Nos. 14-6570; 21-6808; 22-____

In the Supreme Court of the United States

ZENITH E. VIVAS,
DHS-A200-599-097 ,
Petitioner,
-v.-
OFFICE OF THE ATTORNEY GENERAL OF THE UNITED STATES;
MERRICK B. GARLAND, in his Official Capacity as
Attorney General of the United States,
UNITED STATES DEPARTMENT OF HOMELAND SECURITY;
ALEJANDRO MAYORKAS, Secretary of Homeland Security
Respondents.

ON APPLICATION TO CHIEF JUSTICE ROBERTS FOR STAY OF MANDATE OF THE U.S. COURT OF APPEALS FOR THE D.C. CIRCUIT PENDING FURTHER PROCEEDINGS IN THIS COURT

"LIST OF PETITIONER'S EXHIBITS IN SUPPORT OF APPLICATION TO STAY MANDATE PENDING CERTIORARI"

ZENITH E. VIVAS
118 Greenhouse Dr.
Roswell, GA 30076
Tel. (302) 219-4670

Petitioner, Pro Se

GARLAND, MERRICK B.
Attorney General of the United States,
U.S. Department of Justice,
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530-0001
Tel. (202) 514-2000

Respondent

Additional Respondent Listed on Inside Cover

PETITION FOR A WRIT OF CERTIORARI No. 21-6808 FILED: August 17th, 2021
CERTIORARI DENIED: February 28th, 2022

ALEJANDRO MAYORKAS,
Secretary of Homeland Security,
U.S. Department Homeland Security,
2707 MLK Jr. Ave S.E.
Washington, D.C. 20528
Respondent

BRIAN M. BOYNTON
Principal Deputy Asst. Att'y General
Civil Division

PAPU SANDHU
Assistant Director

VICTOR M. LAWRENCE
Senior Litigation Counsel
OIL ~ Civil Division
U.S. Department of Justice
P.O. Box 878
Ben Franklin Station
Washington, D.C. 20044
Tel: (202) 305-8788
Victor.Lawrence@usdoj.gov
SupremeCtBriefs@usdoj.gov

Attorneys for Respondent

Dated: April 5th, 2023

PETITION FOR REVIEW FILED: April 11th, 2022 • **DISMISSED:** June 23rd, 2022 • **RECALL OF MANDATE DENIED:** October 20th, 2022

LIST OF EXHIBITS

[EXHIBITS WILL BE NUMBERED IN REVERSE CHRONOGICAL ORDER]

Page

Exhibit Number **Description of the Exhibit**

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22-1060 **September Term, 2022**

DHS-A200-599-097

Filed On: October 20, 2022

Zenith E. Vivas,

Petitioner

v.

Merrick B. Garland, United States Attorney General and Alejandro N. Mayorkas, Secretary, United States Department of Homeland Security,

Respondents

BEFORE: Henderson, Wilkins, and Katsas, Circuit Judges

ORDER

Upon consideration of the motion to recall the mandate, and the motion for an evidentiary hearing and discovery, it is

ORDERED that the motion to recall the mandate be denied. By order issued June 23, 2022 the court dismissed this appeal, the court denied rehearing on August 30, 2022, and the mandate issued on September 8, 2022. Petitioner has offered no reason for the court to recall the mandate and reopen this closed case. See Johnson v. Bechtel Assocs. Pro. Corp., D.C., 801 F.2d 412, 416 (D.C. Cir. 1986). The Clerk is directed to accept no further submissions from petitioner in this closed case. It is

FURTHER ORDERED that the motion for an evidentiary hearing and discovery be dismissed as moot.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Daniel J. Reidy
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22-1060 **September Term, 2022**

DHS-A200-599-097

Filed On: September 8, 2022

Zenith E. Vivas,

Petitioner

v.

Merrick B. Garland, United States Attorney General and Alejandro N. Mayorkas, Secretary, United States Department of Homeland Security,

Respondents

BEFORE: Henderson, Wilkins, and Katsas, Circuit Judges

ORDER

Upon consideration of the motion to stay the mandate, it is

ORDERED, on the court's own motion, that the panel's order filed August 30, 2022, be amended to reflect that the petition for rehearing, the motion to vacate and reinstate, and the motion to consolidate were denied by Judges Henderson, Wilkins, and Katsas. It is

FURTHER ORDERED that the motion to stay the mandate be denied. Petitioner has not shown that the petition for a writ of certiorari "would present a substantial question and that there is good cause for a stay." Fed. R. App. P. 41(d)(1); D.C. Cir. Rule 41(a)(2).

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Scott H. Atchue
Deputy Clerk

 "C"

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22-1060 **September Term, 2022**

DHS-A200-599-097

Filed On: September 8, 2022 [1962654]

Zenith E. Vivas,

Petitioner

v.

Merrick B. Garland, United States Attorney General and Alejandro N. Mayorkas, Secretary, United States Department of Homeland Security,

Respondents

MANDATE

In accordance with the order of June 23, 2022, and pursuant to Federal Rule of Appellate Procedure 41, this constitutes the formal mandate of this court.

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Scott H. Atchue
Deputy Clerk

Link to the order filed June 23, 2022

"D"

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

In the Matter of: **ZENITH E. VIVAS,**	§	**[NOT DETAINED]**
Petitioner,	§	**Case No.: 20-14767; 20-14815**
- Vs. -	§	**A Number: DHS-A200-599-097**
MERRICK B. GARLAND, **United States Attorney General;** **-and-** **ALEJANDRO MAYORKAS, United States Department Homeland Security, Secretary of Homeland Security** **Respondents.**	§	**[NOTICE OF INTENTION]**
In Removal Proceedings.	§	

NOTICE OF INTENTION TO FILE PETITION FOR A WRIT OF CERTIORARI IN THE UNITED STATES SUPREME COURT

Now comes, *Zenith E. Vivas* (**"VIVAS"**) —the instant Pro Se Petitioner— and hereby gives this Honorable Court of Appeals notice, pursuant to U.S. Supreme Court Rule 61, of his intention to file a petition for writ of certiorari in the United States Supreme Court. The issues sought to be raised in said petition for a writ of certiorari are:

☑ Denial of due process;

☑ Denial of equal protection rights;

☑ Denial of right to petition the Government for a redress of grievances; and

☑ Non-compliance with the Administrative Procedures Act:
5 U.S. Code §556(d) states: *"Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence. The agency may, to the extent consistent with the interests of justice and the policy of the underlying statutes administered by the agency, consider a violation of section* **557(d)** *of this title sufficient grounds for a decision adverse to a party who has knowingly committed such violation or knowingly caused such violation to occur. A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such crossexamination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form."*

[Signature on next page →]

Very Respectfully submitted, this 1st day of September, 2022.

/s/ Zenith E. Vivas - DHS-A200-599-097
ZENITH E. VIVAS
Pro Se Petitioner

District of Columbia: SS
Signed and Sworn to (or affirmed) before me on the 1st day of September, 2022.

KAREN PIERANGELI
NOTARY PUBLIC, DISTRICT OF COLUMBIA
My Commission Expires June 14, 2025.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22-1060 **September Term, 2021**

DHS-A200-599-097

Filed On: August 30, 2022

Zenith E. Vivas,

Petitioner

v.

Merrick B. Garland, United States Attorney General and Alejandro N. Mayorkas, Secretary, United States Department of Homeland Security,

Respondents

BEFORE: Srinivasan, Chief Judge, and Henderson, Rogers, Millett, Pillard, Wilkins, Katsas, Rao, Walker, and Childs*, Circuit Judges

ORDER

Upon consideration of the petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Daniel J. Reidy
Deputy Clerk

*Circuit Judge Childs did not participate in this matter.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22-1060 **September Term, 2021**

DHS-A200-599-097

Filed On: August 30, 2022

Zenith E. Vivas,

Petitioner

v.

Merrick B. Garland, United States Attorney General and Alejandro N. Mayorkas, Secretary, United States Department of Homeland Security,

Respondents

BEFORE: Henderson, Pillard, and Katsas, Circuit Judges

ORDER

Upon consideration of the petition for rehearing; the motion to vacate and reinstate; and the motion to consolidate, it is

ORDERED that the motion to vacate and reinstate be denied. It is

FURTHER ORDERED that the motion to consolidate be denied as unnecessary. It is

FURTHER ORDERED that the petition for rehearing be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Daniel J. Reidy
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22-1060 **September Term, 2021**

DHS-A200-599-097

Filed On: June 23, 2022

Zenith E. Vivas,

Petitioner

v.

Merrick B. Garland, United States Attorney General and Alejandro N. Mayorkas, Secretary, United States Department of Homeland Security,

Respondents

BEFORE: Henderson, Wilkins, and Katsas, Circuit Judges

ORDER

Upon consideration of the motion for leave to proceed in forma pauperis; the motion to dismiss, and the opposition and the supplements thereto; the motion to supplement the record; the motion for discovery; the motion for summary disposition and the supplements thereto; the motions for default judgment; and the motion for an administrative injunction, it is

ORDERED that the motion for leave to proceed in forma pauperis be granted. It is

FURTHER ORDERED that the motions for default judgment be denied. Petitioner has not shown that he is entitled to the requested relief. It is

FURTHER ORDERED that the motion to dismiss be granted. The proper venue for the petition is the United States Court of Appeals for the Eleventh Circuit. 8 U.S.C. § 1252(b)(2); see also Meza v. Renaud, 9 F.4th 930, 931 (D.C. Cir. 2021) (petition for review of an order of removal must be filed "in the court of appeals for the judicial circuit where the removal proceeding was conducted"). The court concludes that transfer to the Eleventh Circuit would not be in the interest of justice. See Hadera v. I.N.S., 136 F.3d 1338, 1341 (D.C. Cir. 1998). It is

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22-1060 **September Term, 2021**

FURTHER ORDERED that petitioner's remaining motions be dismissed as moot.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Laura Chipley
Deputy Clerk

UNITED STATES SUPREME COURT

CERTIFICATE OF SERVICE

(Use this form only if service is being made other than through the Court's electronic-filing system.)

FRAP 25(b) through **(d)** require that at or before the time of filing a paper, a party must serve a copy on the other parties to the appeal or review. Unless the document is being served through the Court's electronic-filing system, the person making service must certify that the other parties have been served, indicating the date and manner of service, the names of the persons served, and their addresses. You may use this form to fulfill this requirement. Please type or print legibly. I hereby certify that on April 5th, 2023 a correct copy of the foregoing **APPLICATION TO CHIEF JUSTICE ROBERTS FOR STAY OF MANDATE OF THE U.S. COURT OF APPEALS FOR THE D.C. CIRCUIT, PETITION FOR A WRIT OF CERTIORARI TO THE U.S. COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT,** and **MOTION FOR PERMISSION TO APPEAL IN FORMA PAUPERIS AND AFFIDAVIT** was mailed with the Honorable Office of the Clerk of the Supreme Court of the United States. So, the same has been (check one):

X sent by mail, postage prepaid
□ sent by electronic means with the consent of the person being served
□ other (specify manner of service)

and properly addressed to the persons whose names and addresses are listed below:

HONORABLE OFFICE OF THE CLERK OF THE
UNITED STATES SUPREME COURT
1 First Ave., NW
Washington, DC 20543

Very respectfully submitted,

/s/ _____

ZENITH E. VIVAS DHS-A200-599-097
Tel.: +1(302) 219-4670
e-Mail: vivaszenith@gMail.com

District of Columbia: **SS**
Signed and Sworn to (or affirmed) before me on the 5th day of April, 2023

KAREN PIERANGELI
NOTARY PUBLIC, DISTRICT OF COLUMBIA
My Commission Expires June 14, 2025.

Rev.: 12/20

In the Supreme Court of the United States

Nos. 14-6570; 21- 6808;

ZENITH E. VIVAS, DHS-A200-599-097,
Petitioner,

-v.-

OFFICE OF THE ATTORNEY GENERAL OF THE UNITED STATES;
MERRICK B. GARLAND, in his Official Capacity as
Acting Attorney General of the United States,

PROOF OF SERVICE

I, ZENITH E. VIVAS, do swear, declare that on this date April 5th, 2023 required by U.S. Supreme Court Rule 29, I have served the enclosed **"LETTER TO THE OFFICE OF THE CLERK;" "APPLICATION FOR STAY OF MANDATE;" "PETITION FOR WRIT OF CERTIORARI;"** and **"MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS"** on each party to the above proceeding or that party's counsel, and on every other person required be served, by depositing an envelope containing the above document(s) in the U.S. mail properly addressed to each of them and with first-class postage prepaid, or by delivery to a third-party commercial carrier for delivery within 3 calendar days.

SUPREME COURT OF THE UNITED STATES
THE OFFICE OF THE CLERK
1 First St. NE,
Washington, D.C. 20543

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: **April 5th, 2023**

/s/ Zenith E.Vivas - DHS- A200-599-097
ZENITH E. VIVAS
118 Green House Dr.
Roswell, GA 30076

KAREN PIERANGELI NOTARY PUBLIC DISTRICT OF COLUMBIA EXP. 01/14/2025

Karen Pierangeli
4/5/2023

Nos. 14-6570; 21-6808; 22-____

In the United States Supreme Court

ZENITH E. VIVAS,
DHS-A200-599-097,
Petitioner,

-v.-

OFFICE OF THE ATTORNEY GENERAL OF THE UNITED STATES;
MERRICK B. GARLAND, in his Official Capacity as
Acting Attorney General of the United States,

OFFICE OF THE UNITED STATES DEPARTMENT OF HOMELAND SECURITY;
ALEJANDRO MAYORKAS, in his Official Capacity as
Secretary of Homeland Security
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICTOF COLUMBIA CIRCUIT

"ORAL ARGUMENT REQUESTED"

ZENITH E. VIVAS
118 Greenhouse Dr.
Roswell, GA 30076
Tel. (302) 219-4670

Petitioner, Pro Se

GARLAND, MERRICK B.
Attorney General of the United States,
U.S. Department of Justice,
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530-0001
Tel. (202) 514-2000
Respondent

Additional Respondent Listed on Inside Cover

PETITION FOR REVIEW FILED: April 11th, 2022

ALEJANDRO MAYORKAS,
Secretary of Homeland Security,
U.S. Department Homeland Security,
2707 MLK Jr. Ave S.E.
Washington, D.C. 20528
Respondent

BRIAN M. BOYNTON
Principal Deputy Asst. Att'y General
Civil Division

PAPU SANDHU
Assistant Director

VICTOR M. LAWRENCE
Senior Litigation Counsel
OIL ~ Civil Division
U.S. Department of Justice
P.O. Box 878
Ben Franklin Station
Washington, D.C. 20044
Tel: (202) 305-8788
Victor.Lawrence@usdoj.gov
SupremeCtBriefs@usdoj.gov

Dated: April 5th, 2023

Attorneys for Respondent

UNITED STATES SUPREME COURT
CERTIFICATE OF INTERESTED PERSONS
AND CORPORATE DISCLOSURE STATEMENT (CIP)

Zenith E. Vivas vs. U.S. Attorney General ~ Appeal Nos.: 14-6570 21-6808;

I hereby certify that the following persons may have an interest in the outcome of this case pursuant to **Rule 18** of this Honorable U.S. Supreme Court, **Rule 26.1** of the Federal Rules of Appellate Procedure and **Rules 26-1** and **28-1** of the United States Court of Appeals for the District of Coulmbia Circuit:

1.- Boynton, Brian M., Attorney for Respondent, Principal Deputy Asst. Att'y General, Civil Division, U.S. Department of Justice, Washington, D.C.;
2.- Hon. Cohen, Mark H., U.S. District Court for the Northern District of Georgia;
3.- Lawrence, Victor M., Attorney for Respondent, Office of Immigration Litigation, Civil Division, U.S. Department of Justice, Washington, D.C.
4.- Garland, Merrick B., Attorney General of the United States, U.S. Department of Justice, Washington D.C., Respondent;
5.- Hon. Hyles, Stephen, U.S. Magistrate Court for the Middle District of Georgia;
6.- Mayorkas, Alejandro, Secretary of Homeland Security, U.S. Department Homeland Security, Washington, D.C., Respondent;
7.- Park, Song, Attorney for Respondent, Acting Assistant Director, OIL, Civil Division, U.S. Department of Justice, Washington, D.C.;
8.- Prelogar, Elizabeth, Acting Solicitor General of the United States, U.S. Department of Justice, Washington, D.C.;
9.- Hon. Scott, Mark A., Dekalb County Georgia Superior Court Stone Mountain Judicial Circuit;
10.- Vivas, Zenith E., Pro Se Petitioner;
11.- Hon. Wall, Sarah F., Chief Judge, Wheeler County Georgia Superior Court, Oconee Judicial Circuit;
12.- Hon. David J. Smith, U.S. Court of Appeals for the 11th Circuit, Clerk of Court, Atlanta, Georgia.

Very respectfully submitted, this 5th day of April, 2023

/s/ _____

Zenith E.Vivas - DHS-A200-599-097
Pro Se Petitioner
118 Green House Dr.
Roswell, GA 30076
Tel.: (302)219-4670

District of Columbia: SS
Signed and Sworn to (or affirmed) before me on the 5th day of April, 2023

KAREN PIERANGELI
NOTARY PUBLIC, DISTRICT OF COLUMBIA
My Commission Expires June 14, 2025.

QUESTIONS PRESENTED

First, the main question presented is: Whether the law Congress adopted tolerates the Department of Homeland Security's **[DHS]** administrative preferred practices' departures from established procedures and policies?

Prefatorily, let's consider two-fold:

a) [Issue of Procedure] Given that the relevant statute defines a notice to appear as "*written notice*," which must be served in person or by mail and which provides certain required information, such as the alleged grounds for removal and the time and place of the removal hearing. **8 U.S. Code §1229(a)(1)**; also in light of -e.g.- ***Niz-Chavez v. Garland***, 141 S. Ct. 1474 (6th Cir. 2021); ***Pereira v. Sessions***, 138 S. Ct. 2105 (1st Cir. 2018); Whether, to trigger the stop-time rule by serving a "notice-to-appear" –in accordance with section **1229(a)** (Initiation of removal proceedings)– which must be served in-person or by mail and which provides certain required information, the government must "*specify*" the items listed in the definition of a **NTA**, including "**(D)** [t]*he charges against the alien and the statutory provisions alleged to have been violated...* **(G)** [t]*he time and place at which the proceedings will be held.*" Section **1229(a)(1)** or whether the government can serve that information over the course of as many documents and as much time as it chooses.

b) [Issue of Policy] On February 8th, 2012, the **Atlanta/ICE/ERO**'s Deciding Service Officer **(DSO)** issued a "*Final Administrative Removal Order*," **(FARO)** the same date as the Issuing Service Officer **(ISO)** signed "*Notice of Intent to Issue a Final Administrative Removal Order.*" There was a remarkable change from **INA §240** to **INA §238(b)**. Direct appeal ***Martinez v. State*** (A13A1445, Ga. Ct. App) was quite ongoing!

So the main question may also be translated into the instant case's more specific context, as: Whether in making the findings of fact and conclusions of law, and consequently issuing a "*Final Administrative Removal Order*" – pursuant to **INA §238(b)**– the **Atlanta/ICE/ERO** Deciding Service Officer **(DSO)** erroneously determined "*aggravated felonies*" **(AF)**?

Second, the U.S. Supreme Court has already held that "*the courts of appeals are recognized to have an inherent power to recall their mandates.*" ***Calderon v. Thompson***, 523 U.S. 538, 549 (1998); See also ***Greater Boston Television Corp. v. FCC***, 463 F.2d 263, 277-78 (D.C. Cir. 1971), cert. denied, 406 U.S. 950 (1972).

The next question presented is: Did the U.S. Court of Appeal for the District of Columbia Ciruit abuse its discretion by: a) Denying **VIVAS**'s "*motion to recall the mandate*," and/or b) denying the litigant's unopposed "*motion to vacate, motion to reconsider*;" "*motion to accept new evidence, request for an evidentiary hearing and discovery*;" "*motion for Summary Judgment*;" etc. ?

Third, the next question presented is: Did the U.S. Court of Appeal for the 11th Ciruit abuse its discretion by: a) Withholding its Mandate; and b) refusing to accept the Petitioner's motion to "vacate-and-reinstate" timely filed on August 30th, 2022 ?

Fourth, the next question presented is: Did the U.S. Court of Appeal for the 11th Ciruit act "*arbitrarily, irrationally, or contrary to law*" by: a) Giving its April 16th, 2021 decision a title "*in contradiction to the record*!" b) failing to follow precedents in applying Time-Limits –such as: ***AvilaSantoyo v. U.S. Attorney Gen.***, 713 F.3d 1357 (11th Cir. 2013)(en banc); and c) whether the lower Court's denials are not only a point of contention from the "*Code of Federal Regulations*" as well as from Intervening, Controlling Statutes on "*Equitable Tolling*" binding authorities; but also, such denials created conflicts that undermine uniformity of federal Case-law?

Fifth, the next question presented is: Whether both lower Courts not only denied **VIVAS** of his right to present his case on a de novo consideration of the evidence or to seek for redress, (or any legal remedy for any wrongful act(s) inflicted upon him) but even worse leaving him with no opportunity to be heard on constitutional claims?

Sixth, the next question presented is: Shouldn't the "*Final Administrative Removal Order*" at issue have been deemed void in whole, since it's been thereby unwarranted by the facts to the extent that the facts are subject to trial de novo, (or) because of the substantial evidence -New Sentence? And,

Seventh, concerning "*substantive due process*:" Given that "*Due process*" is a requirement that legal matters be resolved according to established rules and principles and that individuals be treated fairly. Given also that the participation of an independent adjudicator is such an essential safeguard, and none of the core values of due process –notice and hearing– can be fulfilled without his/her participation, the last question presented is: Have the values of due process been safeguarded nevertheless the absence of those specific procedural protections –"*contrary to rudimentary due process or natural justice*?"

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CASE-LAWS (Cont'd)

TABLE OF AUTHORITIES (Cont'd)

TABLE OF AUTHORITIES (Cont'd)

CASE-LAWS (Cont'd)

♦

LIST OF PARTIES TO THE PROCEEDING

[All parties appear in the caption of the case on the cover page]

DEFENDANTS: GARLAND, MERRICK B. (Respondent) Attorney General of the United States, U.S. Department of Justice, 950 Pennsylvania Avenue, N.W. Washington, D.C. 20530-0001 **Tel.:** (202)514-2000

ALEJANDRO MAYORKAS (Respondent) Secretary of Homeland Security, Office of the U.S. Department of Homeland Security, 2707 Martin Luther King Jr Ave SE Washington, D.C. 20528-0525

PLAINTIFF: ZENITH E. VIVAS, (Petitioner, Pro Se) 118 Greenhouse Dr. - Roswell, GA 30076 **Tel.:** (302)219-4670

♦

PETITION FOR A WRIT OF CERTIORARI

Zenith E. Vivas, **("VIVAS")** the Pro Se Petitioner in the above-captioned civil action, an alien **A#: 200599097** born on September 3rd, 1969 in Caracas, **VENEZUELA**, respectfully petitions this Honorable U.S. Supreme Court for a "*Writ of Certiorari*" be issued to review the judgments of the U.S. Court of Appeals for the District of Columbia Circuit entered on June 23rd, 2022, Case no. **22-1060**; and of the U.S. Court of Appeals for the Eleventh Circuit entered respectively on April 16, 2021 and May 24, 2024, Cases nos. **20-14797** and **20-14815.** All orders are attached at

---

STATEMENT REGARDING ORAL ARGUMENT

Although Zenith E. Vivas, **("VIVAS")** the Petitioner in the above-captioned actions, does have reasons to believe that the U.S. Supreme Court should deem briefing in the instant proceedings as adequately presented in the briefs and record, as well as that such a briefing shows that the Department of Homeland Security's decision at issue against him should be rescinded as it's been void, so oral argument(s) will not be of significant aid; See **Rule 28**; **Fed. R. App. P. 34(a)(2)(C)** however, should the Court deem necessary and appropriate any clarification(s) of any of the point(s) of Law that have been made in the instant Petition and further Brief, the Petitioner is ready and willing to tell this Honorable Court what he thinks is most important about his arguments, as well as to answer any question(s) from the Court Justices, in order to be as helpful as he can be to the Court in the present review.

Wherefore, pursuant to **Rule 28** as well as **Fed. R. App. P. 34(a)(1)**, **VIVAS**, the instant Petitioner, does request for an **Oral Argument** be scheduled in Calendar, at this Honorable U.S. Supreme Court's convenience. Actually, as an opportunity to descend into particulars and further explain to the Supreme Court in person the arguments that have been made in the Petition at bar.

OPINIONS BELOW

On October 20th, 2022, the United States Court of Appeals for the District of Columbia Circuit **(USCADC)** denied to recall its "*Mandate*," dated on September 8th, 2022 (Case **no. 22-1060**). A true and correct copy of this judgment is

On February 28th, 2022, the U.S. Supreme Court's Panel's majority decided to deny (Case **no. 21-6808**) **VIVAS**'s Petition for a review on Certiorari of the

The **USCA11**'s opinion in issued on 04/16/2021 granting the government's "*Motion to Dismiss his Petitions for Review*" in *Vivas vs. U.S. Attorney General* Case nos. **20-14767, 20-14815** (*unpublished*).

The **USCA11's** opinion in **issued** on 05/24/2021 in ***Vivas vs. U.S. Attorney General*** to reconsider Case nos. **20-14767, 20-14815** has also been *unpublished.*

On October 16th, 2018, the **ATLANTA ICE/ERO** decided to provide VIVAS with a ***"NOTICE TO REMOVED ALIENS WHO MAY BE SEEKING JUDICIAL REVIEW"*** ICE Form 71-041 (04/12); (*In-File* since December 22, 2020) so he may seek for review of the case. Arguably, because on October 15th, 2018, the U.S. Court of Appeals for the Eleventh Circuit denied **VIVAS**'s "*Application for a Certificate of Appealability*" Case no. **18-14797** from the denial of the "*Petition for a Writ of Habeas Corpus*" Case no. **1:17-CV-4976** (US Dist Ct Northern Ga) and the case was remanded to the Agency for further considerations. On December 8th, 2014 - prior to civil proceedings with the Habeas Corpus, the U.S. Supreme Court denied "*Petition for a Writ of Certiorari,*" Case no.: **14-6570**. On October 15th, 2014, at "*New Trial Hearing*" for case no. **08-CR-2217-9**, the Superior Court of Dekalb County, Georgia, reversed in-part two (02) "*Financial Identity Fraud*" convictions **(O.C.G.A. §16-9-121)** and affirmed in-part five (05) "*Forgery in the First Degree*" convictions **(O.C.G.A. §16-9-1)**.

