section 101(a)(43)(B) defines "aggravated felony" to mean, among other things: "illicit trafficking in a controlled substance *(as defined in section 802 of Title 21)*, including a drug trafficking crime (as defined in section 924(c) of Title 18) (emphasis added).

for which he pled guilty. Exhibit F (conviction documents).[5] The Board long has held that a failure to identify the controlled substance is fatal to a controlled substance ground of deportability based on possession or distribution. *Matter of Paulus*, 11 I&N Dec. 274, 275 (BIA 1965).[6] At the time the Hartford IJ found Respondent deportable and at the time the Batavia IJ found him deportable, ICE had failed to meet its burden of identifying the substance. Thus, neither IJ should have found him deportable.

3. Respondent's Charged State-Law Convictions Do Not Render Him Deportable Because Connecticut's Controlled Substance Schedule Are Broader Than the Federal Schedule.

Respondent's charged state-law convictions also do not render him deportable since Connecticut's list of controlled substances contains substances that are not listed in 21 U.S.C. § 802. *Matter of Paulus*, 11 I&N Dec. 274, 276 (BIA 1965). Here, both charged convictions -- C.G.S.A. § 21a–277(a) (possession with intent to sell narcotics/hallucinogen) and C.G.S.A. § 21a-279(a) (possession of narcotics/hallucinogen) -- are predicated on the same controlled substances. *See* C.G.S.A. § 21a-240(30); C.G.S.A. § 21a-243(g); Conn. Agencies Regs. § 21a–243–7(a)(10), (52).

The Second Circuit, the U.S. District Court for the District of Connecticut, and this Board have expressly recognized that two of the substances on Connecticut's list of controlled

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[5] Removal proceedings are bifurcated between deportability and relief in that a fact-finder cannot use testimonial evidence in support of a relief application as evidence of deportability when a person denies the charges. 8 C.F.R. § 1240.11(e); *Matter of Bulos*, 15 I&N Dec. 645, 648-49 (BIA 1976). As such, Respondent's identification of the actual substance in testimony in support of his withholding and CAT applications is not part of the record for determining deportability. *Id.*

[6] For nearly fifty years, this Board has followed *Matter of Paulus*. *See Matter of Mena*, 17 I&N Dec. 38, 39 (BIA 1979) (affirming an order of deportation where the record of conviction revealed that the respondent's conviction was for possession was heroin); *Matter of Hernandez-Ponce*, 19 I&N Dec. 613, 616 (BIA1988) (recognizing that "[p]hencyclidine is listed as a controlled substance under the Controlled Substances Act").

substances are not controlled under 21 U.S.C. § 802: specifically, thenylfentanyl and benzylfentanyl.[7] In *Gousse v. Ashcroft*, 339 F.3d 91 (2d Cir. 2003), the Second Circuit held that the petitioner's conviction for violating C.G.S.A. § 21a–277(a) was an aggravated felony *only* because he could not "identify a substance that was both (i) within the Connecticut definition of 'narcotic substance' and (ii) outside the federal definition of 'controlled substance.'" *Gousse*, *supra*, 339 F.3d at 93. The Court's analysis contemplates that it would have reached a different result had the petitioner identified a substance that was on Connecticut's controlled substance schedule, but not on the federal schedule. *Id*.

The District Court for the District of Connecticut repeatedly has held expressly that Connecticut's controlled substance laws include substances that are not federally controlled. *See*, *e.g.*, *United States v. Madera*, 521 F. Supp. 2d 149, 155 (D. Conn. 2007); *United States v. Lopez*, 536 F. Supp. 2d 218, 222 (D. Conn. 2008); *United States v. Cohens*, No. 3:07–cr–195 (EBB), 2008 WL 3824758, at *4–5 (D. Conn. Aug. 13, 2008). In *Madera*, the court noted that the United States conceded that benzylfentanyl and thenylfentanyl were not on the federal schedule. *Madera*, 521 F. Supp. 2d at 154-55 & n.4.

Moreover, this Board has distinguished *Gousse* expressly and held that a noncitizen convicted under Connecticut's drug laws was not deportable because thenylfentanyl and benzylfentanyl were controlled substances in Connecticut but not controlled under 21 U.S.C. § 802. *In Re Spaulding*, 2004 WL 2943545, at *2 (BIA Nov. 2, 2004); attached hereto as Exhibit

[7] The U.S. Drug Enforcement Agency (DEA) temporarily listed trifluoromethylphenylpiperazine on the federal Schedule of Controlled Substances, on an emergency basis, in September 2002. *See* 67 Fed. Reg. 59161 (Sept. 20, 2002); 67 Fed. Reg. 5916. On March 19, 2004, the Attorney General allowed the emergency scheduling of trifluoromethylphenylpiperazine to expire, and the DEA removed the drug from its lists of controlled substances. 69 Fed. Reg. 12794-01 (Mar. 18, 2004). The State of Connecticut added trifluoromethylphenylpiperazine to its schedule in 2003. 65 Conn. L.J. 7 (Aug. 12, 2003). It remains on the schedule to date. Conn. Agencies Regs. § 21a–243–7(c)(43).

O. Having reached a legal conclusion in *Spaulding* regarding the disparity between the Connecticut and federal drug schedules, the BIA must apply the law consistently in this case, even though *Spaulding* is not a precedent decision. *Davila-Bardales v. INS*, 27 F.3d 1, 5 (1st Cir. 1994) (requiring the BIA to apply the law consistently in unpublished cases that raise identical legal issues even though such cases are not precedential).

