[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 20-12761
Non-Argument Calendar

Agency No. A077-361-246

ERWIN WHITTER,

Petitioner,

versus

U.S. ATTORNEY GENERAL,

Respondent.

Petition for Review of a Decision of the
Board of Immigration Appeals

(September 28, 2021)

Before WILSON, ROSENBAUM, and NEWSOM, Circuit Judges.

PER CURIAM:

Erwin Whitter petitions for review of a decision of the Board of Immigration Appeals (BIA). In a final order, the BIA affirmed the Immigration Judge's (IJ) denial of Whitter's application for asylum, withholding of removal, and relief under the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). The BIA also affirmed the denial of Whitter's motion for a continuance while he pursued collateral relief for a criminal conviction. Whitter seeks review only of the decision to affirm the denial of his motion for a continuance. He argues that the IJ and the BIA erred by misapplying the legal standard for granting a continuance. After careful review, we deny the petition.

Whitter is a native and citizen of Bermuda who entered the United States in December 2000. He became a lawful permanent resident in 2002. In June 2014, he was indicted in South Carolina state court for attempted murder and possession of a weapon during the commission of a violent crime. Whitter pleaded guilty to assault and battery of a high and aggravated nature and possessing a knife during the commission of a violent crime. The judge accepted his plea and sentenced him to 20 years of imprisonment as to the assault and battery conviction and 5 years as to the possession of a knife conviction. The sentences were to run concurrently.

In June 2019, as Whitter served his sentence, the Department of Homeland Security (DHS) commenced removal proceedings against him by filing a Notice to

Appear. DHS alleged that Whitter had been convicted of assault and battery of a high and aggravated nature and charged him with removability under INA § 237(a)(2)(A)(iii), 8 U.S.C. § 1227(a)(2)(A)(iii). It noted that he had been convicted of an aggravated felony under INA § 101(a)(43)(F), 8 U.S.C. § 1101(a)(43)(F), which was a crime of violence under 18 U.S.C. § 16(a), for which the term of imprisonment was at least one year.

Whitter appeared pro se before the Atlanta Immigration Court in June 2019, where he indicated that he wanted to seek representation for the proceedings. The IJ granted a continuance and provided a list of attorneys and organizations. Over the next several months, the IJ granted Whitter three more continuances. In October 2019, Whitter informed the IJ that he was not able to secure counsel and decided to proceed pro se.

When proceedings before the IJ commenced, Whitter admitted that he was convicted of the offense of assault and battery of a high and aggravated nature in South Carolina. The IJ then sustained the charge of removability for an aggravated felony. After Whitter expressed a fear of returning to Bermuda, the IJ gave him an application for asylum, withholding of removal, and CAT protection. The IJ also continued the case to provide Whitter additional time to apply for relief from removal. Whitter filed his application for asylum, withholding of removal and CAT relief.

At the merits hearing in December 2019, Whitter again requested a continuance, stating that he was waiting for a response from a South Carolina state court. The IJ stated, in relevant part, that seeking a continuance while pursuing collateral relief on a criminal conviction is "something that's done quite often," but that "the appellate court tells Immigration Judges that . . . [there is no] . . . basis to continue a removal proceeding" in that circumstance. The IJ added that "maybe if the [state] court . . . takes some action . . . , you may be able to ask that the deportation case be reopened, but I cannot continue today's hearing for that purpose that you've told me about."

Regarding his application for relief, Whitter testified that he feared gang violence in Bermuda. However, in an oral decision, the IJ denied Whitter's applications for asylum, withholding of removal, and CAT protection, and ordered his removal to Bermuda. Whitter appealed the IJ's decision to the BIA. He asserted, in part, that the IJ should have granted his request for a continuance so that he could obtain documents from his country for use in a collateral attack on his criminal conviction. The BIA affirmed the IJ's decision and dismissed Whitter's appeal. With regard to Whitter's argument that the proceedings should have been adjourned while he pursued post-conviction relief for his 2014 criminal conviction, the BIA stated that "a pending collateral attack on a criminal conviction is too

tentative and speculative to support a continuance of removal proceedings."

Further, the BIA noted:

> [T]he respondent has not provided documentary evidence to indicate that his conviction has been vacated or materially modified in any way by the appropriate court. The respondent's mere speculation that his conviction may be invalid does not change the finality of the conviction for immigration purposes, unless and until it has been overturned by a criminal court.

Whitter then filed a petition for review.[1]

We review the BIA's decision as the final judgment, unless the BIA expressly adopted the IJ's decision. *Gonzalez v. U.S. Att'y Gen.*, 820 F.3d 399, 403 (11th Cir. 2016) (per curiam). Here, the BIA agreed with the IJ's reasoning for denying the motion for continuance, so we review the decisions of both to the extent of the agreement. *See id.*

Under the criminal alien bar, our jurisdiction to review a petition is limited when a noncitizen is ordered removed for having been convicted of an aggravated felony. *See* INA § 242(a)(2)(C); 8 U.S.C. § 1252(a)(2)(C). We retain jurisdiction, however, to review constitutional claims and questions of law that have been exhausted. *See* INA § 242(a)(2)(D); 8 U.S.C. § 1252(a)(2)(D). Questions of law include questions about whether the BIA applied the correct legal standard. *See Guerrero-Lasprilla v. Barr*, 140 S. Ct. 1062, 1067 (2020). Whitter argues that the

[1] Whitter filed his petition with the Ninth Circuit Court of Appeals. The petition was then transferred to our court.