On November 21st, 2013, the Court of Appeals of Georgia reversed *in-part* and affirmed *in-part* the criminal convictions against the petitioner for case no. **08-CR-2217-9**, Superior Court of Dekalb County, Georgia. The same is published! See (***Martinez v. State***, 750 S.E.2d 504 (Ga. Ct. App.2013)). On February 8th, 2012, the Administrative Agency -**ATLANTA ICE/ERO**- issued the challenged "*Final Administrative Removal Order*" (*In-File* since December 22, 2020) against **VIVAS**. On June 29th, 2011, the Petitioner was sentenced to serve ten (10) years for each count two (02) "*Financial Identity Fraud,*" **(O.C.G.A. §16-9-121)** and five (05) "*Forgery in the First Degree,*" **(O.C.G.A. §16-9-1)** for case no. **08-CR-2217-9**, Superior Court of Dekalb County, Georgia.

STATEMENT FOR THE BASIS OF JURISDICTION

The jurisdiction of the U.S. Supreme Court is invoked under **8 U.S. Code §1254(1).** Moreover, since the Petitioner has reasons to believe that the instant case "*arises under*" the Constitution or laws of the United States, for he has a number of federal questions such as Jurisdiction, which "*form an ingredient of the original cause*" –that is, such question form an element of his claims; therefore, **VIVAS** is actually seeking for:

♦ The Court to invoke its federal judicial power under **Article III, Section 2, Clause 1** of the U.S. Constitution, which should extend to his case as one from among the category encompassing "*to all cases, both in law and equity, arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority*;" and

♦ The Court's determination that his claims alleging constitutional violations are "***justiciable***" –Capable of being decided by a court!

♦

CONSTITUTIONAL PROVISIONS INVOLVED

[Constitution of the United States] The Constitutional provisions involved are the Article III; (Secs. 1-2) First, Fifth and Fourteenth Amendment.

Article III: [Section 1] "*The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.*"

[Section 2] "*The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;--to all cases affecting ambassadors, other public ministers and consuls;--to all cases of admiralty and maritime jurisdiction;--to controversies to which the United States shall be a party;--to controversies between two or more states; --between a state and citizens of another state; --between citizens of different states;--between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.*

In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make.

The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the Congress may by law have directed."

Amendment I: "*Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.*"

Amendment V: "*No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.*"

Amendment XIV: [Section 1] "*All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*"

STATEMENT OF THE CASE

On February 19th, 2010, while **VIVAS** was in the custody of the Dekalb County Jail, **(DKSO)** Georgia, **X0358392** he refused to sign the defective "*Notice to Appear*" –C.f. Appx. "B.3"– under **INA §240**. Said **NTA** was defective because –from among other reasons– the same did **not** show upon its face any date or time for the deportation/removal hearing. On February 8th, 2012, the **Atlanta ICE/ERO** issued the challenged "*Final Administrative Removal Order*," pursuant to **INA §238(b)(2011) (8 U.S. Code §1228 ~ expedited removal)**. Even though in State custody, **VIVAS** was neither notified of nor produced as to attend the hearing –If ever. This governmental action was based in part upon two criminal fraud convictions (**O.C.G.A. §16-9- 121**) which were **not** yet final, since the Petitioner had **not** been duly convicted, (by due process of Law) yet. See Case no. **08-CR-2217-9**, (Dekalb Co., Georgia). On November 21st, 2013, both criminal fraud convictions were reversed at direct appeal, because they were found constitutionally impermissible. On November 19th, 2018, the Petitioner was removed from the country. As soon as precticable, **VIVAS** proceeded on to statutorily file "*Petition for Review*" Case no. **20-14797** before the Eleventh Circuit; as well as a set of "*Motions for Reconsideration, to Remand, to Reopen, etc.*" **20-14815**. On April 16th, 2021, the lower court erred in denying its jurisdiction to hear **VIVAS**'s **PFR**s. The lower court also erred in denying the set of Motions. On August 17th, 2021, **VIVAS** proceeded on to file "*Petition for a Writ of Certiorari*" before the U.S. Supreme Court. On February 28th, 2022, said Petition was denied by the majority Panel.

On April 11th, 2022, **VIVAS** proceeded on to file another "*Petition for Review*" –though this time before the District of Columbia Circuit. On June 23rd, 2022, the government's motion to dismiss be granted. On September 8th, 2022, the Mandate was issued. On October 20th, 2022, recalling the mandate was ***denied***.

The Petition at bar flowed on!

REASONS FOR GRANTING THE PETITION

VIVAS comes hereby to challenge two lower Court's administrative decisions on *judicial review*; (**USCADC**'s and **USCA11**'s) mainly two-fold:

♦ **['PROCESS REVIEW']** Procedural deficiencies in the administrative process; and
♦ **['MERITS REVIEW']** Deficiencies in the analysis of the decision maker on the merits.

VIVAS will also endeavour as to venture to set the basis out –to somewhat the extent– for a potential **"JUDICIAL REVIEW."**

A. THIS COURT SHOULD SUMMARILY VACATE BOTH LOWER COURTS' DECISIONS

I. ['PROCESS REVIEW'] Let's please focus, your Justice, upon those issues which may run unto "*justiciability*." [In chronological order]

◇ **['Defective NTA']** As explained above, your Justice, on February 19th, 2010, **VIVAS** refused-to-sign **NTA** under **INA §240**, mainly because:

♦ His name was **not** listed as respondent
♦ **ICE** officers weren't quite sure whether to deport **VIVAS** to Mexico or Guatemala;
♦ there were **NO** criminal charges attached to the **NTA** ; and
♦ as statutorily required by **8 U.S. Code §1229(a)(1)**, the **NTA** did **not** provide the required information, such as the alleged grounds for removal and the time and place of the removal hearing.

The **NTA** seems as though it was corrected, but also thereafter ***cancelled*** –c.f.(**8 C.F.R. 239.2(a)**).

◇ **['Erroneous AF determination']** On February 8th, 2012, an Atlanta **ICE/ERO**'s Deciding Service Officer **(DSO)** issued the challenged "*Final Administrative Removal Order*," **(FARO)** (*In-File* since Dec. 22, 2020) pursuant to **INA §238(b)(2011) (8 U.S. Code §1228 ~ expedited removal)**. The very same date as the Issuing Service Officer **(ISO)** signed "*Notice of Intent to Issue a Final Administrative Removal Order*."

Even though in State custody, **VIVAS** was neither notified of

There was a remarkable change from **INA §240** to **INA §238(b)**. Direct Appeal ***Martinez v. State*** (A13A1445, Ga. Ct. App) was quite ongoing!

◇ **['Clear error judgment']** The **USCA11**'s decision clearly, plainly violates the Administrative Law principle of Legality or is otherwise "*arbitrary and capricious.*"

♦ The lower Court gave the decision a title "*in contradiction to the record*!"

There's **not** any reasonable explanation for the decision at issue. The same is **not** only irrational, but it's also **not** in accordance with Administrative Law and should **not** be allowable (or even tolerable) from any perspective of this Law; simply because:

The lower Court reached a conclusion that contradicts the underlying record!

The lower Court improperly assumed that Immigration proceedings at bar had been seen by an Immigration Judge and there'd been a decision by the Board of Immigration Appeals, **BIA-1: A200-599-097**, where there's **not** even one shred of evidence as to support such a finding. Likely so, because there's **no** transcripts of Removal Hearing! (**Not** in *Open Records*) As a result, where the same is "*clearly against reason and evidence,*" the decision should therefore be deemed:

"In contradiction to the record!"

♦ The lower Court arbitrarily gave deference to a **BIA**'s decision, in an instance where **no** deference is warranted, simply because **no** decision has ever been made – Such decision is *Non-existent*! The lower Court also neglected to take into considerations, that both Petitioner and Respondent had already presented evidence to the contrary!

• **VIVAS** on the one hand had asserted in both **PFR**s:

No Court has upheld the validity of the "*Final Administrative Removal Order.*"

• On the other hand, the "*Respondent's Motion to Dismiss the Petitions for Review for Lack of Jurisdiction,*" (*In-File* since Jan. 15, 2021) on its Page 2, also confirmed:

FN1: According to the Board of Immigration Appeals online decision database, the Board has **not** issued any decisions pertaining to Vivas.

Not to mention, that the Board may not entertain **VIVAS**'s **PFRs** because of "**Lack of Jurisdiction:**[1] " The Case has never been seen before by the Board. This is **NOT** a case already decided by the **BIA**! See **(BIA Practice Manual 5.2(a)(e)).**

Here, it has become paramount important to recall, that any decision by public authorities should be deemed unreasonable if they do **not** logically follow all the legally and reasonably relevant dimensions. Conformity to reasonability is what makes people believe and rely on administrative actions and law.

◇ **['Subject-matter jurisdiction/Proper venue']** Subject-matter jurisdiction does define an **Art. III** limitation on the power of **federal courts.**

[Here, it is not about to step on the merits of the case, but only to litigate jurisdiction.]

♦ **[USCA11]** On April 16th , 2021, a lower Court **USCA11**'s judicial panel granted the government's motion-to-dismiss

In its Footnote can be read:

> **"We also note that the 30-day period is not subject to equitable tolling, despite Vivas's arguments to the contrary."**

Here, your Justice, it is **not** to auscultate "*Merits Review*," but this clearly creates *intra-circuit*[2] and *inter-circuit* tensions with all other circuits[3]

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1. C.f. (Department of Justice - EOIR Policy Manual. Part III - BIA Practice Manual 5.2(a)(1)).
C.f. Also https://www.justice.gov/eoir/ag-bia-decisions

2. See (***Avila-Santoyo v. U.S. Atty. Gen.***, 713 F.3d 1357 (11th Cir. 2013)); See also (***Ruiz-Turcios v. U.S. Attorney Gen.***, 717 F.3d 847 (11th Cir. 2013) (the BIA's conclusion that it was barred from reopening RuizTurcios's removal proceedings based on the untimeliness of the motion to reopen is erroneous)).

3. Equitable tolling is a principle that entitles litigants to an extension of non-jurisdictional filing deadlines if they act diligently in pursuing their rights but are nonetheless prevented from timely filing by some extraordinary circumstance. See, e.g., ***Holland v. Florida***, 560 U.S. 631 (2010).

Case-Laws concerning this equitable tolling matter are also plentiful in other circuits: See e.g. ***Jobe v. Immigration & Naturalization Service***, 238 F.3d 96 (1st Cir. 2001)(en banc) See also, ***Neves v. Holder***, 613 F.3d 30, 36 (1st Cir. 2010); ***Boakai v. Gonzales***, 447 F.3d 1, 2 n.2 (1st Cir. 2006); ***Cai Xing Chen v. Gonzales***, 415 F.3d 151, 154 n.3 (1st Cir. 2005); ***Iavorski v. United States INS***, 232 F.3d 124, 129-133 (2d Cir. 2000); ***Borges v.Gonzales***, 402 F.3d 398, 406-07 (3d Cir. 2005); ***Kuusk v. Holder***, 732 F.3d 302, 305 (4th Cir. 2013) ("*Recognizing that the principles of equitable tolling apply to "untimely motions to reopen removal proceedings*"); ***Akwada v. Holder***, 113 Fed. Appx. 532 (4th Cir. 2004)(unpublished)("*equity must be reserved for those rare instances where...it would be unconscionable to enforce the limitation period against the party and gross injustice would result;*") ***Cavazos v. Gonzales***, 181 Fed. Appx. 453 (5th Cir. May 23, 2006) (unpublished), the Court stated that the doctrine, if applicable, should be employed only in "rare and exceptional circumstances;" ***Lugo-Resendez v. Lynch***, 831 F.3d 337 (5th Cir. 2016); ***Tapia-Martinez v. Gonzales***, 430 F.3d 997 (6th Cir. 2007); ***Harchenko v. INS***, 379 F.3d 405 (6th Cir. 2004); ***Pervaiz v. Gonzales***, 405 F.3d 488 (7th Cir. 2005); ***Hernandez-Moran v. Gonzales***, 408 F.3d 496 (8th Cir. 2005); ***Kanyi v. Gonzales***, 406 F.3d 1087, 1091 (8th Cir. 2005); ***Socop-Gonzales v. INS***, 272 F.3d 1176, 1195 (9th Cir. 2001) (en banc) (Holding that a 90-day filing deadline for motions to reopen or reconsider did not create a jurisdictional bar);

♦ **[USCADC]** On June 23rd, 2022, the **USCADC**'s judicial panel found: "*The proper venue for the petition is the United States Court of Appeals for the Eleventh Circuit.* **8 U.S.C. §1252(b)(2)**; see also ***Meza v. Renaud***, 9 F.4th 930, 931 (D.C. Cir. 2021) (petition for review of an order of removal must be filed "*in the court of appeals for the judicial circuit where the removal proceeding was conducted*')."

In support, "*We review de novo our subject matter jurisdiction.*" ***Sanchez Jimenez v. U.S. Att'y Gen.***, 492 F.3d 1223, 1231 (11th Cir. 2007).

As in actual fact, jurisdictions are **NOT** to overlap each other!

Notwithstanding, **USCA11** seems as though it ceased to guarantee **VIVAS**'s fundamental rights; therefore, the Court may also wish to assess the national character of the D.C. Circuit:

The D.C. Circuit's authority to review national governments decisions: [Article III oversight] Authority to review national governments decisions have been given to D.C. judges, so they may well be considered **Article III** judges, since they've been entitled to **Article III** protection.

Needless to remark that *Judicial Review* is important, since Court review provides necessary oversight of government decision-making –review which is essential in immigration cases given that a removal order can mean separation from family in the United States or being returned to a country where a person fears for his life.

In actual fact, there most certainly are a number of differences between the D.C. Circuit and the other federal courts of appeals,[4] which the court should reconsider:

- One-third of the D.C. Circuit appeals are from agency decisions;
- About one-quarter of the D.C. Circuit's cases are other civil cases involving federal government; and
- About two-thirds of the cases before the D.C. Circuit involve the federal government in some civil capacity.

In ***Valeriano v. Gonzales***, 474 F.3d 669, 673 (9th Cir. 2007), the Court reiterated its previous conclusion that equitable tolling is only available if diligence is shown, and "*the party's ignorance of the necessary information must have been caused by circumstances beyond the party's control;*" ***Iturribarria v. INS***, 321F.3d 889, 897 (9th Cir. 2003) (holding that equitable tolling will be applied where the alien is prevented from timely filing a motion by deception, fraud, or error so long as the alien acted with due diligence in discovering the deception, fraud, or error); ***Mahamat v. Gonzales***, 430 F.3d 1281, 1283 (10th Cir. 2005); ***Galvez-Piñeda v. Gonzales***, 427 F.3d 833, 838-39 (10th Cir. 2005) ("[t]*o avoid unnecessary delay in immigration proceedings, motions to reopen must be brought promptly*;" alien must show "*requisite diligence" in filing motion*); ***Infanzon v. Ashcroft***, 386 F.3d 1359, 1362-63 (10th Cir. 2004); ***Riley v. INS***, 310 F.3d 1253, 1257-58 (10th Cir. 2002). Running Away From the Regulatory Departure Bar, One Circuit at a Time, in Opposite Directions, **IMMIGRATION LAW ADVISOR, (EOIR)** Sept.-Oct. 2013. at 16.

4. Roberts, J.G. (2006). What Makes the D.C. Circuit Different?: A Historical View.

Virginia Law Review, 92(3), P.377. Available at http://www.jstor.org/stable/4144947

Even when the jurisdiction is *concurrent*, as it often is, agency's administrative decision can be reviewed in the D.C. Circuit, in the circuit where the petitioner resides, or in the circuit where events giving rise to the matter took place. Therefore, **USCADC** may exercise its official power (or jurisdiction) to review the agency's administrative decision[5] –such as the one at issue. Not to mention federal court review adds an important layer of protection –courts can catch inadvertent government mistakes and help ensure that the government is properly interpreting and applying the immigration laws. But equally as important, federal court review builds confidence about the fairness and accuracy of immigration procedures and brings integrity to the system.

This subject-matter jurisdiction topic will need more development (below)

B. THIS COURT SHOULD, IN ITS DEFECT, GRANT CERTIORARI

The Supreme Court is in the unique position to enforce uniformity by resolving the conflict through a decision applicable to all of the courts below it.

"*The Supreme Court should be able to review any violation of the law, including lack of competence, procedural impropriety and abuse of power.*"

Please kindly note, that a basic principle of American legal system is that an outcome should **not** depend upon the court the Petitioner finds himself in; also, that in its assessment to review the subject-matter jurisdiction **de novo**, ('*merits review*') both lower Courts may have also erred clearly contrary to Law! For example, this case's already raised straightforward questions of statutory interpretation, –upon **8 U.S. Code §§1252(b)(1) and 1252(d)**– which this Court should review **de novo**.[6]

I. THE PETITIONER WISHES TO UPHOLD HIS STANDING TO BRING HIS CLAIMS IN THIS COURT

Here, besides the *procedural injury*, (above) **VIVAS** wishes to claim **Article III**–*Standing*. So, in order for the Court to achieve greater transparency and judicial certainty in the petition process, **VIVAS** wishes to propose the flex set out in **Lujan v. Defender of Wildlife**, 504 US 555 (8th Cir. 1992).

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5. M. Wood, D.C. Circuit Has Special History Among Appeals Courts, Roberts Says April 26, 2005. Available at https://www.law.virginia.edu/news/2005_spr/roberts.htm

6. See ***United States v. Shim***, 584 F.3d 394, 395 (2d Cir. 2009); ***Williams v. Beemiller, Inc.***, 527 F.3d 259, 264 (2d Cir. 2008)

◇ **['Standing']** One of those landmarks, setting apart the "Cases" and "Controversies" that are of the justiciable sort referred to in Article III–"*serv*[ing] *to identify those disputes which are appropriately resolved through the judicial process*," ***Whitmore v. Arkansas***, 495 U. S. 149, 155 (1990)–is the ***doctrine of standing***.

In invoking federal jurisdiction over the present matter, **VIVAS** does acknowledge that he's the burden of establishing the following three (03) elements:

♦ **['Standing>Injury in fact']** An invasion of a legally protected interest which is (a) concrete and particularized,[7] and (b) "actual or imminent, not 'conjectural' or 'hypothetical.'[8]" Let's recount:

• On February 8th, 2010, **VIVAS** was unlawfully removed from the streets at the city of Roswell –Fulton Co.– Georgia; without charges he was bound over to Dekalb Co. Jail; **(DKSO)**
• On February 19th, 2010, **VIVAS** was asked to sign a *defective* **Notice-to-Appear** ~In removal proceedings under section 240 of the Immigration and Nationality Act. –He refused to sign!

The **NTA** didn't even allege any criminal charge(s)

It's important to highlight, that the Court may wish to entertain a claim in the wake of –*inter alia*– ***Niz-Chavez v. Garland***, 141 S. Ct. 1474 (6th Cir. 2021); ***Pereira v. Sessions***, 138 S. Ct. 2105 (1st Cir. 2018);

• It wasn't but until ca. eight months later, when **VIVAS** was informed of the charges against him, and a Dekalb Co. public defender asked him to plead guilty to not less than three class **"A"** felonies –to which again, he refused.– Criminal proceedings went on;

• Proceedings were plagued by different irregularities, including 5th amendment due process issues –some of then were reported. c.f. (***Rodolfo Lara Martinez, Petitioner v. Georgia***, **14-6570**) From then on up to here, it's been a great deal of persistence in the controversy;

• On May 11th, 2011, **VIVAS** was found guilty of two (02) counts "*Financial Identity Fraud*" –**O.C.G.A. §16-9-121**, and five (05) counts "*Forgery in the First Degree*" –**O.C.G.A. §16-9-1**. On June 29th, 2011, he was sentenced to serve ten (10) years for each conviction. –All sentences running ***concurrent***. –He did appeal and move for "*New Trial.*" –Case ***Martinez v. State***, A13A1445 Ga Ct App flowed on;

• On February 8th, 2012, while **VIVAS** was in the custody of the Georgia Dept. of Corrections **(GaDOC)** at a compound where there is an Immigration court, an **Atlanta/ICE/ERO**'s Deciding Service Officer **(DSO)** issued a "*Final Administrative Removal Order*," **(FARO)** the same date as the Issuing Service Officer **(ISO)** signed "*Notice of Intent to Issue a Final Administrative Removal Order.*" There was a remarkable change from **INA §240** to **INA §238(b)**. Direct Appeal ***Martinez v. State*** (A13A1445, Ga. Ct. App) was quite ongoing! There's been, as a result, **not** only a **DOJ**'s policy issue here, but also the **FARO** erroneously gave birth to the *removability* and to the *inadmissibility* issues;

• The *injury-in-fact* reached constitutional dimension when the honorable Court of Appeals of Georgia found both convictions for "*Financial Identity Fraud*" –**O.C.G.A. §16-9-121**, as *constitutionally impermissible*. Therefore, both convictions against **VIVAS** were reversed *in-part*;

• For some specific reason, **VIVAS** cannot explain, the "*Record of Proceedings*" can even detect a minor change such as a **SDDO** cancelled **NTA**, but the substantial change above has remained *unperceived/undetected*; –There's a need to correct or supplement record c.f. **Fed. R. App. P. 16(b)**

• Moreover, **VIVAS** has been unable to expose the change in the law since 2014, by means of which pursuant to the **Official Code of Georgia Annotated, (O.C.G.A.) not** even altogether Forgery charges amount to a felony –much less to an Aggravated Felony. Pursuant to criminal indictment **08-CR-2217-9**, the alleged offenses were dated on {25th day of May, 2007, 29th day of May, 2007, 30th day of May, 2007, 2nd day of June, 2007, and 14th day of August, 2007} ... Even the freshest one is more than fifteen (15) years old –c.f. Eligibility for waiver under **INA §212(h)(1)**– which should have a positive impact upon *admissibility* –This matter requires more development;

• On November 19th, 2018, **VIVAS** was escorted out of the **U.S.** And transported back to **VENEZUELA** –his original country; thus erroneously removed from the **U.S.** Thus, *erroneously* removed from the country!

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7. By particularized, we mean that the injury must affect the plaintiff in a personal and individual way. C.f. ***Warth v. Seldin***, 422 U. S. 490, 508 (1975); ***Sierra Club v. Morton***, 405 U. S. 727, 740-741, n. 16 (1972).
8. ***Whitmore***, supra, at 155 (quoting ***Los Angeles v. Lyons***, 461 U. S. 95, 102 (1983)).

♦ **['Standing>Fair traceability']**[9] On the one hand, Attorney General Merrick B. Garland oversees the U.S. Attorneys to the Department of Justice; **(DOJ)** on the other, Attorney Alejandro Mayorkas the Secretary of the U.S. Department of Homeland Security **("DHS")**, which largely enforces the Immigration and Nationality Act **("INA")** –works together with the **DOJ**– which conducts and defends formal immigration administrative adjudications and related rulemaking, engage in constitutional analysis on a limited basis.

♦ **['Standing>Redressability']**[10] *Firstly*, the venue of this civil action against the Attorney General and the Secretary of the U.S. Department of Homeland Security **("DHS")** has been proper in the 11th Circuit; notwithstanding, mainly because of the D.C.'s expertise in administrative law, **VIVAS** seeks to preserve –as an advantage– that the venue may remain in the District of Columbia. C.f. *–e.g.–* *Sierra Club v. EPA*, **292 F. 3d 895 (D.C. Cir. 2002).**

> "*The United States Court of Appeals for the District of Columbia Circuit owes its role as an authority on administrative law to its unique history*," said Judge John G. Roberts at the Ola B. Smith Lecture April 20, an event hosted by the Student Legal Forum and the Virginia Law Review.

Secondly, Both "*Motion to Accept New Evidence*," pursuant to **D.C. Circuit Rule 27, c.f. (FRAP R. 27)** and "*Request for an Evidentiary Hearing and Discovery*" pursuant to the substantial evidence standard in the "Administrative Procedure Act," **5 U.S. Code §706(2)(E)(2006)** –even though unopposed– were disregarded by the **USCADC**. Here it is important to highlight, that besides the Records supplementation, the "*Transfer package*" from **GaDOC** unto **ICE** custody also contains relevant information for any assessment upon the eligibility for relief.

And *thirdly*, hereunder, **VIVAS** will develop to somewhat the extent all four Justiciability's doctrines –including *ripeness.*– Just for this second, he wishes the Court to know that he's attached to the salutary principle that administrative remedies must first be before resorting to the Court.

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9. *Simon v. Eastern Ky. Welfare Rights Organization*, 426 U. S. 26, 41-42 (1976).
10. "*redressed by a favorable decision.*" *Id.*, at 38, 43.

II. THE PETITIONER WISHES TO MAKE A "*CASE OR CONTROVERSY*" OUT BETWEEN HIMSELF AND RESPONDENTS WITHIN THE MEANING OF ARTICLE III[11]

In its constitutional dimension, standing imports justiciability: whether the plaintiff has made out a "*case or controversy*" between himself and the defendant within the meaning of **Art. III**. This is the threshold question in every federal case, determining the power of the court to entertain the suit. As an aspect of justiciability, the standing question is whether the plaintiff has "*alleged such a personal stake in the outcome of the controversy*" as to warrant his invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf. ***Baker v. Carr***, 369 U. S. 186, 204 (1962). The **Art. III** judicial power exists only to redress or otherwise to protect against injury to the complaining party, even though the court's judgment may benefit others collaterally. A federal court's jurisdiction therefore can be invoked only when the plaintiff himself has suffered "some threatened or actual injury resulting from the putatively illegal action... ." ***Linda R. S. v. Richard D.***, 410 U. S. 614, 617 (1973). See ***Data Processing Service v. Camp***, 397 U. S. 150, 151-154 (1970).

In actual fact, whereas "*...the purpose of the standing requirement is to ensure that a litigant has a sufficient interest at stake to present the case or controversy in a sufficiently concrete and competent manner*," ***Warth v. Seldin***, 422 U.S. 490, 498–99 (1975) **VIVAS** is ready and willing to show: **Not** only that (*i*) he's standing, but also that (*ii*) the facts of the case have matured into an '*actual controversy*;' -so, the case is ripe- and (*iii*) issues presented are neither 'moot' nor 'violative of the political question doctrine.'.

◇ **['Justiciability doctrines']** Pursuant to ***Lujan***[12] Standing is only a part of the "*case or controversy*" requirement of **Article III.** Let's proceed on to assess to somewhat the extent all other three requirements:

- **['Justiciability>Ripeness']**[13] The ripeness doctrine originates from the same **Article III** concerns that underlie the standing and mootness doctrines.

