

APPLYING METHOD TO THE MADNESS<sup>1</sup>: THE RIGHT TO COURT APPOINTED  
GUARDIANS *AD LITEM* AND COUNSEL FOR THE MENTALLY ILL IN IMMIGRATION  
PROCEEDINGS

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INTRODUCTION

A unique dilemma facing immigration judges (IJs) and practitioners today is how to address the acute problem of mentally ill respondents<sup>2</sup> appearing pro se in immigration removal proceedings. Mentally ill respondents are more likely to face deportation from a position of indigence and detention, both of which create substantial barriers to obtaining counsel. Even where represented, the mentally ill are less able to contribute to their defense or understand the proceedings against them. This lack of meaningful participation has cascading deleterious effects on respondents themselves, but also on our already overburdened immigration courts by creating docket delays, prolonged detention, and constitutional problems.

Many IJs have expressed concern about this issue and both judges and the immigration bar are in need of practical guidance. Fortunately, there is a path out of this bramblebush.<sup>3</sup> In these situations, IJs can—and must—appoint counsel and a guardian *ad litem* (GAL) to represent mentally ill respondents appearing pro se. Legislative action is not required because IJs already have the authority to make these appointments, which is derived from a variety of sources discussed herein.

In the recent Board of Immigration Appeals (BIA) decision *Matter of M-A-M*,<sup>4</sup> the BIA authorized IJs to prescribe safeguards for mentally ill immigrants facing deportation.<sup>5</sup> *Matter of*

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<sup>1</sup> See WILLIAM SHAKESPEARE, *HAMLET* act 2, sc. 2 (New Folger ed., Simon & Schuster) (2003) (“Though this be madness, yet there is method in ‘t’”).

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<sup>2</sup> “Respondent” is the term ascribed to individuals in removal proceedings. See Immigration and Nationality Act, 8 U.S.C. § 1001.1(r) (2009) (“The term respondent means a person named in a Notice to Appear issued in accordance with section 239(a) of the Act, or in an Order to Show Cause issued in accordance with § 242.1 of 8 CFR chapter I as it existed prior to April 1, 1997.”).

<sup>3</sup> KARL N. LLEWELLYN, *THE BRAMBLEBUSH: THE CLASSIC LECTURES ON THE LAW AND LAW SCHOOL* 157-58 (1951) (“[T]he rule follows where its reason leads; where the reason stops, there stops the rule.”).

<sup>4</sup> *Matter of M-A-M*, 25 I. & N. Dec. 474, 481-83 (B.I.A. 2011).

<sup>5</sup> After the passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 [hereinafter

*M-A-M* contains a non-exhaustive list of actions an IJ could take to ensure a fair hearing. While this list did not explicitly provide for the appointment of GALs, IJs have nevertheless invoked it—both *sua sponte* and on attorney motion—to appoint GALs to assist in removal proceedings.

While appointment of GALs is permitted under *Matter of M-A-M*, such appointments, without the concurrent appointment of counsel, have been insufficient to comport with due process, the Rehabilitation Act of 1973, and federal immigration law. GALs acting without the concurrent assistance of counsel have proven unable to adequately represent their wards. However, counsel acting without a GAL is equally problematic, as counsel may face ethical issues, conflicts of interest and testimonial challenges that impinge on effective advocacy. Further, relying on pro bono and non-profit representation is insufficient. Diminishing funding and the attendant reductions in staff and case capacity, as well as economic constraints in private firms, make reliance on pro bono representation capricious and imprudent. The solution for an IJ confronted with a mentally ill respondent is to concurrently appoint a GAL and counsel.

IJs have generally declined to appoint counsel when urged by amicus curiae in cases where mentally ill respondents are either pro se or represented solely by a GAL. Judges have cited lack of statutory authority, lack of established case law on the issue, and amorphous “ethical concerns.” However, IJs already have the authority to appoint counsel in these cases, when viewing the totality of relevant constitutional and statutory mandates, recent circuit court cases, the Supreme Court decision *Padilla v. Kentucky*,<sup>6</sup> and *Matter of M-A-M* itself. The Department of Homeland Security (DHS) has also stated that nothing in the Immigration and Nationality Act (INA) prohibits the appointment of counsel for the mentally ill in removal proceedings, and the Executive Office for Immigration Review (EOIR) has deputized IJs in the Immigration Judges’ Benchbook<sup>7</sup> to creatively take whatever measures are necessary to ensure due process for particularly vulnerable populations. If IJs continue to decline to appoint both counsel and a GAL, then they must terminate the proceedings to avoid the constitutional problems of an unfair hearing and the potential for indefinite detention.

Part I of this article details the growing problem of mentally ill individuals appearing pro se in deportation proceedings. Part II(A) discusses the BIA’s response to the problem in the form of its seminal decision *Matter of M-A-M*. Part II(B) examines the subsequent interpretation and application of that decision by IJs in cases involving both pro se respondents with mental illness, and those represented by counsel. A feature of this latter section will be to tell the stories of several mentally ill respondents in removal proceedings whose cases are illustrative of the various approaches taken by IJs and attorneys post-*Matter of M-A-M*.

Part III analyzes the insufficiencies of the IJs’ current approaches in these cases and illuminates why a scheme based on appointed GALs without counsel, or conversely, counsel without a GAL, fails to comport with due process. Included in this analysis is a discussion of why reliance on non-appointed non-profit organizations or pro bono representation is insufficient.

Part IV explains how IJs already have the authority to appoint counsel. It begins with a discussion and analysis of due process—specifically, the applicability of due process in the immigration context and the evolution of due process in the civil and criminal contexts in ways that re-

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“IIRAIRA”], Pub. L. No. 104-208, §§ (d)(4)(O)-(e)(1), 110 Stat. 3009 (1996), “deportation proceedings” and “exclusion proceedings” were unified into one process now referred to as “removal proceedings.” The authors use the term “removal” throughout with occasional references to “deportation.”

<sup>6</sup> *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010).

<sup>7</sup> U.S. Department of Justice, Executive Office for Immigration Review, *Introductory Guides, Mental Health Issues*, IMMIGRATION JUDGE BENCHBOOK (Apr. 23, 2010), <http://www.justice.gov/eoir/vll/benchbook/tools/MHI/>.

quire appointed counsel for the mentally ill facing deportation. Next is a close examination of recent case law flowing from the Supreme Court, federal appeals courts, and district courts which, when viewed in its totality, authorizes and even obligates IJs to engage in creative problem-solving when confronted with significant due process concerns. When the case law is considered with agency developments—including *Matter of M-A-M*, the EOIR Judges' Benchbook<sup>8</sup> recommendations on handling cases of mentally ill respondents, and a memorandum by the Department of Homeland Security on the feasibility of appointed counsel—the result is a symphony of authority yielding the conclusion that appointed counsel for the mentally ill in removal proceedings is ripe, already permitted, and required.

Finally, Part V proposes termination of cases where both counsel and a GAL cannot be appointed. Absent court-appointed counsel to represent a mentally ill respondent in all stages of deportation, immigration courts should find that the respondent will suffer irreparable harm, and therefore is entitled to termination of all proceedings until such time that counsel and a GAL can be secured. Without both, deportation proceedings against a mentally ill respondent are unconstitutional.

## I. THE PROBLEM: THE STACKING DISADVANTAGES FACING MENTALLY ILL NON-CITIZENS

Mentally ill immigrants<sup>9</sup> face unique and enormous challenges in immigration proceedings. Not only is it difficult for the mentally ill to effectively represent themselves in their removal cases, but their mental illness makes it difficult to obtain counsel. Thus, they are more likely to appear pro se, to lose their cases even when they have colorable claims for relief, to be detained, to have their mental illness exacerbated, and to be wrongfully removed. The frequent appearance of mentally ill respondents pro se presents serious challenges for already overburdened IJs.<sup>10</sup> It also often leads to unjust outcomes for the mentally ill, threatening the integrity of the immigration system.

Precise numbers on how many respondents in removal proceedings suffer from mental illness are elusive. Among U.S. citizens, at least, about six percent or one in seventeen people have a diagnosed mental illness.<sup>11</sup> According to the American Psychological Association, the prevalence of mental illness among immigrants is likely much higher than that of the native-born

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<sup>8</sup> *Id.*

<sup>9</sup> The authors of this article recognize that they are not psychiatrists, and that a vast spectrum of mental illness may necessarily inform the critical questions of competency—e.g., competent to do *what?* (testify, understand, corroborate information, make choices, confer with an attorney, etc.). In the interest of efficiency, here we adopt the Supreme Court definition of mental incompetency cited in *Matter of M-A-M*. That definition holds that a person is not competent to stand trial if “he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense.” 25 I.&N. Dec. at 478 (citing *Drope v. Missouri*, 420 U.S. 162, 171 (1975)).

<sup>10</sup> See Alice Clapman, *Hearing Difficult Voices: The Due-Process Rights of Mentally Disabled Individuals in Removal Proceedings*, 45 NEW ENG. L. REV. 373, 391 (2011) (noting that IJs must decide approximately four cases a day, roughly twice as many as Social Security Judges); see also Julia Preston, *Lawyers Back Creating New Immigration Courts*, N.Y. TIMES, Feb. 9, 2010, at A14, available at <http://www.nytimes.com/2010/02/09/us/09immig.html> (quoting Immigration Judge Dana Marks, who likened asylum hearings to “holding death penalty cases in traffic court”).

<sup>11</sup> *The Numbers Count: Mental Health Disorders in America*, NAT'L INST. OF MENTAL HEALTH, <http://www.nimh.nih.gov/health/publications/the-numbers-count-mental-disorders-in-america/index.shtml#Intro> (last visited Sept. 5, 2012).

population, attributable to the attendant stress of their migration, possible trauma experienced in their native country, overcoming cultural and language barriers, and encountering discrimination.<sup>12</sup> The government's report concerning immigrants upon their detention by Immigration and Customs Enforcement (ICE) shows that approximately one in four recently detained immigrants required mental health interventions in 2011.<sup>13</sup> Further, in response to an inquiry presented by the Washington Post in 2008, the Department of Immigrant Health Services (DIHS) placed the number of immigration detainees with "serious mental illness" at between two and five percent, and the number of those with "some form of encounter with a mental health professional or the mental health system" at between ten and sixteen percent.<sup>14</sup>

Studies show that the mentally ill are more likely to be indigent and homeless,<sup>15</sup> suffer from alcohol or substance abuse problems,<sup>16</sup> be isolated from family or friends who could otherwise assist in locating counsel,<sup>17</sup> or to have minor criminal backgrounds that subject them to detention—often for offenses typically associated with homelessness (vagrancy, public intoxication, trespassing, etc.).<sup>18</sup> In most parts of the United States, incarceration has replaced hospitalization of the mentally ill.<sup>19</sup> Thus mentally ill immigrants facing removal are often in detention. The de-

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<sup>12</sup> *The Mental Health Needs of Immigrants*, AM. PSYCHOL. ASS'N, <http://www.apa.org/about/gr/issues/minority/immigrant.aspx> (last visited Sept. 5, 2012).

<sup>13</sup> U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, FACT SHEET: ERO-DETAINEE HEALTH CARE (2011), available at <http://www.ice.gov/doclib/news/library/factsheets/pdf/dhc-fy11.pdf> (reporting that of 231,367 intake screenings in FY2011, there were 57,982 mental health interventions).

<sup>14</sup> Dana Priest & Amy Goldstein, *Caseless Detention: Suicides Point to Gaps in Treatment*, WASH. POST, May 13, 2008, at A1, available at [http://www.washingtonpost.com/wp-srv/nation/specials/immigration/cwc\\_d3p1.html](http://www.washingtonpost.com/wp-srv/nation/specials/immigration/cwc_d3p1.html) ("No one in the Division of Immigrant Health Services (DIHS), the agency responsible for detainee medical care, has a firm grip on the number of mentally ill among the 33,000 detainees held on any given day, records show. But in confidential memos, officials estimate that about 15 percent—about 4,500—are mentally ill, a number that is much higher than the public ICE estimate. The numbers are rising fast, memos reveal, as state mental institutions and prisons transfer more people into immigration detention.").

<sup>15</sup> G. Sullivan, A. Burman & P. Koegel, *Pathways to homelessness among the mentally ill*, 35 SOC. PSYCHIATRY & PSYCHIATRIC EPIDEMIOLOGY 444, 445 (2000), available at <http://www.brown.uk.com/homeless/sullivan.pdf> (finding that of the homeless population in the United States, between twenty and twenty-five percent were mentally ill).

<sup>16</sup> *Id.* at 446 (finding that the mentally ill homeless had twice the prevalence of alcohol abuse problems and six times the prevalence of drug abuse problems).

<sup>17</sup> NAT'L COAL. FOR THE HOMELESS, *Mental Illness and Homelessness* (July 2009), available at [http://www.nationalhomeless.org/factsheets/Mental\\_Illness.pdf](http://www.nationalhomeless.org/factsheets/Mental_Illness.pdf) (explaining that mental illness inhibits the healthy formation and maintenance of stable relationships, and often those with mental illness isolate themselves from caregivers, family, and friends); see also Sullivan, Burman & Koegel, *supra* note 15, at 445 (estimating that only ten percent of homeless mentally ill individuals have permanent partners).