BIA and the IJ failed to apply the correct legal standard. He contends that the IJ and the BIA are bound by decisions of the AG, and that they misapplied the AG's guidance—which is binding on them—by creating a bright-line rule that a continuance can never be granted while a respondent seeks collateral relief.

The correct legal standard, the parties agree, is set forth in 8 C.F.R. § 1003.29 and further explained in *Matter of L-A-B-R*, 27 I&N Dec. 405 (A.G. 2018). An immigration judge may grant a motion for a continuance "for good cause shown." 8 C.F.R. § 1003.29. And in *Matter of L-A-B-R-*, the Attorney General (AG) explained that immigration judges must apply "a multifactor analysis," focusing "on the likelihood that the collateral relief will be granted and will materially affect the outcome of the removal proceedings." 27 I&N Dec. at 406, 412. "[C]ontinuances should not be granted when a respondent's collateral pursuits are merely speculative." *Id.* at 414.

More specifically, the AG also addressed collateral attacks on criminal convictions, as opposed to other forms of collateral relief such as visa petitions. With regard to attacks on criminal convictions, the AG cited decisions from federal appellate courts stating that a respondent's "pending collateral attack on a criminal conviction is too 'tentative' and 'speculative' to support a continuance of removal proceedings." *Id.* at 417 (citing *Palma-Martinez v. Lynch*, 785 F.3d 1147, 1150

(7th Cir. 2015); *Jimenez-Guzman v. Holder*, 642 F.3d 1294, 1297 (10th Cir. 2011)).

Because Whitter is challenging whether the IJ and the BIA applied the correct legal standard—a question of law—we have jurisdiction to review his petition. *See Guerrero-Lasprilla*, 140 S. Ct. at 1067. As to the merits of Whitter's argument, he correctly asserts that the BIA is bound by decisions of the AG. *See* 8 C.F.R. § 1003.1(g)(1). However, we disagree with Whitter that the IJ and BIA applied a rule that was inconsistent with the AG's decision. In *Matter of L-A-B-R-*, the AG established that a pending collateral attack on a criminal conviction is simply too speculative to support a continuance, which is precisely why the BIA affirmed the IJ's decision. 27 I. & N. Dec. at 417–18. Accordingly, we reject Whitter's argument that the BIA and the IJ applied the wrong law in finding that Whitter failed to establish good cause for a continuance, and thus we deny the petition.

PETITION DENIED.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

For rules and forms visit
www.ca11.uscourts.gov

September 28, 2021

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 20-12761-CC
Case Style: Erwin Whitter v. U.S. Attorney General
Agency Docket Number: A077-361-246

This Court requires all counsel to file documents electronically using the Electronic Case Files ("ECF") system, unless exempted for good cause. Non-incarcerated pro se parties are permitted to use the ECF system by registering for an account at www.pacer.gov. Information and training materials related to electronic filing, are available at www.ca11.uscourts.gov. Enclosed is a copy of the court's decision filed today in this appeal. Judgment has this day been entered pursuant to FRAP 36. The court's mandate will issue at a later date in accordance with FRAP 41(b).

The time for filing a petition for rehearing is governed by 11th Cir. R. 40-3, and the time for filing a petition for rehearing en banc is governed by 11th Cir. R. 35-2. Except as otherwise provided by FRAP 25(a) for inmate filings, a petition for rehearing or for rehearing en banc is timely only if received in the clerk's office within the time specified in the rules. Costs are governed by FRAP 39 and 11th Cir.R. 39-1. The timing, format, and content of a motion for attorney's fees and an objection thereto is governed by 11th Cir. R. 39-2 and 39-3.

Please note that a petition for rehearing en banc must include in the Certificate of Interested Persons a complete list of all persons and entities listed on all certificates previously filed by any party in the appeal. See 11th Cir. R. 26.1-1. In addition, a copy of the opinion sought to be reheard must be included in any petition for rehearing or petition for rehearing en banc. See 11th Cir. R. 35-5(k) and 40-1 .

Counsel appointed under the Criminal Justice Act (CJA) must submit a voucher claiming compensation for time spent on the appeal no later than 60 days after either issuance of mandate or filing with the U.S. Supreme Court of a petition for writ of certiorari (whichever is later) via the eVoucher system. Please contact the CJA Team at (404) 335-6167 or cja_evoucher@ca11.uscourts.gov for questions regarding CJA vouchers or the eVoucher system.