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11. ***Warth v. Seldin***, 422 US 490 (2nd Cir. 1975)
12. ***Lujan v. Defender of Wildlife***, 504 US 555 (8th Cir. 1992).
13. ***Lee v. Oregon***, 107 F.3d 1382, 1387 (9th Cir. 1997); ***Abbott Labs. v. Gardner***, 387 U.S. 136, 148–49 (1967). ***Lujan v. Defenders of Wildlife***, 504 US 555, 112 S. Ct. 2130, 119 L. Ed. 2D 351 (8th Cir. 1992); ***Reno v. Catholic Social Services, Inc.***, 509 US 43, 113 S. Ct. 2485, 125 L. Ed. 2D 38 (9th Cir. 1993); ***Texas v. US***, 809 F. 3D 134 - Court of Appeals, (5th Cir. 2015) (Eligibility for federal benefits)

VIVAS's already set forth claims because he's suffered legal wrongs; in fact, as pursuant to ***United Public Workers v. Mitchell***, 330 U.S. 75, 89 (1947), this civil action presents "*concrete legal issues, presented in actual cases, not abstractions.*"

Now, as ripeness is concerned with when that litigation may occur, **VIVAS**'s claims are ripe since the facts of the case have matured into an "*actual controversy*," ***Lee v. Oregon***, 107 F.3d 1382, 1387 (9th Cir. 1997) through avoidance of premature adjudication ***Abbott Labs. v. Gardner***, 387 U.S. 136, 148–49 (1967). Here you are three-fold:

◦ The erroneous '*administrative removal*' occurred on November 19th, 2018;
◦ On August 30th, 2022, the **USCA11** accepted **no** further submissions from Petitioner in this **closed** case. Mandate's been withheld; and
◦ On October 20th, 2022, the **USCADC** denied **VIVAS**'s motion to recall the mandate.

> So, **VIVAS**'s completely exhausted all available avenues for ***administrative review***, including **PFR**s in two different U.S. Courts of Appeals.

♦ **['Justiciability>Mooteness']**[14] A claim is *moot* if the relevant issues have already been ***resolved***.

Mootness, which involves different considerations, is the question whether the plaintiff continues to have a requisite stake in the outcome as the lawsuit progresses ***Valle Del Sol Inc. v. Whiting***, 732 F.3d 1006, 1018, n. 11 (9th Cir. 2013) ("*Although ... an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed, that inquiry goes to mootness rather than standing.*").

Immigration cases finding claims ripe for review:

• ***Immigrant Assistance Project v. INS***, 306 F.3d 842, 861–62 (9th Cir. 2002) (noting that even if a plaintiff has not yet applied for a benefit and been denied, a challenge to a regulation is ripe if the court can make a firm prediction that: (1) the plaintiff will apply for the benefit; and (2) the agency will deny the application by virtue of the regulation; plaintiffs met the ripeness requirement where they did apply and the applications were held in abeyance for more than 14 years based on ongoing litigation regarding the regulation)

• ***Olajide v. ICE, 402 F. Supp. 2d 688, 691–92 (E.D. Va. 2005)*** (where petitioner, challenging lengthy detention, filed habeas petition less than six months after taken into ICE custody, and therefore detention was presumptively reasonable under Zadvydas, court rejected ICE's argument that the case should be Page 45 dismissed because not ripe; ripeness is determined not as of the time the petition is filed, but as of the time the petition is adjudicated)

14. See generally Matthew I. Hall, The Partially Prudential Doctrine of Mootness, 77 Geo. Wash. L. Rev. 562,

Whereas, both lower courts have ordered dismissal of **VIVAS**'s claims and declared them as ***moot.*** Notwithstanding, **VIVAS** contends that his presented claims have been unopposed and cannot become *moot* in such manner.

As explained above "*Throughout the litigation the Petitioner has suffered, or been threatened with, an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision*," ***Spencer v. Kemna*, 523 U.S. 1, 7 (1998).**

VIVAS can perfectly understand, that like private actors, governments can and will seek to manipulate a court's jurisdiction to *moot* an **unfavorable case**. But unlike private actors, if a government succeeds in insulating its conduct from judicial review, the consequences are far more dire: The coercive power of the political branches is left unchecked by the judiciary,[15] and important constitutional issues may remain unresolved, permitting future government actors to engage in identical illegal conduct. It is of course possible that in many instances the government's change of policy reflects a true change of heart. But both law and experience undermine the notion that Courts should treat government respondents as inherently more honest and trustworthy than private ones.

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622 (2009). See also ***Friends of the Earth***, 528 U.S. 167 (the mootness doctrine derives from the requirement of an **Article III** case or controversy); ***American Rivers v. National Marine Fisheries Service***, 126 F.3d 1118, 1123 (9th Cir. 1997) (a case that "*has lost its character as a present, live controversy*" is moot and no longer presents a case or controversy amenable to federal court adjudication).

15. Joseph C. Davis & Nicholas R. Reaves, The Point Isn't Moot: How Lower Courts Have Blessed Government Abuse of the Voluntary-Cessation Doctrine, 129 Yale L.J. 341 26 NOV 2019

Immigration cases rejecting government's mootness argument:

Kamagate v. Ashcroft, 385 F.3d 144, 150 (2d Cir. 2004) (petitioner's deportation for having been convicted of an aggravated felony does not moot his challenge to the order of removal; there is a "*concrete and continuing injury other than the now-ended threat of removal...; a collateral consequence of his removal for an aggravated felony conviction is a lifetime bar from reentering the United States*")

Zegarra-Gomez v. INS, 314 F.3d 1124, 1127 (9th Cir. 2003) (challenge to order of removal in habeas petition is not rendered moot by deportation "*so long as* [petitioner] *was in custody when the habeas petition was filed and continues to suffer actual collateral consequences of his removal*;" the inability to seek to return to the United States "*is a concrete disadvantage imposed as a matter of law*")

Umanzor v. Lambert, 782 F.2d 1299, 1301 (5th Cir. 1986) (petitioner's challenge to order of deportation not rendered moot by his deportation because of the "*very real possibility of collateral consequences*," namely inadmissibility for five years and the possibility of criminal prosecution if reentry is attempted, citing ***Sibron v. New York***, 392 U.S. 40, 55 (1968) ("[t]*he mere possibility [of adverse legal consequences] is enough to preserve a criminal case from ending ignominiously in the limbo of mootness*")

The real flex is that "*mootness doctrine*" is based upon the **Article III** requirement of a "*case or controversy.*"

As a result, even though the government might be seeking to moot compensatory and/or exemplary/punitive damages claims; nevertheless, Courts must be ever-vigilant to prevent parties from gaming mootness to destroy federal jurisdiction.

> Relevant issues here are far from having been properly resolved in such manner as ordered by both lower courts!

Especially, where atop of **Article III** there have been also *evidentiary issues* as well as violations to *substantial due process* and *fundamental fairness* (expanded below).

Any evidence supporting an inference of likely presumption of the challenged activity has historically weighed against dismissing the case as *moot.* **See, e.g., *United States v. W.T.Grant Co.*, 345 U.S. 629, 632.**

A removal order will **not** ordinarily moot the case in the **Article III**

Successful immigration cases include: ***Carachuri-Rosendo v. Holder***, 560 US 563 (5th Cir. 2010); ***INS v. Cardoza-Fonseca***, 480 US 421 (9th Cir. 1987); ***INS v. Lopez-Mendoza***, 468 US 1032 (9th Cir. 1984)(material evidences)

♦ **['Justiciability>Political Question Doctrine']** The judicial review shouldn't be barred by the '*political question doctrine*,' and the Court may go ahead and slight this last doctrine because the relevant issues are not '*politically charged*,' at all.

VIVAS, moreover, respectfully informs the Court, two-fold:

- The case at bar does **not** require the Court to offer any advisory opinion, in law; and
- As the Court is acknowledged as an apolitical branch of U.S. Government, there's **no** need for any type of political question doctrine be invoked, here.

More cases rejecting government's mootness argument:

City of Erie v. Pap's A.M., *529 U.S. 277, 288 (2000) ("Our interest in preventing litigants from attempting to manipulate the Court's jurisdiction to insulate a favorable decision from review further counsels against a finding of mootness here."); **United States v. W.T.Grant Co.**, 345 U.S. 629, 632 & n.5 (1953); see also **Khouzam v. Ashcroft**, 361 F.3d 161, 167-68(2d Cir. 2004) (rejecting contention of mootness where litigant sought to avoid an unfavorable ruling).*

III. THE COURT SHOULDN'T OBVIATE THE NECESSSITY FOR JUDICIAL REVIEW OF THIS ADMINISTRATIVE ACTION[16] AT ISSUE

Besides **Article III**, there are at least two (02) more flexes that the Court may wish to consider: "*Substantive due process*" as well as "*equal protection*" issues; and "*fundamental fairness,*" including "natural justice."

◊ **['Substantive due process']** "*Due process*" is a concept that requires rationality and proportionality in government action; it is designed to limit excessive or arbitrary executive action. Accordingly, the Due Process Clause "*contains a substantive component that bars certain arbitrary, wrongful government actions regardless of the fairness of the procedures used to implement them.*" ***Foucha v. Louisiana***, 504 U.S. 71, 80 (1992).

Notwithstanding, your Justice, please allow **VIVAS** to warn that part of the reluctance to engage with or enforce constitutional norms may stem from the fact that immigration law has long operated in the shadows of the "*plenary power*" doctrine.[17] In actual fact, since long federal courts have, at times, rejected constitutional challenges to immigration statutes under various constitutional provisions, including "*due process.*" See ***Fong Yue Ting v. United States***, 149 U.S. 698, 730 (1893)

That's why **VIVAS** comes to contend, that substantive immigration law would benefit from greater adjudicative enforcement of constitutional norms.

Walling v. Helmerich & Payne, Inc., 323 U.S. 37, 43 (1944) (holding case not moot where respondent continued to assert the legality of the challenged conduct but discontinued the conduct); *GoshenMfg. Co. v. Hubert A. Myers Mfg. Co.*, 242 U.S. 202, 207-08 (1916) (same)

Khouzam v. Ashcroft, 361 F.3d 161,167-68 (2d Cir. 2004) (rejecting contention of mootness based on government's agreement to vacatur, based on evidence that government was seeking to avoid court ruling on issueof public importance); ***Albers v. Eli Lilly & Co.***, 354 F.3d 644, 646 (7th Cir. 2004) (refusing todismiss claim on petitioner's motion, stating: "*One good reason to exercise discretion againstdismissal is to curtail strategic behavior .... We think it best ... to carry through so that ... an attempt to make the stock of precedent look more favorable than it really is may be foiled.*")

16. ***Abbott Laboratories v. Gardner***, 387 US 136 (3rd Cir. 1967); ***Citizens to Preserve Overton Park, Inc. v. Volpe***, 401 US 402 (6th Cir. 1971); ***Mathews v. Eldridge***, 424 US 319 (4th Cir. 1976)

17. See Stephen H. Legomsky, Immigration Law and the Principle of Plenary Congressional Power, 1984 SUP. CT. REV. 255, 255 (describing courts' development of plenary power doctrine and its scope); See also Hiroshi Motomura, Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation, 100 YALE L.J. 545, 547 (1990).

The development of constitutional rights in the immigration context, however, has **not** completely stagnated. In a recent decision, the Supreme Court struck down a provision of immigration law addressing citizenship claims on equal protection grounds.[18] Other Supreme Court cases may provide additional contexts for direct resolution of constitutional challenges in immigration law.[19]

Let's start stepping up to "*Constitutional Challenges in Substantive Immigration Law*."

♦ **['Substantive due process>Issues of Policy']** At common law, courts have used the concept of "*justiciability*" to mark the boundary between *reviewable* and *non-reviewable* decisions of policy. There may also be some specific immunities from judicial review for decisions of particular types; and some of these may rest on some notion of *non-justiciability.*

Expedited Removal for Aggravated Felonies: Pursuant to **INA §238(a)(1)**, the Attorney General is authorized to provide for special expedited removal proceedings for aggravated felons. Such special proceedings are to take place at the federal, state, or local correctional facility where the felon is incarcerated –c.f. **INA §238(a)(1).**

The initiation and completion of removal proceedings, as well as subsequent administrative appeals should be completed "*to the extent possible*" before the aggravated felon's release from prison, –c.f. **INA §238(a)(3)**. The intention of allowing special expedited proceedings for aggravated felons is to have the entire removal process occur while the non-citizen is serving his sentence.

For noncitizens in expedited removal proceedings, obtaining judicial review of removal orders is an uphill battle.[20]

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18. ***Sessions v. Morales-Santana***, 137 S. Ct. 1678, 1698 (2017) (invalidating gender#discriminatory provision regulating citizenship claims).

19. See, e.g., ***Jennings v. Rodriguez*, No. 15-1204 (U.S. Feb. 27, 2018) (holding that lower court erred by applying canon of constitutional avoidance to immigration detention statutes in the prolonged detention context and remanding for consideration of constitutionality of the provisions at issue);** ***Sessions v. Dimaya***, No. 15-1498 (U.S. argued Oct. 2, 2017) (addressing applicability of void-for-vagueness doctrine to federal immigration provision).

20. Snow, Emily C. (2021) "Judicial Review in Expedited Removal Proceedings: Applying Sims v. Apfel to Assess the Role of Issue Exhaustion," Georgia Law Review: Vol. 55: No. 2, Article 7.
Available at: https://digitalcommons.law.uga.edu/glr/vol55/iss2/7

In addition, to providing for removal hearings in correctional facilities, the **INA** establishes two special procedures for removing "*aggravated felons*:"

• **INA §238(b)** authorizes **ICE** to issue an administrative order of removal for any felon who is **not** a permanent resident. **No** formal hearing is required, but **ICE** must give the non-citizen notice and an opportunity to inspect the evidence and rebut the charges.

• The second special procedure is judicial removal, –c.f. **INA §238(c)** allows district court judges to enter a removal order during the sentencing phase of a felony trial. The U.S. attorney prosecuting the case must obtain the consent of **ICE** and notify the non-citizen before requesting such an order, –c.f. **INA § 238(c).**

What occurred on November 19th, 2018 was a "*special expedited removal proceedings for aggravated felons... ;*" nonetheless, Ms. Snow continues to assert, some barriers to judicial review are statutory: Noncitizens must first exhaust their administrative remedies, and they may seek review only in a federal circuit court of appeals. So, on December 22nd, 2020, **VIVAS** Petitioned for

VIVAS's been trying to assert, that he –as the non-citizen– did **not** receive timely notice and never had any opportunity at all as to inspect the evidence and rebut the charges.

Let's please reason, your Justice, there must be a piece of actual evidence, which spurred Hon. Mark A. Scott (Trial Judge) to voice out a seventy-five (75) years criminal sentence; and made the **Atlanta ICE/ERO DSO** manufacture such an *emergency* as to support and validate the *expedited removal* at issue. Non-disclosure/concealing such an important evidence is in itself a denial of "*due process of law.*"

As a matter of case-law, there exist a constitutional right to "*judicial review*" of the sufficiency of evidence –c.f. *e.g.* ***Crowell v. Benson***, 285 U. S. 22, 87 (1932) (Brandeis, J., dissenting) ("*under certain circumstances, the constitutional requirement of due process is a requirement of judicial process*"); ***Legarda-Bugarin v. Garland***, No. 20-73424 (9th Cir. 2021)... "*We review claims of due process violations in deportation proceedings de novo... .*".

Whether the Constitution requires *judicial review* is only at issue if such review is otherwise barred, and we will not address the constitutional question unless it is necessary to the resolution of the case before the Court. See ***Johnson v. Robison***, 415 U. S. 361, 366-367 (1974). The extent to which legislatures may commit to an administrative body the unreviewable authority to make determinations implicating fundamental rights is already a difficult question of constitutional law. See, e. g., ***Califano v. Sanders***, 430 U. S. 99, 109 (1977); 5 K. Davis, Administrative Law Treatise § 28:3 (2d ed. 1984).

There also is a burden of proof that the government must satisfy - "*clear and convincing evidence.*"

Whereas, on the one hand, open records do **not** even show any sealing order! On the other hand, open records are silent about **VIVAS**'s criminal direct appeal (**A13A1445**, Ga. Ct. App).

Given the due process violation, it is rather unclear how or why the "*Final Administrative Removal Order*" was validated and never excluded from the case.

• "Due Process" does include within the rights processed the release of evidence, including the questioning of witnesses.

• The notification is a procedural legal act by which the affected party is given legal knowledge that a legal action has been deduced against him or that a judicial decision has been issued, so that he can act procedurally in the trial.

♦ **['Substantive due process>Abuse of Process and Wrongful Use of Civil Process']** A liability's claim against the administrative agency may arise from two facts:

• **Atlanta ICE/ERO DSO** may have acted in a grossly negligent manner or without probable cause and primarily for a purpose other than that of securing the proper discovery, joinder of parties or adjudication of the claim in which the proceedings are based;
• and the proceedings have terminated in favor of the person against whom they are brought. See ***Martinez v. State***, 750 S.E. 2d 504, 325 Ga. App. 267 (Ga Court of Appeals 2013)

♦ **['Substantive due process>Exceptonality'] VIVAS** does insist... What was the exceptionality of the instant case as to so willfully have deprived **VIVAS** of his due process rights protected by the 5th and 14th Amendments to the Constitution or laws of the United States? –c.f. *e.g.* **18 U.S. Code §242.**

In this regard, the Court should decide on the validity of his function; mainly, because of his refusal to terminate proceedings and let an Immigration judge take over the proceedings. It's a fact, that an Immigration judge could have acted with greater ease and naturalness when since he is a specialist in the matter.

The judge, when passing a sentence, does not resort only to the rules contained in the laws or to the analysis of the facts of the case; the judge operates in a more complex way and first seeks to identify and define before which is the special legal discipline (first of all, it says: "*This is a civil case*").

In assessing this matter, the Court may want to take into considerations: The lack of specialization of the quasi–judicial officer could have produced an undue process because the server (or the authority) did not have the knowledge enough as to adequately resolve the immigration situation presented here. Such lack of specialization[21] could have led as well to the process not complying with the norm.

• One of the factors in considering whether there was due process is the time it took to resolve the case. But how long does it take to consider that there was no prompt justice or if in the time taken to judge a process there is a justified delay due to its nature or for causes not attributable to the authority.

• To end with these examples of exceptional cases of compliance with due process: A *Removal Hearing* is part of the Immigration procedure. the presentation of the person before the social representation or the judge of the case, who takes into account the circumstances of the place to carry out this due process. Here, the procedural exception left **VIVAS** defenseless.

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21. See *Benslimane v. Gonzales*, 430 F.3d 828,829 (7th Cir. 2005)
See also Memorandum of Alberto Gonzales, U.S. Attorney General, to Immigration Judges (Jan. 9, 2006), available at http://www.immigration.com/newsletter1/attgenimmjudge.pdf;
Memorandum of Alberto Gonzales, U.S. Attorney General, to Members of the Board of Immigration Appeals (Jan. 9, 2006), available at http://www.immigration.com/newsletter1/attgenmembia.pdf.

DHS officers regularly make erroneous determinations as to whether the offense of conviction is classifiable as an aggravated felony. Determining whether a particular conviction is an aggravated felony involves a complex and legally dense analysis that generally involves close scrutiny of the elements of the statute of conviction. Not surprisingly, courts have overturned DHS's determinations. See, e.g., ***Rodriguez-Celaya v. Atty. Gen. of the U.S.***, 597 Fed. Appx. 79, 82 (3d Cir. 2015) (finding in the context of a petition for review from an administrative removal order that neither of petitioner's two convictions qualified as an aggravated felony basis); ***United States v. Reyes***, 907 F. Supp. 2d 1068 (N.D. Cal. 2012) (finding in the context of an illegal reentry prosecution that defendant erroneously charged with and deported under **§1228(b)** for possession of a short-barreled shotgun and wrongly deprived of the opportunity to apply for voluntary departure). In cases where a noncitizen files a PFR based on a meritorious argument that the offense is not an aggravated felony, the government will often attempt to avoid a helpful circuit decision on the issue either by asking the court to remand the case to **DHS** or **DHS** will cancel the *Final Order* and place the noncitizen in **§240** removal proceedings before an immigration judge.

◇ **['Equal protection of law']** Both **VIVAS** was admitted after inspection at the Atlanta airport; and he was arrested far from the 100-miles border zone. Meaning that, he should've been deemed under the panoply of protection of the 5th Amendment to the U.S. Constitution.

Moreover, aliens in-full regular, formal removal proceedings have access to more types of relief from removal than those in expedited removal.

The 5th Amendment due process clause prohibits the federal government from discrimination so unjustifiable that it violates due process of law (***Bolling v. Sharpe***, 2010).

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22. Federal courts have generally held the administrative removal scheme comports with the minimum requirements of due process. See ***United States v. Benitez-Villafuerte***, 186 F.3d 651, 657-58 (5th Cir. 1999); ***United States v. Garcia-Martinez***, 228 F.3d 956, 960-63 (9th Cir. 2000); ***United States v. Rangel de Aguilar***, 308 F.3d 1134, 1138 (10th Cir. 2002); ***Graham v. Mukasey***, 519 F.3d 546, 551-52 (6th Cir. 2008). However, noncitizens in the context of a **PFR** or criminal illegal reentry prosecution have successfully challenged specific due process violations in their administrative removal cases where they could establish prejudice. See, e.g., ***United States v. Cisneros-Rodriguez***, 813 F.3d 748, 762 (9th Cir. 2015) (reversing illegal reentry conviction and finding underlying administrative removal order "fundamentally unfair" where **DHS** officer obtained invalid waiver of defendant's right to counsel and defendant was thereby wrongly deprived of the opportunity to apply for a U-visa before an immigration judge).

The **Atlanta ICE/ERO DSO** did count with some evidence, that **VIVAS** had been criminally convicted by a State court; however, it was crystal clear that **VIVAS** had **not** been duly convicted (or convicted by due process of Law) as of yet. Nonetheless, the legal department assessed the situation and provided **VIVAS** with "*Notice to Removed Aliens who may be Seeking Judicial Review*"

Now, your Justice, **whereas**:

• The criminal sentence was based upon clearly erroneous facts ***US v. Carty***, 520 F. 3d 984 (9th Cir. 2008) and therefore the reversal of criminal convictions should've made **FARO** to be tainted ***de novo***;

• It's been long held by this Court: "...*Every erroneous decision by a state court on state law would come here as a federal constitutional question*;" ***Gryger v. Burke***, 334 US 728 - Supreme Court 1948

On April 16th, 2021, **USCA11**'s conclusions were unreasonable as well as legally erroneous. The **USCA11's** judicial panel improperly assumed that Immigration proceedings at issue had been seen by an Immigration Judge and there'd been a decision by the Board of Immigration Appeals, **BIA-1: A200-599-097**.

Let's read about what BIA should have found, pursu nt to *Matter of J. M. ACOSTA*, 27 I&N Dec. 420 (BIA 2018):

1. A conviction does not attain a sufficient degree of finality for immigration purposes until the right to direct appellate review on the merits of the conviction has been exhausted or waived.

2. Once the Department of Homeland Security has established that a respondent has a criminal conviction at the trial level and that the time for filing a direct appeal has passed, a presumption arises that the conviction is final for immigration purposes, which the respondent can rebut with evidence that an appeal has been filed within the prescribed deadline, including any extensions or permissive filings granted by the appellate court, and that the appeal relates to the issue of guilt or innocence or concerns a substantive defect in the criminal proceedings.

3. Appeals, including direct appeals, and collateral attacks that do not relate to the underlying merits of a conviction will not be given effect to eliminate the finality of the conviction.

So, for immigration purposes convictions against **VIVAS** couldn't have been deemed final!

Let's read more **BIA's** decisions: "*We have jurisdiction under* **8 U.S. Code §1252**... *We review the* [**BIA's**] *legal conclusions de novo... and its factual findings for substantial evidence.*" ***Bringas-Rodriguez v. Sessions***, 850 F.3d 1051, 1059 (9th Cir. 2017) (en banc) (citations omitted). "*We review claims of due process violations in deportation proceedings de novo... .*" ***Colmenar v. INS***, 210 F.3d 967, 971 (9th Cir. 2000) (citations omitted).

"[A]*n alien who faces deportation is entitled to a full and fair hearing of* [her] *claims and a reasonable opportunity to present evidence on* [her] *behalf.*" **Colmenar**, 210 F.3d at 971 (citations omitted). We will "*reverse the* **BIA**'s *decision on due process grounds if the proceeding was 'so fundamentally unfair that the alien was prevented from reasonably presenting [her] case.'*" Id. (quoting ***Platero-Cortez v. INS***, 804 F.2d 1127, 1132 (9th Cir. 1986)). "*To warrant a new hearing, the alien must also show prejudice, which means that 'the outcome of the proceeding may have been affected by the alleged violation.'*" ***Cinapian v. Holder***, 567 F.3d 1067, 1074 (9th Cir. 2009)(quoting ***Colmenar***, 210 F.3d at 971).

The **BIA** may take administrative notice of facts that are not reasonably subject to dispute, such as: "(1) *Current events*; (2) *The contents of official documents outside the record*; (3) *Facts that can be accurately and readily determined from official government sources and whose accuracy is not disputed; or* (4) *Undisputed facts contained in the record.*" **8 C.F.R. § 1003.1(d)(3)(iv)(A)(1-4)**. When the **BIA** takes administrative notice of controversial or individualized facts, the **BIA** must provide the noncitizen with notice and an opportunity to rebut them. See ***Circu v. Gonzales***, 450 F.3d 990, 993 (9th Cir. 2006) (en banc) (citation omitted); ***Castillo-Villagra v. INS***, 972 F.2d 1017, 1028 (9th Cir. 1992).

Clearly very different and distinct from what both **USCA11** and **USCADC** found, which undeniably obliviated **8 CFR Part 1003 - EXECUTIVE OFFICE FOR IMMIGRATION REVIEW.**

Not all issues of the appropriate reviewing standard are addressed in the **INA.** For example, if an alien is raising a due process or other constitutional challenge, the court of appeals will consider this challenge on a ***de novo*** basis. See, *e.g.*, ***Anwar v. INS***, 107 F.3d 339 (5th Cir. 1997)(granting ***de novo*** review of due process allegation and retention of jurisdiction to consider constitutional questions notwithstanding jurisdictional bar in **AEDPA).**

The Fifth Amendment guarantees *due process* in deportation proceedings. See ***Campos-Sanchez v. INS***, 164 F.3d 448, 450 (9th Cir.1999). As a result, an alien who faces deportation is entitled to a full and fair hearing of his claims and a reasonable opportunity to present evidence on his behalf. See id; **8 U.S. Code §1229a(b)(4).** We review claims of due process violations in deportation proceedings *de novo*, see ***Hartooni v. INS***, 21 F.3d 336, 339 (9th Cir.1994), and will reverse the **BIA's** decision on due process grounds if the proceeding was "*so fundamentally unfair that the alien was prevented from reasonably presenting his case,*" ***Platero-Cortez v. INS***, 804 F.2d 1127, 1132 (9th Cir.1986). We also require an alien to show prejudice, which means that the outcome of the proceeding may have been affected by the alleged violation. See ***Campos-Sanchez***, 164 F.3d at 450; ***Hartooni***, 21 F.3d at 340.

◇ **[Aspects of Due Process ('Fundamental Fairness')]** The government must:

1. provide notice of the charges against you.

2. be able to show that there is an articulated (non-vague) standard of conduct which you are accused of violating.