<sup>18</sup> Kathryn A. Worthington, Note, *Kendra's Law and the Rights of the Mentally Ill: An Empirical Peek Behind the Courts' Legal Analysis and a Suggested Template for the New York State Legislature's Reconsideration for Renewal in 2010*, 19 CORNELL J.L. & PUB. POL'Y 213, 220 (2009) ("When one considers that nearly three-quarters of inmates with mental illness have a co-occurring substance abuse problem, it is not difficult to imagine how the mentally ill wound up incarcerated by committing vagrancy, property, and drug offenses.").

<sup>19</sup> HUMAN RIGHTS WATCH, *ILL-EQUIPPED: U.S. PRISONS AND OFFENDERS WITH MENTAL ILLNESS* 5 (2003), available at <http://www.hrw.org/reports/2003/10/21/ill-equipped> (attributing the increase of incarceration of the mentally ill within state and federal institutions to de-funding of health care institutions and "the punitive anti-crime effort, including a national 'war on drugs' that dramatically expanded the number of persons brought into the criminal justice system,

tained mentally ill respondent is confronted with nearly insurmountable obstacles to securing counsel.<sup>20</sup>

Because the mentally ill are often indigent and detained and because there is no right to appointed counsel in immigration proceedings, the mentally ill often appear pro se in removal proceedings. Immigration proceedings are considered civil rather than criminal in nature.<sup>21</sup> Therefore, despite the enormous complexity of immigration law and the high stakes involved<sup>22</sup> for those facing deportation,<sup>23</sup> immigrants in removal proceedings are not guaranteed an attorney at the public's expense.<sup>24</sup> Section 292 of the Immigration and Nationality Act (INA) only provides that respondents may be represented by counsel of their choosing (either private or from the non-profit sector), but not that such counsel will be paid for by the government in the event that a respondent fails to secure counsel on his or her own.<sup>25</sup> The result is that certain classes of respondents, including indigent respondents who cannot afford private attorneys<sup>26</sup> and those in immigration detention,<sup>27</sup> are particularly likely to appear pro se.<sup>28</sup> Appearing pro se dramatically

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the number of prison sentences given even for nonviolent crimes (particularly drug and property offenses), and the length of those sentences.”).

<sup>20</sup> See HUMAN RIGHTS WATCH, DEPORTATION BY DEFAULT: MENTAL DISABILITY, UNFAIR HEARINGS, AND INDEFINITE DETENTION IN THE U.S. IMMIGRATION SYSTEM 46, 53–56 (2010), available at [http://www.aclu.org/files/assets/usdeportation0710\\_0.pdf](http://www.aclu.org/files/assets/usdeportation0710_0.pdf) (detailing the elevated challenges that mentally ill noncitizens face in accessing and securing counsel).

<sup>21</sup> See *Chae Chan Ping v. United States*, 130 U.S. 581, 582 (1889); see also *INS. v. Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984) (“A deportation proceeding is a purely civil action . . . .”); See Peter L. Markowitz, *Straddling the Civil-Criminal Divide: A Bifurcated Approach to Understanding the Nature of Immigration Removal Proceedings*, 43 HARV. C.R.-C.L. L. REV. 289, 298-307 (2008) (detailing the Supreme Court’s jurisprudence over time defining and confirming that immigration is a civil matter rather than a criminal one).

<sup>22</sup> *Delgado v. Carmichael*, 332 U.S. 388, 391 (1947) (“Deportation can be the equivalent of banishment or exile.”).

<sup>23</sup> *Jordan v. De George*, 341 U.S. 223, 231 (1951) (acknowledging the “grave nature of deportation”).

<sup>24</sup> 8 U.S.C. § 1362 (1996) (“In any removal proceedings before an immigration judge and in any appeal proceedings before the Attorney General from any such removal proceedings, the person concerned shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose.”).

<sup>25</sup> *Id.*

<sup>26</sup> U.S. DEP’T OF JUSTICE, EXEC. OFFICE FOR IMMIGRATION REVIEW, FY 2011 STATISTICAL YEAR BOOK G1 (2012) [hereinafter EOIR 2011 STATISTICAL YEAR BOOK], available at <http://www.justice.gov/eoir/statspub/fy11syb.pdf> (“Many individuals in removal proceedings are indigent and cannot afford a private attorney. Some seek free or pro bono representation, while others proceed without counsel on their own, or pro se.”); see also Andrew I. Schoenholtz & Hamutal Bernstein, *Improving Immigration Adjudications Through Competent Counsel*, 21 GEO. J. LEGAL ETHICS 55, 56 (2008) (“Many times individuals slated for removal hearings have difficulty procuring representation because they do not know how to go about finding counsel, do not have the resources to pay a private-sector lawyer, and/or are detained and thus even more limited in their information about and access to counsel.”).

<sup>27</sup> Peter L. Markowitz, Subcomm. on Enhancing Mechanisms for Serv. Delivery, *Barriers to Representation for Detained Immigrants Facing Deportation: Varick Street Detention Facility, A Case Study*, 78 FORDHAM L. REV. 541, 541 (2009) (detailing the stacking barriers to representation for respondents in immigration detention); see also NAT’L IMMIGRANT JUSTICE CTR., ISOLATED IN DETENTION: LIMITED ACCESS TO LEGAL COUNSEL IN IMMIGRATION DETENTION FACILITIES JEOPARDIZES A FAIR DAY IN COURT 3 (2010), available at <http://www.immigrantjustice.org/sites/immigrantjustice.org/files/Detention.pdf> (“Most of the immigrants detained in the surveyed facilities have insufficient access to legal counsel because the facilities are isolated and legal aid organizations do not have the resources to

decreases a respondent's chance of success in everything from obtaining a bond<sup>29</sup> to prevailing in defending against deportation.<sup>30</sup>

Because the mentally ill are less likely to be represented by an attorney who could advocate for their release, less likely to be able to afford bond when granted one by an immigration judge, and less often able to cooperate with immigration judges and officers in the event that their removal is imminent, they are at significantly higher risk of prolonged detention.<sup>31</sup> Within detention centers, immigrants with mental illness are given substandard psychiatric care—if any at all—and are often placed in isolation rather than given treatment.<sup>32</sup> In isolation they are more likely to fall into depression, despair, and even resort to suicide.<sup>33</sup>

The combination of mental illness and lack of representation has even resulted in the wrongful removal of U.S. citizens. For example, one unrepresented mentally ill man from North Carolina, a native and citizen of the U.S., was allegedly deported to Mexico wrongfully.<sup>34</sup> That individual filed suit claiming he was coerced by ICE into signing false statements that said he was a citizen of Mexico, and by doing so, was not allowed to present evidence to the contrary at his immigration proceeding.<sup>35</sup> Many who would have colorable defenses to removal instead lose their cases after being expected to present complicated legal arguments, complete forms without assistance, and argue on their own behalf before an IJ.<sup>36</sup>

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serve them. More than a quarter of the surveyed facilities had no access to legal aid outreach from non-governmental organizations (NGOs), including direct representation and legal orientation programs.”).

<sup>28</sup> See EOIR 2011 STATISTICAL YEAR BOOK, *supra* note 26, at G1 (“As shown in Figure 9, FY 2011 is the only year that more than half of the aliens whose proceedings were completed during the period FY 2007 to FY 2011 were represented. The percentage of represented aliens for FY 2007 to FY 2011 ranged from forty-five percent to fifty-one percent.”); see generally Steering Committee of The New York Immigrant Representation Study Report, *Assessing Justice: The Availability and Adequacy of Counsel in Removal Proceedings*, 33 CARDOZO L. REV. 357, 359-60 (2011) [hereinafter NYIRS] (detailing low representation rate of respondents in removal proceedings and that demand for representation is higher than supply).

<sup>29</sup> TIM WARDEN-HERTZ, ET AL., N.Y. UNIV. CHAPTER OF THE NAT'L LAWYERS GUILD, 1 BROKEN JUSTICE: A REPORT ON THE FAILURES OF THE COURT SYSTEM FOR IMMIGRATION DETAINEES IN NEW YORK CITY 10 (2007), available at [http://www.detentionwatchnetwork.org/sites/detentionwatchnetwork.org/files/Broken%20Justice\\_1.pdf](http://www.detentionwatchnetwork.org/sites/detentionwatchnetwork.org/files/Broken%20Justice_1.pdf) (“In addition, detainees appearing pro se are uninformed about what relief is available, whether permanent or temporary. One detainee had waived his right to appeal his \$30,000 bond because of a lack of legal counsel to advise him.”).

<sup>30</sup> NAT'L IMMIGRANT JUSTICE CTR., *supra* note 27, at 4 (citing a 2005 Migration Policy Institute study which found that detained individuals, when represented, won permanent residence before an immigration court in forty-one percent of the cases compared to twenty-one percent for those without representation; eighteen percent of detainees with legal representation prevailed in requests for asylum, compared to only three percent for unrepresented detainees).

<sup>31</sup> See Nina Bernstein, *Mentally Ill and in Limbo*, N.Y. TIMES, May 4, 2009, at A21, available at <http://www.nytimes.com/2009/05/04/nyregion/04immigrant.html> (telling the story of a mentally ill Chinese woman who spent more than a year in jail—at times in solitary confinement—emaciated and suicidal, without treatment).

<sup>32</sup> See DR. DORA SHIRO, U.S. DEP'T OF HOMELAND SEC., IMMIGRATION DETENTION OVERVIEW AND RECOMMENDATIONS 26 (2009), available at [www.ice.gov/doclib/about/offices/odpp/pdf/ice-detention-rpt.pdf](http://www.ice.gov/doclib/about/offices/odpp/pdf/ice-detention-rpt.pdf) (“Few beds are available for in-house psychiatric care for the mentally ill. Aliens with mental illness are often assigned to segregation, as are aliens on suicide watch.”).

<sup>33</sup> Priest & Goldstein, *supra* note 14, at A1.

<sup>34</sup> Elise Foley, *Lawsuit Claims ICE Deported Mentally Ill U.S. Citizen*, THE WASH. INDEP. (Oct. 14, 2010), <http://washingtonindependent.com/100651/lawsuit-claims-ice-deported-mentally-ill-u-s-citizen>.

<sup>35</sup> Lyttle v. United States, 867 F. Supp. 2d 1256, 1270 (M.D. Ga. 2012).

<sup>36</sup> Clapman, *supra* note 10, at 374-76 (detailing the case of a chronically paranoid schizophrenic man who,

Judges are growing increasingly concerned about the lack of representation in such cases. In a letter addressed to members of Congress, the National Association of Immigration Judges (NAIJ) urged support of the “Ensuring Mental Competence in Immigration Proceedings Act”<sup>37</sup> proposed by Representative Pete Stark (D-CA) in February 2012. In that letter, the NAIJ addressed the growing problem of unrepresented individuals in immigration proceedings, drawing particular attention to the severe disadvantages faced by the mentally ill.<sup>38</sup> In 2010, Judge Robert A. Katzmann of the U.S. Court of Appeals for the Second Circuit, together with the Vera Institute of Justice, The Governance Institute, and the Leon Levy Foundation, started the New York Immigrant Representation Study, to ascertain and document the representational needs of indigent New Yorkers in removal proceedings.<sup>39</sup> Immigration Judge Mimi Tsankov also published an influential article in the *Immigration Law Advisor* in 2009 calling for a more uniform EOIR effort to increase protections for incompetent respondents in removal who were appearing pro se.<sup>40</sup> Judge Tsankov’s article was instrumental in yielding the Immigration Judge Benchbook guidelines on how judges should proceed when confronted with a mentally incompetent respondent.<sup>41</sup> However, IJs have yet to seize on the authority in the Benchbook, discussed in Part IV.F., *infra*, and the other sources discussed in Part IV, *infra*, and provide what is clearly called for in these cases—the appointment of both a guardian *ad litem* (GAL) and counsel.

## II. THE BOARD OF IMMIGRATION APPEALS WADES INTO THE WATERS

### A. Matter of M-A-M and the Board’s Nascent Attempt to Improve Proceedings for the Mentally Ill

In *Matter of M-A-M*,<sup>42</sup> a mentally ill respondent appeared pro se before an IJ. The respondent was a native citizen of Jamaica, and had been admitted to the U.S. as a lawful permanent resident when he was ten years old.<sup>43</sup> He was in removal proceedings on the basis of criminal convictions for certain drug-related offenses.<sup>44</sup>

When the respondent first appeared before an IJ, he had difficulty answering basic questions, such as his name and date of birth, and told the IJ that he had been diagnosed with schizophrenia and needed medication. At his next hearing, he indicated that he had a history of mental illness that was not being treated in detention. He requested a change of venue to be closer to an

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during his pro se asylum hearing, suffered from hallucinations and heard voices throughout his own testimony).

<sup>37</sup> H.R. 3881, 112th Cong. (2d Sess. 2012).