4. Second Circuit Law Supports the Conclusion that Respondent is Not Deportable.

More recently, in *McCoy v. U.S.*, 707 F.3d 184, 187 (2d Cir. 2013), the Second Circuit acknowledged that thenylfentanyl and benzylfentanyl have ceased to be controlled under 21 U.S.C. § 802 but remain on the Connecticut schedule. The Second Circuit noted that the United States conceded the issue on June 29, 2009. *Id.* at 188 (citing Sentencing Mem. of United States at 6–8, *United States v. Jackson*, No. 3:06–cr–151 (MRK) (D. Conn. June 29, 2009) (ECF No. 96)). The Second Circuit marked the date of this concession as the date on which no doubt remained that Connecticut's drug laws include substances that are not defined in 21 U.S.C. § 802.[8]

5. Supreme Court Law Reaffirms the Conclusion that Respondent is Not Deportable.

McCoy, Matter of Paulus, *Madera*, *Cohen*, and *Lopez*, *supra*, make clear that C.G.S.A. § 21a–277(a) (sale of hallucinogen/narcotics) and C.G.S.A. § 21a-279(a) (possession of narcotics) are broader in scope than in 21 U.S.C. § 802. If these cases leave any doubt that the categorical

[8] The issue in *McCoy* was whether Mr. McCoy received ineffective assistance of counsel in his criminal case because his lawyer's failure to raise the disparity between the federal and Connecticut drug schedules subjected him to a federal sentencing enhancement. The Circuit concluded that there was no ineffective assistance in his criminal case because a reasonably competent attorney would not have known about thenylfentanyl and benzylfentanyl in 1996 on the date McCoy pled guilty, since it was before the date the United States conceded that Connecticut's schedules were not a categorical match with the federal schedules. *McCoy*, 707 F.3d at 188.

approach applies to the deportability determination in Respondent's case, then the Court's decision in *Moncrieffe v. Holder*, 133 S. Ct. 1678 (2013) eliminates it. In that case, the Supreme Court held that a Georgia conviction of marijuana possession with intent to distribute may not be deemed a drug trafficking aggravated felony for removability purposes when the statute of conviction covers some conduct (social sharing of marijuana) that falls outside the aggravated felony drug trafficking definition at issue. *Moncrieffe*, 133 S. Ct. at 1690. The Court expressly rejected the BIA's holding in *Matter of Castro Rodriguez*, 25 I&N Dec. 698, 702 (2012) (bypassing categorical approach and placing burden on respondent to demonstrate conviction was for misdemeanor distribution of marijuana). *Moncrieffe*, 133 S. Ct. at 1690.

Under *Descamps v. United States*, 133 S. Ct. 2276 (2013), in which the Supreme Court elaborated on the categorical approach, it is clear that a conviction under C.G.S.A. § 21a–277(a) and C.G.S.A. § 21a-279(a)) requires that the State of Connecticut prove the identity of the substance to a unanimous jury.[9] *See* Conn. Crim. Jury Instructions § 8.1-1 & n.1 (June 13, 2008) (for a conviction under C.G.S.A. § 21a-277(a)); Conn. Crim. Jury Instructions § 8.1-7 (May 10, 2012) (for a conviction under C.G.S.A. § 21a-279(a)). This means that each narcotic or hallucinogen on Connecticut's drug schedule creates a distinct offense, and that the identity of the particular controlled substance necessarily must be an element of every conviction. Since the relevant record of conviction is silent as to the identity of the substance in Respondent's case

[9] Jury unanimity is the Supreme Court's test for whether a fact is part of a distinct offense or is merely a means to violate a statute. *Descamps*, 133 S. Ct. at 2288. Of course, state cases interpreting a criminal statute's elements are relevant to the determination of whether conduct outside the criminal classification at issue falls under the statute's proscription. *See*, *e.g.*, *U.S. v. Reyes-Mendoza*, 665 F.3d 165, 167-68 (5th Cir. 2011) (examining jury instructions and state case law to conclude that California law prohibiting manufacturing of a controlled substance was broader than federal definition of "manufacture" for drug trafficking offenses under Sentencing Guidelines).

(Exhibit F), ICE has not demonstrated through the conviction documents that Respondent was convicted of a federal—and therefore deportable—drug offense. Respondent could have been guilty of possession with intent to sell thenylfentanyl or possession with intent to sell benzylfentanyl.

In *Moncrieffe*, the Supreme Court explained that "there must be 'a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition of a crime.'" *Moncrieffe*, 133 S. Ct. at 1685 (quoting *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007)). In *Duenas-Alvarez*, the Supreme Court stated:

> . . . to find that a state statute creates a crime outside the generic definition of a listed crime in a federal statute requires more than the application of legal imagination to a state statute's language. It requires a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition of a crime.

549 U.S at 193.[10]

Here, there is a "realistic probability" that Respondent faced prosecution for a controlled substance that was not defined in 21 U.S.C. § 802. The text of the Connecticut statute expressly includes distinct offenses that do not involve controlled substances as defined in 21 U.S.C. § 802; it requires no "legal imagination" to determine that Connecticut statutes under which Respondent has been convicted are, on their face, categorically broader than the generic definition of "drug trafficking" and controlled-substance deportability. *U.S. v. Grisel*, 488 F.3d 844, 850 (9th Cir. 2007) (*en banc*) ("Where, as here, a state statute explicitly defines a crime more broadly than the generic definition, no 'legal imagination' . . . is required . . .") (citation

[10] The Court added dictum about "realistic probability" in reference to determining deportability for trafficking in firearms convictions. *Moncrieffe*, 133 S. Ct. at 1693. The Court's example of an antique firearms exception was not one where, as here, a statutory text defined a distinct offense as broader than the generic definition. Thus, the Court's dictum is consistent with Respondent's position that he meets the "the realistic probability" test by virtue of the fact that the Connecticut legislature itself created distinct offenses.

omitted).

The Third Circuit adopted this analysis in *Rojas v. AG of the United States*, 728 F.3d 203 (3d Cir. 2013). In comparing the Pennsylvania drug schedule with the federal schedule, an en banc panel of the court relied on the statutory text to determine that Pennsylvania's schedule included substances that were not defined in 21 U.S.C. § 802. *Rojas*, 728 F.3d at 220. The court did not address (nor did it need to) whether there was a "realistic probability" that the petitioner would have been prosecuted for one of the substances not on the federal schedule, because it previously had determined that plain statutory language satisfied the Court's concern in *Duenas-Alvarez*. *Jean-Louis v. Attorney General*, 582 F.3d 462, 481 (3d Cir. 2009) ("Here . . . no application of 'legal imagination' to the Pennsylvania simple assault statute is necessary. The elements of [the statute] are clear, and the ability of the government to prosecute a defendant under [the removable portion of the statute] is not disputed.").