3. provide you with an opportunity to rebut their charges against you in a meaningful way and at a meaningful time (the "*hearing requirement*").

4. establish--at a minimum--that there is substantial and credible evidence supporting its charges. In order to sustain its position (i.e., its deprivation of your liberty or property),

5. provide some explanation to the individual for the basis of any adverse finding.

Procedural protections that may be required for certain types of deprivations include:

1. The right to a pre-deprivation hearing.

2. The right to cross-examine witnesses.

3. The right to have a neutral person review an adverse decision.

4. The right to recover compensation for a wrongful deprivation.

5. The right to be present when adverse evidence is presented to the fact-finder.

Petitioners in removal proceedings are entitled, under the Fifth Amendment due process clause, to an unbiased arbiter who has not prejudged their claims. **U.S.C.A. Const. Amend. 5.**

◇ **['Natural justice']** Another reviewable error of law is *lack of substantial supporting evidence.*

Here the "*substantial evidence*[22]" standard of review applies!

In other words, there most certainly is "*more than a mere scintilla*" of evidence.

Truthfully enough, in light of the evidence contained in the record considered as a whole, there must be "*such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.*" But, records are silent about **VIVAS**'s criminal direct appeal, which overturned *in-part* the conviction as basis for the **FARO**.

Here's mainly where ***Due Process*** and ***Article III*** do require some degree of ***Judicial Process.***

In ***Panitz v. District of Columbia***, 112 F. 2D 39 (D.C. Cir. 1940) the D.C. Circuit addressed whether a litigant was required to raise a constitutional objection to the imposition of a tax in a hearing with an assessor in order to pursue such a claim in federal court.

Pursuant to Fifth Amendment's *Due Process*, the classical approach to the boundaries of judicial review is expressed in the following quotation: "*Courts will not interfere with administrative determinations unless, upon the record, the proceedings were manifestly unfair, or substantial evidence to support the administrative finding is lacking, or error of law has been committed, or the evidence reflects a manifest abuse of discretion...*" See ***Bowman Transp., Inc. v. Arkansas-Best Freight System, Inc.***, 419 U.S. 281 (1974) (agency finding supported by substantial evidence may be set aside as arbitrary and capricious).

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22. As a matter of case-law, the following is a good statement of the substantial evidence rule: Briefly, substantial evidence means evidence that has relevant probative force and which a reasonable mind might accept as adequate to support a conclusion. It does not include the idea of the **"weight of the evidence"** ***Bowman Transp., Inc. v. Arkansas-Best Freight System, Inc.***, 419 U.S. 281, 284, 95 S. Ct. 438, 42 L. Ed. 2d 447, (administrative holding supported by substantial evidence may nevertheless be arbitrary and capricious). ***Chan v. INS***, 631 F.2d 978 (D.C. Cir. 1980) (substantial evidence standard appropriate to review findings of fact; "less demanding" abuse of discretion standard appropriate or review of discretion) the determination that reasonable ground exists for grounds for petition for review doj

♦ **['Natural justice'> New law]** In 2014, the Official Code of Georgia Annotated **O.C.G.A.** Did change with regards to **§16-9-1 ~ Forgery in the First Degree;** and now, not even altogether convictions make a felony, much less an **AF**.

Here's why Reconsideration Forgery Convictions to assess:

- Whether the omission of an element of a criminal offense from indictment can constitute harmless error; and
- Whether reasons given by Hon. Mark A. Scott (Trial Judge) at New Trial hearing as to deny "*Motion for Directed Verdict*" remain valid.

♦ **['Natural justice'> Production of Documents]** "*Due process requires 'a full and fair hearing,' ... which, at a minimum, includes a reasonable opportunity to present and rebut evidence and to cross-examine witnesses... .*" ***Grigoryan v. Barr***, 959 F.3d 1233, 1240 (9th Cir. 2020) (citations omitted); see also ***Ching v. Mayorkas***, 725 F.3d 1149, 1158–59 (9th Cir. 2013). "*The Federal Rules of Evidence, ... , do not apply in immigration hearings. Rather, the sole test for admission of evidence is whether the evidence is probative and its admission is fundamentally fair.*" ***Sanchez v. Holder***, 704 F.3d 1107, 1109 (9th Cir. 2012) (per curiam)

Please take moreover into account: An **IJ**'s refusal to order production of documents that may affect the outcome of proceedings may result in a violation of the noncitizen's due process rights. See ***Ibarra-Flores v. Gonzales***, 439 F.3d 614, 620–21 (9th Cir. 2006).

VIVAS does believe a "***Mandatory review***" becomes appropriate, so he may **produce new material evidence**. As in fact, **VIVAS** is eager to present **non-frivolous grounds for reopening / reconsideration**. **VIVAS** did prevail on federal constitutional grounds and does have at least two substantial constitutional claims regarding an error which was sufficiently "*prejudicial*" to require reversal.

VIVAS might need briefing as to go more thoroughly on narrower grounds; though he's mainly in need for production of additional evidence.

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23. C.f. ***Dada v. Mukasey***, 554 US 1 (Supreme Court, 2008); ***Kucana v. Holder***, 558 US 233 (Supreme Court, 2010) ; Ahmed v. Gonzales, 398 F.3d 722 (6th Cir. 2005)

[Relief/Supplementing the Records][24] By and by, your Justice, please allow **VIVAS** to interject "*Although Federal Courts of Appeals review district court orders and judgments on the basis of a closed record, which is limited to materials in the record when the district court made the decision under review*;"[25] **b-t-w**

This limitation is "*fundamental*" because appellate courts lack the means to authenticate documents.[26]

Notwithstanding, what if there exist newly unveiled documents... Are there any way(s) to supplement the record on appeal with those uncovered documents? What if such documents strongly refute a key finding of fact... Is there anything the Petitioner can do to have the court of appeals consider them?

As fortune would have it, the general rule of a closed appellate record is **not** absolute. Attorneys requesting that federal courts of appeals consider materials **not** in the record can rely on three possible avenues to supplement the record on appeal:

(1) **Rule 10(e)(2)(C)** of the Fed. R. App. P.;
(2) **Rule 201** of the Fed. R. Evid.; and
(3) the inherent equitable authority of the federal courts of appeals.[27]

[Relief/Judicial Clemency][28] In the long run of his Petition, **VIVAS** wishes to interject, that **Fed. R. Civ. P. 59(a)(2)** authorizes to take additional testimony, amend findings of fact and conclusions of law or make new ones, and direct the entry of a new judgment.

At last, pursuant to **8 C.F.R. §1003.5(b)**, there most assuredly have existed an available contingency that should have been activated here -expedited removal proceedings at issue should've been **terminated**; the appeal should've been taken from the discretionary decision of the **DHS** officer; and the record of proceeding forwarded to the "*Board of Immigration Appeals*" (BIA) or any **IJ** be assigned.

Your Justice may also wish to take a look at Appendix "**H.1**" for **VIVAS**'s "*Statement of Issues Presented.*"

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25. See e.g. ***Fassett v. Delta Kappa Epsilon***, 807 F.2d 1150, 1165 (3d Cir. 1986)(pointing out that "[t]*he only proper function of a court of appeals is to review the decision below on the basis of the record that was before the district court*")

26. See ***Lowry v. Barnhart***, 329 F.3d 1019, 1024 (9th Cir. 2003).

27. See id. (citing **Fed. R. App. P. 10(e)(2)(C)** and **Fed. R. Evid. 201**, and listing the three exceptions to the general rule of reviewing a closed record). **Rule 48** of the Federal Rules of Appellate Procedure also provides for appellate fact-finding in the form of appointing a "*special master to hold hearings, if necessary, and to recommend factual findings and disposition in matters ancillary to proceedings in the court.*"

28. Pivoting Away from Prosecutorial Misconduct and Prosecutorial Discretion

FINAL REMARKS

It is with much trepidation, that **VIVAS** prays for the Court will assess Compensatory damages and atop the effectivity of Exemplary and Punitive damages. Those should be awarded by the Court to punish government officials whose conduct should be considered *grossly negligent* or *intentional.*

Punitive damages may serve *three* (03) important functions:

- Punish particularly egregious behavior by the defendant;
- Set an example to dissuade government officials from behaving that way time after time in the future; and
- Deter others from engaging in similar conduct.

CONCLUSION

For the reasons set forth above, This "*Petition for Writ of Certiorari*" should be **granted**.

Very respectfully submitted, this 5th day of April, 2023

/s/ _____

Zenith E.Vivas - **DHS-A200-599-097**
Pro Se Applicant
118 Green House Dr.
Roswell, GA 30076
Tel.: (302)219-4670

District of Columbia: **SS**
Signed and sworn to (or affirmed) before me on 5th day of April, 2023

KAREN PIERANGELI
NOTARY PUBLIC, DISTRICT OF COLUMBIA
My Commission Expires June 14, 2025.

Dismissal in the Interest of Justice: Greater Transparency and Equitable Discretion
https://www.researchgate.net/publication/321386770_Judicial_Dismissal_in_the_Interest_of_Justice

Nos. 14-6570; 21-6808; 22-____

In the Supreme Court of the United States

ZENITH E. VIVAS,
DHS-A200-599-097 ,
Petitioner,
-v.-
OFFICE OF THE ATTORNEY GENERAL OF THE UNITED STATES;
MERRICK B. GARLAND, in his Official Capacity as
Attorney General of the United States,
UNITED STATES DEPARTMENT OF HOMELAND SECURITY;
ALEJANDRO MAYORKAS, Secretary of Homeland Security
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

"APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI "

ZENITH E. VIVAS
118 Greenhouse Dr.
Roswell, GA 30076
Tel. (302) 219-4670

Petitioner, Pro Se

GARLAND, MERRICK B.
Attorney General of the United States,
U.S. Department of Justice,
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530-0001
Tel. (202) 514-2000

Respondent

Additional Respondent Listed on Inside Cover

PETITION FOR A WRIT OF CERTIORARI No. 21-6808 FILED: August 17th, 2021
CERTIORARI DENIED: February 28th, 2022

LIST OF CONTENT

"A1"

Final Administrative Removal Order

In removal proceedings under section 238(b) of the Immigration and Nationality Act

Event No: ATL1202000368
FIN # 1053244961
File Number A200599097
Date February 8, 2012

To: Zenith Erich VIVAS AKA: MARTINEZ-LARA, RODOLFO ; LOPEZ-SANTOS, WILSON

Address: GEORGIA DIAGNOSTIC AND CLASSIFICATION PRISON HWY 36 WEST JACKSON BUTTS GA UNITED STATES 30233
(Number, Street, City, State and ZIP Code)

Telephone: (404) 656-4661
(Area Code and Phone Number)

ORDER

Based upon the allegations set forth in the Notice of Intent to Issue a Final Administrative Removal Order and evidence contained in the administrative record, I, the undersigned Deciding Officer of the Department of Homeland Security, make the following findings of fact and conclusions of law. I find that you are not a citizen or national of the United States and that you are not lawfully admitted for permanent residence. I further find that you have a final conviction for an aggravated felony as defined in section 101(a)(43)(R) of the Immigration and Nationality Act (Act) as amended, 8 U.S.C. 1101(a)(43)(R), and are ineligible for any relief from removal that the Secretary of Homeland Security, may grant in an exercise of discretion. I further find that the administrative record established by clear, convincing, and unequivocal evidence that you are deportable as an alien convicted of an aggravated felony pursuant to section 237(a)(2)(A)(iii) of the Act, 8 U.S.C. 1227(a)(2)(A)(iii). By the power and authority vested in the Secretary of Homeland Security, and in me as the Secretary's delegate under the laws of the United States, I find you deportable as charged and order that you be removed from the United States to:

VENEZUELA
or to any alternate country prescribed in section 241 of the Act.

(Signature of Authorized Official)

SDDO
(Title of Official)

6/27/2016, Atlanta, GA
(Date and Office Location)

Certificate of Service

I served this FINAL ADMINISTRATIVE REMOVAL ORDER upon the above named individual.

3/19/18 at SDC — IN PERSON
(Date, Time, Place and Manner of Service)

(Signature and Title of Officer)

I-851

Form I-851A (Rev. 08/01/07)

"B1"

DEPARTMENT OF HOMELAND SECURITY
U.S. Immigration and Customs Enforcement

NOTICE TO REMOVED ALIENS WHO MAY BE SEEKING JUDICIAL REVIEW

Alien's Name: Vivas, Zenith Erich

A#(s): A200 599 097

You have received an administratively final order of removal from an immigration judge, the Board of Immigration Appeals (BIA) or the Department of Homeland Security (DHS). Generally, U.S. Immigration and Customs Enforcement (ICE) is authorized to execute your administratively final removal order, even if you have filed a petition for review (PFR) with a U.S. Circuit Court of Appeals challenging that order. In the event the court grants your PFR, ICE may decide to facilitate your return to the United States following removal. It is your responsibility to follow any court rules about providing updated address and contact information while your PFR is pending.

Absent extraordinary circumstances, if you are removed while a PFR is pending, ICE will facilitate your return to the United States under the following circumstances:

(1) If your case is remanded by the court for further administrative consideration and your presence has been ordered by the court or deemed necessary by ICE to resolve your administrative removal proceedings; or

(2) If the court's order has restored you to lawful permanent resident or other status permitting you to be physically present in the United States.

If a decision is made to facilitate your return, the steps ICE will take in your case will depend on whether you will be returning to the United States by air or sea vessel, or by land from Mexico or Canada. ICE will not ordinarily make your travel arrangements or fund the cost of your return travel. If ICE facilitates your return to the United States because a court grants your PFR, you will revert to the immigration status you held, if any, just prior to the administratively final removal order that the federal court has reversed or vacated. Please note that ICE may detain you upon your return, depending on the circumstances of your case.

Contact Information: If, based on this notice, you believe that ICE should facilitate your return to the United States, please have available your circuit court case number, alien registration number(s) listed above, and a reliable way for ICE to get in touch with you, and contact:

Office of the Public Advocate
Enforcement and Removal Operations
U.S. Immigration and Customs Enforcement
500 12th Street., S.W. Washington, DC 20536
T: (202) 732-3100

EROPublicAdvocate@ice.dhs.gov

J. M. White
(Signature of ICE Officer serving order)

J. M. White DO
(Printed Name and Title of ICE Officer serving order)

(Signature of Alien) Zenith Vivas (Date) 10/16/18

ICE Form 71-041 (04/12)

"B2"

Notice of Intent to Issue a Final Administrative Removal Order

In removal proceedings under section 238(b) of the Immigration and Nationality Act

FIN # 1053244961
Event No: ATL1202000368
File Number A200599097

To: Zenith Erich VIVAS AKA: MARTINEZ-LARA, RODOLFO , LOPEZ-SANTOS, WILSON

Address: GEORGIA DIAGNOSTIC AND CLASSIFICATION PRISON HWY 36 WEST JACKSON BUTTS GA UNITED STATES 30233
(Number, Street, City, State and ZIP Code)

Telephone: (404) 656-4661
(Area Code and Phone Number)

Pursuant to section 238(b) of the Immigration and Nationality Act (Act) as amended, 8 U.S.C. 1228(b), the Department of Homeland Security (Department) has determined that you are amenable to administrative removal proceedings. The determination is based on the following allegations:

1. You are not a citizen or national of the United States.
2. You are a native of VENEZUELA and a citizen of VENEZUELA
3. You entered the United States (at)(near) Atlanta, GA on or about September 21, 2002
4. At that time you entered you entered as a B1 visitor.
5. You are not lawfully admitted for permanent residence.
6. You were, on June 29th, 2011, convicted in the DeKalb County Superior Court Decatur, GA for the offense of IDENTITY FRAUD;FORGERY 1ST DEGREE in violation of O.C.G.A. 16-9-221 and O.C.G.A. 16-9-1 for which the term of imprisonment imposed was ten (10) years

Charge:
You are deportable under section 237(a)(2)(A)(iii) of the Act, 8 U.S.C. 1227(a)(2)(A)(iii), as amended, because you have been convicted of an aggravated felony as defined in section 101(a)(43)(R) of the Act, 8 U.S.C. 1101(a)(43)(R).

Based upon section 238(b) of the Act, 8 U.S.C. 1228(b), the Department is serving upon you this NOTICE OF INTENT TO ISSUE A FINAL ADMINISTRATIVE REMOVAL ORDER ("Notice of Intent") without a hearing before an Immigration Judge.

Your Rights and Responsibilities:
You may be represented (at no expense to the United States government) by counsel, authorized to practice in this proceeding. If you wish legal advice and cannot afford it, you may contact legal counsel from the list of available free legal services provided to you.

You must respond to the above charges in writing to the Department address provided on the other side of this form within 10 calendar days of service of this notice (or 13 calendar days if service is by mail). **The Department must RECEIVE your response within that time period.**

In your response you may: request, for good cause, an extension of time; rebut the charges stated above (with supporting evidence); request an opportunity to review the government's evidence; admit deportability; designate the country to which you choose to be removed in the event that a final order of removal is issued (which designation the Department will honor only to the extent permitted under section 241of the Act, 8 U.S.C. 1231); and/or, if you fear persecution in any specific country or countries on account of race, religion, nationality, membership in a particular social group, or political opinion or, if you fear torture in any specific country or countries, you may request withholding of removal under section 241(b)(3) of the Act, 8 U.S.C. 1231(b)(3), or withholding/deferral of removal under the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (Convention Against Torture). A grant of withholding or deferral of removal would prohibit your return to a country or countries where you would be persecuted or tortured, but would not prevent your removal to a safe third country.

You have the right to remain in the United States for 14 calendar days so that you may file a petition for review of this order to the appropriate U.S. Circuit Court of Appeals as provided for in section 242 of the Act, 8 U.S.C. 1252. You may waive your right to remain in the United States for this 14-day period. If you do not file a petition for review within this 14-day period, you will still be allowed to file a petition from outside of the United States so long as that petition is filed with the appropriate U.S. Circuit Court of Appeals within 30 calendar days of the date of your final order of removal.

JOSE L. PERALTA - Supv Detention Deportation Officer	ATLANTA, GA	February 08, 2012 09:00
(Signature and Title of Issuing Officer)	(City and State of Issuance)	(Date and Time)

Form I-851 (Rev. 08/01/07)

Certificate of Service

I served this Notice of Intent. I have determined that the person served with this document is the individual named on the other side of the form.

Donato DOA — 8/15/13 — IN PERSON

(Signature and Title of Officer) (Date and Manner of Service)

☒ I explained and/or served this Notice of Intent to the alien in the ENGLISH language.

(Name of interpreter) (Signature of interpreter)

Location/Employer: GD&CP, JACKSON, GA

I ~~Acknowledge~~ that I Have Received this Notice of Intent to Issue a Final Administrative Removal Order.

VIVAS — 8/15/13 920

(Signature of Respondent) (Date and Time)

☐ The alien refused to acknowledge receipt of this document.

(Signature and Title of Officer) (Date and Time)

☑ **I Wish to Contest and/or to Request Withholding of Removal**

☑ I contest my deportability because: *(Attach any supporting documentation)*

- ☐ I am a citizen or national of the United States.
- ☐ I am a lawful permanent resident of the United States.
- ☐ I was not convicted of the criminal offense described in allegation number 6 above.
- ☑ I am attaching documents in support of my rebuttal and request for further review.

☐ I request withholding or deferral of removal to _____ [Name of Country or Countries]:

- ☐ Under section 241(b)(3) of the Act, 8 U.S.C. 1231(b)(3), because I fear persecution on account of my race, religion, nationality, membership in a particular social group, or political opinion in that country or those countries.
- ☐ Under the Convention Against Torture, because I fear torture in that country or those countries.

VIVAS — Zenith Erich Vivas — 8/15/13 920

(Signature of Respondent) (Printed Name of Respondent) (Date and Time)

☐ **I Do Not Wish to Contest and/or to Request Withholding of Removal**

☐ I admit the allegations and charge in this Notice of Intent. I admit that I am deportable and acknowledge that I am not eligible for any form of relief from removal. I waive my right to rebut and contest the above charges. I do not wish to request withholding or deferral of removal. I wish to be removed to _____

☐ I understand that I have the right to remain in the United States for 14 calendar days in order to apply for judicial review. I do not wish this opportunity. I waive this right.

(Signature of Respondent) (Printed Name of Respondent) (Date and Time)

(Signature of Witness) (Printed Name of Witness) (Date and Time)

RETURN THIS FORM TO:
Department Of Homeland Security

DHS/ICE/ERO
180 SPRING STREET SW
ATLANTA, GA 30303

ATTENTION: **The Department office at the above address must RECEIVE your response within 10 calendar days from the date of service of this Notice of Intent (13 calendar days if service is by mail).**

"B3"

U.S. Department of Homeland Security

Notice to Appear

In removal proceedings under section 240 of the Immigration and Nationality Act:

Subject ID : 282875134 FIN #: 1053244961 File No: A200 599 097

DOB: 09/03/1969 Event No: ATL1002000485

In the Matter of:

Respondent: Zenith Erich VIVAS AKA: MARTINEZ, RODOLFO LARA; LOPEZ-SANTOS, WILSON ; currently residing at:

C/O ICE / DRO 180 SPRING STREET SW , ATLANTA GEORGIA 30303 (404)893-1342

(Number, street, city and ZIP code) (Area code and phone number)

☐ 1. You are an arriving alien.

☐ 2. You are an alien present in the United States who has not been admitted or paroled.

☒ 3. You have been admitted to the United States, but are removable for the reasons stated below.

The Department of Homeland Security alleges that you:

1. You are not a citizen or national of the United States;
2. You are a native of VENEZUELA and a citizen of VENEZUELA;
3. You were admitted to the United States at ATLANTA, GEORGIA on or about September 21, 2002 as a nonimmigrant TEMPORARY VISITOR (B1) with authorization to remain in the United States for a temporary period not to exceed March 20, 2003;
4. Your application to Extent / Change of Non-Immigrant Status was DENIED on October 10, 2003;
5. You remained in the United States beyond your authorized time allowed without authorization from the Immigration and Naturalization Service or its successor the Department of Homeland Security.

On the basis of the foregoing, it is charged that you are subject to removal from the United States pursuant to the following provision(s) of law:

Section 237(a)(1)(B) of the Immigration and Nationality Act (Act), as amended, in that after admission as a nonimmigrant under Section 101(a)(15) of the Act, you have remained in the United States for a time longer than permitted, in violation of this Act or any other law of the United States.

☐ This notice is being issued after an asylum officer has found that the respondent has demonstrated a credible fear of persecution or torture.

☐ Section 235(b)(1) order was vacated pursuant to: ☐8CFR 208.30(f)(2) ☐8CFR 235.3(b)(5)(iv)

YOU ARE ORDERED to appear before an immigration judge of the United States Department of Justice at:

180 Spring Street, SW, Suite 241 Atlanta GEORGIA US 30303

(Complete Address of Immigration Court, including Room Number, if any)

on a date to be set *(Date)* at a time to be set *(Time)* to show why you should not be removed from the United States based on the charge(s) set forth above.

ANDREW JAIRAM SUPV. DETENTION/DEPORTATION OFFICER

(Signature and Title of Issuing Officer)

Date: February 19, 2010 ATLANTA, GEORGIA

(City and State)

See reverse for important information

Form I-862 (Rev. 08/01/07)

Notice to Respondent

Warning: Any statement you make may be used against you in removal proceedings.

Alien Registration: This copy of the Notice to Appear served upon you is evidence of your alien registration while you are under removal proceedings. You are required to carry it with you at all times.

Representation: If you so choose, you may be represented in this proceeding, at no expense to the Government, by an attorney or other individual authorized and qualified to represent persons before the Executive Office for Immigration Review, pursuant to 8 CFR 3.16. Unless you so request, no hearing will be scheduled earlier than ten days from the date of this notice, to allow you sufficient time to secure counsel. A list of qualified attorneys and organizations who may be available to represent you at no cost will be provided with this notice.

Conduct of the hearing: At the time of your hearing, you should bring with you any affidavits or other documents, which you desire to have considered in connection with your case. If you wish to have the testimony of any witnesses considered, you should arrange to have such witnesses present at the hearing.

At your hearing you will be given the opportunity to admit or deny any or all of the allegations in the Notice to Appear and that you are inadmissible or removable on the charges contained in the Notice to Appear. You will have an opportunity to present evidence on your own behalf, to examine any evidence presented by the Government, to object, on proper legal grounds, to the receipt of evidence and to cross examine any witnesses presented by the Government. At the conclusion of your hearing, you have a right to appeal an adverse decision by the immigration judge.

You will be advised by the immigration judge before whom you appear of any relief from removal for which you may appear eligible including the privilege of departure voluntarily. You will be given a reasonable opportunity to make any such application to the immigration judge.

Failure to appear: You are required to provide the DHS, in writing, with your full mailing address and telephone number. You must notify the Immigration Court immediately by using Form EOIR-33 whenever you change your address or telephone number during the course of this preceeding. You will be provided with a copy of this form. Notices of hearing will be mailed to this address. If you do not submit Form EOIR-33 and do not otherwise provide an address at which you may be reached during proceedings, then the Government shall not be required to provide you with written notice of your hearing. If you fail to attend the hearing at the time and place designated on this notice, or any date and time later directed by the Immigration Court, a removal order may be made by the immigration judge in your absence, and you may be arrested and detained by the DHS.

Mandatory Duty to Surrender for Removal: If you become subject to a final order of removal, you must surrender for removal to one of the offices listed in 8 CFR 241.16(a). Specific addresses on locations for surrender can be obtained from your local DHS office or over the internet at http://www.ice.gov/about/dro/contact.htm. You must surrender within 30 days from the date the order becomes administratively final, unless you obtain an order from a Federal court, immigration court, or the Board of Immigration Appeals staying execution of the removal order. Immigration regulations at 8 CFR 241.1 define when the removal order becomes administratively final. If you are granted voluntary departure and fail to depart the United States as required, fail to post a bond in connection with voluntary departure, or fail to comply with any other condition or term in connection with voluntary departure, you must surrender for removal on the next business day thereafter. If you do not surrender for removal as required, you will be ineligible for all forms of discretionary relief for as long as you remain in the United States and for ten years after departure or removal. This means you will be ineligible for asylum, cancellation of removal, voluntary departure, adjustment of status, change of nonimmigrant status, registry, and related waivers for this period. If you do not surrender for removal as required, you may also be criminally prosecuted under section 243 of the Act.

Request for Prompt Hearing

To expedite a determination in my case, I request an immediate hearing. I waive my right to a 10-day period prior to appearing before an immigration judge.

Before: _____

(Signature of Respondent)

_____ Date: _____

(Signature and Title of Immigration Officer)

Certificate of Service

This Notice To Appear was served on the respondent by me on February 19, 2010, in the following manner and in compliance with section 239(a)(1)(F) of the Act.

☒ in person ☐ by certified mail, returned receipt requested ☐ by regular mail

☐ Attached is a credible fear worksheet.

☒ Attached is a list of organization and attorneys which provide free legal services.