<sup>38</sup> Letter from Nat’l Ass’n of Immigration Judges to members of U.S. Congress (Jan. 11, 2012), available at [http://www.stark.house.gov/images/stories/112/press/naij\\_letter\\_support.pdf](http://www.stark.house.gov/images/stories/112/press/naij_letter_support.pdf) (“Those who appear in Immigration Court unrepresented are often uneducated in our language, culture and law, but are nevertheless required to present their claims unaided, while the DHS is represented by skilled government attorneys. This challenge becomes much more difficult when a respondent has a mental health disability, exponentially so when he or she is detained.”).

<sup>39</sup> See NYIRS, *supra* note 28, at 360-61 (concluding that the two predominant obstacles to obtaining a successful outcome in an immigration case were lack of representation and being in detention).

<sup>40</sup> Mimi E. Tsankov, *Incompetent Respondents in Removal Proceedings*, IMMIGRATION LAW ADVISOR, Apr. 2009, at 17-19, available at <http://www.justice.gov/eoir/vll/ILA-Newsletter/ILA%202009/vol3no4.pdf>.

<sup>41</sup> EXEC. OFFICE FOR IMMIGRATION REVIEW, *supra* note 8, Part II.B.2.

<sup>42</sup> Matter of M-A-M, 25 I. & N. Dec. 474 (B.I.A. 2011).

<sup>43</sup> *Id.* at 475.

<sup>44</sup> *Id.*

attorney and his family, but the request was denied. At additional hearings, further reference was made to the respondent's mental illness and he asked to see a psychiatrist. That request was granted and psychiatric evaluations and reports about the respondent from the New York State Office of Mental Health were included in the record thereafter.<sup>45</sup>

The respondent appeared pro se at his final merits hearing. At first he said that he could not represent himself, but upon further questioning by the IJ, he said he "believed" he could. The IJ proceeded with the hearing, asking the respondent questions about his entry into the U.S., his criminal convictions, and his fear of returning to Jamaica.<sup>46</sup>

The IJ found the respondent removable, and denied his applications for asylum, withholding of removal, and relief under the Convention Against Torture.<sup>47</sup> In her decision, the IJ summarized the respondent's mental health history, but did not make an explicit finding regarding his mental competency. The respondent then obtained an attorney and appealed to the BIA, arguing that the IJ failed to properly assess his mental competency.<sup>48</sup>

The Board took this opportunity to provide "a framework for analyzing cases in which issues of mental competency are raised."<sup>49</sup> While recognizing that its decision addressed only "a limited set of questions regarding aliens with competency issues in immigration proceedings," the Board stated that its goal was "to ensure that proceedings are as fair as possible in an unavoidably imperfect situation."<sup>50</sup>

The Board noted that there is a general presumption of competence unless a respondent or representative affirmatively raises competency as an issue.<sup>51</sup> Further, an IJ has no duty to consider a respondent's competency unless there is some indicia that competency is implicated.<sup>52</sup> However, the Board provided a fairly expansive definition of the "indicia of incompetency" that should trigger an inquiry into whether additional safeguards are appropriate. This includes but is not limited to, a respondent's "inability to understand and respond to questions, the inability to stay on topic, or a high level of distraction." Also considered is evidence in the record such as mental health records, school records showing special education, affidavits from friends and family members, prior participation in mental health programs, and other indications that a competency analysis is warranted.<sup>53</sup> Using competency within the criminal context for guidance,<sup>54</sup> the Board reasoned that the test for competency is "whether [the Respondent] has a rational and factual understanding of the nature and object of the proceedings, can consult with the attorney or representative if there is one, and has a reasonable opportunity to examine and present evidence

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<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 476.

<sup>48</sup> Matter of M-A-M, 25 I. & N. Dec. 474, 476 (B.I.A. 2011).

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 477 (citing *Munoz-Monsalve v. Mukasey*, 551 F.3d 1, 6 (1st Cir. 2008) (holding that it is the alien's burden to raise the issue of competency); *United States v. Shan Wei Yu*, 484 F.3d 979, 985 (8th Cir. 2007) (finding that competency is presumed in a criminal matter "absent some contrary indication" arising from the defendant's behavior or prior medical history addressing competency).

<sup>52</sup> *Id.* at 479.

<sup>53</sup> *Id.* at 479-80.

<sup>54</sup> *Id.* at 479.



and cross-examine witnesses.”<sup>55</sup> Significantly, the Board expanded DHS’ statutory duty to disclose all evidence material to an alien’s removability to include evidence relevant to the respondent’s mental competency.<sup>56</sup>

In those cases where the respondent does exhibit indicia of incompetency, the BIA continued, the IJ must make on-the-record findings and implement appropriate procedural safeguards to ensure a fair hearing.<sup>57</sup> The Board gave IJs wide discretion to determine what safeguards are appropriate on a case-by-case basis.<sup>58</sup> Examples of appropriate safeguards may include: refusing to take pleadings from a pro se respondent, identifying a family member or close friend who can assist the court, providing additional time for a respondent to locate legal representation, involving a guardian, waiving the respondent’s appearance at court, participating in the development of the record (including the examination of witnesses), and reserving appeal rights on behalf of the respondent.<sup>59</sup> The Board stated that the IJ could “decide which of these or other relevant safeguards to utilize” in a particular case.<sup>60</sup>

Finally, the Board explained that in some cases, the court will be unable to ensure appropriate safeguards, and that in those cases, the IJ “may pursue alternatives with the parties, such as administrative closure . . . [or] . . . treatment for the respondent.”<sup>61</sup>

The latitude granted by the Board in *Matter-of-M-A-M* has produced disparate results and some novel approaches to handling the cases of mentally ill respondents, as detailed below.

### *B. Post Matter of M-A-M: Immigration Judges’ Interpretations and Applications of “Safeguards”*

In the wake of *Matter of M-A-M*, there has been a spectrum of IJ interpretations of what the BIA may have meant by “safeguards.” Some IJs have appointed GALs for pro se respondents; some have *sua sponte* changed venue to convenience family members who may be able to assist the respondent.<sup>62</sup> Many have proactively sought out and enlisted pro bono attorneys to take cases, while others have relied on a combination of pro bono representation plus the assistance of a GAL. In the absence of appointed counsel, the latter of these approaches offers the best alternative. Serious problems persist with each approach, however, as discussed in detail in Section III, *infra*.

There have long been examples of cases in which mentally ill respondents are represent-

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<sup>55</sup> *Matter of M-A-M*, 25 I. & N. Dec. 474, 479 (B.I.A. 2011).

<sup>56</sup> *Id.* at 480 (referencing 8 C.F.R. § 1240.2(a) (2010) (“[DHS] counsel shall present on behalf of the government evidence material to the issues of deportability or inadmissibility and any other issues that may require disposition by the immigration judge.”)).

<sup>57</sup> *Id.* at 481-82 (citing I.N.A. §240(b)(3)).

<sup>58</sup> *Id.* at 482.

<sup>59</sup> *Id.* at 483.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> Normally an IJ may not change venue *sua sponte*, but may only do so upon motion by one of the parties. 8 C.F.R. § 1003.20(b) (2010). See also EXEC. OFFICE FOR IMMIGRATION REVIEW, OPERATING POLICY AND PROCEDURE MEMORANDUM 01-02—CHANGES OF VENUE 3 (2001), available at <http://www.justice.gov/eoir/efoia/ocij/oppm01/OPPM01-02.pdf>.

ed by pro bono counsel—at least at the BIA or federal appeals court level.<sup>63</sup> However, post-*Matter of M-A-M*, judges have begun to hold competency hearings and appoint GALs to assist in a respondent’s defense at the trial level. In one example, a respondent from Ivory Coast who had been diagnosed with schizophrenia and had been homeless for years prior to his detention smiled amiably through most court appearances.<sup>64</sup> When asked any question—from whether he enjoyed the food in the detention facility to whether he wished to proceed with an application for asylum—he would invariably turn the conversation to telephones: how they worked, different styles he had encountered in his life, etc. The judge held a two-part *Matter of M-A-M* hearing to adjudicate: (1) whether the respondent was competent to meaningfully participate in his own defense, and (2) the appropriateness of a GAL selected, vetted, and proffered by the respondent’s pro bono attorney.<sup>65</sup> The respondent was held incompetent and the GAL was appointed to assist the pro bono counsel. The IJ also granted motions to withdraw previously submitted applications and statements made by the respondent that may have otherwise undermined his credibility or resulted in a “frivolous” application for relief.<sup>66</sup>

A more unfortunate example is that of “Oscar Jenkins,” with whom the authors became acquainted in the spring of 2012.<sup>67</sup> His case is particularly relevant because it illustrates four distinct “safeguards” that two different IJs in two different jurisdictions attempted to employ—and the failure of each in turn. It should also be noted that each safeguard was instituted while Oscar was pro se.

The authors were alerted to Oscar’s case by DHS trial counsel, who had been asked by the IJ to reach out to local Legal Orientation Program (LOP) participants in an effort to secure pro bono counsel for Oscar.<sup>68</sup> Oscar is a legal permanent resident who came to the United States as a child from a country in Africa and is now in his late 20s. Prior to his detention, he did not have a

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<sup>63</sup> See, e.g., *Mohamed v. Gonzales*, 477 F.3d 522 (8th Cir. 2007); *Raffington v. INS*, 340 F.3d 720 (8th Cir. 2003).

<sup>64</sup> All details of this respondent’s case are derived from personal knowledge as co-author Amelia Wilson represented him before EOIR. The respondent’s personal details are withheld to promote anonymity and the integrity of attorney/client confidentiality, as well as the sealed nature of asylum hearings in immigration court.

<sup>65</sup> The proposed GAL’s relationship to the client, experience working with detainees and refugees, and potential motivation in becoming a GAL were central to the question of her appropriateness. The GAL in this case was an individual who spoke the respondent’s language, provided services without pecuniary gain, was not a family member, and led a volunteer nonprofit detainee visitation program. The hearing on the proposed GAL also turned on whether she had an objective understanding of the respondent’s best interests and from whence that understanding was derived—which was based on NJ state court guidelines on the appointment of GALs in state superior court proceedings. (See N.J. Ct., 1969 R. 5:8A) (2005).

<sup>66</sup> A Court may find that an applicant for asylum has submitted a frivolous application if it determines that the respondent deliberately fabricated any material elements of the asylum application. Immigration and Nationality Act § 208(d)(6), 8 U.S.C. § 1158(d)(6) (2006); 8 C.F.R. § 1208.20 (2005). In order for a frivolous finding to be upheld, the respondent must have made the misrepresentations knowingly. See *Matter of Y-L-*, 24 I. & N. Dec. 151, 157 (B.I.A. 2007).

<sup>67</sup> The Respondent’s name has been changed and personal details obscured to protect confidentiality. Oscar Jenkins’ father (and Oscar’s court-appointed Guardian *ad litem*) shared the Digital Audio Recording and all court proceedings with the authors, consented to their observation of a master calendar hearing, consented to the eventual amicus curiae brief submitted to the IJ recommending appointed counsel, and consented to the publication of this article.

<sup>68</sup> The LOP is an EOIR-run initiative in which nonprofit organizations provide explanations about immigration law and procedure to groups of detained individuals and refer detainees to pro bono counsel. See *Office of Legal Access Programs*, EXEC. OFFICE FOR IMMIGRATION REVIEW, <http://www.justice.gov/eoir/probono/probono.htm> (last visited Sept. 5, 2012).

documented history of violence or mental illness. In the summer of 2011, Oscar was placed in removal proceedings following a felony conviction which is statutorily “aggravated” under immigration law.<sup>69</sup> His conviction also subjected him to mandatory detention.<sup>70</sup>

Oscar was detained in Pennsylvania. At the outset of his detention, he did not display any mental health concerns or incapacity. He was mostly lucid during his first master calendar hearing (MC) before the IJ; he was able to answer basic questions regarding national origin, age, and current status, and was subdued. While he was initially represented by private counsel, his attorney withdrew from the case after Oscar’s family failed to pay any legal fees. From mid-summer 2011 through that fall, Oscar exhibited increasing difficulty understanding and communicating with the immigration court. Over the course of the next several months, Oscar was beset by psychotic episodes during which he covered himself in feces, ran in continuous circles on his bed until his feet developed sores, attacked guards, and attempted to escape from the facility. He was given a mental health evaluation and was isolated from the other inmates. Though detained, Oscar failed to appear for two MCs due to his being held in the psychiatric ward and “unfit” for presentation before the court.