Likewise, the Eleventh Circuit shares the view that the existence of statutorily created offenses that are broader than the generic definition automatically satisfies the "realistic probability" test set forth in *Duenas-Alvarez*. Where the state definition is facially broader than the generic definition, a court need not depart from the traditional categorical approach that examines the "minimum conduct" necessary to offend the relevant statute of conviction. *See*, *e.g.*, *Ramos v. Attorney General*, 709 F.3d 1066, 1071-72 (11th Cir. 2013) ("*Duenas-Alvarez* does not require this showing when the statutory language itself, rather than 'the application of legal imagination' to that language, creates the 'realistic probability' that a state would apply the statute to conduct beyond the generic definition"). *Cf. Kawashima v. Holder*, 132 S. Ct. 1166 (2012) (finding that the proscribed conduct for a conviction for tax evasion under 26 U.S.C. § 7201 was broader than the generic ground of "fraud or deceit" offenses, without making a

finding based on any actual showing that there was a "realistic probability" of such prosecutions).

Thus, as the Third, Ninth, and Eleventh Circuits have held, and the Board similarly should hold, Respondent need not make a separate showing of a "realistic probability" when, as here, the state legislature has expressly defined distinct offenses that are broader than the generic definition. At bottom, the lesson in *Moncrieffe* is that the categorical approach requires a fact-finder to "presume that the conviction 'rested upon [nothing] more than the least of th[e] acts' criminalized, and then determine whether even those acts are encompassed by the generic federal offense."). *Moncrieffe*, 133 S. Ct. at 1684 (quoting *Johnson v. United States*, 559 U.S. 133, 137 (2010)).

Imposition of the stringent requirement of showing actual state prosecutions for offenses that go beyond the generic definition to Respondent, and others like him, is unwarranted, patently unrealistic, and unfair. This is so because "the majority of people who are convicted . . . never go to trial at all, but rather plead guilty to the charge . . . a lack of published cases or appellate-level cases does not imply a lack of convictions." *Nunez v. Holder*, 594 F.3d 1124, 1137 n.10 (9th Cir. 2010). With the vast majority of convictions resulting from pleas,[11] it is unrealistic and unfair to require an adjudicator to determine whether or not a criminal statute reaches certain conduct based solely on the existence of a decision from one of the small percentage of cases that go to trial or the even smaller percentage that are appealed to a court that routinely makes its decisions available in searchable form.

[11] Criminal justice systems rely on plea bargaining. *Missouri v. Frye*, 132 S. Ct. 1399, 1407 (2012) (citing Justice Department finding that 97 percent of federal convictions and 94 percent of state convictions are the result of guilty pleas).

B. THE BOARD SHOULD TREAT THE INSTANT MOTION AS A TIMELY FILED STATUTORY MOTION BECAUSE RESPONDENT MERITS EQUITABLE TOLLING OF THE TIME AND NUMERICAL LIMITATIONS.

1. Standard for Equitable Tolling

In general, only one motion to reopen may be filed, and it must be filed within 90 days of the date of entry of a final administrative order, INA §§ 240(c)(7)(A)&(C). However, the Second Circuit Court of Appeals, within which this case arises, recognizes that the time and numeric limitations on motions to reopen are subject to equitable tolling. *Iavorski v. INS*, 232 F.3d 124, 132 (2d Cir. 2000) (Sotomayor, J.) ("In sum, nothing in the 1990 statute that directed the Department of Justice to limit the timing and number of motions to reopen convinces us that these limitations were intended to be jurisdictional and therefore not subject to equitable tolling."). When a court recognizes that a statute is subject to tolling, it then must determine whether the litigant's circumstances warrant tolling in the particular case before it. *Ruiz-Turcios v. Att'y Gen.*, 717 F.3d 847, 851 (11th Cir. 2013) ("We note that eligibility for equitable tolling is a threshold showing that must be made before the merits of the claim or claims underlying a motion to reopen can be considered.").

The Supreme Court concisely and repeatedly has articulated the standard for determining whether an individual is "entitled to equitable tolling." *See*, *e.g.*, *Holland v. Florida*, 560 U.S. 631, 632 (2010). Specifically, an individual must show "'(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way' and prevented timely filing." *Id.* (quoting *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005)). *See also Credit Suisse Securities (USA) LLC v. Simmonds*, 132 S. Ct. 1414, 1419 (2012); *Lawrence v. Florida*, 549 U.S. 327, 336 (2007). The Supreme Court also requires that those seeking equitable tolling pursue

their claims with "reasonable diligence," but petitioners need not demonstrate "maximum feasible diligence." *Holland*, 560 U.S. at 653 (internal quotations omitted).

The Supreme Court's equitable tolling test accords with the test of the Second Circuit. *Iavorski*, 232 F.3d at 134 (holding that equitable tolling requires litigant to exercise "reasonable diligence" and that, where fraud or concealment of the existence of a claim prevented the timely filing, courts may permit equitable tolling "until the fraud or concealment is, or should have been, discovered by a reasonable person in the situation"). Significantly, as the Second Circuit held in *Iavorski*, to the extent an equitable tolling claim is not based on fraud or concealment, a respondent need only demonstrate reasonable diligence. *Id*.

If the individual is not able to make this threshold showing, review of the underlying claim will be "barred" by the statutory deadline. *See*, *e.g.*, *Pace*, 544 U.S. at 419. But, if the court determines that an individual "qualifies for equitable tolling," the filing will be "treated as if it were the one [he or she] is statutorily entitled to file." *See Singh v. Holder*, 658 F.3d 879, 884 (9th Cir. 2011).