The alien was provided oral notice in the Spanish language of the time and place of his or her hearing and of the consequences of failure to appear as provided in section 240(b)(7) of the Act.

Refused To Sign
(Signature of Respondent if Personally Served)

CARLTON COOPER Immigration Enforcement Agent
(Signature and Title of officer)

"C1.1"

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22-1060 **September Term, 2021**

DHS-A200-599-097

Filed On: June 23, 2022

Zenith E. Vivas,

Petitioner

v.

Merrick B. Garland, United States Attorney General and Alejandro N. Mayorkas, Secretary, United States Department of Homeland Security,

Respondents

BEFORE: Henderson, Wilkins, and Katsas, Circuit Judges

ORDER

Upon consideration of the motion for leave to proceed in forma pauperis; the motion to dismiss, and the opposition and the supplements thereto; the motion to supplement the record; the motion for discovery; the motion for summary disposition and the supplements thereto; the motions for default judgment; and the motion for an administrative injunction, it is

ORDERED that the motion for leave to proceed in forma pauperis be granted. It is

FURTHER ORDERED that the motions for default judgment be denied. Petitioner has not shown that he is entitled to the requested relief. It is

FURTHER ORDERED that the motion to dismiss be granted. The proper venue for the petition is the United States Court of Appeals for the Eleventh Circuit. 8 U.S.C. § 1252(b)(2); see also Meza v. Renaud, 9 F.4th 930, 931 (D.C. Cir. 2021) (petition for review of an order of removal must be filed "in the court of appeals for the judicial circuit where the removal proceeding was conducted"). The court concludes that transfer to the Eleventh Circuit would not be in the interest of justice. See Hadera v. I.N.S., 136 F.3d 1338, 1341 (D.C. Cir. 1998). It is

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22-1060 **September Term, 2021**

FURTHER ORDERED that petitioner's remaining motions be dismissed as moot.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Laura Chipley
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22-1060 **September Term, 2021**

DHS-A200-599-097

Filed On: August 30, 2022

Zenith E. Vivas,

Petitioner

v.

Merrick B. Garland, United States Attorney General and Alejandro N. Mayorkas, Secretary, United States Department of Homeland Security,

Respondents

BEFORE: Srinivasan, Chief Judge, and Henderson, Rogers, Millett, Pillard, Wilkins, Katsas, Rao, Walker, and Childs*, Circuit Judges

ORDER

Upon consideration of the petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Daniel J. Reidy
Deputy Clerk

*Circuit Judge Childs did not participate in this matter.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22-1060 **September Term, 2021**

DHS-A200-599-097

Filed On: August 30, 2022

Zenith E. Vivas,

Petitioner

v.

Merrick B. Garland, United States Attorney General and Alejandro N. Mayorkas, Secretary, United States Department of Homeland Security,

Respondents

BEFORE: Henderson, Pillard, and Katsas, Circuit Judges

ORDER

Upon consideration of the petition for rehearing; the motion to vacate and reinstate; and the motion to consolidate, it is

ORDERED that the motion to vacate and reinstate be denied. It is

FURTHER ORDERED that the motion to consolidate be denied as unnecessary. It is

FURTHER ORDERED that the petition for rehearing be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Daniel J. Reidy
Deputy Clerk

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

Nos. 20-14767-F, 20-14815-F

ZENITH E. VIVAS,
a.k.a. Rodolfo Martinez-Lara
a.k.a. Wilson Lopez-Santos,

Petitioner,

versus

U.S. ATTORNEY GENERAL,

Respondent.

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

Before: JILL PRYOR, GRANT and BRASHER, Circuit Judges.

BY THE COURT:

The government's motion to dismiss these petitions for lack of jurisdiction is GRANTED. Both of Zenith E. Vivas's *pro se* petitions for review challenge the final administrative removal order ordering his removal to Venezuela. However, the final administrative removal order was personally served on Vivas in March 2018 and he was later removed from the United States in November 2018. Accordingly, the instant petitions for review, filed here in December 2020, are untimely because they were filed well outside the

30-day period for challenging the order.[1] *See* 8 U.S.C. § 1252(b)(1); *Chao Lin v. U.S. Att'y Gen.*, 677 F.3d 1043, 1045 (11th Cir. 2012).

All pending motions are DENIED as moot.

ORDER: *Motion to dismiss appeal for lack of jurisdiction filed by Respondent U.S. Attorney General is* **GRANTED**. [9284643-2], [9284638-2]. *All pending motions are* **DENIED** *as moot.* [9302475-2], [9302470-2], [9311567-2], [9311566-2], [9271734-2], [9271728-2], [9271720-2], [9271716-2], [9280268-2], [9271725-2]. (*See* attached order at Appendix ("App.") at "**A**" *for complete text*) [20-14815, 20-14767] [Entered: 04/16/2021 12:54 PM]

1. We also note that the 30-day period is not subject to equitable tolling, despite Vivas's arguments to the contrary.

"C2.2"

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

Nos. 20-14767-F, 20-14815-F

ZENITH E. VIVAS,
a.k.a. Rodolfo Martinez-Lara
a.k.a. Wilson Lopez-Santos,

Petitioner,

versus

U.S. ATTORNEY GENERAL,

Respondent.

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

Before: JILL PRYOR, GRANT and BRASHER, Circuit Judges,

BY THE COURT:

Zenith E. Vivas's *pro se* motions to 1) amend, correct, or settle our order granting the government's motion to dismiss; 2) reconsider and remand our order granting the government's motion to dismiss; and 3) set aside our order granting the government's motion to dismiss, which were all filed in both case number 20-14767 and case number 20-14815, are DENIED.

ORDER: Motions to amend, correct, or settle our order granting the government's motion to dismiss; 2) reconsider and remand our order granting the government's motion to dismiss; and 3) set aside our order granting the governmnet's motion to dismiss, which were all filed in both case number 20-14767 and case number 20-14815 are **DENIED.** [9362328-2], [9362325-2], [9362323-2], [9362327-2], [9362326-2], [9362324-2] (*See* attached order at Appendix ("App.") at **"B"** *for complete text*) [20-14815, 20-14767] [Entered: 05/24/2021 06:14 PM]

"D1"

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
VALDOSTA DIVISION

ZENITH E VIVAS :
:
Petitioner, :
:
v. : CASE NO. 7:18-CV-161-WLS-MSH
: 28 U.S.C. § 2241
WARDEN, IRWIN COUNTY :
DETENTION CENTER, :
:
Respondent. :

ORDER

Petitioner filed an application for habeas relief under 28 U.S.C. § 2241 (ECF No. 1) on September 19, 2018, and a motion for leave to proceed *in forma pauperis* ("IFP") (ECF No. 5) on September 20, 2018. The Court denied Petitioner's IFP motion and directed Petitioner to pay the required filing fee, which he has subsequently failed to pay. Order, September 5, 2018, ECF No. 6. Accordingly, Petitioner is ordered to pay the required filing fee and show cause as to why his case should not be dismissed due to his failure to comply with the Court's directives. Petitioner's response must be filed within fourteen (14) days of the date of this Order. Failure to fully and timely comply with this Order will result in the dismissal of this action.

SO ORDERED, this 25th day of October, 2018.

/s/ Stephen Hyles
UNITED STATES MAGISTRATE JUDGE

"E1"

No. A13A1445
Court of Appeals of Georgia.

Martinez v. State

750 S.E.2d 504 (Ga. Ct. App. 2013)
Decided Dec 5, 2013

No. A13A1445.

2013-12-5

Rodolfo Lara MARTINEZ v. The STATE.

Gerard Bradley Kleinrock, for Appellant. Robert D. James Jr., Deborah D. Wellborn, for Appellee.

DILLARD

505 *505

Gerard Bradley Kleinrock, for Appellant. Robert D. James Jr., Deborah D. Wellborn, for Appellee.

DILLARD, Judge.

Following a jury trial, Rodolfo Lara Martinez was convicted of five counts of forgery in the first degree and two counts of identity fraud. Martinez's conviction on one of the two counts of identity fraud was later reversed by the trial court in its order on a motion for new trial. On appeal, Martinez contends that, as to the forgery counts, the indictment fatally varied from the proof at trial. He also claims that the evidence was insufficient to support his remaining conviction for identity fraud, and that the trial court expressed an improper opinion as to what had been proven at the trial. We agree with Martinez that in August 2007, the fraudulent possession and use of the identifying information of corporations did not fall within the ambit of Georgia's identity-fraud statute, and so we reverse his conviction on that count. Martinez's other claims, however, are without merit, and so we affirm his convictions for forgery in the first degree.

Viewed in a light most favorable to the jury's verdict,[1] the evidence shows that on August 14, 2007, Martinez attempted to cash a check at Tower Package Store. The check, dated August 10, 2007, purported to be a payroll check issued by Labor Staffing, Inc., and payable to Martinez in the amount of $139.36. The cashier followed
506 the store's usual practice by attempting to access Martinez's*506 information on her computer, but instead she received instructions to immediately contact store security. The security officer determined that, according to the computer-generated information, the check was fraudulent, and so he detained Martinez and notified the DeKalb County Police.

[1] *See Drammeh v. State*, 285 Ga.App. 545, 546(1), 646 S.E.2d 742 (2007).

When the responding detective arrived, the security officer gave him copies of four checks that had been previously cashed at the store by Martinez, but that had been returned by the bank as counterfeit. And after the detective arrested Martinez and read him his *Miranda* [2] rights, Martinez claimed that he was "paid that money

for doing construction work." But when the detective offered to drive Martinez to any location where he performed work in order to confirm his story, Martinez was unable to remember any work location or name, address, or telephone number associated with his alleged employers.

[2] *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

At trial, the evidence showed that Martinez previously cashed four checks at the Tower Package Store dated May 25, May 26, May 29, and June 2, 2007, in the amounts of $98.76, $97.86, $148.61, and $146.64, respectively. All four checks purported to be payroll checks issued by Staff Zone, Inc. But according to Staff Zones's manager, the company did not issue any payroll checks to Martinez. The manager also examined photocopies of the checks purported to have been issued by Staff Zone and testified that they were not, in fact, company checks. And as to the check purported to have been issued by Labor Staffing, Inc., and which Martinez attempted to cash at Tower Package Store on August 14, 2007, Labor Staffing's employee in charge of accounting and payroll testified that it was not an authentic corporate check and that the real check bearing the same check number had already been issued by the company to another person in a different amount.

Ultimately, the jury found Martinez guilty of two counts of identity fraud and five counts of first-degree forgery. Martinez moved for a new trial, and the trial court found that the evidence was insufficient to sustain Martinez's conviction on one of the two counts of identity fraud. Martinez's motion for new trial was otherwise denied, and this appeal follows.

1. Martinez contends that the evidence was insufficient to support his forgery convictions. His arguments, however, are based on an alleged variance between the indictment and the proof presented by the State at trial. But setting aside the question of whether Martinez waived his fatal-variance claims by failing to raise them in a timely fashion below,[3] they are nonetheless without merit.

[3] *See Walker v. State,* — Ga.App. ——, ——(2), 747 S.E.2d 691 (2013) (holding that the fatal-variance claim was waived for failure to raise it below); *Palmer v. State,* 286 Ga.App. 751, 753–754(2), 650 S.E.2d 255 (2007) (same).

(a) As to the four counts of forgery in the first degree corresponding to the four checks purportedly issued by Staff Zone, Martinez contends that the State failed to prove these crimes because the indictment alleged, but the evidence failed to show, that these checks were actually drawn on Staff Zone's account. We disagree with Martinez that there was a variance between the indictment and the proof presented by the State at trial.

At the outset, we note that a person commits the crime of first-degree forgery if "with intent to defraud he knowingly makes, alters, or possesses any writing in a fictitious name or in such manner that the writing as made or altered purports to have been made by another person, at another time, with different provisions, or by authority of one who did not give such authority and utters or delivers such writing." [4] And in four separate counts, the indictment alleged that Martinez possessed with intent to defraud, and that he uttered and delivered, four checks payable to himself, specifically identified by number, date, amount, and as also "drawn on
507 Wachovia Bank, N.A. on the account of Staff Zone Inc." [5] But according to Staff Zone's manager,*507 the account number on the checks presented by Martinez was not Staff Zone's actual account number with Wachovia. As such, Martinez argues that the evidence showed that the checks were not drawn on Staff Zone's account, whereas the indictment charged him with uttering checks that were actually drawn on Staff Zone's account.

4 *See*OCGA § 16–9–1(a) (2007). This Code section was amended in 2012, but the prior version applies here. See Ga. L.2012, p. 899.

5 For example, Count Three of the indictment alleges, in part, that Martinez "with intent to defraud, did knowingly possess a certain writing, to wit: a check, being No. 134632 dated 6/2/2007, in the amount of $146.64 payable to [Martinez] drawn on Wachovia Bank, N.A. on the account of Staff Zone Inc...."

In considering Martinez's argument, our analysis necessarily begins with the general rule that "[i]f the indictment sets out the offense as done in a particular way, the proof must show it so, or there will be a variance." [6] But in applying the fatal-variance rule, we must be ever mindful that Georgia no longer employs "an overly technical application of the ... rule, focusing instead on materiality." [7] And the rule that allegations and proof must correspond is based upon the obvious requirements "(1) that the accused shall be definitely informed as to the charges against him, so that he may be enabled to present his defense and not be taken by surprise by the evidence offered at trial; and (2) that he may be protected against another prosecution for the same offense." [8] Thus, a variance is not fatal if the accused is "definitely informed as to the charges against him and is protected against another prosecution for the same offense." [9]

6 *Ross v. State,* 195 Ga.App. 624, 625(1), 394 S.E.2d 418 (1990) (punctuation omitted).

7 *Haley v. State,* 289 Ga. 515, 529(3)(a), 712 S.E.2d 838 (2011) (punctuation omitted); *see also White v. State,* —— Ga.App. ——, 744 S.E.2d 857, 859 (2013) ("We no longer adhere to an overly technical application of the fatal variance rule, focusing instead on materiality. The true inquiry, therefore, is not whether there has been a variance in proof, but whether there has been such a variance as to affect the substantial rights of the accused.").

8 *McCrary v. State,* 252 Ga. 521, 523, 314 S.E.2d 662 (1984) (punctuation omitted).

9 *Nelson v. State,* 269 Ga.App. 103, 106(2), 603 S.E.2d 691 (2004) (punctuation omitted).

And here, the four checks at issue appear on their face to be drawn on Staff Zone's account at Wachovia. That the checking account number printed on the checks was not the correct account number was one of several ways in which Staff Zone's manager identified the checks as not being authentic company checks. Moreover, the logo and signatures on actual Staff Zone checks differed from those on the forged checks. But the indictment did not allege that the four checks contained Staff Zone's *correct* banking account number. Accordingly, we discern no actual, much less fatal, variance between the indictment and the evidence. Furthermore, the indictment—which also identifies each check by number, date, and amount—sufficiently apprised Martinez of what writings he was accused of forging,[10] and he is protected from further prosecution for these offenses because, *inter alia,* copies of all the checks referenced in the indictment were introduced into evidence.[11] For the foregoing reasons, as to these four counts, we "reject any fatal variance claim and hold the evidence was sufficient" [12] for a rational trier of fact to find Martinez guilty beyond a reasonable doubt of forgery in the first degree.[13]

[10] *See, e.g., Veasey v. State,* 322 Ga.App. 591, 594(1)(b), 745 S.E.2d 802 (2013) (finding indictment detailed enough for defendant to understand what he was accused of taking, and from whom).

[11] *See Holder v. State,* 242 Ga.App. 479, 480(2), 529 S.E.2d 907 (2000) (finding that, because alleged bad check was introduced into evidence, defendant did not face another prosecution thereon even though there was a slight discrepancy in the amount of the check alleged in the indictment and the proof at trial).

[12] *Evans v. State,* 318 Ga.App. 706, 715(6), 734 S.E.2d 527 (2012).

[13] *See Jackson v. Virginia* 443 U.S. 307, 319(III)(B), 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

(b) Martinez also contends that the evidence was insufficient to establish that he was guilty of forgery in the first degree with respect to the check purportedly drawn on the account of Labor Staffing. The indictment alleged, in pertinent part, that Martinez knowingly possessed with intent to defraud, and did utter and deliver, 508 "a check, *508 being No. 94369 dated 8/13/2007, in the amount of $139.36 payable to [Martinez] drawn on SunTrust Bank on the account of Labor Staffing Inc." The check adduced at trial was dated August 10, 2007, not August 13, 2007, as alleged. But notwithstanding the indictment's error, the other information identifying the forged check, including the check number, dollar amount, and the designated payee, drawee bank, and account holder, was sufficient to apprise Martinez of the charge against him. [14] Nor does Martinez face further prosecution for the same offense. [15] Accordingly, we find no fatal variance here either. Additionally, as to this count, we conclude that a rational trier of fact could find that Martinez was guilty beyond a reasonable doubt of forgery in the first degree. [16]

[14] *See Smith v. State,* 317 Ga.App. 801, 803–804(1), 732 S.E.2d 840 (2012) (concluding that although the indictment for forgery improperly identified the check number as the bank routing number, defendant was nevertheless sufficiently informed of the writing upon which the forgery count was based); *Serna v. State,* 308 Ga.App. 518, 520–521(1), 707 S.E.2d 904 (2011) (finding that where the indictment notified defendant of the date of the offense, the type of offense, and the basis for the offense, and defendant was convicted of the same offense listed in the indictment, indictment charging defendant with possession of nonexistent compound with a name similar to actual controlled substance was not a fatal variance); *Grier v. State,* 198 Ga.App. 840, 403 S.E.2d 857 (1991) (finding typographical error in describing date of prior conviction did not create fatal error in indictment charging possession of firearm by convicted felon); *Bowman v. State,* 144 Ga.App. 681, 682(5), 242 S.E.2d 480 (1978) (variation in allegation and proof as to amount of soybeans stolen could not have harmed the defendant).

[15] *See Holder,* 242 Ga.App. at 480(2), 529 S.E.2d 907.

[16] *See Jackson,* 443 U.S. at 319(III)(B), 99 S.Ct. 2781.

2. In three claims of error, Martinez asserts that the crime of identity fraud, as applicable to the August 2007 incident at issue, protected only the identifying information of *natural* persons and not corporations. And here, Martinez was convicted of identity fraud for obtaining the bank account number of the corporate victim, Labor

Staffing, Inc.[17] Thus, Martinez contends that the evidence was necessarily insufficient to show that he violated OCGA § 16–9–121 (2007), as then applicable. He further asserts that his trial counsel, not realizing that OCGA § 16–9–121 (2007) did not apply to corporate victims, was ineffective in failing (i) to object to the trial court's instruction to the jury as to the elements of identity fraud, and (ii) by not filing a dispositive demurrer or motion in arrest of judgment. In contrast, the State argues that a corporation could be a victim of identity fraud under the 2007 version of the statute and that the evidence of the crime was, therefore, sufficient, and Martinez's trial counsel effective.

[17] Although the jury found that Martinez was guilty of a second count of identity fraud with respect to corporate victim, Staffing Zone, the trial court reversed that conviction for insufficient evidence.

It is undisputed that before May 24, 2007, a victim of the crime of identity fraud was not limited to natural persons. Under OCGA § 16–9–121(1), as amended in 2002, a person committed identity fraud if, *inter alia,* he or she "with the intent unlawfully to appropriate resources of or cause physical harm to that *person* ... [o]btains or records identifying information of a *person* which would assist in accessing the resources of that *person* or any other *person.*" [18] Under OCGA § 16–1–3, which contains the definitions of certain words used in Title 16, and which has not been amended since 1982, a "person" is "an individual, a public or private corporation, an incorporated association, government, government agency, partnership, or unincorporated association." [19] Thus, a "person," which was not separately defined for purposes of the article governing identity fraud, necessarily
509 included corporate victims before May 24, 2007.[20] *509

[18] *See*OCGA § 16–9–121(1) (2002) (emphasis supplied).

[19] .OCGA § 16–1–3(12).

[20] *See Lee v. State,* 283 Ga.App. 826, 826–27(1), 642 S.E.2d 876 (2007) (finding that "Snelling Personnel Services, a company" was a "person" for purposes of the crime of identity theft).

And under the current version of the statute, a person commits the crime of identity fraud when, *inter alia,* "he or she willfully and fraudulently ... [w]ithout authorization or consent, uses or possesses with intent to fraudulently use identifying information concerning a *person.*" [21] Again, in light of the definition of the term for purposes of Title 16, there is no doubt that a "person" encompasses corporate victims.

[21] .OCGA § 16–9–121(a)(1) (emphasis supplied).

But in August 2007, when Martinez used the identifying information of Labor Staffing, the law provided that a person commits the offense of identity fraud when, as applicable here, "he or she willfully and fraudulently ... [w]ithout authorization or consent, uses or possesses with intent to fraudulently use, identifying information concerning an *individual.*" [22] And unlike "person," there is no definition for "individual" in Title 16. The question squarely presented, then, is whether the fraudulent use or possession of the identifying information of a corporation was punishable as the crime of identity fraud under OCGA § 16–9–121 (2007).

22 .OCGA § 16–9–121(a)(1) (2007) (emphasis supplied), effective May 24, 2007. *See* Ga. L.2007, p. 450, § 7.

And as with any question of statutory interpretation, we necessarily begin our analysis with familiar and binding canons of construction. Indeed, in considering the meaning of a statute, our charge as an appellate court is to "presume that the General Assembly meant what it said and said what it meant." [23] And toward that end, we must afford the statutory text its plain and ordinary meaning,[24] consider the text contextually,[25] and read the text "in its most natural and reasonable way, as an ordinary speaker of the English language would." [26] In sum, where the language of a statute is plain and susceptible of only one natural and reasonable construction, "courts must construe the statute accordingly." [27]

23 *Deal v. Coleman,* —— Ga. ——, *5, —— S.E.2d —— (2013) (punctuation and citation omitted); *see also Arby's Restaurant Group, Inc. v. McRae,* 292 Ga. 243, 245(1), 734 S.E.2d 55 (2012) (same).

24 *See Deal,* —— Ga. —— at *5, —— S.E.2d —— ("To that end, we must afford the statutory text its plain and ordinary meaning.") (punctuation and citation omitted); *State v. Able,* 321 Ga.App. 632, 636, 742 S.E.2d 149 (2013) ("A judge is charged with interpreting the law in accordance with the original and/or plain meaning of the text at issue (and all that the text fairly implies)....").

25 *See Deal,* —— Ga. —— at *5, —— S.E.2d —— ("[W]e must view the statutory text in the context in which it appears[.]"); *Hendry v. Hendry,* 292 Ga. 1, 3(1), 734 S.E.2d 46 (2012) (same).

26 *Deal,* —— Ga. —— at *5, —— S.E.2d ——;*see also Luangkhot v. State,* 292 Ga. 423, 424(1), 736 S.E.2d 397 (2013) (same).

27 *Luangkhot,* 292 Ga. at 424(1), 736 S.E.2d 397 (punctuation omitted); *see also Deal,* —— Ga. —— at *5, —— S.E.2d —— ("[I]f the statutory text is clear and unambiguous, we attribute to the statute its plain meaning, and our search for statutory meaning is at an end.") (punctuation omitted).

In the case *sub judice,* we first consider the ordinary meaning of "individual," as it is not a term of art or a technical term.[28] In its common meaning, an "individual" is an actual human being.[29] And this appears to be the way "individual" is used in the definition of "person" in OCGA § 16–1–3(12), so as to differentiate a natural person from other entities, such as corporations. OCGA § 16–9–121 (2007) also used the term "person," but in the context of the perpetrator or in the context of fraud committed "on another person," but not in the context of
510 the victim whose identifying information was being used *510 or possessed.[30] This, of course, is entirely consistent with the General Assembly having intended that "individual" refer to a natural person, not a corporation.

28 *See*OCGA § 1–3–1(b) (providing that "[i]n all interpretations of statutes, the ordinary signification shall be applied to all words, except words of art or words connected with a particular trade or subject matter, which shall have the signification attached to them by experts in such trade or with reference to such subject matter"); *Harris v. State,* 286

Ga. 245, 246(3), 686 S.E.2d 777 (2009) (applying same).

[29] *See Mohamad v. Palestinian Auth.*, — U.S. —, —(I)(A), 132 S.Ct. 1702, 182 L.Ed.2d 720 (2012) (looking first to a word's ordinary meaning when a statute does not define a term and noting that "an individual" normally means "a human being, a person"); The Compact Oxford English Dictionary 880 (2d ed.1991) (defining "individual" as, *inter alia,* "[a] single human being").

[30] *See*OCGA § 16–9–121(a)(2) (2007) (a person commits identity theft when he or she willfully and fraudulently "[u]ses identifying information of an individual under 18 years old over whom he or she exercises custodial authority"); OCGA § 16–9–121(a)(3) (2007) (a person commits identity theft when he or she willfully and fraudulently "[u]ses or possesses with intent to fraudulently use identifying information concerning a deceased individual"); OCGA § 16–9–121(a)(4) (2007) (a person commits identity theft when he or she willfully and fraudulently "[c]reates, uses, or possesses with intent to fraudulently use any counterfeit or fictitious identifying information concerning a fictitious individual with intent to use such counterfeit or fictitious identification information for the purpose of committing or facilitating the commission of a crime or fraud on another person"); OCGA § 16–9–121(a)(5) (2007) (a person commits identity theft when he or she willfully and fraudulently "[w]ithout authorization or consent, creates, uses, or possesses with intent to fraudulently use any counterfeit or fictitious identifying information concerning a real individual with intent to use such counterfeit or fictitious identification information for the purpose of committing or facilitating the commission of a crime or fraud on another person").

Furthermore, and of some significance, when the General Assembly again changed the law in 2010, it was "[t]o amend Article 8 of Chapter 9 of Title 16 of the Official Code of Georgia Annotated, relating to identity fraud, so as to *revise* [31] a term so as to *include* [32] businesses as potential identity theft victims." [33] And tellingly, the law was then amended so as to substitute "person" for "individual" in the text of OCGA § 16–9–121(a)(1), (4), and (5). It follows, then, that no rational trier of fact could have found beyond a reasonable doubt that Martinez committed the crime of identity fraud against "an individual" by using the identifying information of Labor Staffing, a *corporation,* in a manner otherwise prohibited by OCGA § 16–9–121 (2007).[34] Accordingly, Martinez's identity-fraud conviction must be reversed,[35] and Martinez's claims that his trial counsel rendered ineffective assistance are moot.

[31] *See* The Compact Oxford English Dictionary 1581 (2d ed.1991) (defining "revise" as, *inter alia,* "To look or read carefully over, with a view toward improving or correcting ... [t]o go over again, to re-examine, in order to improve or amend....").

[32] *See* The Compact Oxford English Dictionary 831 (2d ed.1991) (defining "include" as, *inter alia,* "[t]o ... embrace, comprise, contain ... to place in a class or category").

[33] Ga. Laws.2010, p. 568 (emphasis supplied).