The IJ in Pennsylvania expressed concerns throughout the many MCs about Oscar’s competency and his lack of representation. Oscar behaved erratically, making unhelpful comments and engaging in disruptive outbursts. In early 2012, the Court, citing *Matter of M-A-M*, held a competency hearing and found Oscar mentally incompetent. In that same decision, the IJ stated that Oscar’s father had been located and was residing in New Jersey. In February 2012, Oscar and his father appeared in court, at which time the IJ appointed Oscar’s father to act as his court-appointed guardian. The judge again found authority for his decision in *Matter of M-A-M*—which lists among its suggested safeguards the ability of family members to act as representatives.<sup>71</sup>

At the conclusion of the hearing on guardianship, the judge asked Oscar’s father if he had any questions, to which he answered, “I don’t really know, I don’t know. I really can’tFalse”<sup>72</sup> The IJ asked him if he could complete his son’s 10-page asylum application (“Form I-589”) in three or four weeks, to which Oscar’s father responded, “Two weeks is enough.” The IJ then invoked *Matter of M-A-M* one final time and made a *sua sponte* change of venue to New Jersey to convenience the GAL. Motions to change venue ordinarily are granted only upon motion by one of the parties,<sup>73</sup> but the IJ took authority from *Matter of M-A-M* to support the *sua sponte* motion on the theory that an incompetent respondent could not make the motion on his own behalf. The following month Oscar’s father appeared in immigration court in New Jersey.

In this example, there were two important ancillary effects of the change of venue. First, despite Oscar’s case being venued in New Jersey, none of the detention facilities in the area

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<sup>69</sup> Immigration and Nationality Act (INA) § 101(a)(43), 8 U.S.C. § 1101 (2012). Oscar was further charged as removable under INA § 237(a)(2)(A)(iii), 8 U.S.C. § 1227(a)(2)(A)(iii) (2006) (“Any alien who is convicted of an aggravated felony at any time after admission is deportable.”).

<sup>70</sup> *Immigration and Nationality Act* § 236(c), 8 U.S.C. § 1226(c) (2006) (“The Attorney General shall take into custody any alien who . . . is deportable by reason of having committed any offense covered in section 237(a)(2)(A)(ii), (A)(iii). . .”).

<sup>71</sup> See *infra* Part III for discussion of *Matter of M-A-M*, 25 I. & N. Dec. 474 (B.I.A. 2011).

<sup>72</sup> All statements in quotation are direct quotes, taken from Digital Audio Recording (DAR) of Oscar’s removal proceeding.

<sup>73</sup> 8 C.F.R. § 1003.20(b) (2012) (“The Immigration Judge, for good cause, may change venue only upon motion by one of the parties . . .”).

agreed to house him due to his “unique” combination of factors: 1) that he was mentally ill (not all facilities in New Jersey have adequate psychiatric wards) and 2) that he had exhibited violent behavior and made attempts to escape (those facilities that have adequate psychiatric wards do not have enough security to approve his admission).<sup>74</sup> Thus for Oscar’s first MC in New Jersey, he was transported in shackles over three hours from Pennsylvania via private prison van, accompanied by two armed guards.<sup>75</sup> However, because Oscar was not technically a resident of the New Jersey facility in which his MC was held, any attorney wishing to consult with him was not authorized to meet with him in the visitation area to conduct a consultation.<sup>76</sup>

The second IJ, in New Jersey, asked Oscar’s father if he was ready to tender a completed Form I-589. Oscar’s father, rather than answer the question, expressed frustration with his inability to obtain documents from his son’s prison: “When I request his medical [records] they say they cannot give me any information. I don’t know what kind of drugs he’s taking. I have no idea what he’s doing in there.” The IJ told Oscar’s father with regard to his role as GAL: “It’s important. If you don’t help him out, he’s going to be deported.” Oscar’s father complained, “I keep going to [the prison], and I can’t talk to nobody. I can’t find out information, what is happening, what I should do, or what I shouldn’t do. I’m just, you know, like an ordinary visitorFalse” When Oscar’s father continued to express frustration that he could not get anyone to give him any information, the IJ urged him to reach out to the area’s nonprofit organizations.

Two weeks later, Oscar’s father returned to court, again without a completed application. He was given two additional weeks to tender the Form I-589. However, two weeks later, Oscar’s father not only failed to produce an application, but failed to appear altogether. The court telephoned Oscar’s father, who answered the phone and stated that he had encountered problems in attending court but was on his way.

An hour and a half later, with the GAL present in court, the IJ questioned the reason for his tardiness. Oscar’s father expressed contrition but offered no sound excuse. Again he stated that he “never filled [the I-589] out.” The IJ told Oscar’s father: “I gave you a list of free and low cost legal providers. I encourage you to keep trying.” However, the IJ also told Oscar’s father that if he failed to complete the requisite forms, “ultimately, I will be sending [Oscar] back to [his country] without understanding why he has a fear because he has given up his right. OK? Do you understand?” Oscar’s father said that he understood but nevertheless did not understand how to proceed.<sup>77</sup>

A similar fact-pattern to Oscar’s is that of Ever Francisco Martinez-Rivas (“Martinez”), who was one of the class members in the pending litigation in the Ninth Circuit Court of Appeals, *Franco-Gonzales v. Holder*.<sup>78</sup> In *Franco*, the ACLU brought suit against the U.S. Attorney General on behalf of a number of mentally disabled immigrants who are both detained and without

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<sup>74</sup> This information was learned from DHS’s written opposition to the change of venue and motion to return venue to Pennsylvania.

<sup>75</sup> One of this article’s authors was present for this MC and observed the production of Oscar by the described method.

<sup>76</sup> The facility in question never permits attorneys to meet with “non-resident” detainees (respondents from other detention centers who are temporarily held in the facility for in-person hearings).

<sup>77</sup> Ultimately the authors of this article intervened to assist Oscar and his father, and successfully represented Oscar in his application for Withholding of Removal and deferral of removal under the Convention Against Torture, after first filing an unsuccessful amicus curiae brief urging the Court to appoint counsel. Oscar was released from detention and is now receiving psychiatric care at a New Jersey hospital.

<sup>78</sup> 767 F. Supp. 2d 1034, 1041-42, 1053-55 (C.D. Cal. 2010).

counsel.

Martinez is a legal permanent resident originally from El Salvador in his early 30s.<sup>79</sup> In 2008, he was convicted of a violent crime against his stepfather.<sup>80</sup> He was initially deemed incompetent to stand trial for the offense, but was eventually restored to competency and pled guilty.<sup>81</sup> In 2009, he was placed in removal proceedings.<sup>82</sup> He is currently detained in California.<sup>83</sup>

Martinez suffers from schizophrenia, and has been repeatedly hospitalized over a number of years due to his disability.<sup>84</sup> He takes medication for the condition. In 2010, he was examined by a doctor and diagnosed with “Schizophrenia, Undifferentiated Type, Continuous with Prominent Negative Symptoms.”<sup>85</sup> According to the doctor, his symptoms include the absence of facial expression, the inability to speak more than a few words at a time, and the inability to initiate and persist in goal-directed activity.<sup>86</sup> The doctor stated that Martinez “cannot understand, formulate, and verbally express ideas in a way that most other people can.”<sup>87</sup> The doctor noted that his schizophrenia also causes Martinez to hear voices and renders him unable to process information.<sup>88</sup> The doctor concluded that Martinez was not competent to represent himself, stating that his illness “precludes a capacity to conceptualize ideas and verbally advocate a defense in his removal proceedings.”<sup>89</sup>

During his removal proceeding, Martinez attended several MCs. At a hearing in June 2010, Martinez’s mother addressed the court to point out that she had served as her son’s conservator for several years.<sup>90</sup> However, Martinez’s mother also testified that she “could not and cannot serve” as Martinez’s legal representative, stating:

I want what is best for my son. I cannot do as good a job as an attorney because I have no experience or education in the law. I do not understand many of the legal terms that I have heard used by the judge at court. I also do not have access to all of the information that real attorneys need to make legal arguments. For instance, I do not have or know how to use a computer, and I do not have books about the law.<sup>91</sup>

The judge did not appoint Martinez’s mother conservator or Guardian *ad litem* in the case, noting that the immigration court could not “compel her to appear” on behalf of her son.<sup>92</sup>

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<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Franco-Gonzales*, 767 F. Supp. 2d at 1041.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Franco-Gonzales*, 767 F. Supp. 2d at 1041.

<sup>89</sup> *Id.* at 1041-42.

<sup>90</sup> *Id.* at 1042.

<sup>91</sup> *Id.* at 1054.

<sup>92</sup> *Id.*

Instead, at each of the hearings, the immigration judge told Martinez that he had a right to obtain counsel and recommended that he seek an attorney, but Martinez remained unrepresented during the entire proceeding.<sup>93</sup>

In April 2010, the IJ provided Martinez with a Form I-589 to apply for relief under the Convention Against Torture. Martinez managed to file the application with the court in May 2010. In August 2010, DHS submitted a memorandum to the IJ in which it stated that in the event the court found Martinez incompetent, the court could appoint a custodian, such as Martinez's mother, to speak on his behalf.<sup>94</sup> However, the court did not do so.

In September 2010, the IJ found Martinez incompetent to proceed pro se in the removal proceedings.<sup>95</sup> Because the respondent was unrepresented and mentally incompetent, the court also set aside all prior actions taken in the case.<sup>96</sup> Specifically, the court found that Martinez was "unable to effectively participate in a coherent manner, to comprehend the nature and consequences of the proceedings, to communicate with the Court in any meaningful dialogue, to assert or waive any rights, and to seek various forms of relief."<sup>97</sup> For these reasons, the IJ terminated the proceedings and certified her decision for appellate review.<sup>98</sup>

The case was pending before the BIA when Martinez became a member of the class in the ACLU suit, which alleges that Martinez and others similarly situated had a right to appointed counsel under federal immigration law, the federal Rehabilitation Act, and under the federal Due Process Clause. The District Court granted a TRO and mandatory injunction prohibiting DHS from pursuing further immigration proceedings against the plaintiffs until they are afforded a "Qualified Representative."<sup>99</sup> The court also enjoined the government from detaining Martinez unless a bond hearing was promptly held justifying his ongoing detention.<sup>100</sup> This case is currently pending before the Ninth Circuit Court of Appeals at the time of publication.

Despite the myriad safeguards—including the appointment of GALs—that IJs have been employing to try to provide a fair hearing for respondents such as Oscar and Martinez, in the absence of appointed counsel, their hearings have not been fair. In Oscar's case, the IJs cast a wide net under *Matter of M-A-M*, and yet in the absence of counsel, his proceeding did not satisfy due process.

### III. THE INSUFFICIENCY OF CURRENT INTERPRETATIONS OF *MATTER OF M-A-M*

While the appointment of GALs by IJs since *Matter of M-A-M* has generally been an auspicious development, the lack of concomitant appointment of counsel has blunted an otherwise positive evolution. Indeed, GALs play an indispensable role, for without them an attorney faces serious ethical complications representing a mentally ill respondent, as well as potential conflicts

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<sup>93</sup> *Id.* at 1042.

<sup>94</sup> *Franco-Gonzales*, 767 F. Supp. 2d at 1042.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 1060-61. For the definition of a qualified representative, see *infra* Part III.A.

<sup>100</sup> *Franco-Gonzales*, 767 F. Supp. 2d at 1060-61; see also *infra* Part V.B. for a discussion of the unconstitutionality of indefinite detention and the need for a bond hearing in these circumstances.

of interest.<sup>101</sup> But as demonstrated by the cases of Oscar Jenkins and Ever Martinez,<sup>102</sup> GALs are generally not appropriate advocates for an individual's legal claims.

### A. *Different Hats: The Distinct Roles of Guardians Ad Litem and Attorneys*

GALs acting alone generally do not possess the relevant training, expertise, or rights of access necessary to competently navigate the complicated immigration system. This does not diminish a GAL's importance and, indeed, a GAL's involvement in cases of mentally ill respondents is indispensable.<sup>103</sup> GALs can serve a vital testimonial role at master calendar hearings, merits hearings, and particularly in asylum hearings. In asylum hearings, a respondent must express a subjective fear of returning to his or her country of origin, which in turn must be objectively reasonable.<sup>104</sup> Where an incompetent respondent is not aware of, appreciative of, or fearful of conditions in his or her home country, a GAL can subjectively express fear on the respondent's behalf—as was done in the case of the mentally ill respondent from Ivory Coast discussed in *supra* Part II.B.

GALs are further necessary to make decisions on behalf of their ward. In any legal proceeding, a client is endowed with the power of self-determination regarding his or her case, and his or her representative is beholden to those wishes.<sup>105</sup> However, where an individual is incapable of effectively participating in his or her own defense,<sup>106</sup> a guardian intervenes via court order<sup>107</sup> and, to the extent possible, essentially channels the ward's imputed best interest.<sup>108</sup> At times the ward's expressed interest will conflict with the ward's objective "best" interest, and vast scholarship exists on how to reconcile these conflicts when they arise.<sup>109</sup> But having a separate guardian to channel the ward's objectives and a separate attorney to advise the GAL of the best legal strategy and then act in accordance with the client's wishes, as imputed by the GAL, best avoids these difficult conflicts.

Congress has recognized the intricacy of immigration proceedings and the role that qualified legal representatives must play in their navigation.<sup>110</sup> The Ninth Circuit described the prolific

<sup>101</sup> See *infra* Part III.C.

<sup>102</sup> See *supra* Part II.B.

<sup>103</sup> See *infra* Part III.C.

<sup>104</sup> *INS v. Cardoza-Fonseca*, 480 U.S. 421, 430-32 (1987).