2. Respondent Is Diligently Pursuing His Rights.

Respondent has exhibited the requisite "due diligence" because he is filing the instant motion to reopen within 90 days of discovering his claim that he is not deportable. As stated above, under Second Circuit precedent, Respondent need only demonstrate reasonable diligence to the extent that he merits equitable tolling, based on the simple fact that he was not deportable under the law in effect when the IJ ordered him deported, nor is he deportable now. In other words, to the extent that he makes this showing independently from (and in addition to) a claim based on fraud or concealment, he need only demonstrate, and has demonstrated, reasonable diligence. *Iavorski*, 232 F.3d at 134

On [redacted], 2013, the Second Circuit appointed undersigned counsel, who, in turn, reviewed the administrative record, determined that Respondent is not deportable, and raised this argument in a motion seeking reconsideration of the court's prior stay denial. Exhibit M (Declaration of Trina Realmuto). Respondent first learned of this argument when he read the reconsideration pleadings, which undersigned counsel mailed to him at the Buffalo Federal Detention Center. Exhibit I (Respondent's Declaration); Exhibit M (Declaration of Trina Realmuto). Respondent subsequently wrote a letter to counsel, stating that the motion to reconsider raised points of which he was previously unaware. Exhibit N (Letter from Respondent to Trina Realmuto). On January 21 or 22, 2014, undersigned counsel received from Respondent authorization to pursue a motion to reopen on his behalf. Exhibit M (Declaration of Trina Realmuto). This motion to reopen is being filed as soon as practicable after obtaining that authorization and on the same day as receipt of Respondent's signed declaration, Exhibit I.

3. Extraordinary Circumstances Prevented Timely Filing this Motion.

a. Ineffective Assistance By Prior Counsel.

Equitable tolling of the motion to reopen deadline allows noncitizens to fully present their claims for relief, which is particularly crucial after improper actions by attorneys have prevented immigration judges from hearing those claims in the original proceedings. *See, e.g.*, *Rabiu v. INS*, 41 F.3d 879 (2d Cir. 1994); *Rodriguez-Lariz v. INS*, 282 F.3d 1218 (9th Cir. 2002). The Board has determined that evidence of ineffective assistance of counsel merits reopening. *See*, *e.g.*, *Matter of N-K- & V-S-*, 21 I&N Dec. 879 (BIA 1997); *Matter of Grijalva-Barrera*, 21 I&N Dec. 472 (BIA 1996). Among other circumstances, this Board has found that equitable tolling is appropriate where attorneys did not recognize that their clients were eligible for particular forms of relief, *see*, *e.g.*, *In re Palomares-Quintero*, 2008 WL 1924626 (BIA Apr. 11,

2008) (unpublished) or misled noncitizens about the status of their cases, *see*, *e.g.*, *In re Chang*, 2004 WL 2952096 (BIA Nov. 17, 2004) (unpublished).

In this case, the ineffective assistance of prior counsel prevented Respondent from timely raising this issue to the Board. Prior counsel failed to: (1) review the NTA and Form I-261 before declining to contest deportability; (2) review the conviction documents ICE submitted (which do not identify the substance that formed the basis for the charge); and (3) conduct research on whether [redacted] charged state-law convictions did, in fact, render him deportable. Had Mr. [redacted] reviewed these documents and conducted even minimal research, Respondent would not now be facing the imminent threat of deportation to [redacted]. That is, the Immigration Judge likely would not have found Respondent deportable, and Respondent could have sought, and likely would have been granted, termination of removal proceedings. Thus, prior counsel's ineffective assistance not only prevented Respondent from initially challenging deportability before the Immigration Judge; it also prevented Respondent from clearly articulating this issue before the Board in his pro se appeal. Accordingly, it deprived Respondent of due process of the law by taking away his opportunity for a full and fair hearing, and then both administrative and judicial review. "It is well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings." *Reno v. Flores*, 507 U.S. 292, 306 (1993).

A motion to reopen based on ineffective assistance of counsel must contain: (1) an affidavit detailing the agreement with former counsel and what prior counsel represented to the respondent; (2) an indication that prior counsel has been informed of the allegations of ineffective assistance of counsel and allowed an opportunity to respond; and (3) an indication of whether the respondent filed a complaint with the appropriate disciplinary authority regarding

counsel's conduct, or, if a complaint was not filed, an explanation for not filing one. *Matter of Lozada*, 19 I&N Dec. 637, 639 (BIA 1988); 8 C.F.R. § 1208.4(a)(5)(iii). In addition, the motion must demonstrate that prior counsel's conduct prejudiced the respondent. *Matter of Lozada*, 19 I&N Dec. at 638. Respondent has met these requirements.

i. Procedural Requirements.

The exhibits attached to this motion demonstrate that Respondent has complied with the procedural requirements of *Matter of Lozada*, *supra*, and 8 C.F.R. § 1208.4(a)(5)(iii). First, attached as Exhibit I is Respondent's declaration, in which he attests that he entered into an oral agreement with Mr. [redacted] and that Mr. [redacted] never asked him to sign a retainer contract. Based on this oral agreement, Respondent "understood that he would handle my case in the best way possible to allow me to remain in the United States" and "said that he believed I qualified for withholding of removal and assured me that he would be able to prevent me from being deported to [redacted]." Exhibit I. Respondent did not know that he had an argument that he was not deportable as charged until the Second Circuit appointed undersigned counsel and he read the stay pleadings filed with that Court. Exhibit I. *See also* Exhibit N (Letter from Respondent to Trina Realmuto, stating "You mentioned many valid points that I was unaware of. . ."). Mr. [redacted] received a payment of $2,500 for representing Respondent ineffectively. Exhibit J (Declaration of [redacted]).

Second, attached as Exhibit Q, is a letter informing Mr. [redacted] of the allegations that Respondent is making against him, including proof of delivery. Respondent is not able to wait to receive a response from Mr. [redacted] given the imminent threat of deportation and the Board's

policy and practice that it will not consider a stay request unless it is filed in conjunction with a motion to reopen. Board of Immigration Appeals Practice Manual, Chapter 6.3 (Oct. 1, 2013).[12]

Third, Respondent has filed a complaint against Mr. [redacted] with the State Bar Association of New York, specifically, to the Attorney Grievance Committee for the Eighth Judicial District. Exhibit R (Complaint and Proof of Federal Express Delivery).

ii. Prior Counsel's Failure to Contest Deportability Constituted Ineffective Assistance, Which Prejudiced Respondent.