[34] The State's arguments to the contrary are unavailing. It is of no consequence that the scope of OCGA § 16–9–120 *et seq.* (2007) was arguably broadened in some respects, or that other, more universal provisions of this statutory scheme can be construed as applying to business victims of identity theft (*e.g.*, the venue provision). The fact remains that the

"elements of offense" outlined in OCGA § 16–9–121 (2007) make it abundantly clear that the only possible victim of this offense is "an individual," not a business. Furthermore, even if we assume *arguendo* that the State's reading of these other "conflicting" provisions is accurate, this changes nothing. At best, these provisions arguably create an ambiguity as to the meaning of "individual," and we have repeatedly held that "criminal statutes must be strictly construed against the State." *Hedden v. State,* 288 Ga. 871, 875, 708 S.E.2d 287 (2011) (punctuation omitted). *Accord Davis v. State,* 273 Ga. 14, 15, 537 S.E.2d 663 (2000). *See also State v. Marlowe,* 277 Ga. 383, 386(1)(b) n. 24, 589 S.E.2d 69 (2003) (noting that although another construction of the criminal statute at issue was possible, "the legislature's choice is not clear and an ambiguous criminal statute must be strictly construed against the State"); *Busch v. State,* 271 Ga. 591, 595, 523 S.E.2d 21 (1999) (construing criminal statute narrowly in light of rule requiring its strict construction).

[35] We note that although Martinez did not demur to the indictment, he does not need to demonstrate that the indictment was void in order to show that the evidence was insufficient to support his conviction for violating OCGA § 16–9–121 (2007). *See, e.g., McKay v. State,* 234 Ga.App. 556, 556–560(1), (2), 507 S.E.2d 484 (1998) (reviewing claim that evidence was insufficient to support appellant's conviction for selling marijuana within 1,000 feet of housing project in violation of OCGA § 16–13–32.5, but refusing to consider claim that indictment failed to allege any violation of OCGA § 16–13–32.5); *Williams v. State,* 162 Ga.App. 350, 352–53, 291 S.E.2d 425 (1982) (reviewing sufficiency of evidence under standard of *Jackson v. Virginia,* but refusing to accept claim of an allegedly void indictment as a proper basis to challenge conviction on the general grounds).

3. Lastly, Martinez contends that the trial court violated OCGA § 17–8–57 by assuming certain facts in its
511 instruction to the jury. We disagree.*511

OCGA § 17–8–57 provides that "[i]t is error for any judge in any criminal case, during its progress or in his charge to the jury, to express or intimate his opinion as to what has or has not been proved or as to the guilt of the accused." And here, Martinez maintains that this statute was violated when the trial court instructed the jury as follows:

The intent of the accused to defraud is an essential element of the crime of forgery. As one of the essential elements of the crime, it is the duty of the State to prove that in writing the name of Labor Staffing, Inc. or Staff Zone, Inc. and in presenting the writing as a genuine document it was the intent of the accused to defraud Tower Package Store.

Martinez argues that this instruction assumes that he wrote the checks and presented them, and that it was not for the trial court to comment on such facts. However, the trial court's instruction must be considered as a whole, and Martinez cannot necessarily show error by highlighting a narrow portion of the jury charge. Rather, OCGA § 17–8–57 is violated only when the trial court's instruction, "considered as a whole, assumes certain things as facts and intimates to the jury what the judge believes the evidence to be," [36] and the portion of the instruction complained of only addresses intent. And here, the trial court previously instructed the jury as to the elements of forgery in the first degree, explaining that it was for the State to prove those elements beyond a reasonable doubt. The trial court also defined a writing for purposes of forgery, knowledge as an element of the crime, and reiterated that the State must prove beyond a reasonable doubt that the defendant delivered a forged document. Thus, viewing the charge as a whole, a reasonable juror would not have understood the charge to mean that the trial court was expressing an opinion that Martinez had, in fact, written and presented the checks at issue.[37] Accordingly, we find no error.

36 *Simmons v. State,* 291 Ga. 705, 708(5), 733 S.E.2d 280 (2012); *see Parker v. State,* 276 Ga. 598, 600(5), 581 S.E.2d 7 (2003) (viewing contested charge in context of instruction as a whole).

37 *See, e.g., Pullen v. State,* 315 Ga.App. 125, 129–130(3), 726 S.E.2d 621 (holding, upon consideration of the jury charge as a whole, that no reasonable juror could have construed it to be an expression of the trial court's own opinion).

Judgment affirmed in part and reversed in part.

ANDREWS, P.J., and McMILLIAN, J., concur.

DEPARTMENT OF COMMUNITY SUPERVISION

CERTIFICATE OF SENTENCE COMPLETION

Awarded to

MARTINEZ, RODOLFO LARA

Sentence Completion Date: 02/08/2020 County(ies)/Docket Number(s): Dekalb/ 08CR2217-9

For completing supervision requirements with the Georgia Department of Community Supervision

James Smith

Chief Community Supervision Officer

DEPARTMENT OF COMMUNITY SUPERVISION STATE OF GEORGIA Certified 2015

03/10/2021

Date

This Certificate symbolizes the individual's achievement toward successful reentry into society and meets the provisions as outlined in O.C.G.A. 51- 1-54 for engaging in activity with the individual to whom this Certificate was issued.

STATE'S WITNESSES:
Detective D.L. Smith #1139
DKPD

No. 08-CR-2217-9

DeKalb Superior Court

March Term, **2008**

THE STATE

VERSUS

Rodolfo Martinez-Lara

D0189464-9

IDENTITY FRAUD (2 Counts)
FORGERY IN THE FIRST DEGREE (5 Counts)

True BILL.

[signature] Foreperson.

The Defendant Rodolfo Martinez-Lara waives copy of Indictment, list of witnesses, full panel, formal arraignment, and pleads

Not Guilty

This the 9 day of May 20 11

[signature] District Attorney

[signature] Defendant's Attorney

D.M. Defendant

We, the jury, find the defendant _____

_____, Foreperson

_____, 20 ___

"G1"

IN THE SUPERIOR COURT OF DEKALB COUNTY

CASE NO. 08CR2217-9

OFFENSE(S) IDENTITY FRAUD (2CTS); FORGERY IN THE FIRST DEGREE (5CTS);

THE STATE OF GEORGIA

VS

RODOLFO MARTINEZ-LARA

RACE/SEX: H/M DOB: _____

OFFENDER TRACKING NUMBER: _____

PLEA:

☐ NEGOTIATED
☐ ALFORD VS. NORTH CAROLINA
☐ GUILTY ON COUNT(S) _____
☐ NOLO CONTENDERE ON COUNT(S) _____
☐ TO LESSER INCLUDED OFFENSE(S) _____
ON COUNT(S) _____

☑ VERDICT:
☑ JURY ☐ NON-JURY
☑ GUILTY ON COUNT(S) 1-7
☐ NOT GUILTY ON COUNT(S) _____
☐ GUILTY OF LESSER INCLUDED OFFENSE(S) OF _____
ON COUNT(S) _____

May TERM, 20 11

OTHER DISPOSITION
☐ NOLLE PROSEQUI ORDER ON COUNT(S) _____
☐ DEAD DOCKET ORDER ON COUNT(S) _____
☐ COUNT(S) _____ MERGE WITH COUNT(S) _____

AS TO COUNTS 1-7 ☑ **FELONY SENTENCE** ☐ **MISDEMEANOR SENTENCE**

WHEREAS, the above-named defendant has been found guilty of the above-stated offense, WHEREUPON, it is ordered and adjudged by the Court that: The said defendant is hereby sentenced to confinement for a period of TEN YEARS TO SERVE IN PRISON AS TO COUNTS 1 THROUGH 7. ALL COUNTS TO RUN CONCURRENT.

in the State Penal System or such other institution as the Commissioner of the State Department of Corrections may direct, to be computed as provided by law.
HOWEVER, it is further ordered by the Court:

☐ 1) THAT the above sentence may be served on probation

☐ 2) THAT upon service of _____ of the above sentence, the remainder of _____ may be served on probation PROVIDED that the said defendant complies with the following general and other conditions herein imposed by the Court as part of this sentence.

☐ 3) Defendant is to receive credit for time served.

☐ 4) Time to serve reduced to present time served.

☐ **FIRST OFFENDER SENTENCE**

WHEREAS said defendant has not previously been convicted of a felony nor availed himself of the provision of the First Offender Act (Ga. Laws 1968, p. 324).
NOW, THEREFORE, the defendant consenting hereto, it is the judgment of this Court that no judgment of guilt or sentence be imposed at this time, but that further proceedings are deferred and defendant is hereby placed on probation for the period of _____ from this date provided that said defendant complies with the following general and special conditions herein imposed by the Court as part of this sentence:
PROVIDED, further, that upon violation of the terms of probation, the Court may enter an adjudication of guilt and proceed to sentence defendant to the maximum sentence provided by law. Upon fulfillment of the terms of probation, or upon release of the defendant by the Court prior to the termination of the period thereof, the defendant shall stand discharged of said offense charged and shall be completely exonerated of guilt of said offense charged.
Let a copy of this Order be forwarded to the Office of the State Probation System of Georgia, and to the Identification Division of the Federal Bureau of Investigation.

☐ **GENERAL CONDITIONS OF PROBATION**

The defendant, having been granted the privilege of serving all or part of the above-stated sentence on probation, hereby is sentenced to the following general conditions of probation:

☐ 1) THAT defendant not violate any State or Federal laws to be adjudged by the Court;
☐ 2) THAT defendant make regular reports to the Adult Probation Officer of DeKalb County as directed;
☐ 3) THAT defendant keep the Adult Probation Officer of DeKalb County informed at all times of the defendant's place of employment and residence address;
☐ 4) THAT defendant shall, from time to time upon oral or written request by any probation officer, produce a breath, urine, and/or blood specimen for analysis for the possible presence of a substance prohibited or controlled by any law of the state of Georgia or of the United States;
☐ 5) THAT defendant pay a fine in the amount of $ _____ plus $50.00 or 10% of said fine, whichever is less pursuant to O.C.G.A. 15-21-70 and pay a jail fee in the amount of $ _____, drug penalty fine $ _____, Victim's Fund $ _____, DUI penalty $ _____ Brain & Spinal injury fee $ _____, and pay restitution in the amount of $ _____, probation fee $ _____, One-time felony fee $ _____, Court Cost $ _____ through the adult probation officer as provided by said office;
☐ 6) THAT defendant undergo and successfully complete any alcohol, drug, mental health or educational program abiding by all rules, regulations or directions of such program to include any aftercare deemed necessary as directed by the probation officer.
☐ 7) THAT defendant must complete _____ hours of Community Service as directed by Adult Probation.
☐ 8) THAT defendant must enter into and successfully complete the _____ program, abiding by all of their rules and regulations.
☐ 9) THAT defendant must report to the DeKalb County Jail on _____ at _____ ☐ (a.m.) ☐ (p.m.), to begin serving sentence.
☐ 10) THAT defendant may remain on probation until accepted into _____ program.
☐ 11) THAT defendant may perform Community Service at the rate of $5.00 per hour in lieu of payment of fine and fees with the exception of probation fee.
☐ 12) THAT defendant must abstain from the use or possession of any alcoholic beverages or illegal drugs.

☐ SPECIAL CONDITIONS OF SENTENCE ☐ SPECIAL CONDITIONS OF PROBATION ☐ OTHER CONDITIONS OF PROBATION ☐ OTHER CONDITIONS OF SENTENCE

IT IS FURTHER ORDERED THAT the defendant abide by all other general conditions of probation as set forth herein: _____

IT IS THE FURTHER ORDER of the Court, and the defendant is hereby advised that the Court may, at any time, revoke any conditions of this probation and/or discharge the defendant from probation. The probation shall be subject to arrest for violation of any condition of probation herein granted. If such probation is revoked, the Court may order the execution of the sentence which was originally imposed or any portion thereof in the manner provided by law after deducting therefrom the amount of time the defendant has served on probation.

So ordered this 24th day of June, 20 11

Judge, DeKalb Superior Courts Mark Anthony Scott

Filed in Open Court, this 24th day of June, 20 11

Deputy Clerk Renee Rodgers

DEFENDANT

RESENTENCING DATED ON 6/29/11

SG-6 Final Disposition Felony Confinement Sentence

"G3"

IN THE SUPERIOR COURT OF DEKALB COUNTY, STATE OF GEORGIA

STATE OF GEORGIA versus

RODOLFO MARTINEZ-LARA

CRIMINAL ACTION #:

08CR2217-9

September **Term of 2014**

Clerk to complete if incomplete:

OTN(s):

DOB: 04/18/1972

Ga. ID#:

Final Disposition:
FELONY CONFINEMENT

☐ **First Offender entered under O.C.G.A. § 42-8-60**
☐ **Repeat Offender as imposed below**
☐ Repeat Offender waived

PLEA: ☐ Negotiated ☐ Non-negotiated

VERDICT: ☒ Jury ☐ Non-jury

The Court enters the following judgment:

Count	Charge (as indicted or accused)	Disposition (Guilty, Not Guilty, Guilty-Alford, Guilty-Lesser Incl, Nolo, Nol Pros, Dead Docket)	Sentence	Fine	Concurrent/ Consecutive, Merged, Suspended
1	IDENTITY FRAUD	NOT GUILTY			
2	IDENTITY FRAUD	NOT GUILTY			
3	FORGERY IN THE FIRST DEGREE	GUILTY	10 YEARS TO SERVE IN CUSTODY		CONCURRENT
4	FORGERY IN THE FIRST DEGREE	GUILTY	10 YEARS TO SERVE IN CUSTODY		CONCURRENT

The Defendant is adjudged guilty or sentenced under First Offender for the above-stated offense(s); the Court sentences the Defendant to confinement in such institution as the Commissioner of the State Department of Corrections may direct, with the period of confinement to be computed as provided by law.

Sentence Summary: The Defendant is sentenced for a total of 10 YEARS.

The Defendant is to receive credit for time served in custody: ☒ from 8/14/07- 8/29/07, 8/5/08 - 8/12/08, AND 2/8/10 - PRESENT; or ☐ as determined by the custodian.

SCANNED

☐ The Court sentences the Defendant as a recidivist under O.C.G.A.:
☐ § 17-10-7(a); ☐ § 17-10-7(c); ☐ § 16-7-1(b); ☐ § 16-8-14(b); or ☐ § _____.

RESENTENCING DATED ON 6/29/11

0032

RESENTENCING DATED ON 6/29/11

SC-6.5 Final Disposition Continuation or Sentence

NOTE: May be used to continue any final disposition form when needed

IN THE SUPERIOR COURT OF DEKALB COUNTY, STATE OF GEORGIA

STATE OF GEORGIA versus

RODOLFO MARTINEZ-LARA

CRIMINAL ACTION #:

08CR2217-9

Final Disposition:
CONTINUATION OF SENTENCE

September **Term of 20**14

The Court enters the following judgment:

Count	Charge (as indicted or accused)	Disposition (Guilty, Not Guilty, Guilty-Alford, Guilty-Lesser Incl, Nolo, Nol Pros, Dead Docket)	Sentence	Fine	Concurrent/ Consecutive, Merged, Suspended 1
5	FORGERY IN THE FIRST DEGREE	GUILTY	10 YEARS TO SERVE IN CUSTODY		CONCURRENT
6	FORGERY IN THE FIRST DEGREE	GUILTY	10 YEARS TO SERVE IN CUSTODY		CONCURRENT
7	FORGERY IN THE FIRST DEGREE	GUILTY	10 YEARS TO SERVE IN CUSTODY		CONCURRENT
8					
9					
10					
11					

SCANNED

to confinement at such institution as the Commissioner of the State Department of Corrections or the Court may direct, with the period of confinement to be computed as provided by law.

Upon violation of the terms of probation, upon conviction for another crime during the period of probation, or upon the Court's determination that the Defendant is or was not eligible for sentencing under the First Offender Act or for Conditional Discharge, the Court may enter an adjudication of guilt and proceed to sentence the Defendant to the maximum sentence as provided by law.

Upon fulfillment of the terms of this sentence, or upon release of the Defendant by the Court prior to the termination of this sentence, the Defendant shall stand discharged of said offense without court adjudication of guilt and shall be completely exonerated of guilt of said offense charged.

For Court's Use:

PREVIOUS SENTENCE DATED JUNE 29, 2011 IS HEREBY VACATED
DEFENDANT IS HEREBY RESENTENCED ONLY ON COUNTS 3-7 ON 10/15/14
COUNTS 1-2 REVERSED ON APPEAL TO A VERDICT OF NOT GUILTY.

The Hon. GERARD KLEINROCK, Attorney at Law, represented the Defendant by: ☐ employment; or ☒ appointment.

SO ORDERED this 15TH day of October, 2014.

Filed in Open Court
This 15 day of OCT 2014
Deputy Clerk
Time _____ M

Judge of Superior Court
STONE MOUNTAIN Judicial Circuit

MARK ANTHONY SCOTT
(print or stamp Judge's name)

FIREARMS – If you are convicted of a crime punishable by imprisonment for a term exceeding one year, or of a misdemeanor crime of domestic violence where you are or were a spouse, intimate partner, parent, or guardian of the victim, or are or were involved in another similar relationship with the victim, it is unlawful for you to possess or purchase a firearm including a rifle, pistol, or revolver, or ammunition, pursuant to federal law under 18 U.S.C. § 922(g)(9) and/or applicable state law.

Acknowledgment: I have read the terms of this sentence or had them read and explained to me. If all or any part of this sentence is probated I certify that I understand the meaning of the order of probation and the conditions of probation. I understand that violation of a condition of probation could result in revocation of all time remaining on the period of probation.

_____
Defendant

SCANNED

"G4"

IN THE SUPERIOR COURT OF DEKALB COUNTY

STATE OF GEORGIA

STATE OF GEORGIA,	)	
	)	ORIGINAL
	)	
vs	)	CRIMINAL CASE NUMBER
	)	08-CR-2217-09
	)	
RODOLFO LARA MARTINEZ,	)	Sentencing Hearing
	)	
DEFENDANT.	)	

CASE CALLED FROM THE CRIMINAL MOTIONS CALENDAR
OCTOBER 15th, 2014 PAGES 001 - 011

PROCEEDINGS HELD OCTOBER 15th, 2014, BEFORE THE **HONORABLE MARK ANTHONY SCOTT**, SUPERIOR COURT JUDGE, AT THE DEKALB COUNTY COURTHOUSE ANNEX, JUDICIAL TOWER, COURTROOM 6-A, DECATUR, GEORGIA.

* * * * *

For the State: Buffy Thomas
Assistant District Attorney

For the Defense: Gerald Kleinrock
Assistant Public Defender

2014 DEC -4 AM 9:50
CLERK OF SUPERIOR COURT
DEKALB COUNTY GA

Kimberly Hunnicutt, CCR, CVR
Official Court Reporter
6107 Judicial Tower
556 N. McDonough Street
Decatur, Georgia 30030
(404) 371-2330

P R O C E E D I N G S

commenced in open court

* * * * *

THE COURT: *[Sounding]* Mr. Kleinrock, do you need to get something worked out before 1:30 on the resentencing of -- is this Rodolfo Martinez?

MR. KLEINROCK: It is, Judge.

THE COURT: What are we doing? They want -- you want to just do the resentencing?

MR. KLEINROCK: Yes, Judge.

MS. THOMAS: Yes, Judge.

THE COURT: It's worked out that the Court of Appeals came back and said I couldn't sentence him on some things and sentence him on some others. I don't have the decisions because I was going to review it again before --

MR. KLEINROCK: Yeah, basically identity fraud, they said at the time of this incident, was only applicable to individuals and not to --

THE COURT: Corporations.

MR. KLEINROCK: -- corporations.

THE COURT: Right. Okay.

MR. KLEINROCK: So because it was, you know.

THE COURT: Do we have that file for this afternoon? So how do we proceed? Just a resentencing?

MS. THOMAS: Yes, Your Honor. As to Counts 1 through 5 only, because he was originally sentenced on all seven counts that he was convicted of after trial. That Your Honor reversed the conviction on a motion for new trial as to Count 6, which left the remaining count of identity fraud, which the Court of Appeals have now reversed.

So that -- they affirm the convictions for the five counts of forgery in first degree, so the State would just ask that he be resentenced to ten years to serve concurrent as to those remaining five counts and that the sentence sheet reflect the modified sentence.

THE COURT: All right. Mr. Kleinrock, you've asked to be heard to do something different?

MR. KLEINROCK: I am asking, Judge.

THE COURT: Your client can sit down and I'll hear from you.

MR. KLEINROCK: Thank you, Judge. I understand obviously Your Honor had discretion to do whatever you think is appropriate in this case.

I'll just very quickly summarize. Four checks were cashed over a five-day span by Mr. Martinez. They were totaling just under $500 for those checks that were cashed. And then about two and a half months later when he went in to cash Check Number 5 for just under $140, that's when he was arrested.

I want to highlight there's no evidence or even indication that he was the ring leader or even the guy who printed these checks. He just unfortunately repeatedly walked through that door and cashed them.

Obviously, he went to trial so, you know, acceptance of responsibility is something you will consider. There's not much I can say about that.

I believe he has no priors. I checked anyway. There's no notice of aggravation that I saw on OJS. I do not have the trial file unfortunately.

Once thing I'd say, it's true as far as the acts and the conduct remain the same. Nothing's really changed. What we've done is gotten rid of identity fraud.

I would ask the Court to consider, for me and I think for the legislature, identity fraud is really a worse crime and particularly when it involves individuals which we don't have here. It's really a nightmare when someone steals your identity and social security. I'm sure Your Honor, you know. But this was not a crime against an individual. This was not one of those worse crimes. These were basic forgeries.

Mr. Martinez is 45 years old now. Back at the time of these crimes, he was 37. I don't want -- should I keep going?

THE COURT: You should. What I'm looking for is the

sentencing sheet. I don't know if you all pulled --

MS. THOMAS: I have a copy of it.

THE COURT: You all pulled the file apart and sent it up to Appeals and because this was on the 1:30 calendar, I don't have my notes, which, you know, for certain lawyers around here I have become legendary about keeping good notes.

MS. THOMAS: I do have a copy, the State's copy of the sentence, Your Honor.

THE COURT: No, I want Mr. Kleinrock to finish his argument.

Okay, identity fraud is a nightmare crime but because those were kicked out I should do something different for Mr. Martinez.

MR. KLEINROCK: And not just because they were kicked out, but if you think about why they were kicked out because it wasn't a crime against individuals, which I think is really what makes it a nightmare crime. And when you take identity fraud out of the picture, I'm asking Your Honor to look at the case differently.

As I said, he's 45 years old now. He was 37 at the time. I believe he's got no priors. He lives in Roswell. Has been married for 18 years. His wife and 17-year-old son are present. His 8-year-old daughter is in school. He did go to college for one year at

Interactive College of Technology in Chamblee. The last job he worked was at a call center before his arrest.

So, you know, having the whole picture, I understand Your Honor can do whatever you think is appropriate.

THE COURT: He's been in seven years now.

MS. THOMAS: No.

MR. KLEINROCK: I think he was out --

MS. THOMAS: Your Honor, I tried this. This was my first trial in DeKalb County if the Court remembers back in May of 2012.

THE COURT: I'll tell you like I tell everybody else: No, I didn't.

MS. THOMAS: Okay. Well, I remember it because it was my first trial in DeKalb County Superior Court and Jerome Lee represented the defendant, and the victims of the forgeries --

THE COURT: Oh, I do remember that. That's when I was -- he made some analogy of --

MS. THOMAS: You remember the hypothetical.

THE COURT: -- the gazelle.

MS. THOMAS: Well, that and some other things.

THE COURT: But I do remember the trial.

MS. THOMAS: And the victims and the forgery counts were same the victims in the identity fraud counts. There were Staff Zone Labor Staff. The victims are the

same, Judge. And he was sentenced on July 24, 2011. The State recommended that he be sentenced to ten years to serve in prison to run concurrent on all counts. His wife and his child were also present at the sentencing hearing. I was not aware that Mr. Kleinrock was going to come in here and ask for something different. Otherwise, I'd have the victims present because I feel like if the Court is going to modify the sentence --

THE COURT: Well, I do remember because the company came in -- this was against a day laborer firm and the checks -- the police officer was pretty brash in how he got to it. I think there was a big motion to suppress that I denied. I thought they argued that the police officer, the way he conducted the investigation.

MS. THOMAS: There was a motion --

MR. KLEINROCK: That was something in closing.

MS. THOMAS: It was in the closing, but there was no motion to suppress so we didn't file a motion to suppress. But, yes, the victim -- it was -- there were two labor staffing companies and he had forged checks on the accounts, and they were -- the payroll checks had been written out to other individuals, not him, so there was a question as to how he even came to be in possession of the check numbers and their account numbers. And he done this and he had done this on five separate

occasions. The last time he was actually caught because they had flagged -- Tower Package Store had flagged the account because of the four counterfeit checks that he had previously cashed.

And so the State's -- I thought that the Court would just resentence him on the remain -- existing counts of convictions that were affirmed. Didn't realize they were going to come in here and ask for anything less; otherwise, I would have had the victims present. And if the Court is inclined to do that I would ask for it to be reset so that the victims could be here, and so they would have an opportunity to be heard.

Mr. Martinez Lara has his wife and his son here, and the State would just vehemently object to the sentence being reduced or modified just because he had the two convictions of identity fraud reversed. The forgery convictions remain. The victims are the same as to those counts, and we would just ask for him to be resentenced to ten years to serve concurrent as to Counts 1 through 5 which remain.

THE COURT: All right. Anything else, Mr. Kleinrock?

MR. KLEINROCK: I just -- I didn't quite get to the finale, which is we'd ask for maybe a sentence of five years.

THE COURT: This is Mr. Martinez Lara's problem with

the Court. He never stood up and accepted responsibility. He never, you know, he has maintained -- he looked at me. He eyeballed me. I didn't do it. I didn't do it. I didn't do it. And the evidence all said that he did it, and he went in there and he cashed these checks. I considered that.

I thought based on his attitude towards the charges, the effort that the State had to make to prove the charges, the defense of the case, I would resentence him to ten years to serve on the remaining counts with credit for time served. So I wouldn't change my sentence and I wanted him to know why.

Okay. Anything else, Mr. Kleinrock?

MR. KLEINROCK: Mr. Martinez has, I guess, discovered an issue that I didn't and he just notified me today. He's raising it on *habeas corpus*. But -- so I don't know the law, but -- and I confess I had not even thought of this until he pointed it out, but two checks were cashed on the same day. And I know for theft crimes if I steal your watch and your purse, that's one theft, you know. I don't know. It's two different items that were uttered, so I'm not really sure. He seems to think they would merge. I guess I'll just ask that they merge, the two May 30th, 2007 checks.

THE COURT: Well, you said he raised it on *habeas*

so...

MR. KLEINROCK: He is.

THE COURT: I'm confident that his procedural subsequent due process rights been not been violated.

Okay. Thank you, Mr. Kleinrock. Have a good day.