<sup>105</sup> MODEL CODE OF PROF'L RESPONSIBILITY EC 7-12 (1983) ("[A] lawyer cannot perform any act or make any decision which the law requires his client to perform or make, either acting for himself competent, or by a duly constituted representative if legally incompetent.").

<sup>106</sup> See BLACK'S LAW DICTIONARY 774 (9th ed. 2009) (defining a GAL as an individual "appointed by the court to appear in a lawsuit on behalf of an incompetent or minor party").

<sup>107</sup> See, e.g., FED. R. CIV. P. 17(c).

<sup>108</sup> See Marcia M. Boumil et al., *Legal and Ethical Issues Confronting Guardian Ad Litem Practice*, 13 J.L. & FAM. STUD. 43, 44 n.48 (2011).

<sup>109</sup> See, e.g., Alberto Bernabe, *The Right to Counsel Denied: Confusing the Roles of Lawyers and Guardians*, 43 LOY. U. CHI. L.J. 833, 837 (2012) (describing multiple models of guardianship as well as competing theories on how an attorney should proceed where a ward's expressed interest conflicts with a guardian's perceived "best" interest).

<sup>110</sup> See Immigration and Nationality Act § 292, 8 U.S.C. § 1362 (2006) ("In any removal proceedings before an immigration judge and in any appeal proceedings before the Attorney General from any such removal proceedings, the person concerned shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose.").

eration of immigration laws and regulations as “a labyrinth that only a lawyer could navigate.”<sup>111</sup> In addition to attorneys, the regulations also allow for representation by BIA-accredited representatives, law students, and law graduates.<sup>112</sup> Federal courts have sharpened the definition to require that a qualified representative<sup>113</sup> meet the following criteria:

(1) be obligated professionally to provide zealous representation; (2) be subject to sanction by the bar or EOIR for ineffective assistance; (3) be free of any conflicts of interest; (4) have adequate knowledge and information to provide representation at least as competent as that provided by a detainee with ample time, motivation, and access to legal materials; and (5) maintain confidentiality of information.<sup>114</sup>

The critical distinction between a GAL and a qualified representative is that while the GAL acts as a proxy for his or her ward’s best interests, the qualified representative acts as an agent of the client’s legal and administrative remedies.

In addition to benefiting from formal training in the law and having access to legal materials and resources (forms, research engines such as Westlaw, instructive guides and primers, membership in professional organizations), qualified representatives enjoy enhanced access to detainees. The ICE Performance-Based National Detention Standards 2011 (PBNDS 2011) mandate that “Each facility shall permit legal visitation seven days a week, including holidays, for a minimum of eight hours per day on regular business days (Monday through Friday), and a minimum of four hours per day on weekends and holidays.”<sup>115</sup> The PBNDS 2011 defines a legal visitor as “an attorney or other person representing another in a matter of law, including: law students or law graduates not yet admitted to the bar under certain conditions; accredited representatives; and accredited officials and attorneys licensed outside the United States.”<sup>116</sup> The authority to manage visitation by non-legal representatives is vested in each detention facility individually, with only the instruction that visitors be permitted to access detainees on weekends and holidays, and “to the extent practicable,” certain evenings during the week.<sup>117</sup> Unless the GAL’s ward is a minor, GALs are generally granted no additional access beyond that of a regular visitor.

### *B. A Cautionary Tale: The Problem With Guardians Ad Litem Without Counsel*

Two examples of the ill effects of trying to put the GAL peg in the attorney hole are the cases of Oscar Jenkins and Ever Martinez. As Oscar’s story<sup>118</sup> made clear, Oscar’s father completely lacked the essential knowledge of asylum law and attendant burdens of proof to properly mount a viable defense to deportation. Oscar’s father himself best expressed his lack of

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<sup>111</sup> *Biwot v. Gonzales*, 403 F.3d 1094, 1098 (9th Cir. 2005).

<sup>112</sup> *See* 8 C.F.R. § 1292.1 (2011).

<sup>113</sup> Immigration and Nationality Act § 292, 8 U.S.C. § 1362 (2006).

<sup>114</sup> *Franco-Gonzales*, 767 F.Supp.2d at 1058.

<sup>115</sup> U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, PERFORMANCE-BASED NAT’L DETENTION STANDARDS 2011, at 317 (2011), available at <http://www.ice.gov/doclib/detention-standards/2011/pbnds2011.pdf>.

<sup>116</sup> *Id.* at 317.

<sup>117</sup> *Id.* at 315.

<sup>118</sup> *See supra* Part II.B.



knowledge regarding how to proceed, when the IJ asked him if he understood what was expected of him, and he replied, “. . . I don’t really know, I don’t know. I really can’t . . .” Despite being a court-appointed GAL for the duration of his son’s removal proceedings, he lacked the authority and the practical capability to access the information necessary to complete his son’s application. If he wished to consult with his son privately concerning the case he could not do so. An attorney would not be confronted with such administrative obstructions.

In fact, Oscar’s father told the authors of this article that during the several month period he “represented” his son, he not only lacked a computer to perform any research, he did not have electricity in his home and did not know how to use the Internet at the library. His wife, Oscar’s mother, could not read or write and so had failed to produce an affidavit. When the authors asked Oscar’s father to view the file that he had prepared for court, it contained only a list of legal service providers, a half-completed appeals form, and a map of western Africa. As articulated by the second IJ in Oscar’s case, the GAL’s inaction and inability put Oscar at risk of being ordered deported without anyone ever knowing why he *should not* be deported.

Ever Martinez’s mother also testified that she was incapable of serving as her son’s legal representative because she had “no experience or education in the law.”<sup>119</sup> Like Oscar’s father, she did not know how to use a computer or perform legal research.<sup>120</sup> Of course, the IJ in that case did not ultimately appoint Martinez’s mother as GAL. But to have done so would not have been problematic if the IJ had likewise appointed counsel. When a GAL is expected and permitted to perform the duty for which the role was created—namely, to promote the ward’s best interest—and not asked to perform tasks traditionally assigned to a highly trained lawyer, a fair hearing is bolstered.

### C. *The Conundrum of Counsel Without Guardians Ad Litem*

While GALs alone are inadequate, representation by attorneys (or qualified representatives) operating without GALs presents significant problems as well. Representation in immigration court is necessarily achieved through collaboration between client and attorney, and for that to occur, the client must be somehow capable of making his wishes known.<sup>121</sup> As previously noted, an attorney is bound to follow a client’s directives as to how to proceed in a particular matter.<sup>122</sup> Having a GAL best allows the mentally ill client’s wishes to be known and best provides a client’s directives for an attorney to follow. In short, it best preserves the separate and necessarily dual roles of attorney and client.

Nonetheless, there are currently situations where there is no GAL and an attorney must make due. Complicated ethical issues exist in the lawyer-client relationship where a client is mentally ill and the Model Rules of Professional Conduct (“MRPC”) contemplate situations where an attorney must engage in a delicate balancing act of anticipating a client’s best interest

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<sup>119</sup> *Franco-Gonzales*, 767 F. Supp. 2d at 1054.

<sup>120</sup> *See id.*; *see also supra* Part II.B.

<sup>121</sup> *See* MODEL CODE OF PROF’L RESPONSIBILITY, *supra* note 105.

<sup>122</sup> *See* MODEL RULES OF PROF’L CONDUCT R. 1.2 (2010) (“[A] lawyer shall abide by a client’s decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client’s decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client’s decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.”).

and performing his or her legal function.<sup>123</sup> Some scholars have promoted a hybrid model in this vein, wherein the attorney also acts as the respondent's GAL.<sup>124</sup> This is not advisable.

The first problem is that hybrid GAL/attorneys have an inherent conflict of interest, as what is best legally is not always what is best for the individual. Several examples of this phenomenon arise regularly in the immigration context. The first stems from a problematic rule that any asylum applicant whose case has been pending for less than 180 days may not apply for work authorization.<sup>125</sup> If 180 days pass without resolution, the applicant may at that time request work authorization.<sup>126</sup> However, each IJ controls "the asylum clock," stopping and starting the time accrual on its march toward 180 days.<sup>127</sup> The clock stops at any delay "created" by an asylum applicant—including a request for time to prepare one's case. So, if an asylum seeker does not accept the earliest proposed date for a final hearing (sometimes mere weeks hence), the clock stops and she cannot obtain work authorization—sometimes permanently.<sup>128</sup> For many individuals work authorization is of paramount importance and the denial of employment opportunities presents tremendous hardship for themselves and their families.<sup>129</sup> However, despite that obtaining work authorization is a "best interest" for many asylum applicants, it is not a best "legal" interest for attorneys. The best legal interest is to ultimately prevail in the request for asylum—thereby conferring myriad protections and benefits onto an applicant. Because mounting a successful asylum claim is very time-consuming and labor intensive,<sup>130</sup> an expedited hearing may not be feasible for an attorney. In short, an attorney asked to play a hybrid role of both GAL and qualified representative in an asylum case would face a major conflict of interest.

In another example, the "best interest" of releasing an individual from detention competes with the "best legal interest" of actually keeping him or her in custody. Detained cases are placed on an expedited docket—meaning there is urgency to resolve the matter both to avoid expense to the government in detaining the alien<sup>131</sup> and to promote the liberty interest of the indi-

<sup>123</sup> See MODEL CODE OF PROF'L RESPONSIBILITY, *supra* note 105. ("If a client under disability has no legal representative, his lawyer may be compelled in court proceedings to make decisions on behalf of the client.")

<sup>124</sup> See Clapman, *supra* note 10, at 373-74.

<sup>125</sup> Immigration and Nationality Act § 208(d)(2), § 8 U.S.C. § 1158(d)(2) (2006) ("An applicant for asylum is not entitled to employment authorization, but such authorization may be provided under regulation by the Attorney General. An applicant who is not otherwise eligible for employment authorization shall not be granted such authorization prior to 180 days after the date of filing of the application for asylum.")

<sup>126</sup> Immigration and Nationality Act § 208(d)(5)(A)(iii), 8 U.S.C. § 1158(d)(5)(A)(iii) (2006).

<sup>127</sup> Memorandum from Brian M. O'Leary, Chief Immigration Judge of the Executive Office for Immigration Review of the U.S. Dep't of Justice to All Immigration Judges 7 (Nov. 15, 2011), *available at* [http://jlasc.org/attachments/article/216/USDOJ\\_Operating%20Policies%20Memo%2011-02\\_Asylum%20Clock.pdf](http://jlasc.org/attachments/article/216/USDOJ_Operating%20Policies%20Memo%2011-02_Asylum%20Clock.pdf).

<sup>128</sup> See DAVID G. RODRIGUEZ AND JESÚS E. SAUCEDO, LEGAL ACTION CENTER, AMERICAN IMMIGRATION COUNCIL, UP AGAINST THE CLOCK: FIXING THE BROKEN EMPLOYMENT AUTHORIZATION ASYLUM CLOCK 21 (2011), *available at* [http://www.legalactioncenter.org/sites/default/files/docs/lac/Asylum\\_Clock\\_Paper.pdf](http://www.legalactioncenter.org/sites/default/files/docs/lac/Asylum_Clock_Paper.pdf).

<sup>129</sup> 59 Fed. Reg. 232, 62290 (Dec. 5, 1994); *see also* Complaint for Petitioner at 2, A.B.T. v. U.S. Citizenship and Immigration Services Case 2:11-cv-02108 (No. 11-2108).

<sup>130</sup> Such an application often involves proving the applicant's identity in accordance with the REAL ID Act (2005) including: fully citing the act, taking statements, preparing affidants for oral testimony, locating country condition experts, securing forensic physical or psychological exams, preparing a pre-trial memorandum of law, etc.

<sup>131</sup> NAT'L IMMIGRATION FORUM, THE MATH OF IMMIGRATION DETENTION 2 (2012), *available at* <http://www.immigrationforum.org/images/uploads/MathofImmigrationDetention.pdf> (citing a \$2,023,827,000 fiscal year 2012 annual budget request for immigration detention, amounting to \$5.5 million per day (\$166 daily cost to tax payers per immigrant detainee, times 365 days per year)).

vidual facing possible prolonged detention.<sup>132</sup> Most cases on the detained docket are resolved in several months from the time the alien first comes into contact with ICE,<sup>133</sup> while non-detained cases may take upwards of several years.<sup>134</sup> At times, the best legal interest for a client may be a quick resolution (hence, deliberately keeping the client in detention), for example in order to enable the quick filing of petitions to join for endangered family members in the home country.<sup>135</sup> It may also be in the client's best legal interest to remain in detention where the annual cap on grants of Cancellation of Removal has been reached for non-detained respondents but not for detained respondents, meaning the client cannot be granted relief if released from detention until the following year. The hybrid GAL/attorney in these situations would be improperly forced to assign hierarchical values to the competing interests.

Another challenge is that of testimony. Where an attorney normally is able to summon a respondent as a fact witness to testify as to the elements of entry into the United States, removability, claims for relief, and so on, in the absence of a competent respondent an attorney can call a court-appointed GAL. This cannot happen if the attorney is also the GAL.