For questions concerning the issuance of the decision of this court, please call the number referenced in the signature block below. For all other questions, please call Carol R. Lewis, CC

at (404) 335-6179.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Jeff R. Patch
Phone #: 404-335-6151

OPIN-1 Ntc of Issuance of Opinion

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 20-12761-CC

ERWIN WHITTER,

Petitioner,

versus

U.S. ATTORNEY GENERAL,

Respondent.

Petition for Review of a Decision of the
Board of Immigration Appeals

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

BEFORE: WILSON, ROSENBAUM, and NEWSOM, Circuit Judges.

PER CURIAM:

The Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. (FRAP 35) The Petition for Panel Rehearing is also denied. (FRAP 40)

ORD-46

Decision of The
Board of Immigration Appeals.

Cover Page

Followed By Pages Four (4) of Four (4)

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

WHITTER, ERWIN MCLAIN
A077-361-246
STEWART DETENTION CENTER
146 CCA ROAD
LUMPKIN, GA 31815

DHS/ICE Office of Chief Counsel - ATL
180 Ted Turner Dr., SW, Ste 332
Atlanta, GA 30303

Name: WHITTER, ERWIN MCLAIN **A 077-361-246**

Date of this notice: 5/6/2020

Enclosed is a copy of the Board's decision in the above-referenced case. If the attached decision orders that you be removed from the United States or affirms an Immigration Judge's decision ordering that you be removed, any petition for review of the attached decision must be filed with and received by the appropriate court of appeals within 30 days of the date of this decision.

Sincerely,

Donna Carr

Donna Carr
Chief Clerk

Enclosure

Panel Members:
Couch, Stuart V.

Userteam: Docket

File: A077-361-246 – Atlanta, GA

Date: MAY - 6 2020

In re: Erwin McLain WHITTER

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Pro se

APPLICATION: Asylum; withholding of removal; Convention Against Torture

The respondent, a native and citizen of Bermuda, has appealed the Immigration Judge's December 5, 2019, decision, denying his applications for asylum and withholding of removal under sections 208 and 241(b)(3) of the Immigration and Nationality Act, 8 U.S.C. §§ 1158 and 1231(b)(3), and for protection under the Convention Against Torture, 8 C.F.R. § 1208.16(c). The appeal will be dismissed. .

We review the findings of fact, including the determination of credibility, made by the Immigration Judge under the "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i). We review all other issues, including issues of law, discretion, or judgment, under a de novo standard. 8 C.F.R. § 1003.1(d)(3)(ii).

We affirm the decision of the Immigration Judge. The respondent has not raised any argument on appeal which persuades this Board that the Immigration Judge erred in denying his applications for relief. On appeal, the respondent has not specifically challenged the Immigration Judge's determination that he is statutorily ineligible for asylum due to his conviction for an offense that qualifies as an aggravated felony under section 101(a)(43)(F) of the Act, 8 U.S.C. § 1101(a)(43)(F) (IJ at 3; Exh. 3). Nor has he specifically challenged the Immigration Judge's determination that he did not establish a nexus between the harm he experienced in the past and fears in the future, and a protected ground enumerated in the definition of refugee (IJ at 3). Section 101(a)(42)(A) of the Act, 8 U.S.C. § 1101(a)(42)(A); section 241(b)(3)(A) of the Act. Hence, we find that the respondent has not demonstrated that the Immigration Judge erred in denying his applications for asylum and withholding of removal on these bases. *See, e.g., Matter of Cervantes*, 22 I&N Dec. 560, 561 n.1 (BIA 1999) (expressly declining to address an issue not raised by party on appeal); *Matter of Gutierrez*, 19 I&N Dec. 562, 565 n.3 (BIA 1988) (same).

The respondent also has not meaningfully challenged the Immigration Judge's determination that he failed to establish that he will more likely than not be tortured upon returning to Bermuda by or with the acquiescence or willful blindness of a public official (IJ at 4). *See* 8 C.F.R. §§ 1208.16(c)(2) and 1208.18(a)(1); *Matter of M-B-A-*, 23 I&N Dec. 474, 479-80 (BIA 2002); *Matter of J-F-F-*, 23 I&N Dec. 912, 917-18 (A.G. 2006) (to establish eligibility for protection under the Convention Against Torture evidence must show that any step in the hypothetical chain of events is more likely than not to happen, and that the entire chain will come together to result in the probability of torture of respondent).

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
ATLANTA, GEORGIA

File: A077-361-246 December 5, 2019

In the Matter of

ERWIN MCLAIN WHITTER	)	IN REMOVAL PROCEEDINGS
RESPONDENT	)	

CHARGES: Section 237(a)(2)(A)(iii).

APPLICATIONS: Asylum; withholding of removal; and protection under the Convention against Torture.

ON BEHALF OF RESPONDENT: PRO SE

ON BEHALF OF DHS: AMANDA KATZ

ORAL DECISION OF THE IMMIGRATION JUDGE

EXHIBITS

1, Notice to Appear;

2, Respondent's application;

3, South Carolina court records.