MR. KLEINROCK: Thank you.

[Proceedings concluded]

C E R T I F I C A T E

STATE OF GEORGIA :

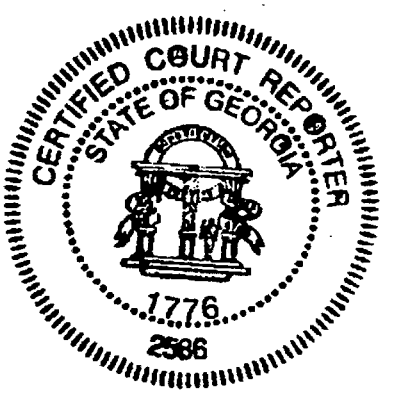
COUNTY OF COBB :

I, Kimberly Hunnicutt, Certified Court Reporter, do hereby certify that I reported in the above-captioned matter and reduced to print by me or under my supervision; pages 001 through 010 consisting of testimony of the above-captioned hearing, and constitutes to the best of my knowledge and ability a true and correct transcription of the said proceedings.

I further certify that I am neither a relative nor counsel to the parties herein, nor have any interest in the outcome of said proceedings.

This certification is expressly withdrawn and denied upon the disassembly and/or photocopying of the foregoing transcript or any part thereof unless disassembly and photocopying is done by the undersigned Certified Court Reporter and original signature and official seal attached thereto.

WITNESS my hand and official seal this 19th day of October 2014.



Kimberly Hunnicutt, CCR, CVR
Certified Court Reporter
Certificate Number: 2586

"H1"

STATEMENT OF ISSUES PRESENTED

First, concerning the ['*Right to Appeal:*'] An appeal is a Petitioner's request that an unfavorable ruling be reviewed. The right to immigration appeal is established -*f.ex.*- by statute, **INA §242 (2011)(8 U.S. Code §1252)** ~Judicial review of orders of removal.

Nevertheless, on April 16th, 2021, in its preliminary determinations, an **USCA11**'s panel **GRANTED** the government's motion to dismiss **VIVAS**'s "*Petitions for Review*" **20-14767** and **20-14815**. The Panel erroneously found the Court's *Lack of Jurisdiction* and **DENIED** all pending motions as **MOOT** by determining that the contested February 8th, 2012 "*Final Administrative Removal Order*" did **NOT** qualify for review, simply because the "*Petition for Review*" of the **DHS's** administrative action was already *untimely*, pursuant to **INA §242(b)(1)(8 U.S. Code §1252(b)(1); *Chao Lin v. U.S. Att'y Gen.***, 677 F.3d 1043, 1045 (11th Cir. 2012).

Consequently, the necessity of uniform interpretation of federal constitutional provisions is hereby called into existence. We'll see below how this panel's decision deviates -for instance- from a number of Federal common-laws on right to appeal, thus offending too the principle of *Uniformity*.

Unfortunately, the panel decision failed to observe, *inter alia*, that:

- The administrative agency did **NOT** even have personal jurisdiction at the time of making the decision;
- the **DHS**'s deciding Service officer substantially deviated from the agency's set-out policies; and
- pursuant to **INA §242(a)(2)(D)**, judicial review of *constitutional claims* or *questions* of law should **NOT** have been precluded.

On August 17th, 2021, **VIVAS** timely filed his "*Petition for a Writ of Certiorari to the U.S. Court of Appeals for the 11th Circuit.*" On January 11th, 2022, the case was docketed **21-6808**: Such "*lack of uniformity*" was presented before the U.S. Supreme Court. On February 28th, 2022, the Petition was **DENIED**.

Now, an appeal is also a process of civil-law origin and has been used to review errors of fact and law. Regardless, both **USCA11** withheld issuance of the mandate; and its Clerk's rejected any further motion to *vacate* the *clearly erroneous* decision as well as to reinstate motions, (such as for *Reconsideration*) the appeal is ***closed*, Period**... **NO** formal closure, though!

In complete disregard for **VIVAS**'s right to appeal, See *e.g.* **FRAP 4.**

Please Mr. Roberts, your Honor, this is **NOT** any instance of Justice-shopping! It's been more a matter as though, this way, the ends of justice will never be met!

Here's a reasonable proposal:

Persuade **USCA11** to voluntarily relinquish its jurisdiction.

We'll see below more details how much **VIVAS**'s due process rights have been unconstitutionally abridged or even denied. In fact,

VIVAS's right to appeal is of constitutional magnitude!

Moreover, apropos of ['*Right to Due Process of Law*':[1]] In order to meet the reliability, and *procedural-due-process* requirement, the U.S. Constitution requires that all evidence admitted must comport with the utilitarian purpose of the "*Due Process Clause.*"

Let's focus upon factual allegations which *substantially* may matter[2]:

◊ On July 22nd, 2002, **VIVAS** entered the U.S. via direct flight **CARACAS/ATLANTA.** After inspection, he obtained a **B1** visitor visa.
◊ On February 8th, 2010, **VIVAS** was *unlawfully*[3] arrested and escorted to the Roswell Police Department. He was booked-in for "*Loitering-and-Prowling,*" **O.C.G.A. §16-11-36.** After only few hours, **VIVAS** was subsequently bound over to Dekalb Co. Jail (**NOT** Fulton Co.).

It is important to remark that **VIVAS**, therefore, did **NOT** qualify for *expedited removal*; so, he was supposed to be deemed under the panoply of equal protections guaranteed by the 5th Amnedment to the U.S. Constitution.

Let's keep "*Shadow Proceedings*" within "*Summary Processes*" in mind, as well as how a criminal conviction was deemed necessary as to set-up an "*administrative removal,*" then.

◊ **VIVAS** was booked-in Dekalb Co. Jail under "John Doe," allegedly for failure-to-appear. The computer didn't show **FTA** on what!
◊ On February 19th, 2010, **VIVAS** met two Immigration officers, who provided him a defective "*Notice-to-Appear.*"

Whereas, he showed them his armband and explained that his name was **Zenith E. Vivas** natural ~from **Venezuela**; the **NTA** did **NOT** reflect so; there were **NO** criminal charges on the **NTA**; and the same did lack essential time and **place** information: When or where were the proceedings will continue on...

As a stipulation with **IOs**, **VIVAS** refused-to-sign the **NTA**!

The **NTA in removal proceedings under section 240 of the Immigration and Nationality Act** "*in the record of proceeding*" seems as though the same was corrected; also as though it was *cancelled*.

◊ It is important to highlight, that for **FTA**, the defendant usually sees the judge within two weeks; and then, a way out is provided. Here, it took ca eight months for a public defender to come interview the defendant, clear up that the two-weeks deal was a lie; correct the name on the armband to Rodolfo Martinez; and reclassify him to a *non-violent* section.
◊ Within four more months, **VIVAS** could find out the discovery package.

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1. ***United States v. McDonald***, 55 MJ 173 (*a fundamental requirement of due process is that individuals subjected to proceedings by the Government are entitled to the safeguards established in the governing statutes and regulations, and that the Government must follow the prescribed procedures, regardless whether they are constitutionally required*).
Available at: https://www.armfor.uscourts.gov/newcaaf/opinions/2001Term/00-0544.htm
2. At Briefing **VIVAS** will show more details and supporting evidences.
3. There's a likelihood for a "*unlawful arrest lawsuit.*" See Exhibit at the end of the Statement.

◊ No right to Speedy Trial, No Challenge to the Investigation and Prosecution, and No Demurrer to the indictment (even though constitutionally challenging charges) were ever admitted or allowed at Pre Trial, much less assessed by the Dekalb Co. Superior Court.

◊ On May 9th, 2011, even before any potential juror stepped into the Courtroom, Hon. Mark A. Scott (Trial Judge) announced a 75 years sentence. The indictment was never returned by Grand Jury Bailiff in Open Court... *The indictment went on*!

◊ On May 11th, 2011, a jury found the defendant guilty of:

- Two (02) counts of "*Financial Identity Fraud*," **O.C.G.A. 16-9-121** and
- Five (05) counts of "*Forgery in the First Degree*," **O.C.G.A. 16-9-1.**
- **VIVAS** appealed right away and moved for "*New Trial*."

◊ On June 29th, 2011, **VIVAS** was sentenced to serve ten (10) years for each conviction (all sentences running concurrent).

He wasn't present at the Sentencing hearing!

◊ On November 21st, 2011, **VIVAS** was placed in the custody of the Georgia Department of Corrections **(GaDOC)**. He was transferred to the same main compound where Immigration court is set-out and Service officers were at.

◊ On February 8th, 2012, an "*Issuing Service Officer*" *summarily* issued a "*Notice of Intent to Issue a Final Administrative Removal Order*" pursuant to section **238(b)** of the Immigration and Nationality Act (Act) as amended, **8 U.S. Code 1228(b)**. **VIVAS** was **not** aware at all that the Department of Homeland Security (Department) had determined that he was amenable to *administrative* removal proceedings.

It wasn't but until August 15th, 2013 @ 09:20 when he was personally served!

◊ On February 8th, 2012, a "*Deciding Service Officer*" also *summarily* issued the "*Final Administrative Removal Order*" at challenge. **DHS** made the following two (02) findings of fact and conclusions of law:

> • I further find that you have a final conviction for an aggravated felony as defined in section **101(a)(43)(R)** of the Immigration and Nationality Act (Act) as amended, **8 U.S. Code 1101(a)(43)(R)** ...
> • I further find that the administrative record established *by clear, convincing and unequivocal evidence* that you are deportable as an alien convicted of an aggravated felony pursuant to section **237(a)(s)(A)(iii)** of the Act, **8 U.S. Code 1227(a)(2)(A)(iii)**.

It wasn't but until March 19th, 2018 @Stewart Detention Center, after completing his criminal sentence, when he was personally served!

◊ Here, your Justice, it is paramount important to remark that **VIVAS** was in the custody of the **GaDOC** at the very same compound where the Immigration court and Service Officers were at. He was simply oblivious because of the lack of notice even though he was only a simple call-out away.

Therefore, any *Failure-to-Appear*, **(FTA)** as in the case at bar, wholly was through **NO** fault of the non-citizen, C.f. also **8 C.F.R. §1003.2(c)(3)(i)**.

Due process concerns that might arise because of so many *irregularities in obtaining the order* include, but by **NO** means are limited to:

- Lack of an impartial adjudicator;
- Failure to duly serve the "Final Administrative Removal Order;"
- Lack of notice and opportunity to be heard;
- Lack of a full and fair hearing —including the right to inspect the evidence accompanying the charges;
- Lack of meaningful opportunity to present and rebut evidence;
- Inability to develop an adequate administrative record; and
- Erroneous aggravated felony determination.

Why should the Court view the Petitioner's *right to appeal* as an element of '*due process of law*'?

In the present case, this last item alone does require the honorable intervention of the U.S. Supreme Court. So, for the purpose of adjudication upon the merits, the right to an *evidentiary hearing* may be assured, as well as the subsequent *judicial review.*

◊ Right after Personal Service, on March 22nd, 2018, **VIVAS** replied with a "Motion to Reopen to Rescind an *In-Absentia* Order," pursuant to **8 C.F.R. 1003.23(b)(4)(ii)**. **NO** answer to the motion.

Furthermore, in view of ['*Right to Judicial Review*'] first thing that stands out from Due process concerns, (above) is the necessity of Review for an "*Abuse of Discretion*:"

◊ When the **DSO** found "... *you have a final conviction...*;" and proceeded on to sign the **FARO**, the officer actually broke **DHS**'s policies and went against procedures already set out in "*Administrative Removal Proceedings Manual*" (M-430, Rev. June 4, 1999). Even worse, in his/her refusal to Terminate proceedings, he/she's stirred up more "*Removability Issues*" that still need to be resolved, such as:

- The conviction had been on direct appeal, See ***Martinez v. State***, 750 S.E.2d 504 (GA Ct. App Decided Nov. 21, 2013) therefore it was ***nonfinal***; and thus, what the **DSO** found was actually **NOT** a sufficient basis upon which to ground the removal order;
- *At direct Appeal, Id Fraud'* s convictions and sentences were found to be *unconstitutional*; and as a result, they were *reversed*;

The prevailing law had long held *reversal* of a conviction eliminated its immigration effects.

- **VIVAS**'s "Motion to Reopen to Rescind an *In-Absentia* Order," actually set forth at its basis:
  - ♦ He failed to file a timely petition but the failure was excused;
  - ♦ the NTA was improvidently issued; and
  - ♦ circumstances in the case have changed.

◊ When the **DSO** found "... *the administrative record established by clear, convincing and unequivocal evidence that you are deportable...;*" what actually stood out was the necessity of a "*de Novo*" Review:

• Being true that an agency does enjoy a presumption that it properly designated the administrative record absent clear evidence to the contrary, it's also true that the agency does **NOT** unilaterally determine what constitutes the administrative record.[4]

• Being true that the courts limit the review "*to the record actually before the agency... to guard against courts using new evidence to 'convert the 'arbitrary and capricious' standard into effectively de novo review;*[5]" well it's also true, that the judicial presumption of the administrative record's regularity is clearly susceptible to a challenge, here.

VIVAS does acknowledge, that his present application of remedies in the "*record*" case may pose significant issues for the agency; —**DHS**— nonetheless, rules of procedure —such as **Fed. R. App. P. 16(b)** provides that certified administrative records in review of certain final agency action may be amended by stipulation or the court may order a supplemental record.[6] On the other hand, in order for the "*Preparation of the Administrative Record for Judicial Review,*" **Fed. R. App. P. 30** provides for the parties to file a joint appendix of those portions of the record cited by the parties.

Actually, both of these approaches are adaptable to the review of a certified administrative record of a rulemaking, as well as both are in accordance with this honorable court's practice.

• In order to resolve questions regarding the presumption of regularity, (raised above) **VIVAS** respectfully prays for an opportunity to file an appendix to his prime or opening brief containing those documents necessary for the court's review, including but not limited to: Resentencing and Transcripts of New Trial Hearing.

Notably, however, the agency —**DHS**— must still serve **VIVAS** with the full record.[7] The D.C. Circuit has also utilized a deferred appendix.[8]

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4. Bar MK Ranches, 994 F.2d at 739-40 (stating that the administrative record enjoys the same presumption of regularity afforded to other established administrative procedures); San Luis Obispo Mothers for Peace v. Nuclear Regulatory Comm'n, 751 F.2d 1287, 1324 (D.C. Cir. 1984) (noting that "[i]n discharging their obligation to monitor agency action, courts review a record compiled by the agency").

5. ***Axiom Res. Mgmt., Inc. v. United States***, 564 F.3d 1374, 1380 (Fed. Cir. 2009) (quoting ***Murakami v. United States***, 46 Fed. Cl. 731, 735 (2000)).

6. Fed. R. App. P. 16(b). Although the rules technically apply to review of specific agency orders, **28 U.S. Code §2112**, the process is adaptable to petitions for review of rulemaking.

7. Service of a complete record would necessarily include service of material that has been incorporated by reference into the text of regulations, which may require the agency to purchase sufficient copies to serve all parties. See generally Administrative Conference Recommendation 2011-5, Incorporation by Reference. Reference and bibliography of generally available works in the preambular explanation of a rule poses substantially less difficult issues.

8. See, e.g., ***Nat'l Ass'n of Mfr.s v. SEC***, **No. 12-1422**, D.C. Cir. No. 12-1422, Doc. No. 1406287 (D.C. Cir. filed Nov. 21, 2012) ("Pursuant to Fed. R. App. P. 30(c), this Court's Local Rule 30(c), and the Clerk's Order of October 22, 2012, Petitioners ... state that they have agreed with the [SEC] to utilize a deferred joint appendix.

Finally, in relation to ['*Right of Access to Justice*'] the same may be understood as the individual's right to obtain the protection of the law and the availability of legal remedies before a court or other equivalent mechanism of judicial or quasi-judicial protection. This is a principle of both customary law on the treatment of aliens and human rights law. This type of protection is a *sine qua non* for any type of constitutional democracy, where the rule of law and the independence of the courts, rather than the benevolence of the ruler, provide the fundamental guarantees of individual rights and freedoms.[9]

Wherever there is constitutional democracy and the universal recognition of human rights, non-citizens may invoke '*denial of justice*:' A wrongful act for which international responsibility may arise and in relation to which an interstate claim and diplomatic protection may be made by the national state of the victim.

There's **NO** need to advance thus far, mainly because the principle of the '*minimum standard of justice*' is already engraved in the U.S. Constitution. Maybe **NOT** within the '*Bill of rights*,' but as the words of the First Amendment itself have established six rights: **(1)** the right to be free from governmental establishment of religion (the "Establishment Clause"), **(2)** the right to be free from governmental interference with the practice of religion (the "Free Exercise Clause"), **(3)** the right to free speech, **(4)** the right to freedom of the press, **(5)** the right to assemble peacefully (which includes the right to associate freely with whomever one chooses), and **(6)** the right to petition the government for redress of grievances.

This principle presupposes that the individual who has suffered an injury at the hands of public authorities must be afforded the opportunity to obtain redress before a court of law or appropriate administrative agency.

I hereby certify that the facts (above stated) are true to the best of my knowledge, belief and understanding. Nothing has been concealed therefrom.

Very respectfully,

KAREN PIERANGELI NOTARY PUBLIC DISTRICT OF COLUMBIA EXP. 06/14/2026

4/5/2023

/s/ _____

Zenith E.Vivas - DHS-A200-599-097
Pro Se Petitioner
118 Green House Dr.
Roswell, GA 30076
Tel.: +1(302)219-4670

9. Inter-American Commission on Human Rights (the "IACHR" or "Inter-American Commission") **ACCESS TO JUSTICE AS A GUARANTEE OF ECONOMIC, SOCIAL, AND CULTURAL RIGHTS. A REVIEW OF THE STANDARDS ADOPTED BY THE INTER-AMERICAN SYSTEM OF HUMAN RIGHTS** Available at: https://www.cidh.oas.org/countryrep/AccesoDESC07eng/Accesodesci-ii.eng.htm

INCIDENT/INVESTIGATION REPORT

INCIDENT DATA

Agency Name	Case#
Roswell Police Department	*1000-013670*
ORI *GA0600500*	Date / Time Reported *02/08/2010 16:26 Mon*
	Last Known Secure *02/08/2010 15:12 Mon*
Location of Incident *FRAZIER ST, Roswell GA 30075-*	Premise Type *Other/unknown* / Zone/PARK *C1*
	At Found *02/08/2010 16:20 Mon*

	Crime Incident(s)	(Com)	Weapon / Tools	Activity
#1	*Arrest On Warrant LWF174*		*Unknown,*	
			Entry / Exit / Security	
#2	Crime Incident	( )	Weapon / Tools / Activity	
			Entry / Exit / Security	
#3	Crime Incident	( )	Weapon / Tools / Activity	
			Entry / Exit / Security	

MO

VICTIM

# of Victims *0* | Type: | Injury:

	Victim/Business Name (Last, First, Middle)	Victim of Crime #	DOB / Age	Race	Sex	Relationship To Offender	Resident Status	Military Branch/Status
V1								

Home Address | Home Phone

Employer Name/Address | Business Phone | Mobile Phone

VYR	Make	Model	Style	Color	Lic/Lis	VIN

OTHERS INVOLVED

CODES: V- Victim (Denote V2, V3) O = Owner (if other than victim) R = Reporting Person (if other than victim)

Type: | Injury:

Code	Name (Last, First, Middle)	Victim of Crime #	DOB / Age	Race	Sex	Relationship To Offender	Resident Status	Military Branch/Status

Home Address | Home Phone

Employer Name/Address | Business Phone | Mobile Phone

Type: | Injury:

Code	Name (Last, First, Middle)	Victim of Crime #	DOB / Age	Race	Sex	Relationship To Offender	Resident Status	Military Branch/Status

Home Address | Home Phone

Employer Name/Address | Business Phone | Mobile Phone

PROPERTY

1 = None 2 = Burned 3 = Counterfeit / Forged 4 = Damaged / Vandalized 5 = Recovered 6 = Seized 7 = Stolen 8 = Unknown
("OJ" = Recovered for Other Jurisdiction)

VI #	Code	Status Frm/To	Value	OJ	QTY	Property Description	Make/Model	Serial Number

Officer/ID# *JONES, O. A. (454)*

Invest ID# *(0)* | Supervisor *BATES, D. O. (65)*

Status | Complainant Signature | Case Status *Cleared By Arrest / Citation Issued 02/08/2010* | Case Disposition:

R_CS1IBR | Printed By: JWILSON, | Sys#: 938633 | 03/02/2021 08:15

INCIDENT/INVESTIGATION REPORT

Roswell Police Department

Case # *1000-013670*

Status Codes 1 = None 2 = Burned 3 = Counterfeit / Forged 4 = Damaged / Vandalized 5 = Recovered 6 = Seized 7 = Stolen 8 = Unknown

	IBR	Status	Quantity	Type Measure	Suspected Type	
DRUGS						

Assisting Officers

Suspect Hate / Bias Motivated:

INCIDENT/INVESTIGATION REPORT

Roswell Police Department

Narr. (cont.) OCA: 1000-013670

NARRATIVE

----------Incident Report----------

Reporting Officer: (454) JONES, OMARSAIEED
Added By Employee: (454) JONES, OMARSAIEED

Added Date: 02/08/2010

On 02-08-10 at or about 1510 hours Officer Pantelis and I were conducted a premise check on foot of the rear parking lots of 1023 Alpharetta Street when we observed several males walking away from the parking lot towards Frasier Street Apartments. We identified ourselves and made contact with several male subjects. All the male subjects advised that they were standing around waiting for employment. I advised the males that what they were doing was loitering. I then made contact with ZENITH ERICH VIVAS, who was with the males standing around. VIVAS stated that he was looking for work. A records check of VIVAS indicated an active arrest warrant through Dekalb Co. S.O. for Fraud - Forgery 1st Degree 3 counts (NIC # W358154558). The name on the warrant was RODOLFO MARTINEZ-LARA with an alias name of ZENITH ERICH VIVAS.
VIVAS stated that he did not have any photo identification on his person. VIVAS advised that he does not know a MARTINEZ-LARA. A records check of the AS400 indicated that MARTINEZ-LARA was an alias of VIVAS. Roswell Dispatch confirmed the warrant, and Dekalb Co. placed a hold for VIVAS. I placed VIVAS under arrest and secured him in the backseat of my patrol car. I transported VIVAS to the Roswell Detention Center, without incident, and turned him over to staff for booking. VIVAS was advised of the charges on the warrant. I also issued VIVAS a citation for Loitering. I recorded the information for my report, and returned to service. No further action taken.

Incident Report Suspect List

Roswell Police Department

OCA: *1000-013670*

1

Name (Last, First, Middle)	Also Known As	Home Address
VIVAS, ZENITH ERICH	*MARTINEZ-LARA, RODOLFO; MARTINEZ, RODOLFO LARA;*	*605 EAGLES CREST VILLAGE LN - 1 ROSWELL, GA 30076 770-410-9095*

Business Address *UNEMPLOYED, CONSTRUCTION*

DOB	Age	Race	Sex	Eth	Hgt	Wgt	Hair	Eye	Skin	Driver's License / State.
[redacted]/1969	*40*	*W*	*M*	*H*	*508*	*140*	*BRO*	*BRO*	*OLV*	*NOT LICENSED*

Scars, Marks, Tattoos, or other distinguishing features

Reported Suspect Detail	Suspect Age	Race	Sex	Eth	Height	Weight	SSN

Weapon, Type	Feature	Make	Model	Color	Caliber	Dir of Travel / Mode of Travel

VehYr/Make/Model	Drs	Style	Color	Lic/St	VIN

Notes

Physical Char

Hair Length, Medium
Hair Facial, Slight Beard
Build, MEDIUM
Hair Facial, Clean Shaven
Hair Length, Short

ROSWELL
GEORGIA
SINCE 1854

DISPOSITION

NAME: ZENITH, ERICH VIVAS
ADDRESS: 605 EAGLE CREST, ROSWELL, GA 30076
DOB: 9/03/1969

DATE OF VIOLATION: 2/08/2010

STATUS/DISPOSITION: NOLLE PROSE

CITATION# G0120010

CHARGE: DISORDERLY CONDUCT

CODE SECTION: ORDI 13.1.1

CASE NUMBER: 2010013670

PLEA:

COURT CLOSED DATE: 10/16/2012

VERDICT:

AMOUNT PAID: 0.00

COMMENTS:
NO PROBABLE CAUSE

ROSWELL MUNICIPAL COURT
FULTON COUNTY GEORGIA
This is a true and accurate copy of the
original instrument on file in the office
of the Court Clerk
Issued this 5 day of March, 2021.
Clerk/Deputy Clerk Court seal required

City of Roswell Georgia
SEAL
Municipal Court

"H2"

SELECT CIRCUIT COURT CITATIONS

First Circuit

Rosales Justo v. Sessions, 895 F.3d 154, 167 (1st Cir. 2018) (holding that the BIA misapplied clearly erroneous standard when it overturned an IJ's finding that the Mexican government was unable or unwilling to protect respondent from persecution and remanding).

Second Circuit

Wu Lin v. Lynch, 813 F.3d 122, 129-31 (2d Cir. 2016) (remanding for correct application of clear error review standard to IJ's negative credibility determination and citing cases).

Alom v. Whitaker, 910 F.3d 708, 713-14 (2d Cir. 2018) (remanding because "the BIA's commentary implies that it applied only clear error review to the entirety of the good faith marriage determination . . . and did not contemplate its authority to reweigh the evidence or to conclude that the IJ's legal conclusions were insufficient").

Third Circuit

Sheriff v. Att'y Gen., 587 F.3d 584, 592-93 (3d Cir. 2009) (finding that "[i]t is difficult, if not impossible, to determine what standard of review the BIA applied, and to what determinations" and remanding with instructions to apply bifurcated standard of review to determination of whether DHS rebutted presumption of well-founded fear).

Kaplun v. Att'y Gen., 602 F.3d 260, 272-73 (3d Cir. 2010) (remanding where the BIA impermissibly applied de novo review to IJ's factual findings underlying his determination that the respondent would likely face torture upon removal to home country).

Myrie v. Att'y Gen., 855 F.3d 509, 516-17 (3d Cir. 2017) (remanding where the BIA erroneously applied clear error review, instead of bifurcated review, to petitioner's claim that government in country of origin would acquiesce in torture).

Fourth Circuit

Duncan v. Barr, 919 F.3d 209, 215 (4th Cir. 2019) (concluding that "whether a foreign-born child was in the 'physical custody' or her citizen parent under the CCA is a mixed question of fact and law," and thus IJ determinations were subject to bifurcated review by BIA).

Upatcha v. Sessions, 849 F.3d 181, 185-87 (4th Cir. 2017) (remanding where the BIA had reviewed an IJ's good faith marriage determination for clear error, when this is in fact a mixed question of law "subject to a hybrid standard of review.").