Other ancillary issues arise with a hybrid model. While a client's communications with an attorney are privileged, the same communications are not privileged between a client and a GAL.<sup>136</sup> Another issue is candor. An attorney's duty is to the tribunal<sup>137</sup> while a GAL's is to the client. Again and again the ethical considerations of the GAL and the qualified representative are at cross-purposes, creating a tangle that is best unsnarled by separating the attorney from the GAL altogether, and having both.

#### *D. The Failing Proposition of Reliance on Pro Bono and Non-Profit Representation*

An attorney's intervention assists the Court in facilitating proceedings and advances its docket by identifying avenues of relief, speaking on the respondent's behalf, and easing commu-

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<sup>132</sup> *Diouf v. Napolitano*, 634 F.3d 1081, 1087 (9th Cir. 2011) (finding that a detainee has a substantial liberty interest in freedom from prolonged detention).

<sup>133</sup> EXEC. OFFICE FOR IMMIGRATION REVIEW, *NEW CASE COMPLETION GOALS FY 2010*, 1 (2010) (showing a case completion goal for detained cases as under 60 days).

<sup>134</sup> *Immigration Backlog, Wait Times, Keep Rising*, TRACIMMIGRATION, <http://trac.syr.edu/immigration/reports/286/> (last visited Feb. 1, 2013) ("The average time these pending cases have been waiting in the Immigration Courts of the Executive Office for Immigration Review (EOIR) is now 526 days, compared with 489 days at the end of fiscal year 2011 and 447 days at the end of fiscal year 2010."); *see also* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO 06-771, REPORT TO THE CHAIRMAN, COMMITTEE ON FINANCE, U.S. SENATE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW: CASELOAD PERFORMANCE REPORTING NEEDS IMPROVEMENT 11 (2006).

<sup>135</sup> 8 C.F.R. § 208.20 (2009) (providing that a refugee may request following-to-join or accompanying benefits for his or her spouse and unmarried, minor child(ren) after the refugee is granted asylum).

<sup>136</sup> Jean K. Peters, *How Children Are Heard In Child Protective Proceedings, In The United States And Around The World In 2005: Survey Findings, Initial Observations, And Areas For Further Study*, 6 NEV. L.J. 966, 1025 (2006) ("In addition, the rules of confidentiality, extremely strict for lawyers in the United States, are often unclear for guardians ad litem. Many guardians ad litem have no duty of confidentiality to their clients. In contrast, the lawyer confidentiality is extremely strict.").

<sup>137</sup> MODEL RULES OF PROF'L CONDUCT R. 3.3 (2005), available at [http://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/rule\\_3\\_3\\_candor\\_toward\\_the\\_tribunal.html](http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_3_3_candor_toward_the_tribunal.html).

nication.<sup>138</sup> In instances where a particularly needy respondent is without counsel for a prolonged period but whom an IJ suspects has a colorable claim for relief, it is no secret that judges will lean on nonprofit organizations to intervene.<sup>139</sup> And yet while the funding for nonprofits retreats, the need for services balloons.<sup>140</sup> Nonprofit organizations are increasingly incapable of accepting cases for representation despite how the Court and DHS are helped by such zealous intervention. The Legal Services Corporation (LSC), the largest source of funding for legal aid providers, experienced a 17% decrease in funding over the last two years, hitting a level equivalent to 2007.<sup>141</sup> Dependent on federal money, many LSC grantees were forced to discharge employees between 2010 and 2012, reducing attorney staff by 13.3%, paralegals by 15.4%, and support staff by 12.7%.<sup>142</sup> Additionally, funding from IOLTA (Interest on Lawyers Trust Accounts) programs, which provide funds to nonprofit providers to assist low income and indigent individuals in civil matters, is entirely dependent on interest rates and the health of the private legal sector. Since the economic downturn of 2008, interest rates are at nearly zero, resulting in a near complete drying up of IOLTA funds.<sup>143</sup>

State funding for the public sector has likewise evaporated. For example, the Arizona state legislature cut funding in November 2011 to the three legal aid organizations in the state by \$1.6 million, resulting in an anticipated loss of legal services to more than 3,000 Arizona residents.<sup>144</sup> Similarly, Maryland recently announced that for fiscal year 2013, the Maryland Legal Services Corporation must reduce funds to all participating legal providers due to an unanticipated budget deficit of \$1 million.<sup>145</sup> The Center for Non-Profits detailed the expanding chasm between the demand for legal services and nonprofit capacity in New Jersey, finding that 37% of nonprofits in New Jersey had had their funding significantly decline in 2011, while 40% reported

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<sup>138</sup> HUMAN RIGHTS WATCH, *supra* note 20, at 52 (“Several recent reports on the immigration court system all cite the need for appointed counsel as a core recommendation, and EOIR recently deemed the large number of individuals representing themselves as ‘of great concern’ . . .”).

<sup>139</sup> See Emily Ramshaw, *Mentally Ill Immigrants Have Little Hope for Care When Detained*, DALLAS MORNING NEWS, July 13, 2009, available at <http://www.justice.gov/eoir/vll/benchbook/tools/MHI/library/Emily%20Ramshaw.%20The%20Dallas%20Morning%20News.%20July%202013.%202009.pdf> (quoting Elaine Komis, spokeswoman for EOIR: “‘When judges encounter someone who seems to be mentally incompetent, they do try as much as possible to arrange for some kind of *pro bono* counsel.’”).

<sup>140</sup> *Improving Efficiency and Promoting Justice in the Immigration System: Lessons from the Legal Orientation Program*, VERA INSTITUTE FOR JUSTICE, [http://www.vera.org/download?file=1780/LOPpercent2BEvaluation\\_May2008\\_final.pdf](http://www.vera.org/download?file=1780/LOPpercent2BEvaluation_May2008_final.pdf) (last visited Sept. 5, 2012).

<sup>141</sup> WASHINGTON COUNCIL ON LAWYERS, 2012 REPORT ON LEGAL SERVICES FUNDING 6 (2012), available at <http://www.wclawyers.org/Washington%20Council%20of%20Lawyers%20Legal%20Services%20Funding%20Report.pdf>.

<sup>142</sup> *Id.* at 12.

<sup>143</sup> *Id.* at 6; see also *Interest Rates*, IOLTA.ORG, [http://www.iolta.org/grants/item.Interest\\_Rates](http://www.iolta.org/grants/item.Interest_Rates) (last visited Sept. 5, 2012) (“The amount of IOLTA income depends on interest rates paid on the accounts. When rates drop and stay low, as they have from the beginning of 2008 to the present, IOLTA revenue declines. Many IOLTA programs have been forced to reduce grants to legal aid providers, in many cases by large percentages.”).

<sup>144</sup> Press Release, Ariz. Found. For Legal Servs. & Educ., *At a Time When Needed Most, Legal Aid Funding to Decrease in Arizona*, (Jan. 5, 2012), available at <http://www.azflse.org/azflse/pressreleases/viewpressrelease.cfm?presid=230>.

<sup>145</sup> See *MLSC Announces Impending Funding Cuts to Legal Aid Providers*, MD. LEGAL SERVS. CORP. (Feb. 6, 2012), <http://mlsc.org/2012/02/mlsc-announces-impending-funding-cuts-to-legal-aid-providers/>.

that expenses exceeded support and revenue during the most recently completed fiscal year.<sup>146</sup> Thirty-five percent of nonprofit respondents to the survey reported that they had frozen or cut salaries by the time the survey was taken, 26% had cut staff, 18% had implemented some reduction of staff hours, and 17% had reduced employee benefits.<sup>147</sup>

By contrast, immigration detention facilities throughout the nation have increased capacity. The current detention capacity is 33,400 beds in more than 250 facilities, a 21% increase since 2006.<sup>148</sup> Between 2002 and 2010, the total private detainee population increased by an astonishing 259%.<sup>149</sup> The rise followed an increase in congressional funding allocated to the expansion of detention facilities.<sup>150</sup> The state of Texas alone contains twelve separate detention facilities, the most recent one opening in March 2012 with capacity for an additional 600 detainees.<sup>151</sup> In New Jersey, Delaney Hall Detention Facility was opened in October 2011, introducing 350 new beds for immigrant detainees,<sup>152</sup> and Essex County Correctional Facility increased its space for detainees by 150%.<sup>153</sup>

Many of these detained immigrants lack representation in their immigration proceedings, and non-profit organizations are already trying to assist as many detainees with colorable claims as they can. It is unfair for IJs to pressure these already overburdened and underfunded organizations to take on additional cases pro bono, potentially at the expense of the organizations' current clients. It also leads to unpredictable and inconsistent representation of such detainees. In *Franco-Gonzales v. Holder*, the U.S. District Court analyzed a proposal by DHS to rely on local non-profit organizations to take the cases of the plaintiffs, all of which were unrepresented and mentally ill detainees. The plaintiffs argued that resources were limited and agencies could not be expected to absorb each case that fell under the defined class.<sup>154</sup> The Court stated that despite the fact that certain counsel had "responded favorably" to efforts to secure their pro bono representation of the plaintiffs, "[s]uch information, in and of itself, is insufficient to either extinguish the

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<sup>146</sup> See CENTER FOR NON-PROFITS, NEW JERSEY NON-PROFITS 2012: TRENDS AND OUTLOOKS 4 (2012), available at <http://www.njnonprofits.org/2012AnnualSurveyRpt.pdf>.

<sup>147</sup> See *id.* at 8.

<sup>148</sup> See RUTGERS SCHOOL OF LAW-NEWARK IMMIGRANT RIGHTS CLINIC & AM. FRIENDS SERV. COMM., FREED BUT NOT FREE: A REPORT EXAMINING THE CURRENT USE OF ALTERNATIVES TO IMMIGRATION DETENTION 3 (2012), available at <http://www.law.newark.rutgers.edu/files/FreedbutnotFree.pdf>.

<sup>149</sup> See CODY MASON, THE SENTENCING PROJECT, DOLLARS AND DETAINEES: THE GROWTH OF FOR-PROFIT DETENTION 1 (2012), available at [http://sentencingproject.org/doc/publications/inc\\_Dollars\\_and\\_Detainees.pdf](http://sentencingproject.org/doc/publications/inc_Dollars_and_Detainees.pdf).

<sup>150</sup> See *id.* at 6 ("[C]ongress increased funding for Detention and Removal by over \$184 million to \$2.75 billion for FY 2012.").

<sup>151</sup> See Laura Sullivan & Amy Walters, *Trying To Make Immigrant Detention Less Like Prison*, NPR (Mar. 14, 2012), <http://www.npr.org/2012/03/14/148538183/ice-opens-immigrant-detention-center-in-rural-texas>.

<sup>152</sup> See Eunice Lee, *Essex County freeholders award controversial immigration detention contract*, N.J. STAR-LEDGER (Dec. 14, 2011), [www.nj.com/news/index.ssf/2011/12/essex\\_county\\_freeholders\\_award.html](http://www.nj.com/news/index.ssf/2011/12/essex_county_freeholders_award.html).

<sup>153</sup> See SEMUTEH FREEMAN & LAUREN MAJOR, NYU SCHOOL OF LAW IMMIGRANT RIGHTS CLINIC, IMMIGRATION INCARCERATION: THE EXPANSION AND FAILED REFORM OF IMMIGRATION DETENTION IN ESSEX COUNTY, NJ 4 (2012), available at <http://www.afsc.org/sites/afsc.civicaactions.net/files/documents/ImmigrationIncarceration2012.pdf>; See Annie Sovcik & Lori Adams, *Call for Increasing Pro Bono Legal Services for Immigrants Detained in New Jersey*, HUMAN RIGHTS FIRST BLOG (Apr. 4, 2012) <http://www.humanrightsfirst.org/2012/04/10/call-for-increasing-pro-bono-legal-services-for-immigrants-detained-in-new-jersey/> ("[T]he need outweighs the availability of legal resources for indigent immigrants and asylum seekers, especially those in detention.").

<sup>154</sup> See *Franco-Gonzales*, 767 F. Supp. 2d at 1057.

urgency of, or to moot, [the] Plaintiffs' claims [of the right to appointed counsel]."<sup>155</sup> Thus, IJs cannot merely rely on the haphazard and fortuitous intervention of non-profit organizations to represent mentally ill respondents. Rather, to achieve justice for this vulnerable population, IJs must actually appoint counsel, at the government's expense.

#### IV. THE SOLUTION: IMMIGRATION JUDGES ALREADY HAVE THE AUTHORITY TO APPOINT COUNSEL FOR THE MENTALLY ILL IN REMOVAL PROCEEDINGS

Immigration judges already have many bases on which they can appoint counsel for mentally ill immigrants facing deportation. Due process jurisprudence in the criminal, general civil, and civil immigration context requires it. Federal statutory law authorizes it. The recent Supreme Court case *Padilla v. Kentucky* logically invites it. The BIA in *Matter of M-A-M*, the EOIR in the Judges' Benchbook, and the Department of Homeland Security in a memorandum on the issue, allow it. Any concerns about doing so are substantially outweighed by the grave issues currently plaguing the system, wherein mentally ill respondents appear pro se, completely unable to represent themselves, and often languish in detention indefinitely.