HISTORY OF THE CASE

DHS personally served respondent with a copy of the Notice to Appear on May 29, 2019, and filed the charging document with this Court on June 4, 2019. On June

The respondent did not establish good cause for a continuance of these proceedings. *See* 8 C.F.R. §§ 1003.29, 1240.6; *see Matter of L-A-B-R-*, 27 I&N Dec. 405, 412 (A.G. 2018) (reiterating the long-standing rule that an Immigration Judge may grant a continuance only for "good cause shown"). On appeal, the respondent appears to argue that the Immigration Judge should have adjourned his proceedings to allow him additional time to gather documentary evidence in support of his case. However, on appeal, the respondent has not specifically identified what evidence he needed additional time to obtain; nor has he demonstrated that such evidence would likely have changed the result in his case. *See Matter of Coelho*, 20 I&N Dec. 464 (BIA 1992).

Moreover, with regard to the respondent's argument that his proceedings should have been adjourned while he pursues post-conviction relief for his 2014 criminal conviction, a pending collateral attack on a criminal conviction is too tentative and speculative to support a continuance of removal proceedings (Notice of Appeal at 2; Respondent's Brief). *Matter of L-A-B-R-*, 27 I&N at 417) ("[C]ontinuances should not be granted when a respondent's collateral pursuits are merely speculative."). On appeal, the respondent has not provided documentary evidence to indicate that his conviction has been vacated or materially modified in any way by the appropriate court. The respondent's mere speculation that his conviction may be invalid does not change the finality of the conviction for immigration purposes, unless and until it has been overturned by a criminal court (Notice of Appeal at 2, Respondent's Brief). *See Matter of Ponce de Leon*, 21 I&N Dec. 154 (A.G. 1997; BIA 1997, 1996).

Accordingly, in view of the foregoing, the following order will be entered.

ORDER: The appeal is dismissed.

NOTICE: If a respondent is subject to a final order of removal and willfully fails or refuses to depart from the United States pursuant to the order, to make timely application in good faith for travel or other documents necessary to depart the United States, or to present himself or herself at the time and place required for removal by the Department of Homeland Security, or conspires to or takes any action designed to prevent or hamper the respondent's departure pursuant to the order of removal, the respondent shall be subject to a civil monetary penalty of up to $799 for each day the respondent is in violation. *See* section 274D of the Immigration and Nationality Act, 8 U.S.C. § 1324d; 8 C.F.R. § 280.53(b)(14).

FOR THE BOARD

18, 2019, respondent appeared at an initial Master Calendar hearing. The proceedings were continued a number of times to provide respondent an opportunity to engage legal counsel. On October 4, 2019, respondent admitted factual allegations 1 through 4 and number 6. The Court then sustained the sole charge of removability. On that date, respondent was provided with an asylum application, which he filed with the Court on October 25, 2019. An Individual merits hearing was conducted on December 5, 2019.

SUMMARY OF TESTIMONY

Respondent testified that he left Bermuda in the year 2000 at the age of 40. He flew to Los Angeles via New York to meet an acquaintance. He has not departed the United States since. He has two children; a son, 37 years old, in Bermuda and a daughter, 33 years old, in England. Respondent worked for a construction company and then later as a self-employed carpenter in Bermuda.

Respondent fears persons in Bermuda who are involved with gangs and drugs and criminal activities. In Bermuda, the respondent was robbed at gunpoint in 1999. He was targeted; this was not a random crime. It was due to gang affiliations. Several years before that, respondent was a passenger in an automobile driven by his friend. His friend was shot in an ambush. The shot came from outside the vehicle; his friend died.

Respondent testified that he was a lawful permanent resident from 2002 until 2011 or 2012. He did not apply for asylum then because he did not realize the immigration consequences of his criminal conviction until recently.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court has considered all documentary and testimonial evidence in this case. The Court's failure to comment on a specific exhibit or particular testimony does not mean that the Court failed to consider it.

Respondent filed his application for asylum nearly 20 years after arriving in the United States, therefore, he did not file his application within one year of his arrival. Respondent has not provided any evidence that would allow him to fall under an exception to the one-year filing deadline. As such, the Court finds respondent's application for asylum is barred as being untimely filed.

In 2014, respondent was convicted for assault and battery of a high aggravated nature in South Carolina. He was sentenced to 20 years in prison. A person violates that South Carolina statute when he unlawfully injures another person and great bodily injury results or the act is accomplished by means likely to produce death or great bodily injury. Under 18 U.S.C. 16(a), a crime of violence has an element, the use, attempted use or threatened use of physical force against another person. The South Carolina assault and battery of a high aggravated nature statute is divisible as it includes alternate elements of injury. The indictment charged respondent with stabbing another person with a knife. That charge for which respondent was convicted involves the use of force with a dangerous object. Therefore, respondent has been convicted of an aggravated felony and he is, therefore, ineligible for asylum. The Court notes that in January 2019, the United States Court of Appeals for the Fourth Circuit held that a conviction in South Carolina for second-degree assault and battery was a crime of violence. See 760 F.App'x 194.