Cruz-Quintanilla v. Whitaker, 914 F.3d 884, 889-92 (4th Cir. 2019) (holding that whether a government will acquiesce in torture is a mixed question of law and fact subject to a bifurcated standard of review, and remanding).

Fifth Circuit

Morales-Morales v. Barr, 933 F.3d 456, 467 (5th Cir. 2019) (remanding where the Board claimed to review IJ's grant of CAT protection for clear error but actually "impose[d] its own view on de novo review").

Alvarado de Rodriguez v. Holder, 585 F.3d 227, 229-30, 235 (5th Cir. 2009) (reversing and remanding a petition for review "[b]ecause the BIA applied the incorrect legal standard to conclude that the marriage was not entered into in good faith," applying a de novo, rather than clear error, review to IJ factual determinations).

Sixth Circuit

Hussam F. v. Sessions, 897 F.3d 707, 723 (6th Cir. 2018) (remanding petition for review where the Board recited the clear error standard, but erroneously "engag[ed] in de novo factfinding").

Tran v. Gonzales, 447 F.3d 937, 944 (6th Cir. 2006) ("Because BIA review under an incorrect standard of review implicates Tran's due process rights, we conclude that remand to the BIA is appropriate . . . .").

Seventh Circuit

Estrada-Martinez v. Lynch, 809 F.3d 886, 896-97 (7th Cir. 2015) (remanding for the Board to reconsider its denial of petitioner's CAT eligibility where it misapplied clear error review, substituting its own view of the evidence for the IJ's).

Rosiles-Camarena v. Holder, 735 F.3d 534, 537-39 (7th Cir. 2013) (remanding because the Board substituted its own judgement for the IJ's finding regarding likelihood of future persecution, rather than reviewing that finding for clear error).

Eighth Circuit

Waldron v. Holder, 688 F.3d 354, 360-61 (8th Cir. 2012) (remanding where "BIA set forth the correct standard of review at the outset of its decision," but "deviated from this standard" by performing its own factfinding).

Garcia-Mata v. Sessions, 893 F.3d 1107, 1110 (8th Cir. 2018) (remanding petition for review because the court could not "discern from the Board's decision whether it followed the governing regulations on standards or review" and "the Board never directly asserted that the immigration judge committed clear error").

Ninth Circuit

Vitug v. Holder, 723 F.3d 1056, 1063-64 (9th Cir. 2013) (holding that the BIA misapplied clear error review when it substituted its own findings of fact for the IJ's in a case regarding eligibility

Chart of Principal Cases, by Circuit	
First Circuit	• *Jobe v. INS*, 238 F.3d 96 (1st Cir. 2001). • *Nascimento v. Mukasey*, 549 F.3d 12 (1st Cir. 2008). • *Neves v. Holder*, 613 F.3d 30 (1st Cir. 2010). • *Bead v. Holder*, 703 F.3d 591 (1st Cir. 2013).
Second Circuit	• *Iavorski v. US INS*, 232 F.3d 124 (2d Cir. 2000). • *Zhao v. INS*, 452 F.3d 154 (2d Cir. 2006). • *Aris v. Mukasey*, 517 F.3d 595 (2d Cir. 2008). • *Rashid v. Mukasey*, 533 F.3d 127 (2d Cir. 2008).
Third Circuit	• *Borges v. Gonzales*, 402 F.3d 398 (3d Cir. 2005). • *Mahmood v. Gonzales*, 427 F.3d 248 (3d Cir. 2005). • *Luntungan v. Atty. Gen.*, 449 F.3d 551 (3d Cir. 2006). • *Alzaarir v. Atty. Gen.*, 639 F.3d 86 (3d Cir. 2011). • *Davies v. US INS*, 10 Fed. Appx. 223 (4th Cir. 2001) (per curiam).
Fourth Circuit	• *Akwada v. Ashcroft*, 113 Fed. Appx. 532 (4th Cir. 2004). • *Kuusk v. Holder*, 732 F.3d 302 (4th Cir. 2013).
Fifth Circuit	• *Ramos-Bonilla v. Mukasey*, 543 F.3d 216 (5th Cir. 2008). • *Toora v. Holder*, 603 F.3d 282 (5th Cir. 2010).
Sixth Circuit	• *Scorteanu v. INS*, 339 F.3d 407 (6th Cir. 2003). • *Harchenko v. INS*, 379 F.3d 405 (6th Cir. 2004). • *Tapia-Martinez v. Gonzales*, 482 F.3d 417 (6th Cir. 2007). • *Barry v. Mukasey*, 524 F.3d 721 (6th Cir. 2008). • *Mezo v. Holder*, 615 F.3d 616 (6th Cir. 2010). • *Gordillo v. Holder*, 640 F.3d 700 (6th Cir. 2011).
Seventh Circuit	• *Pervaiz v. Gonzales*, 405 F.3d 488 (7th Cir. 2005). • *Gaberov v. Mukasey*, 516 F.3d 590 (7th Cir. 2008). • *El-Gazawy v. Holder*, 690 F.3d 852 (7th Cir. 2012).
Eighth Circuit	• *Hernandez-Moran v. Gonzales*, 408 F.3d 496 (8th Cir. 2005). • *Pafe v. Holder*, 615 F.3d 967 (8th Cir. 2010). • *Valencia v. Holder*, 657 F.3d 745 (8th Cir. 2011).

Ninth Circuit	• *Socop-Gonzales v. INS*, 272 F.3d 1176 (9th Cir. 2001). • *Rodriguez-Lariz v. INS*, 282 F.3d 1218 (9th Cir. 2002). • *Fajardo v. INS*, 300 F.3d 1018 (9th Cir. 2002). • *Iturribarria v. INS*, 321 F.3d 889 (9th Cir. 2003). • *Avagyan v. Holder*, 646 F.3d 672 (9th Cir. 2011).
Tenth Circuit	• *Riley v. INS*, 310 F.3d 1253 (10th Cir. 2002). • *Galvez Piñeda v. Gonzales*, 427 F.3d 833 (10th Cir. 2005).
Eleventh Circuit	• *Avila-Santoyo v. U.S. Atty. Gen.*, 713 F.3d 1357 (11th Cir. 2013). • *Ruiz-Turcios v. U.S. Atty. Gen.*, 717 F.3d 847 (11th Cir. 2013).

for withholding of removal and CAT protection, and directing a grant of withholding of removal).

Rodriguez v. Holder, 683 F.3d 1164, 1170 (9th Cir. 2012) ("We do not rely on the Board's invocation of the clear error standard; rather, when the issue is raised, our task is to determine whether the BIA faithfully employed the clear error standard or engaged in improper de novo review of the IJ's actual findings.").

Zumel v. Lynch, 803 F.3d 463, 476-77 (9th Cir. 2015) (remanding where the BIA had recited the clear error standard of review, but overturned the IJ's factual findings based on "conclusory statements").

Tenth Circuit

Kabba v. Mukasey, 530 F.3d 1239, 1245-46 (10th Cir. 2008) (remanding where the BIA recited the clear error standard but did not defer to IJ's factual findings regarding a likelihood of future persecution).

Eleventh Circuit

Zhou Hua Zhu v. Att'y. Gen., 703 F.3d 1303, 1305 (11th Cir. 2013) (remanding where the BIA erroneously analyzed the petitioner's risk of future persecution "not through the prism of clear error review, but rather after its own de novo consideration of the evidence").

Meridor v. Att'y Gen., 891 F.3d 1302, 1306-07 (11th Cir. 2018) (holding that the BIA misapplied clear error review in an asylum case because its basis for overturning the IJ was that it "simply disagreed and 'was not persuaded'").

"H4"

IMMIGRATION COURT
146 CCA ROAD, P.O.BOX 248
LUMPKIN, GA 31815

IN THE MATTER OF ZENITH E. VIVAS
IN REMOVAL PROCEEDINGS

CASE NO.: A200599097

MOTION TO REOPEN TO RESCIND AN "IN-ABSENTIA" ORDER

Now comes, Zenith Erich Vivas – A#: 200599097, the respondent in the above captioned action, and pursuant to 8 U.S.C. §1229a moves, hereby, this Honorable Court to Reopen to Rescind Final Administrative Order: Event No. ATL1202000368, FIN # 1053244961, File Number A200599097, dated February 8, 2012. See (Exhibit marked as "A)."

Please be aware that, pursuant to 8 C.F.R. §1003.23(b)(4)(ii), this motion should be allowed. Also that, even though the 180-Day deadline is already "*due*," pursuant to INA§240(b)(5)(c), this motion should proceed at any time.

In order to support his challenge to finding of deportability as well as to show cause as to alien is newly eligible for relief, Vivas states his arguments as to buttress entitlement to relief, as to-wit:

1.- On September 3, 1969, Vivas was born in Caracas, Venezuela, where he is natural citizen, and where he was residing before entering this country.

2.- In September 2002, Vivas lastly entered the United States of America by means of a direct Delta flight from Caracas to Atlanta. He obtained a B1 – visitor visa. Shortly thereafter, he was granted an extension for his Stay (A copy of his full Venezuelan passport no. v-9.487.234 should be In-File).

3.-Vivas also unsuccessfully applied for a Student visa. He does acknowledge, that because of circumstances beyond his will and control, he did overstay.

4.- On June 29, 2011, Vivas was convicted to serve ten (10) years in the custody of the Georgia Department of Corrections under the name of Rodolfo L. Martinez – GDC ID: 1000602079, See Case no. 08-CR-2217-9, (Dekalb Co.) and he has NOT been released yet. As a result, any Failure-to-Appear (FTA) was through NO fault of the Alien.

5.- On March 16, 2018, D/O E. Almodovar served Vivas in person the Final Administrative Removal Order. (Above described) The removal was ordered under section 238(b) of the Immigration and Nationality Act.

6.- Said order states both: "*You have a final conviction for an aggravated felony as defined in section 101(a)(43)(R) ... and are ineligible for any relief from removal that the Secretary of Homeland Security, may grant in exercise of discretion;*" **and** "*I further find that the administrative record established by clear, convincing, and unequivocal evidence that you are deportable as an alien convicted of an aggravated felony pursuant to 8 U.S.C.§1227(a)(2)(A)(iii).*" Both are points of contention.

7.-Should this Court issue an Order to Show Cause, Vivas has further reasons to believe, that even though he was convicted for two (02) counts of Financial Identity Fraud, O.C.G.A.§16-9-121, and five (05) counts of Forgery in the First Degree, O.C.G.A.§16-9-1, ("aggravated felonies") and do NOT have lawful permanent status in this country; yet further development of his criminal appeal – See e.g. A13A1445, Court of Appeals of Georgia; S17H0804, Supreme Court of Georgia; and 1:17-CV-4976, U.S. District Court for the Northern District of Georgia – may newly reveal that Vivas is NOT removable.

8.- It is important to remark, that: (a) Vivas did never obtain any Notice to Appear **(NTA)** as for him to be aware of the commencement / initiation of Removal Proceedings against him and, therefore, he's never had a fair opportunity to obtain an attorney or representative; (b) Vivas did never receive any Notice of Hearing in Removal Proceedings, so as to be aware of any hearing or that Failure-to-Appear **(FTA)** at said alleged hearing may result in either: He may be taken into custody by the Department of Homeland Security and held for further action OR such hearing may be held in his absence (In-Absentia) under section 240(b)(5) of the Immigration and Nationality Act.

Vivas may have been denied, this way of his Fundamental Due process right to "Notice and Hearing."

9.- Vivas was never provided either with any Notice of Rights and Advisals. Let's say for instance: Even though Vivas has illegally been in the United States, he still has the right to a hearing before the Immigration Court for determination of whether he may remain in the United States, and/or whether he may be eligible to be released from detention with or without payment of bond.

10.- Vivas does acknowledge, moreover, that he's been without legal status for over one year; notwithstanding, he also has reasons to believe, that his Final Administrative Removal Order under section 238(b) of the Immigration and Nationality Act should be deemed *unenforceable* and *illegal*.

Whereas Vivas did never have the opportunity to review (or deny) any charges against him;

Whereas Vivas did never give the Court information about his case, so as to identify and narrow its factual and legal issues;

Whereas Vivas did never examine any evidence against him and/or question (confront) any witness(es) against him;

Whereas Vivas has never been previously removed (or deported);

WHEREFORE Vivas respectfully prays for this Honorable Court will grant him a Hearing, so he may gain a fair opportunity to explain the reasons why he believes his deportation / removal should be cancelled.

In a clear understanding, that giving false information will be subject to Perjury charges, pursuant to 18 U.S.C.§1621, I do declare hereby, that the foregoing information provided by me in support of the challenge to Removal Proceedings is true and correct to the fullest extent of my knowledge and understanding.

Very respectfully submitted, this 22nd day of March, 2018.

Z Vivas

Zenith E. Vivas
A#: 200599097
STEWART DETENTION CENTER 6A/217-B
146 CCA Road, P.O.Box 248
Lumbkin, Georgia 31815

Forsyth, April 29, 2013

"H5"

To: Calvin Palmer
U.S. Dept. of Homeland Security
180 Spring Street
Atlanta, GA 30303

From: Martinez, Rodolfo
(A.K.A. Zenith Vivas)
GDC ID #: 1000602079
BURRUSS C.T.C. - K2T/117T
P.O. Box 5849
FORSYTH, GA 31029-5849

A200 599 097

Matter: Renewing Application for Stay of Deportation or Removal.

Mr. Palmer,
as a matter of Background, and in order to further information from previous "Application for Stay of Deportation or Removal" (*) (submitted in or about November 2011), allow me please to let you know that being true that I've been incarcerated since February 8, 2010, serving a sentence of ten (10) years for case # 08CR2217-9 (originated in Dekalb County, Georgia); it's also true that this case is currently being heard by the Honorable Court of Appeals of Georgia - case # A13A1445, which will be decided by December 16, 2013.

Also that all other previous, pending charges, since November 2011 before the Honorable Fulton County Superior Court, have been Nolle Prosequi by the State or placed upon the Dead Docket for already longer than one year; And that there are no previous convictions on my records.

turn back

(*): I haven't heard of this application yet.

WHEREFORE, I very respectfully pray for this Honorable Court that my previous Application be renewed, that it be updated with above information; and that I be granted with enough time of Stay, so that I may proceed with my Appeal.

Submitted this 29 day of April, 2013.

Z. VIVAS

MARTINEZ, RODOLFO
(A.K.a. ZENITH VIVAS)
GDC ID #: 1000602079
BURRUSS CTC - K2T/117T
P.O. BOX 5849
FORSYTH, GA 31029-5849

Alamo, JUN. - 24, 2014

TO: CALVIN PALMER
U.S. DEPT. OF HOMELAND SECURITY
180 SPRING STREET
ATLANTA, GA 30303

FROM: MARTINEZ, RODOLFO
(A.K.A. ZENITH VIVAS)
GDC ID #: 1000602079
WHEELER CORRECTIONAL FACILITY
9N3/10B
P.O. BOX 466
ALAMO, GA 30411-0466

MATTER: RENEWAL OF APPLICATION FOR STAY OF DEPORTATION OR REMOVAL PROCEEDINGS (FILE NO.: A-200 599 097).

MR. PALMER:

AS A MATTER OF BACKGROUND, IT'S BEEN LONGER THAN ONE YEAR THAT I WROTE YOU TO RENEW MY PREVIOUS APPLICATIONS FOR STAY OF DEPORTATION / REMOVAL PROCEEDINGS. IN FACT, I HAVEN'T HEARD OF ANY OF THESE APPLICATIONS YET.

FOR YOUR INFORMATION, CASE NO.: S14C0575 WAS ORDERED BY THE HONORABLE SUPREME COURT OF GEORGIA ON JUNE 2nd, 2014. MY PETITION FOR A WRIT OF CERTIORARI WAS DENIED. HOWEVER, I STILL WAS GIVEN THE OPPORTUNITY TO EXERCISE MY RIGHTS BEFORE THE HONORABLE U.S. SUPREME COURT, SEEKING FOR A WRIT OF CERTIORARI; AND AS COLLATERAL PROCEEDINGS, I STILL MAY SEEK FOR A WRIT OF HABEAS CORPUS.

I HEREBY AM LETTING YOU KNOW OF MY DECISIONS TO PROCEED BOTH WAYS. CIVIL ACTION NO.: 14-CV-066 IS PENDING BEFORE THE SUPERIOR COURT OF WHEELER COUNTY (COUNTY WHERE I'M CONFINED); AND I FILED TIMELY NOTICE OF INTENTION BEFORE THE U.S. SUPREME COURT.

(OVER)

IT'S IMPORTANT ,- MARK THAT ALL OTHER PREVIOUS PENDING CHARGES (IN FULTON CO. SUPERIOR COURT), WHICH HAVE BEEN NOLLE PROSEQUI BY THE STATE OR PLACED UPON THE DEAD DOCKET, ARE BEING HEARD BY HON. SARAH F. WALLS, JUDGE - SUPERIOR COURT OF WHEELER COUNTY - SEEKING FOR FINAL ADJUDICATION.

THERE ARE NO PREVIOUS CONVICTIONS ON MY RECORDS.

WHEREFORE, I VERY RESPECTFULLY PRAY FOR THIS HONORABLE COURT TO RENEW MY PREVIOUS APPLICATIONS; UPDATE THEM WITH THIS INFORMATION (ABOVE); AND GRANT ME ENOUGH TIME OF STAY, SO THAT I MAY PROCEED WITH MY APPEALS

DATED: JUNE 24, 2014.

VERY SINCERELY,

Z VIVAS

MARTINEZ, RODOLFO
(A.K.A. ZENITH VIVAS)
GDC ID#: 1000602079
WHEELER CORRECTIONAL FACILITY
9N3 / 10B
P.O. BOX 466
ALAMO, GA 30411-0466

P.S.: IF YOU WILL, PLEASE SEND ME TWO FORMS I-246 - "APPLICATION FOR STAY OF DEPORTATION OR REMOVAL.

Nos. 14-6570; 21-6808; 22-

In The
Supreme Court of the United States

ZENITH E. VIVAS,
DHS-A200-599-097,
Petitioner,

Vs.

OFFICE OF THE ATTORNEY GENERAL OF THE UNITED STATES;
MERRICK B. GARLAND, in his Official Capacity as Attorney General of the United States,
-And-
UNITED STATED DEPARTMENT OF HOMELAND SECURITY;
ALEJANDRO MAYORKAS, Secretary of Homeland Security
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
U.S. COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

The petitioner asks leave to file the attached petition for a writ of certiorari without prepayment of costs and to proceed *in forma pauperis*.

[✔] Petitioner has previously been granted leave to proceed *in forma pauperis* in the following court(s):

U.S. Court of Appeals for the District of Columbia Circuit; and

U.S. District Court for the Northern District of Georgia

[ ] Petitioner has not previously been granted leave to proceed *in forma pauperis* in any other court. Petitioner's affidavit or declaration in support of this motion is attached hereto. -N/A-

Petitioner's declaration in support of this motion is attached hereto.

/s/ Zenith E. Vivas
ZENITH E. VIVAS - DHS-A200-599-097
Pro Se Petitioner

Motion for Permission to Appeal In Forma Pauperis and Affidavit

United States Supreme Court

Zenith E. Vivas **U.S. SupremeCourt No. _____**

Petitioner,

- Vs. -

MERRICK B. GARLAND,
United States Attorney General;

-and-

ALEJANDRO MAYORKAS,
United States Department Homeland Security,
Secretary of Homeland Security

Respondents.

Instructions: Complete all questions in this application and then sign it. Do not leave any blanks: if the answer to a question is "0," "none," or "not applicable (N/A)," write in that response. If you need more space to answer a question or to explain your answer, attach a separate sheet of paper identified with your name, your case's docket number, and the question number.

Affidavit in Support of Motion

I swear or affirm under penalty of perjury that, because of my poverty, I cannot prepay the docket fees of my appeal or post a bond for them. I believe I am entitled to redress. I swear or affirm under penalty of perjury under United States laws that my answers on this form are true and correct. **(28 U.S.Code §1746; 18 U.S.Code §1621.)**

Date: **April 5th, 2023.** Signed: Zenith E. Vivas

1. ***My issues on appeal are:***

- PRO SE REQUEST FOR DISCOVERY;
- NON-COMPLIANCE WITH THE ADMINISTRATIVE PROCEDURE ACT, **5 U.S. Code §556(d)**
- MOTION TO ACCEPT NEW EVIDENCE;
- DENIAL OF DUE PROCESS;
- DENIAL OF EQUAL PROTECTION RIGHTS;
- DENIAL OF RIGHT TO PETITION THE GOVERNMENT FOR REDRESS OF GRIEVANCES
- MOTION TO VACATE AND REMAND DHS "FINAL ADMINISTRATIVE REMOVAL ORDER;"

Below, state any money you or your spouse have in bank accounts or in any other financial institution.

Financial Institution | Type of Account | Amount you have | Amount your spouse has

Your Honor, it's not only that I've lost contact with my spouse since my removal from the United States; but also, here in Venezuela most of the population (including me) do **not** have any kind of access to the banking system. For instance, it's been more than 7 years that here in Lara Branch Offices haven't open even one account.

If you are a prisoner seeking to appeal a judgment in a civil action or proceeding, you must attach a statement certified by the appropriate institutional officer showing all receipts, expenditures, and balances during the last six months in your institutional accounts. If you have multiple accounts, perhaps because you have been in multiple institutions, attach one certified statement of each account.

6. List the assets, and their values, which you own or your spouse owns. Do not list clothing and ordinary household furnishings.

Home (Value) -N/A-

Other Real Estate (Value) -N/A-

Motor Vehicle #1 (Value)

Make & Year: -N/A-
Model: -N/A-
Registration #: -N/A-

Your Honor, I do **NOT** own any home, real estate, motor vehicle, etc.

7. State every person, business, or organization owing you or your spouse money, and the amount owed:

Your Honor, nobody owes any significant amount of money to me.

8. State the persons who rely on you or your spouse for support.

Name [or, if under 18, initials only]	**Relationship**	**Age**
Myriam Camero	Mother	81 y

9. Estimate the average monthly expenses of you and your family. Show separately the amounts paid by your spouse. Adjust any payments that are made weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate.

	You	Your Spouse
For home-mortgage payment (include lot rented for mobile home)	$ 0	$ -N/A-
Are real-estate taxes included? X Yes ☐ No	$ 0	$ -N/A-
Is property insurance included? X Yes ☐ No	$ 0	$ -N/A-
Utilities (electricity, heating fuel, water, sewer, and telephone)	$ .75	$ -N/A-
Home maintenance (repairs and upkeep)	$ 0	$ -N/A-
Food	$ 1.-	$ -N/A-
Clothing	$ 0	$ -N/A-
Laundry and dry-cleaning	$ 0	$ -N/A-
Medical and dental expenses	$ 0	$ -N/A-
Transportation (not including motor vehicle payments)	$ 0	$ -N/A-
Recreation, entertainment, newspapers, magazines, etc.	$ 0	$ -N/A-
Insurance		
(not deducted from wages or included in mortgage payments)	$ 0	$ -N/A-
Homeowner's or renter's	$ 0	$ -N/A-
Life	$ 0	$ -N/A-
Health	$ 0	$ -N/A-
Motor Vehicle	$ 0	$ -N/A-
Other: -N/A-	$ 0	$ -N/A-
Taxes (not deducted from wages or included in mortgage payments) (specify): -N/A-	$ 0	$ -N/A-
Installment payments	$ 0	$ -N/A-
Motor Vehicle	$ 0	$ -N/A-
Credit card (name): -N/A-	$ 0	$ -N/A-
Department store (name):	$ 0	$ -N/A-
Other: -N/A-	$ 0	$ -N/A-
Alimony, maintenance, and support paid to others	$ 0	$ -N/A-
Regular expenses for operation of business, profession, or farm (attach detailed statement)	$ 0	$ -N/A-
Other (specify): -N/A-	$ 0	$ -N/A-
Total monthly expenses	$ 1.75	$ -N/A-

10. Do you expect any major changes to your monthly income or expenses or in your assets or liabilities during the next 12 months?

☐ Yes **X** No If yes, describe on an attached sheet.

11. Have you spent – or will you be spending – any money for expenses or attorney fees in connection with this lawsuit?

☐ Yes **X** No If yes, how much: $ -N/A-

12. Provide any other information that will help explain why you cannot pay the docket fees for your appeal: Your Honor, five (05) facts that I wish to present to this Court for its considerations:

- Just for your information your Honor:

  On CIVIL DOCKET FOR CASE #: **1:17-cv-04976-MHC** you may find this entry:

  * 01/11/2018 7 **ORDER GRANTING** In Forma Pauperis. The Court DIRECTS the Clerk to send by certified mail a copy of the petition and this order to Respondents and the Attorney General. Respondents shall SHOW CAUSE within 30 days why the writ should not be granted. Signed by Magistrate Judge Linda T. Walker on 1/8/18. (jpa) (Entered: 01/12/2018)

- Venezuela has been running under a different system other than Capitalism: Here's why most of the population (including myself) do **not** have access whatsoever to the financial system ... Sometimes, we are allowed restricted access to -f.ex.- Western Union Zelle svcs. But, such access has been suspended for over ten (10) months;

- I've been working for the Secretary of Education, teaching Math; but, the educational system has been shut down for the Pandemic Covid-19. I did submit request for a proof of Incomes; though, it may take weeks (if not months) for the same to arrive. In any case, best case scenario, monthly wages in this country do **not** exceed $2.50; and

- Communications from Venezuela to abroad ~ specifically with the United States, have been forbidden by the regime: Including Postal Svc. and/or Phone calls. Here's partly why I've lost contact with mi wife and family abroad.

- I'm able to work using the skills that I learned while in the GaDOC system: Carpentry, Electricity, Plumbing doing some maintenance; though, I mainly charge food & clothes. I also have been blessed with the Theological skills that I learned from Titus Baptist Seminary, and try to help others understand a better perspective to this whole situation.

13. State the city and state of your legal residence.
Caracas, D.C. ~ Venezuela.

Your daytime phone number: (302) 219-4670

Your age: 53 y Your years of schooling: 16

ORDER OF THE IMMIGRATION JUDGE

Upon consideration of the find Respondent's **MOTION FOR PERMISSION TO APPEAL IN FORMA PAUPERIS AND AFFIDAVIT, IT IS HEREBY ORDERED** that said motion be:

_____ **GRANTED** _____ **DENIED**

because:

_____ **DHS** does not oppose the motion.
_____ A response to the motion has not been filed with the court by opposing party.
_____ Good Cause has been established for the motion.
_____ The Court agrees with the reasons stated in the opposition.
_____ Motion is not timely.
_____ Other
_____ or Motion requires further briefing/action and the following **DEADLINES SHALL APPLY**:

Dated: _____

Hon. _____
Immigration Judge

_____

CERTIFICATE OF SERVICE

This document was served by: [ ] mail; [ ] personal service

To: [ ] Respondent; [ ] Respondent's attorney/rep.; [ ] Dept. of Homeland Security

Date: _____ By: Court Staff _____