##### A. Due Process Lays the Foundation

Under the federal Due Process Clause, all noncitizens in deportation proceedings, including those with disabilities, have a due process right to a full and fair hearing.<sup>156</sup> The BIA has similarly held that the constitutional requirement of due process mandates that immigration proceedings be fair.<sup>157</sup> Much has been written about the particulars of what a "full and fair hearing" requires in the immigration context, particularly with regard to the mentally ill.<sup>158</sup> Scholars generally agree that under the well-established standards in criminal and civil cases, due process requires appointed counsel for the mentally ill facing deportation.<sup>159</sup>

In the criminal context, the Supreme Court has recognized that the Due Process Clause

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<sup>155</sup> *Id.*

<sup>156</sup> *Reno v. Flores*, 507 U.S. 292, 306 (1993) (noting that it is "well-established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings"); *see also* *Leslie v. Att'y Gen. of U.S.*, 611 F.3d 171, 181 (3d Cir. 2010) (citing *Xu Yong Lu v. Ashcroft*, 259 F.3d 127, 131 (3d Cir. 2001) (holding due process guarantees immigration respondents a fundamentally fair hearing)); *Cabrera-Perez v. Gonzales*, 456 F.3d 109, 115 (3d Cir. 2006) (per curiam) ("[D]ue process requires that aliens threatened with removal are provided the right to a full and fair hearing that allows them a reasonable opportunity to present evidence on their behalf."); *Brue v. Gonzales*, 464 F.3d 1227, 1233 (10th Cir. 2006) (citing *Schroek v. Gonzales*, 429 F.3d 947, 951-52 (10th Cir. 2005) (finding that those in removal proceedings are entitled to due process and therefore "the opportunity to be heard at a meaningful time and in a meaningful manner")); *Jaadan v. Gonzales*, 211 Fed. Appx. 422, 430 (6th Cir. 2006) (citing *Ahmed v. Gonzales*, 398 F.3d 722, 725 (6th Cir. 2005) (holding that noncitizens in removal proceedings are entitled to due process in the form of full and fair hearing)); *Garcia-Jaramillo v. INS*, 604 F.2d 1236, 1239 (9th Cir. 1979) (holding that in a deportation hearing, an alien is entitled to due process, which is satisfied only by a full and fair hearing).

<sup>157</sup> *See Matter of Exilus*, 18 I. & N. Dec. 276, 278 (B.I.A. 1982).

<sup>158</sup> *See, e.g.,* Clapman, *supra* note 10, at 373; Helen Eisner, *Disabled, Defenseless, and Still Deportable: Why Deportation Without Representation Undermines Due Process Rights of Mentally Disabled Immigrants*, 14 U. PA. J. CONST. L. 511 (2011); American Bar Association, *Due Process for People with Mental Disabilities in Immigration Removal Proceedings*, 33 MENTAL & PHYSICAL DISABILITY L. REP. 882 (2009).

<sup>159</sup> *See* Clapman *supra* note 10.

requires appointed counsel for indigent criminal defendants.<sup>160</sup> In *Massey v. Moore*, the Supreme Court unanimously held that mentally ill individuals should not have to make vital decisions regarding their case where their mental illness renders such decisions futile: “[I]f he were then insane as claimed, he was effectively foreclosed from defending himself. . . . his need of a lawyer to tender the defense is too plain for argument.”<sup>161</sup> The Court stated unequivocally: “No trial can be fair that leaves the defense to a man who is insane, unaided by counsel, and who by reason of his mental conditions stands helpless and alone before the court.”<sup>162</sup> In *Rohan v. Woodford*, the capacity to communicate was held to be the “cornerstone of due process.”<sup>163</sup> In *Palmer v. Ashe*, the Supreme Court held that an individual with serious mental illness was incapable of “protect[ing] himself in the give-and-take of a courtroom trial” and therefore remanded the case for an evidentiary hearing on competency.<sup>164</sup>

Although immigration removal proceedings have traditionally been considered civil rather than criminal in nature, the Supreme Court has long recognized that deportation can result in hardship to the deportee that is even greater than criminal prosecution. For example, in *Bridges v. Wixon*, the Court stated that, “The impact of deportation upon the life of an alien is often as great if not greater than the imposition of a criminal sentence . . . . Return to his native land may result in poverty, persecution, even death.”<sup>165</sup> The Court echoed this sentiment more recently in *Padilla v. Kentucky*, in which it noted that “deportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes”,<sup>166</sup> “deportation is a particularly severe ‘penalty’”,<sup>167</sup> and “[p]reserving the client’s right to remain in the United States may be more important to the client than any potential jail sentence.”<sup>168</sup> Scholars have argued that *Padilla* has begun to break down the distinction between immigration removal cases and criminal proceedings.<sup>169</sup>

Even in the civil context, the landmark case *Lassiter v. Department of Social Services* held that where a substantial liberty interest is at stake, Due Process requires the appointment of counsel.<sup>170</sup> *Lassiter* involved proceedings to terminate parental rights and held that the Due Pro-

<sup>160</sup> See *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

<sup>161</sup> 348 U.S. 105, 108 (1954); *Wade v. Mayo*, 334 U.S. 672, 684 (1948) (“There are some individuals who, by reason of age, ignorance or mental capacity are incapable of representing themselves adequately in a prosecution of a relatively simple nature.”); see also *Palmer v. Ashe*, 342 U.S. 134, 137 (1951) (holding that defendant with alleged “mental abnormality” was entitled to counsel at trial if he suffered from mental illness).

<sup>162</sup> *Massey*, 348 U.S. at 108.

<sup>163</sup> 334 F.3d 803, 809 (9th Cir. 2003).

<sup>164</sup> 342 U.S. 134, 137 (1951); see also *Massey*, 348 U.S. at 108 (“One might not be insane in the sense of being incapable of standing trial and yet lack the capacity to stand trial without benefit of counsel.”); Cf. *Indiana v. Edwards*, 554 U.S. 164, 174 (2008) (stating that a defendant may have “sufficient mental competence to stand trial” yet “lack[] the mental capacity to conduct his trial defense unless represented”).

<sup>165</sup> *Bridges v. Wixon*, 326 U.S. 135, 164 (1945).

<sup>166</sup> *Id.* at 1480.

<sup>167</sup> *Id.* at 1481.

<sup>168</sup> *Id.* at 1483 (citing *INS v. St. Cyr*, 533 U.S. at 323).

<sup>169</sup> See *infra* Part IV.C. (discussing how *Padilla v. Kentucky* has begun to break down this distinction); see also Peter L. Markowitz, *Deportation is Different*, 13 U. PA. J. CONST. L. 1299, 1299 (June 2011) (arguing that *Padilla v. Kentucky* and other Supreme Court jurisprudence is increasingly recognizing that a deportation proceeding is “quasi-criminal” in nature).

<sup>170</sup> See 452 U.S. 18, 25 (1981).

cess Clause does not require the appointment of counsel for all parents in such proceedings, but rather requires courts to assess the need for counsel on a case-by-case basis.<sup>171</sup> *Lassiter* distinguished between two classes of cases: those in which a litigant “may lose his physical liberty if he loses” the case, and those in which physical liberty is not potentially at stake.<sup>172</sup>

When physical liberty is at stake, *Lassiter* held that appointed counsel is always required. It relied on prior decisions recognizing that Due Process requires appointed counsel for juveniles in civil delinquency proceedings<sup>173</sup> and for convicted prisoners facing civil commitment.<sup>174</sup> Subsequent decisions have confirmed that where civil proceedings threaten to deprive litigants of their physical liberty, Due Process requires appointed counsel.<sup>175</sup>

Where physical liberty is not at stake, *Lassiter* held that courts must conduct procedural due process balancing analysis to determine whether to provide appointed counsel when depriving people of lesser liberty or property interests.<sup>176</sup> Such an inquiry weighs the respondent’s interest at stake, the value of appointed counsel, the potential risk of irreversible error without such counsel and the government’s interest in efficiency.<sup>177</sup>

In removal proceedings, the respondents’ physical liberty is clearly at stake. Respondents face involuntary (and sometimes indefinite) detention and possible forcible removal to countries where they often do not have any family or support system. However, even if IJs disagree that respondents face a severe threat to their physical liberty, they would still need to conduct a procedural Due Process balancing analysis under *Lassiter*. Such analysis would also come down firmly on the side of providing appointed counsel.

Applying the procedural Due Process balancing analysis, we first consider the respondents’ interest at stake. That interest—the right to stay in their country of choice where they often have family and substantial community ties—is particularly important for respondents with mental illness, who may need social support for their very survival.<sup>178</sup>

Second, we consider together the value of appointed counsel and the potential risk for irreversible error without it. The high value of appointed counsel and extreme risk of irreversible error without it are undeniable. Federal courts have repeatedly recognized the complexity of immigration proceedings and the resulting potential for error when individuals are forced to defend themselves without legal representation.<sup>179</sup> The American Civil Liberties Union and Human

<sup>171</sup> *Id.* at 31-32.

<sup>172</sup> *Id.* at 25.

<sup>173</sup> *In re Gault*, 387 U.S. 1, 41 (1967).

<sup>174</sup> *Vitek v. Jones*, 445 U.S. 480, 497 (1980).

<sup>175</sup> See *Heryford v. Parker*, 396 F.2d 393, 396 (10th Cir. 1968) (“It matters not whether the proceedings be labeled ‘civil’ or ‘criminal’ or whether the subject matter be mental instability or juvenile delinquency. It is the likelihood of involuntary incarceration . . . which commands observance of the constitutional safeguards of due process.”).

<sup>176</sup> See *Lassiter*, 452 U.S. at 27 (citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)).

<sup>177</sup> *Id.*

<sup>178</sup> See *Sullivan, Burman & Koegel*, *supra* note 15, at 445.

<sup>179</sup> See, e.g., *Biwot v. Gonzales*, 403 F.3d 1094, 1098 (9th Cir. 2005) (“The proliferation of immigration laws and regulations has aptly been called a labyrinth that only a lawyer could navigate.” (citing *Castro-O’Ryan v. INS*, 847 F.2d 1307, 1312 (9th Cir. 1988))); see also Brief for The American Psychiatric Association and American Academy of Psychiatry and the Law, as Amici Curiae In Support of Neither Party at 13 n.4 *Indiana v. Edwards*, 554 U.S. 164 (2008) (No. 07-208) (citing N. Poythress, R. Bonnie, J. Monahan, R. Otto, S. Hoge, *Adjudicative Competence: The MacArthur Studies* 44 (2002) (“[A] mentally impaired defendant might be unfairly convicted if he alone has knowledge of certain facts but does not appreciate the value of such facts, or the propriety of communicating them to counsel.”)).



Rights Watch have also extensively documented the prevalence of errors arising from removal hearings where a mentally ill respondent appears pro se.<sup>180</sup> Their year-long investigation revealed that mentally incompetent respondents were unable to provide immigration courts with basic information necessary to contest removability or establish eligibility for relief, including at times their names, places of birth, and family contact information. In some cases, detainees interviewed did not know what a court or a judge was, let alone what was happening in court.<sup>181</sup>

Finally, we consider the government's interest in efficiency. The government's interest would also be better served by appointed counsel because of fewer continuances, the timely tendering of completed applications, and fluency before the IJ in complex immigration laws.

Significantly, in the immigration context, some circuit courts have held that appointed counsel can be required for populations analogous to the mentally ill. In *Lin v. Ashcroft*, the Ninth Circuit held, in the context of unaccompanied minors in removal proceedings, that "[a]bsent a minor's knowing, intelligent, and voluntary waiver of the right to counsel, the IJ may have to take an affirmative role in securing representation by competent counsel."<sup>182</sup> Decades earlier, circuit courts were even more emphatic in calling for appointed counsel. In *United States v. Campos-Asencio*, the Fifth Circuit held that "[A]n alien has a right to counsel if the absence of counsel would violate due process under the fifth amendment" because in some cases, "[t]he laws and regulations determining [an alien's] deportability [a]re too complex for a pro se alien."<sup>183</sup> Finally, in *Aguilera-Enriquez v. INS*, the Sixth Circuit stated, "where an unrepresented indigent alien would require counsel to present his position adequately to an immigration judge, he must be provided with a lawyer at the Government's expense. Otherwise 'fundamental fairness' would be violated."<sup>184</sup> Though seldom cited by IJs, these cases are still good law and are ripe for revival.

## B. Federal Law and Interpretations Thereof

### 1. The Immigration and Nationality Act

In the INA and corresponding regulations, Congress was also concerned with the fundamental fairness of immigration removal proceedings. Specifically, Congress established procedural rights including the right to examine witnesses, present evidence, and cross-examine the Government's witnesses.<sup>185</sup> Additionally, all persons in removal proceedings have the right to be advised of the charges against them<sup>186</sup> and the "privilege of being represented, at no expense to the government, by counsel of the alien's choosing."<sup>187</sup>

The INA also acknowledges that respondents may be mentally incompetent and may need additional safeguards in order for the proceedings to be fair. Specifically, the INA states: "If it is impracticable by reason of an alien's mental incompetency for the alien to be present at the

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<sup>180</sup> See HUMAN RIGHTS WATCH, DEPORTATION BY DEFAULT, *supra* note 20, at 54-56.