Even if respondent were eligible for asylum, there is no evidence that the persons he fears would pursue him because of his political opinion or membership in a particular social group. Those targeted for violence, crime or extortion by gangs or criminals are not members of a cognizable particular social group nor are they targeted on account of another protected ground. The Attorney General has rejected particular social groups that are based on criminal activity committed by private actors. Being a

victim of criminal activity or intimidation does not form the basis for refugee protection under the Act. Evidence that either is consistent with acts of private violence or that merely shows that a person has been the victim of criminal activity does not constitute evidence of persecution based on a statutorily protected ground. While the Court is sympathetic to respondent's fears of harm in Bermuda, fear of gangs and criminals is not a valid basis for asylum.

Respondent's claim of a fear of future persecution mirrors his claim of past persecution and fails for the same reason. Respondent has not shown there is good reason to believe that he would be singled out in Bermuda for persecution. There is no evidence that the Bermuda government has been searching for him and there is no evidence that the Bermuda government is out to harm him.

Because respondent has failed to meet his burden under the asylum claim, it naturally follows that he is unable to meet the higher burden of proof for withholding of removal.

The Court denies respondent's request for protection under the Convention against Torture because he has not shown that it is more likely than not that he would be tortured by the Bermuda government or be subjected to torture with the acquiescence of that government. There is no claim or evidence of past torture. There is no evidence or testimony of fear of the Bermuda government. Therefore, the Court denies his request for protection under the Convention against Torture.

ORDERS OF THE COURT

Respondent's application for asylum, withholding of removal and protection under the Convention against Torture is denied.

Respondent will be removed from the United States to Bermuda.

A written order reflecting the above decisions will be provided separately and made part of the record.

Please see the next page for electronic signature

DUNCAN, RANDALL W.
Immigration Judge

//s//

Immigration Judge DUNCAN, RANDALL W.

i:0e.t|eoir federation services|randall.duncan@usdoj.gov on January 27, 2020 at 12:27 PM GMT

"APPENDIX A."

IN THE DISTRICT COURT OF SPARTANBURG
FOR THE STATE OF SOUTH CAROLINA

ERWIN WHITTER, *Pro Se*	)	
A#077361246	)	
	)	
Petitioner,	)	
	)	
v.	)	**Case No. 2012GS4205993**
	)	
	)	
SPARTANBURG COUNTY	)	
SOUTH CAROLINA	)	
	)	
Respondent.	)	

PETIONER'S MOTION FOR CONSIDERATION
TO RE OPEN AND VACATE CASE

DECLARATION OF INMATE FILING

I was an inmate confined in a institution at Folkston Detention Center, GA then to an institution at the Stewart Detention Center, Georgia, where I am, currently, since December 2019. I declare under penalty of perjury that the foregoing is true and correct (see 28 U.S.C. § 1746; 18 U.S.C. § 1621).

Sign your name here: _____ Print your name here: Erwin Whitter

Date Signed: 05/06/2020

Erwin Whitter
A #A077361246
Stewart Detention Center
P.O. Box 248
146 CCA Road
Lumpkin, GA 31815

IN THE DISTRICT COURT OF SPARTANBURG
FOR THE STATE OF SOUTH CAROLINA

Erwin Whitter, *Pro Se*	)	
A#077361246	)	
	)	
Petitioner,	)	
	)	
v.	)	Case No. 2012GS4205993
	)	
	)	
Spartanburg County	)	
South Carolina	)	
	)	
Respondent.	)	

PETITIONER'S MOTION FOR CONSIDERATION
TO RE-OPEN AND VACATE CASE 2012GS4205993

On or around 8/16/2012, I was charged with Attempted Murder. That charge is a false claim. I did not Attempt Murder as stated in the records. My rights were violated by the system as the Public Defender did not inform me of several important items pertaining to my case. From the offset, my case was stacked against me. I was held in captivity for about two years. I was scared, and was traumatized and confused. My privileges were completely denied and was categorically denied by the Public Defender of pertinent information related to my case.

My Immigration status was never a part of our discussion (toward a plea deal). The British Consulate was never part of our discussion, all of which were part of my privileges. The Public

Defender did not appear with me in court, instead I had no choice when I was offered Mr. James Cheeks at the very last minute of the process. I was consequently coerced into a guilty plea without even realizing and being instructed what I had accepted into signing.

I was offered a term of three (3) to five (5) years total with Probation for this Guilty Plea which did not occur. With further due, I ask your Honor (Judge Code 2132) for permission to reconsider/reopen these facts that have been referenced, for this needs to be effective so to govern the future of said Defendant Erwin Whitter.