Mr. [redacted] failed to contest deportability at Respondent's hearing on November [redacted] 2012, even though the IJ had put him on notice two weeks before the hearing, on October [redacted] 2012, that he would have the opportunity to do so. Specifically, at the October [redacted] 2012 hearing, the IJ stated that he would grant Mr. [redacted] the opportunity to plead to the allegations in the NTA. Exhibit E (Transcript at 53) ("It does appear there was a pleading previously taken when the case was before the court in Hartford, but the matter has been reopened, so you can review it as you see fit."). At the conclusion of that hearing, the IJ further reminded Mr. [redacted] that he could review the record of proceeding in the case. *Id*. at 54 ("And again, Mr. [redacted], that will be a good idea for you to review the Court's ROP. All these exhibits are here and you can get some copies of what you need.").

At November [redacted] 2012, despite the IJ's prior notice that he could review the immigration court's record to obtain copies of all relevant documents, Mr. [redacted] did not have the "new" NTA in his possession. *Id*. at 58 ("Your Honor, I have not -- I do not have the new NTA for some reason."). There was no "new" NTA; rather, as the IJ explained **and as Mr. [redacted] would have known if he had looked in the record of proceedings,** the October [redacted] 2008 NTA was part of

[12] *Available at* http://www.justice.gov/eoir/vll/qapracmanual/BIAPracticeManual.pdf#page=93.

the court's record marked "Exhibit No. 1," which was supplemented by Form I-261 (Additional Charges of Inadmissibility/Deportability), on November 4, 2008, and marked as "Exhibit No. 2." Exhibit E (Transcript at 58); Exhibit D (NTA and I-261). Mr. [redacted] went on to ask the judge to identify to him the basis of ICE's supplement to the NTA. Exhibit E (Transcript at 58) ("And they just supplemented -- or they changed the removal grounds?").

That prior counsel did not know the content of the allegations and charges in the actual charging documents in the case, the NTA and I-261, indicates that he did not even consider reviewing the charges of deportability, even though the IJ informed him that he could revisit the pleadings. The transcript also does not reflect that Mr. [redacted] was given a copy of the NTA and Form I-261, further indicating that he decided not to contest deportability without even reviewing the charging documents (or the conviction records). Rather, in response to the IJ's inquiry about readdressing the pleading, Mr. [redacted] informed the Court that "there [was] no need" to do so. Exhibit E (Transcript at 59). Thus, Mr. [redacted] did not adequately review the charging documents or conduct even basic research to determine whether to contest Respondent's deportability, despite ample opportunity to do so.

A reasonably competent attorney would have obtained and reviewed the allegations and charges on the NTA and Form I-261, as well as the evidence of the convictions that ICE had put forward. Even a cursory review of these documents would have revealed that ICE had not met its burden of establishing that Respondent was deportable as charged because the conviction documents ICE submitted do not identify the substance. *Matter of Paulus*, 11 I&N Dec. 274, 276 (BIA 1965).

A competent attorney also would have researched the grounds of deportability, the applicable definition of aggravated felony, the statutes of conviction, and the references

Congress included in the grounds of deportability and relevant definitions. Had Mr. [redacted] done any research, he would have discovered that the District Court for the District of Connecticut repeatedly had held that Connecticut's list of controlled substances includes benzylfentanyl and thenylfentanyl, which are not federally controlled. *See United States v. Madera*, 521 F. Supp. 2d 149, 151 (D. Conn. 2007); *United States v. Lopez*, 536 F. Supp. 2d 218, 225 (D. Conn. 2008); *United States v. Cohens*, No. 3:07CR195, 2008 U.S. Dist. LEXIS 62542, at *21 (D. Conn. Aug. 13, 2008). In *Madera*, the United States even conceded that benzylfentanyl and thenylfentanyl were not on the federal schedule. 521 F. Supp. 2d at 154-55 & n.4. Additionally, research would have revealed a law review article that detailed the differences between Connecticut's narcotics schedule and the federal schedule. *See* Sarah French Russell, *Rethinking Recidivist Enhancements: The Role of Prior Drug Convictions in Federal Sentencing*, 43 U.C. Davis L. Rev. 1135, 1211 (2010).

With the amount of research that any competent lawyer would conduct before pleading (or deciding not to plead) to a charging document, Mr. [redacted] would have discovered that this Board had held in an unpublished decision that a noncitizen was not deportable for a conviction for violating C.G.S.A. § 21a–277(a), the same statute that ICE alleged made Respondent deportable for having an aggravated felony conviction. *In Re Spaulding*, 2004 WL 2943545 (BIA Nov. 2, 2004), attached as Exhibit O. A reasonably competent attorney would have noticed the similarities between the legal issue in the unpublished decision and the legal issue in Respondent's case and raised the same argument that had previously persuaded the Board. *See Davila-Bardales v. INS*, 27 F.3d 1, 5 (1st Cir. 1994) (requiring the BIA to apply the law consistently in unpublished cases that raise identical legal issues even though such cases are not precedential).

Rudimentary research also would have led Mr. [redacted] to *Gousse v. Ashcroft*, 339 F.3d 91 (2d Cir. 2003) in which the Second Circuit analyzed whether a conviction under C.G.S.A. § 21a–277(a) constituted "illicit trafficking in a controlled substance" within the meaning of 8 U.S.C. § 1101(a)(43)(B). The petitioner in *Gousse* lost because he could not "identify a substance that was both (i) within the Connecticut definition of 'narcotic substance' and (ii) outside the federal definition of 'controlled substance.'" 339 F.3d at 93. Reading any of the above sources would have alerted Mr. [redacted] to the disparity between Connecticut's definition of narcotics and the federal list of controlled substances, thereby providing the basis for an important argument that the petitioner in *Gousse* lacked: that the substances in question were on Connecticut's schedule, but not on the federal schedule. Furthermore, had Mr. [redacted] reviewed the evidence of the convictions in Respondent's case, he would have noticed the utter lack of evidence of the substances in the record in Respondent's case. *Accord In Re Spaulding*, 2004 WL 2943545, *2 (BIA Nov. 2, 2004) ("Without the identity of the controlled substance underlying the respondent's 2004 conviction, we are unable to determine whether the substance at issue is included in the federal controlled substance schedules.").