As your reply is much warranted and appreciated, the fact of this act, the facts of this charge is false. This Plea Deal was fabricated for acceptance and convenience, and never occurred. Justice was denied in this case and my full Constitutional Rights. I have been in total awe in the last few years, complete awe. My surroundings have been unjustifiable and very toxic.

In summary, I am seeking an order to vacate the conviction and effectively eliminate that conviction. This will assist me in my Immigration issue, where the order is based on a violation of state statute requiring the court to advise and inform the Defendant (as referenced in the *Padilla v. Kentucky, 559 U.S. 356 (2010)* prior to entry of Plea of the possible Immigration consequences of the conviction (advisal statute). I was definitely deprived of that "Advisal Statute."

Case Reference:

Padilla v. Kentucky, 559 U.S. 356 (2010) (failure to advise about a non-criminal consequence such as deportation risks of guilty pleas could violate the Sixth Amendment) explained by Chaidez v. United States, 133 S. Ct. 1103 (2013)

Relief:

Seeking to Entirely VACATE Case 2012GS4205993 in favor of Defendant, Erwin Whitter.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	IN THE SEVENTH JUDICIAL CIRCUIT
COUNTY OF SPARTANBURG	)	
	)	
ERWIN WHITTER	)	2021-CP-43-015311
Applicant,	)	
	)	
	)	
VS	)	
	)	CERTIFICATE OF SERVICE BY MAIL
	)	
STATE OF SOUTH CAROLINA	)	
	)	
Respondent,	)	
	)	

I AM, the Applicant in the above-captioned action.

I HEREBY CERTIFY that on this 6rth. Day of April, I sent a copy of the foregoing with the Clerk of the Court for the Spartanburg County by using, a contractor service that will mail said Motion, and on this same day forwarded this motion also by contractor to the Following;

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
Telephone: (803) 734-0386

_____
Erwin Whitter

STATE OF SOUTH CAROLINA COUNTY OF SPARTANBURG	)	IN THE COURT OF COMMON PLEAS FOR THE SEVENTH JUDICIAL CIRCUIT
Erwin Whitter, Applicant, V. State of South Carolina, Respondent,	)	Case No. 2021-CP-43-015311 **RETURN AND MOTION TO RESPONSE**

NOW COMES Applicant, making its return and moving to respond for the appeal to review of the dismissal of Post-Conviction Review. Date: 6th Day of April by Respondent. Applicant respectfully offers the following in support of its return:

11. Current Action Before the Court

On or around 8/16/2012, I was charged with an Aggravated Assault. That charge is a false claim. I did not commit the crime as stated in the records. My rights were violated by the system as the Public Defender did not inform me of several important items pertaining to my case. From the offset, my case was stacked against me. I was held in captivity for about two years. I was scared, and was traumatized and confused. My privileges were completely denied and was categorically denied by the Public Defender of pertinent information related to my case.

My Immigration status was never a part of our discussion (toward a plea deal). The British Consulate was never part of our discussion, all of which were part of my privileges. The Public Defender did not appear with me in court, instead I had no choice when I was offered Mr. James Cheeks at the very last minute of the process. I was consequently coerced into a guilty plea without even realizing and being instructed what I had accepted into signing.

I was offered a term of three (3) to five (5) years total with Probation for this Guilty Plea did not occur. With further due, I ask your Honor (Judge Code 2132) for permission to review/ revisit these facts that have been referenced, for this needs to be effective so as to govern the future of said Defendant Erwin Whitter.

Justification for Delay.

The applicant as a first time offender, also due to applicants lack of knowledge, also then added stress of not being aware of his rights, the applicant was indeed following the advice of his public defender, who did not advise him of his rights in regard to the **Sixth Amendment** (Advisal Statute). see: United States v. Liu, 731 F.3d 982 Where trial lawyer failed to raise an obvious statute of limitations defense, he provided ineffective ... Supreme Court of the United States - SCOTUSblog The applicant was confined to county jail without any means to obtain any knowledge in concern of his rights other than what the Public Defender presented. **Reply: *Laches***

Justification for Delay: Mr Whitter had not been advised of his rights by his Public Defender. He did not know of his rights, the Public Defender "failed" to advise him of those rights. Whitter trusted in his Public Defender, he had no need not to trust in him for he was assigned by the courts. The Public Defender did not follow the law at that time. Note: **Ineffectiveness claims can be brought by defendants who plead guilty to a plea deal and did so following the bad advice of counsel. Such claims typically arise when the defendant's lawyer fails to inform their client about the "collateral" consequences of their guilty plea.** Mr.Whittier shows this is based on grounds of which he could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the state occurred. ***prima facie***

prima facie: the existence of a legal duty that the defendant owed to the plaintiff. The Public Defender's office failed to advise Mr. Whitter of his rights. Advisal Statute, those rights; a non-criminal consequence such as deportation risks of a guilty plea, in which is a violation of the **Sixth Amendment**. Proof that the defendant's breach caused the injury, Mr Whitter would not have made a guilty plea if he had known of the Advisal Statute. The **Sixth Amendment** right to counsel is the right to the **"effective assistance"** of counsel, and, also the benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial

process that the trial cannot be relied on as having produced a just result. The same principle applies to a capital sentencing proceeding -- such as the one provided by Florida law -- that is sufficiently like a trial in its adversarial format and in the existence of standards for decision that counsel's role in the proceeding is comparable to counsel's role at trial. Pp. 466 U. S. 684-687. *See* Mohammed v. Gonzales, 400 F.3d 785, 793 (9th Cir. 2005). As in a criminal case, a lawyer's performance is not measured using "specific guidelines," *see*: Wiggins v. Smith, 539 U.S. 510, 521, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003) Strickland v. Washington :: 466 US 668 (1984) Argersinger v. Hamlin :: 407 US 25 (1972 Williams v. Taylor (2000)

Actual Discovery of Facts

Mr. Whitter discovered the immigratiom consequences of his plea at the time of a visit from ICE on Date: 5/29/19 *see*: Attachment (A).

see: 08-905 Merck & Co. v. Reynolds (04/27/2010) - Supreme Court

Opinion of the Supreme Court: *The Clock Starts upon Actual or Constructive Discovery of the "Facts Constituting the Violation".* Mr. Whitter did not discover this through reasonable diligence before entering his plea, for his Public Defender had never once discussed his rights. The Public Defender violated Mr. Whitters rights "Advisal Statute" . *see*: case reference: Padilla v. Kentucky, 559 U.S. 356 (2010) (failure to advise about a non-criminal consequence such as deportation risks of guilty pleas could violate the Sixth Amendment) explained by; *see*: Chaidez v. United States, 133 S. Ct. 1103 (2013). The applicant's first Petition was filed by the Court on: Date: **2020 MAY 22 AM 9:40.** which was followed up on *numerous attempts* for updates in/on this matter. Mr. Whitter received a letter from The Honorable Judge; J Mark Hayes ll on Date: **March, 3 2021** which is in fact, close to a year of the date that the applicants filing had been posted, by the Courts records. *see*: .10-1001 Martinez v. Ryan (03/20/2012) - Supreme Court **Artuz v. Bennett, 531 U.S. 4 (2000)** **Calderon v. Thompson, 523 U.S. 538 (1998)**

What is a PCR in Law? If you are convicted or enter a guilty plea, you have the right to file an appeal if you believe that the Court made a mistake. If you believe that the lawyer made a mistake, that type of error must be raised by filing a Post Conviction Relief (PCR) Petition.Dec 18, 2018

The court shall allow this motion based on *laches*.

Allegations

Applicant's PCR application should not be denied, so the applicant has shown Standards, Revieved Reviews, also Sections pertaining to this/these allegations.

Conclusion

The Applicant moves to the court for his reply. The court should grant the application for the *appeal of a review*.

Respectfully Submitted,

Date: April 6,2022

Erwin Whitter (applicant)

ATTACHMENT (A).

Contents: Pages one (1) of one (1).

Note: The following attached page one(1) of one(1) is not numbered.
(Original Copy)

U.S. DEPARTMENT OF HOMELAND SECURITY **Warrant for Arrest of Alien**

File No. 077 361 246

Date: 05/29/19

To: Any immigration officer authorized pursuant to sections 236 and 287 of the Immigration and Nationality Act and part 287 of title 8, Code of Federal Regulations, to serve warrants of arrest for immigration violations

I have determined that there is probable cause to believe that WHITTER, ERWIN is removable from the United States. This determination is based upon:

☐ the execution of a charging document to initiate removal proceedings against the subject;

☐ the pendency of ongoing removal proceedings against the subject;

☐ the failure to establish admissibility subsequent to deferred inspection;

☒ biometric confirmation of the subject's identity and a records check of federal databases that affirmatively indicate, by themselves or in addition to other reliable information, that the subject either lacks immigration status or notwithstanding such status is removable under U.S. immigration law: and/or

☐ statements made voluntarily by the subject to an immigration officer and/or other reliable evidence that affirmatively indicate the subject either lacks immigration status or notwithstanding such status is removable under U.S. immigration law.

YOU ARE COMMANDED to arrest and take into custody for removal proceedings under the Immigration and Nationality Act, the above-named alien.

(Signature of Authorized Immigration Officer)

M.G. Hill for Supt

(Printed Name and Title of Authorized Immigration Officer)

Certificate of Service

I hereby certify that the Warrant for Arrest of Alien was served by me at N. CHARLESTON, SC (Location)

on WHITTER, ERWIN (Name of Alien) on 05/29/19 (Date of Service), and the contents of this notice were read to him or her in the ENGLISH (Language) language.

J.E. ROMERO / DO #7248

Name and Signature of Officer

Name or Number of Interpreter (if applicable)

APPENDIX B.