In sum, had Mr. [redacted] done his job, he would have: (1) reviewed the NTA and Form I-261 before declining to contest deportability; (2) reviewed the conviction documents ICE submitted and discovered that Respondent is not deportable because ICE did not meet its burden of proving deportability, since the conviction documents do not identify the substance; and/or (3) conducted research on whether Respondent's charged state-law convictions did, in fact, render him deportable.

It is plainly evident that Mr. [redacted]' ineffective assistance prejudiced Respondent. Had Mr. [redacted] provided competent assistance, he would have contested deportability, and the IJ would not

have sustained the charges of deportability against Respondent. Instead, the IJ would have terminated proceedings, allowing Respondent to retain his lawful permanent resident status. This also would have obviated the need for subsequent proceedings, including the hearing on withholding and CAT relief, the prior appeal to this Board, and the petition for review currently pending before the Court of Appeals. Moreover, and most significantly, Respondent would not currently be facing the imminent threat of deportation to [redacted].

b. The Agency's Misfeasance Prevented Timely Filing.

There is rebuttable presumption that equitable tolling is read into every federal statute of limitations. *Holland v. Florida*, 560 U.S. 631, 631 (2010) (quoting *Irwin v. Dept. of Veterans Affairs*, 498 U.S. 89, 95-96 (1990)). This means that a deadline may be extended where the litigant acted diligently in pursuing his or her rights, but an extraordinary circumstance stood in the way. *See Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005). Separately, but relatedly, the INA requires that a motion to reopen state "new facts" and "be supported by affidavits and other evidentiary material." INA § 240(c)(7)(B); 8 C.F.R. § 1003.23(b)(3). Here, Respondent pursued his statutory right to file a motion diligently. *See* § III.B.2, *supra*. However, as explained in § III.B.2 and herein, the "extraordinary circumstance" and "new facts" that prevented Respondent from timely filing this motion converge.

The agency's misleading position and misguided interpretations regarding challenges to criminal grounds of deportability constitute an "extraordinary circumstance" that prevented Respondent from timely filing this motion. The agency's position is reflected by the Hartford IJs' statements to Respondent and his failure to advise Respondent of his right to seek termination in this case. Furthermore, the Supreme Court's admonishment of the agency's errors, as reflected in its decisions in *Moncrieffe and Descamps*, constitutes "new facts" within

the meaning of INA § 240(c)(7)(B), which the Board must consider when determining whether to toll the 90-day statutory deadline. That is, Respondent argues that the agency's "misfeasance" merits equitable tolling. *Sebelius v. Auburn Reg'l Med. Ctr.*, 133 S. Ct. 817, 830 (2013) (Sotomayer, J., concurring) ("In particular, efforts by an agency to enforce tight filing deadlines in cases where there are credible allegations that filing delay was due to the agency's own misfeasance may not survive deferential review.").

Here, as set forth in § II, *supra*, the Hartford IJ's conduct constituted misfeasance because he: (1) violated 8 C.F.R. § 1240.10(c) by failing to require Respondent to admit or deny removability; (2) violated 8 C.F.R. § 1240.11(a)(2) by failing to inform Respondent that he could contest deportability and seek termination or that he could apply for withholding of removal; and (3) misled Respondent into believing that contesting deportability was not an available option and he stood little chance of success. Although Respondent conceded the existence of the charged 2002 and 2008 convictions, the IJ violated the regulations -- and the due process protections the regulations embody -- by finding him removable without ever having asked Respondent to admit or deny removability. *See* 8 C.F.R. § 1240.10(c) ("The immigration judge shall require the respondent to plead to the notice to appear by stating whether he or she admits or denies the factual allegations and his or her removability under the charges contained therein."). Similarly, even though Respondent specifically asked about defenses against the deportability charges he faced, the IJ did not inform him he could contest deportability and seek termination, or that he could apply for withholding of removal. *See* 8 C.F.R. § 1240.11(a)(2) ("The immigration judge shall inform the alien of his or her apparent eligibility to apply for any of the benefits enumerated in this chapter and shall afford the alien an opportunity to make application during the hearing, in accordance with the provisions of § 1240.8(d)"); *Matter of Y-*

L-, *A-G-*, *R-S-R-*, 23 I&N Dec. 270, 276-77 (AG 2002) (affording respondents with drug-trafficking convictions the opportunity to rebut the presumption that said convictions render them ineligible for withholding of removal). Moreover, **the IJ allowed opposing counsel to advise Respondent** that there was *no* defense to an aggravated felony charge. Finally, prior to ordering Respondent removed, the IJ made several statements to misleading Respondent into believing that that no defense to an aggravated felony charge existed and that he stood virtually no chance of success.[13]

Significantly, but for the Hartford IJ's malfeasance, Respondent would have been on notice of the main defense against the aggravated felony and controlled substance grounds of deportability he faced, and possibly his best chance of retaining his lawful permanent resident status: contesting deportability. The IJ's malfeasance, combined with the ineffective assistance of his prior counsel, effectively made it impossible for Respondent, an "unsophisticated claimant," to know about this defense. *Cf. Auburn Reg'l Med. Ctr.*, 133 S. Ct. at 830 (Sotomayor, J., concurring) (". . . with respect to remedial statutes designed to protect the rights of unsophisticated claimants, . . . agencies (and reviewing courts) may best honor congressional intent by presuming that statutory deadlines for administrative appeals are subject to equitable tolling, just as courts presume comparable judicial deadlines under such statutes may be tolled.").

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[13] *See* Exhibit E (Transcript at 27) (an aggravated felony "is a very bad thing under immigration law"); at 28 ("I think we talked about the *only* option [relief under the Convention Against Torture] that would possibly allow you to stay") (emphasis added); at 28-29 (I don't believe [that the harm faced by [redacted], [redacted]] would make a difference in the case"); at 29 ("you've got a very difficult case"); at 29 ("you have a tough case"); at 29 ("[CAT relief] is your *only* option") (emphasis added); at 30 ("[T]he nature of your convictions makes it a very difficult situation for you. It eliminates most of the options that may allow you to stay here under the law").

The IJ's conduct, however, is symptomatic of a larger agency malfeasance in the Board's misinterpretation of conviction-based removability grounds. In the recent past, the Supreme Court has corrected this Board's approach to conviction-based deportability grounds in at least three cases, *Moncrieffe*, *supra*, *Carachuri-Rosendo v. Holder*, 560 U.S. 563 (2010), and *Lopez v. Gonzales*, 549 U.S. 47 (2006).

Indeed, the new legal landscape collectively brought about by these latest Supreme Court cases requires that the Board now follow a Supreme Court-approved categorical approach when reviewing an IJ's assessment of the criminal deportability grounds. These cases -- particularly *Moncrieffe* -- as applied here, represent more than simply a change in law. Rather, they represent a systemic change to the way that the agency must analyze convictions. In *Moncrieffe*, the Supreme Court eliminated any doubt that the categorical approach applies to all aspects of determining deportability for a drug-trafficking aggravated felony. In so doing, the Court expressly rejected the holding in *Matter of Castro Rodriguez*, 25 I&N Dec. 698, 702 (2012), in which the Board bypassed the categorical approach and placed the burden on the respondent to demonstrate that the conviction was for misdemeanor distribution of marijuana. *Moncrieffe*, 133 S. Ct. at 1690. The Court in *Moncrieffe* eliminated the confusion surrounding the proper interpretation of the aggravated felony definition.[14]

In *Descamps*, the Court confirmed that the elements of the offense, not the underlying conduct, determine the nature of the conviction. The combination of *Descamps* and *Moncrieffe* represent a rejection of the administrative decisions *Matter of Lanferman,* 25 I&N Dec. 721 (BIA

[14] The number of published decisions the BIA issued to interpret the aggravated felony drug trafficking definition illustrates the complexity of this issue. *See Matter of Castro Rodriguez*, 25 I&N Dec. 698 (2012); *Matter of Salazar-Regino*, 23 I&N Dec. 223 (BIA 2002); *Matter of K-V-D-*, 22 I&N Dec. 1163 (BIA 1999); *Matter of L-G-*, 21 I&N Dec. 89 (BIA 1995); *Matter of L-G-*, 20 I&N Dec. 905 (BIA 1994); *Matter of Davis*, 20 I&N Dec. 536 (BIA 1992).

2012) (emphasizing conduct) and *Matter of Silva-Trevino*, 24 I&N Dec. 687 (BIA 2008) (permitting recourse to documents outside of the record of conviction). Through its collective jurisprudence, the Court has now instructed the agency to determine the nature of the conviction based on the elements of the offense, to apply the categorical approach, and to ignore the individual's actions in deciding whether the offense matches a generic definition. In sum, these events represent "new facts" within the meaning of INA § 240(c)(7)(B).

The Supreme Court has held that a motion to reopen is an important procedural safeguard. *Dada*, 554 U.S. at 18; *see also Kucana*, 558 U.S. at 242. The instant motion warrants equitable tolling to prevent any unfavorable decision on this motion from being isolated from judicial review. *See*, *e.g.*, *Kucana*, 558 U.S. at 252 (warning that the agency must not "have a free hand to shelter its own decisions from abuse-of-discretion appellate court review"); *Auburn Reg'l Med. Ctr.*, 133 S. Ct. at 830 (Sotomayor, J., concurring) (noting that failure to recognized equitable tolling in remedial schemes with unsophisticated claimants "could have odd practical consequences and would attribute a strange intent to Congress: to protect a claimant's ability to seek judicial review of an agency's decision by making equitable tolling available, while leaving to the agency's discretion whether the same claimant may invoke equitable tolling in order to seek an administrative remedy in the first place."). This is consistent with the purpose of motions to reopen, according to the Supreme Court: "to ensure a proper and lawful disposition." *Dada*, 554 U.S. at 18.

IV. EMERGENCY REQUEST TO STAY REMOVAL TO [redacted]

Because removal is imminent, Respondent asks the Board to act immediately to stay his removal to [redacted] pending adjudication of the instant motion. Forced deportation to [redacted] would subject him to persecution and torture. By previously granting Respondent asylum, the

government has already recognized that he established a well-founded fear of persecution if returned to [redacted]. Exhibit C (LPR card). If deported, Respondent faces further persecution and torture at the hands of government, police, and military officials on account of the governmental and political activities of [redacted]. He also faces mistreatment based on his status as a criminal deportee.

If Respondent were deported to [redacted], he would be targeted by the government on the basis of [redacted]. [redacted]. These threats are directed against both him and his family. *See* Exhibit S [redacted]"). Because of the risk of bodily harm or death, [redacted]." *Id*. Respondent would face the same risks if deported [redacted].

Respondent's family state that his life would be in grave danger if deported to [redacted]. Exhibit J ([redacted]) [redacted]"); Exhibit L [redacted]"); Exhibit T (Letter from [redacted]) ("[redacted]"). Respondent's former employers describe Respondent as a courteous, reliable, and trustworthy employee. Exhibit U (Letters from [redacted]).

In addition, Respondent is likely to be targeted based on his status as a criminal deportee. Historically, criminal deportees [redacted] have been subjected to detention upon arrival, and, as recently as 2013, human rights experts have confirmed that deportees face life-threatening risks both during detention and after release.

In 2012, attendees of the 20th Session of the Human Rights Council released an oral statement concluding that "[r]eturning individuals [redacted] places them in a vulnerable, life-threatening position" and calling on the U.S. government to "refrain from forcibly returning individuals to [redacted] under any and all circumstances." 20th Session of the Human Rights Council, "A Joint Statement Concerning [redacted] Deportations from the US," July 3, 2012.[15] This statement was based on the report of an independent human rights expert, who noted that "deportees are illegally held in local jail cells that contain human excrement, blood, and vomit, have few or no working toilets, and have no or poor ventilation systems." *Id.* The report also stated that the [redacted] "does not provide deportees with food, treated water, or medical or mental health care." *Id.* This lack of medical care would be dangerous or even life-threatening for Respondent, who suffers from [redacted] and would not have access to critical prescription medications ([redacted], which he takes daily) while imprisoned. Exhibit S (Declaration of Respondent, [redacted]).