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

ERWIN WHITTER, *Pro Se*	)	
A#077-361-246	)	
Petitioner,	)	
v.	)	**Case No. _____**
	)	
William P. Barr	)	
US Attorney General	)	**Alien Number: A077-361-24**
Respondent.	)	

PETIONER'S MOTION FOR STAY OF REMOVAL

DECLARATION OF INMATE FILING

I was an inmate confined in a institution at Folkston Detention Center, GA then to an institution at the Stewart Detention Center, Georgia, where I am, currently, since December 2019. I declare under penalty of perjury that the foregoing is true and correct (see 28 U.S.C. § 1746; 18 U.S.C. § 1621).

Sign your name here: _____ Print your name here:_____

Date Signed:_____

Erwin Whitter A #A077-361-246

Stewart Detention Center

P.O. Box 248 146 CCA Road

Lumpkin, GA 31815

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Erwin McLain Whitter	)	
Petitioner	)	
	)	
v.	)	**Case No. _____**
	)	
William P. Barr	)	**Alien Number: A077-361-246**
US Attorney General	)	
Respondent.	)	

PETITIONER'S MOTION FOR STAY OF REMOVAL

On or around 8/16/2012, I was charged with an Aggravated Assault. That charge is a false claim. I did not commit the crime as stated in the records. My right were violated by the system as the Public Defender did not inform me of several important items pertaining to my case. From the offset, my case was stacked against me. I was help in captivity for about two years. I was scared, and was traumatized and confused. My privileges were completely denied and was categorically denied by the Public Defender of pertinent information related to my case.

My Immigration status was never a part of our discussion (toward a plea deal). The British Consulate was never part of our discussion, all of which were part of my privileges. The Public Defender did not appear in with me in court, instead I had no choice when I was offered Mr. James Cheeks at the very last minute of the process. I was consequently coerced into a guilty plea without even realizing and being instructed what I had accepted into signing.

I was offered a term of three (3) to five (5) years total with Probation for this Guilty Plea did not occur. With further due, I ask your Honor (Judge Code 2132) for permission to review/ re-visit these facts that have been referenced, for this needs to be effective so to govern the future of said Defendant Erwin McLain Whitter.

As your reply is much warranted and appreciated, the fact of this act, the facts of this charge is false. This Plea Deal was fabricated for acceptance and convenience, and never occurred. Justice was denied in this case and my full Constitutional Rights. I have been in total awe in the last few years, complete awe. My surroundings have been unjustifiable and very toxic.

In summary, I am seeking an order to vacate the conviction and effectively eliminate that conviction. This will assist me in my Immigration issue, where the order is based on a violation of state statute requiring the court to advise and inform the Defendant (as referenced in the *Padilla v. Kentucky, 559 U.S. 356 (2010)* prior to entry of Plea of the possible Immigration consequences of the conviction (advisal statute). I was definitely deprived of that "Advisal Statute."

<u>Case Reference:</u>

***Padilla v. Kentucky, 559 U.S. 356 (2010)* (failure to advise about a non-criminal consequence such as deportation risks of guilty pleas could violate the Sixth Amendment) explained by Chaidez v. United States, 133 S. Ct. 1103 (2013)**

Firstly, the "Petition of Review" has a high likelihood of success on the merit. On petitioner Cancellation of removal, the Immigration Judge and the Board of Immigration Appeals exercises plausible discretion in deciding that petition adjustment of status should be granted considering the circumstances in its totality with regards to exercise of discretion.

Granting stay would serve the public interest by allowing petitioner to remain safely in the United States while the Court considers the merit of the Petition for review for the sake of justice and adjudicates this case for first impression. The issues to be raised in this Petition for review has not been ruled on the the BIA or any federal court in the United States.

The opposing party may argue that, since the passage of illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), the proper legal standard of obtaining a stay of removal is set forth in *8 USC § 1252 (f) (2), and that Sofinet, Supra,* no longer applies. However, Sofinet was issued three years "after" the effective data of "IIRIRA " and is still the controlling law.

Even under the higher standard set forth in *8 USC § 1252 (f) (2),* the Court should grant a stay. Given the facts set forth above, the BIA clearly erroneously and unprecedently went along with the "IJ" verdict. Accordingly, under either *USC § 1252 (f) (2) or Sofinet,* the Court should grant the Petitioner's request for a stay of removal.

Potential harm to the movant clearly outweighs the harm of the opposing party if a stay is not granted. *(See Sofinet, 188 F. 3d at 706).* Petitioner would face extreme hardship if returned to Bermuda. The Government on the other hand, will not suffer any harm if this motion is granted. Petitioner had never been convicted of any

felony or aggravated crimes in the Unites States of America, or a crime against any individual or entity to inflict harm or damages.

Relief:

Seeking to Entirely VACATE Case 2012GS4205993 in the Spartanburg, SC Court for the reasons outlined above.

For these reasons, Petitioner respectfully requests that this Court stay the order of removal.

Date: _____

Respectfully Submitted

_____

Erwin McLain Whitter, *Pro Se*