Criminal deportees continue to be targeted for persecution after their release from detention, in part because of the social stigma attached to criminal convictions. *Id.* This stigma is particularly pronounced for individuals who have been deported based on drug-related convictions. In interviews conducted [redacted] March and April 2013, Michelle Karshan of Alternative Chance learned that, upon arrival [redacted] with drug convictions were

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[15] *Available at* http://www.ijdh.org/2012/07/topics/immigration-[redacted].

detained longer and interrogated separately from other deportees by the drug-trafficking unit of the [redacted] police. Michelle Karshan, "Alternative Chance" home page, June 3, 2013.[16]

High-ranking human rights officials have repeatedly condemned the practice of deporting individuals from the U.S. to [redacted]i. In 2011, the Inter-American Commission on Human Rights recognized that the U.S. government's deportation policy raises serious human rights concerns and called on the U.S. to refrain from deporting [redacted] petitioners. 20th Session of the Human Rights Council, "A Joint Statement Concerning [redacted] Deportations from the US," July 3, 2012. In addition, the UN High Commissioner for Human Rights, UN High Commissioner for Refugees (UNHCR), and UN Independent Expert on [redacted] have all issued emergency appeals for UN Member States to suspend forced returns to [redacted]i. *Id.*

For the reasons above, the Board should act immediately to stay Respondent's removal to [redacted] pending adjudication of the instant motion.

V. CONCLUSION

The Board should grant a stay of removal to prevent Respondent's imminent deportation to [redacted] a country where he faces torture based [redacted] and imprisonment amounting to torture based on his status as a criminal deportee.

The Board should reopen its May 22, 2013 decision because Respondent, a lawful permanent resident since 1989, is not deportable under INA § 237(a)(2)(B)(i) or 237(a)(2)(A)(iii) based on his 2002 and 2008 convictions.

Equitable tolling of the 90-day motion to reopen deadline is warranted. First, Respondent has exhibited the requisite "due diligence" because he is filing his motion within 90 days of discovering from current counsel his claim that he is not deportable; in addition, this motion is

[16] *Available at* http://alternativechance.org/.

being filed within 90 days of the Second Circuit's appointment of undersigned counsel. Second, reopening is warranted in light of the ineffective assistance rendered by prior counsel and the agency's malfeasance.

For the foregoing reasons, Respondent respectfully requests the Board reopen and terminate removal proceedings against him.

Respectfully submitted,

[redacted]

Trina Realmuto
Kaitlin Konkel, Student Extern
National Immigration Project of the
National Lawyers Guild
14 Beacon Street, Suite 602
Boston, MA 02108
(617) 227-9727 ext. 8
(617) 227-5495

Counsel for Respondent

Dated: February 10, 2014

PROOF OF SERVICE

On February 10, 2014, I, Kaitlin Konkel, served a copy of this Motion to Reopen to Terminate and Emergency Motion to Stay Removal [redacted] and Exhibits by U.S. mail delivery to the following office and address:

Buffalo Federal Detention Facility
Office of the Chief Counsel
U.S. Immigration and Customs Enforcement
U.S. Department of Homeland Security
4250 Federal Drive
Batavia, NY 14020

[redacted]
Kaitlin Konkel

Date: February 10, 2014

LIST OF EXHIBITS IN SUPPORT OF MOTION TO REOPEN TO TERMINATE PROCEEDINGS AND EMERGENCY MOTION FOR STAY OF DEPORTATION TO HAITI

A. Board of Immigration Appeals decision, dated May 22, 2013.

B. Orders of the U.S. Court of Appeals in [redacted] *v. Holder*, Case No. [redacted], dated November [redacted] 2013 and November [redacted] 2013.

C. Copy of Respondent's Lawful Permanent Resident Card.

D. Copies of Notice to Appear and Form I-261 (Additional Charges of Inadmissibility/Deportability) (marked by the IJ as Exhibits 1 and 2).

E. Cited pages from Transcripts of Hearings, specifically pages 15, 20, and 24-30 of November [redacted] 2008 hearing; pages 53-54 of October [redacted] 2012 hearing; and pages 57-59 of November [redacted] 2012 hearing.

F. Copies of 2002 and 2009 conviction records from Connecticut Superior Court (marked by the IJ as Exhibits 4 and 5).

G. Copy of motion to reopen to apply for asylum (without attached asylum application), received by the Hartford Immigration Court on August [redacted] 2012, and Order of Immigration Judge granting reopening, dated September [redacted] 2012.

H. Copy of Continuance Motion filed by [redacted], dated October 15, 2012.

I. Declaration of [redacted], dated [redacted], 2014.

J. Copy of Declaration of [redacted], dated [redacted], 2014, with certified translation (original will be forward upon receipt by counsel).

K. Immigration Judge Decision and Order, dated December 18, 2012.

L. Declaration of [redacted], dated February [redacted] 2014 (original will be forward upon receipt by counsel).

M. Declaration of Trina Realmuto, dated February 6, 2014.

N. Copy of letter from [redacted] to Trina Realmuto, dated December [redacted] 2013.

O. *In Re Spaulding*, 2004 WL 2943545 (BIA Nov. 2, 2004).

P. Page 152 of Rachel Haroz and Michael I. Greenberg, "New Drugs of Abuse in North America," 26 Clin. Lab Med. 147 (2006).

Q. Copy of letter to prior counsel, [redacted], dated February [redacted] 2014, and proof of delivery on February [redacted] 2014.

R. Copy of bar complaint to the Attorney Grievance Committee for the Eighth Judicial District of New York pursuant to *Matter of Lozada*, dated February 4, 2014, and proof of delivery on February [redacted] 2014.

S. Declaration of [redacted], dated December [redacted], 2013.

T Letter from [redacted], dated December [redacted], 2013.

U. Letters from Respondent's former employers, [redacted], dated December [redacted] 2013, and [redacted] dated December [redacted], 2013.