<sup>181</sup> *Id.* at 25-26.

<sup>182</sup> 377 F.3d 1014, 1034 (9th Cir. 2004).

<sup>183</sup> 822 F.2d 506, 509 (5th Cir. 1987) (citing *Partible v. INS*, 600 F.2d 1094, 1096 (5th Cir. 1979)).

<sup>184</sup> 516 F.2d 565, 569 n.3 (6th Cir. 1975).

<sup>185</sup> Proceedings to Determine Removability of Aliens in the United States, 8 C.F.R. § 1240.10(a)(4) (2005).

<sup>186</sup> See Notice to Appear, 8 C.F.R. § 239.1(a), (b) (2005).

<sup>187</sup> Expedited Removal of Aggravated Felons, 8 C.F.R. § 238.1(b)(2)(i) (2011); 8 C.F.R. § 1240.10(a)(1) (2005).

proceeding, the Attorney General shall proscribe safeguards to protect the rights and privileges of the alien.”<sup>188</sup> The INA assumes that proceedings can go forward against an incompetent respondent as long as the proceedings are fair.

The regulations provide some guidance regarding treatment of aliens who lack mental competency. For example, IJs may not accept an admission of removability from an unrepresented respondent who is incompetent and unaccompanied.<sup>189</sup> Further, when it is impractical for the respondent to be “present” at the hearing because of incompetency, the attorney, legal representative or guardian, near relative, or friend who was served with a copy of the Notice to Appear can appear on the respondent’s behalf.<sup>190</sup> If an IJ determines that a respondent lacks sufficient competency to proceed with the hearing, the IJ “shall prescribe safeguards to protect the rights and privileges of the alien”<sup>191</sup> in the judge’s discretion.<sup>192</sup> Being represented by counsel is a crucial safeguard. Thus the INA appears to allow judicial appointment of counsel in these cases where it is necessary to make the proceedings fair.

## 2. *Franco-Gonzales v. Holder* and the Rehabilitation Act/Americans with Disabilities Act

The seminal case supporting the notion of appointed counsel, under the federal Rehabilitation Act, is *Franco-Gonzales v. Holder*.<sup>193</sup> In *Franco*, the Central District of California held that the Rehabilitation Act compelled the appointment of counsel in immigration proceedings where the respondent was mentally ill: “Given Plaintiff Martinez’s mental condition and the importance of the issues at stake in the pending BIA appeal, the Court is compelled to conclude that he is entitled under the Rehabilitation Act to a reasonable accommodation that would provide him with adequate representation.”<sup>194</sup> The court further held that the adequate representation must be provided by a Qualified Representative,<sup>195</sup> and that such representative should be bound for the entirety of the immigration proceedings, and could perform “the services either pro bono or at [DHS’s] expense.”<sup>196</sup>

Section 504 of the Rehabilitation Act of 1973 prohibits federal agencies from discriminating against immigration respondents with mental or physical disabilities.<sup>197</sup> Failing to provide accommodations amounts to a violation under Section 504: “No otherwise qualified individual

<sup>188</sup> Immigration and Nationality Act, 8 U.S.C. § 1229a(b)(3) (2006).

<sup>189</sup> 8 C.F.R. § 1240.10(c) (2005).

<sup>190</sup> 8 C.F.R. §§ 1240.4, 1240.43 (2010). It is unclear whether the inability to be “present” referenced in this provision is meant to include only the inability to be physically present or also the inability to be mentally present due to a mental disability. See Clapman, *supra* note 10, at 377.

<sup>191</sup> See *Matter of M-A-M*, 25 I. & N. Dec. 474, 478 (B.I.A. 2011) (citing the Immigration and Nationality Act § 240(b)(3), 8 U.S.C. § 1229a(b)(3) (2006)); see also *Immigration Judges*, 8 C.F.R. § 1003.10(b) (2010) (“In deciding the individual cases before them, and subject to the applicable governing standards, immigration judges shall exercise their independent judgment and discretion and may take any action consistent with their authorities under the Act . . .”).

<sup>192</sup> See 25 I. & N. Dec. 474, 478.

<sup>193</sup> 767 F. Supp. 2d 1034, 1061 (C.D. Cal. 2010).

<sup>194</sup> *Id.* at 1055.

<sup>195</sup> *Id.* at 1056. For the definition of a qualified representative, see *supra* Part III.A.

<sup>196</sup> *Franco-Gonzales*, 767 F. Supp. 2d at 1058.

<sup>197</sup> The Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355 (1973); Promulgation of rules and regulations, 29 U.S.C. § 794(a), Pub. L. 93-112, title V, § 504, 87 Stat. 394 (1973); 29 U.S.C. § 701, Pub. L. 93-112, § 2, 112 Stat. 1095 (1998).

with a disability . . . shall solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency . . . .<sup>198</sup> Section 504 bars not only intentional discrimination, but “disparate impact” discrimination as well.<sup>199</sup> Any agency or organization receiving federal funds must ensure that individuals with disabilities receive a reasonable accommodation to ensure meaningful access to public services, which includes courts.<sup>200</sup> A person with a “mental disability” is defined as “any person who has a physical or mental impairment that substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment.”<sup>201</sup>

The Rehabilitation Act has been read in conjunction with the Americans with Disabilities Act (ADA).<sup>202</sup> The ADA was enacted in 1990 and extended the responsibilities codified in the Rehabilitation Act to state and non-governmental entities, including courts. Exclusion from court proceedings was one of the primary motivations for the enactment of the ADA.<sup>203</sup> The ADA provides that, “nothing in this chapter shall be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973 (29 U.S.C. 790 et seq.) or the regulations issued by Federal agencies pursuant to such title.”<sup>204</sup>

The Supreme Court held in *Tennessee v. Lane* that the ADA “applie[s] to cases implicating the fundamental right to access the courts.”<sup>205</sup> The Court continued that states have an affirmative duty to provide necessary accommodations to ensure that individuals with disabilities are not excluded from or disadvantaged during the administration of justice.<sup>206</sup> According to the Court, “[t]his duty to accommodate is perfectly consistent with the well-established due process principle that, ‘within the limits of practicability, a State must afford to all individuals a meaningful opportunity to be heard’ in its courts.”<sup>207</sup> A lawyer is a necessary accommodation for the mentally ill during removal proceedings. Thus, the ADA and the Rehabilitation Act both provide

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<sup>198</sup> 29 U.S.C. § 794(a), Pub. L. 93-112, title V, § 504, 87 Stat. 394 (1973), codified as 28 C.F.R. § 39.130 (1984).

<sup>199</sup> See 28 C.F.R. § 39.130(b)(3) (1984).

<sup>200</sup> See *Alexander v. Choate*, 469 U.S. 287, 301 n.21 (1985) (“The regulations implementing Section 504 are consistent with the view that reasonable adjustments in the nature of the benefit must be made to assure meaningful access.”); General Prohibitions Against Discrimination, 28 C.F.R. § 35.130(b)(7) (1991) (“A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability . . . .”).

<sup>201</sup> See Definitions, 28 C.F.R. § 39.103 (1984).

<sup>202</sup> Americans with Disabilities Act of 1990, 42 U.S.C. § 12101, Pub. L. No. 101-336, § 2, 104 Stat. 327, 327-28 (1990). At least one federal circuit court has held that the Rehabilitation Act and the ADA are analogous, and that all claims under the Rehabilitation Act also apply under the ADA, and vice versa. See *Frederick L. v. Dep’t of Pub. Welfare*, 364 F.3d 487, 491 (3d Cir. 2004); *Chisolm v. McManimon*, 275 F.3d 315, 325–26 n.9 (3d Cir. 2001); *Yeskey v. Pa. Dep’t. of Corrections*, 118 F.3d 168, 170 (3d Cir. 1997); *Helen L. v. DiDario*, 46 F.3d 325, 330–31 & n.7 (3d Cir. 1995).

<sup>203</sup> *Tennessee v. Lane*, 541 U.S. 509, 526–27 (2004) (“In the deliberations that led up to the enactment of the ADA . . . Congress learned that many individuals, in many States across the country, were being excluded from courthouses and court proceedings by reason of their disabilities.”).

<sup>204</sup> 42 U.S.C. § 12201, Title V-Miscellaneous Provisions, §501. Construction, Pub. L. No. 101-336, 104 Stat. 327, 369 (1990).

<sup>205</sup> *Tennessee*, 541 U.S. at 533-34.

<sup>206</sup> *Id.*

<sup>207</sup> *Id.* at 532 (quoting *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971)).

further authority for appointing counsel for mentally ill respondents.

### C. *Padilla v. Kentucky: Inviting Appointed Counsel*

In *Padilla v. Kentucky*<sup>208</sup> a lawful permanent resident for more than 40 years who was also a Vietnam War veteran was facing deportation after pleading guilty to a drug offense. During his post-conviction proceeding, he claimed that his counsel failed to advise him of the deportation consequences of his plea and inaccurately advised him that he did not have to worry about his immigration status since he had been in the country for so long.<sup>209</sup> The Supreme Court held that defense attorneys have an affirmative duty to advise their clients when a plea triggers deportation proceedings.<sup>210</sup> The Court stated that deportation is a “particularly severe ‘penalty’ . . . intimately related to the criminal process,”<sup>211</sup> and that “advice regarding deportation is not categorically removed from the ambit of the Sixth Amendment right to counsel.”<sup>212</sup>

*Padilla* was a watershed decision. It represented the first time the Court held that immigrants are entitled to effective assistance of counsel. Previous rulings had imposed a duty on attorneys not to provide inaccurate advice. But under *Padilla*, defense lawyers now have an affirmative duty to provide correct advice, and can no longer claim ignorance of the collateral immigration consequences of a plea deal in order to escape the duties imposed by the doctrine of effective assistance of counsel.<sup>213</sup> Most importantly for this discussion, *Padilla* arguably elevated immigration proceedings to a level of consequence parallel to criminal proceedings,<sup>214</sup> stating, “deportation is . . . intimately related to the criminal process.”<sup>215</sup>

While *Padilla* does not explicitly mandate appointed counsel in removal proceedings, the language of the decision logically invites it. The opinion contains many references to the drastic, severe, and punitive nature of deportation. Specifically, the Court states, “The ‘drastic measure’ of deportation or removal . . . is now virtually inevitable for a vast number of noncitizens convicted of crimes.”<sup>216</sup> The Court continued that “as a matter of federal law, deportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on nonciti-

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<sup>208</sup> *Padilla v. Kentucky*, 130 S. Ct. 1477 (2010).

<sup>209</sup> *Id.* at 1478.

<sup>210</sup> *Id.* at 1483.

<sup>211</sup> *Id.* at 1481.

<sup>212</sup> *Id.* at 1482.

<sup>213</sup> See Malia Brink, *A Gauntlet Thrown: The Transformative Potential of Padilla v. Kentucky*, 39 FORDHAM URB. L.J. 39, 41 (2011) (“While some courts had held that a lawyer has a duty not to provide inaccurate advice, no federal court had held that the defense lawyer has an affirmative duty to provide correct advice. Until *Padilla*, silence of even ‘I don’t know’ was sufficient—a reality that resulted in a defense culture of not providing information regarding collateral consequences despite practice standards that required this advice”).

<sup>214</sup> See Duncan Fulton, Comment, *Emergence of a Deportation Gideon?: The Impact Of Padilla v. Kentucky on Right to Counsel Jurisprudence*, 86 TUL. L. REV. 219, 238 (“Because *Padilla* increases the judiciary’s assessment of the private interest of noncitizens in combating deportation, the balance of the *Eldridge* factors now supports a Sixth Amendment right to counsel in deportation proceedings. Similarly, *Padilla* provides a new interpretation of *Aguilera-Enriquez*, which also heightens support for the right to counsel. Finally, *Padilla*, along with other recent developments, illustrates that societal pressures demand that same right to counsel.”).

<sup>215</sup> *Padilla*, 130 S. Ct. at 1481.

<sup>216</sup> *Id.* at 1478 (citing *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948)).

zen defendants who plead guilty to specified crimes,<sup>217</sup> and “is a particularly severe penalty.”<sup>218</sup> Further, “[p]reserving the client’s right to remain in the United States may be more important to the client than any potential jail sentence.”<sup>219</sup> Finally, “The severity of deportation – ‘the equivalent of banishment or exile’ . . . only underscores how critical it is for counsel to inform her noncitizen client that he faces a risk of deportation.”<sup>220</sup>

The Court also expressed concern about the effect of deportation on a vulnerable population, calling immigrants with deportable offenses, “a class of clients least able to represent themselves,”<sup>221</sup> and noting regarding its holding: “Our longstanding Sixth Amendment precedents, the seriousness of deportation as a consequence of a criminal plea, and the concomitant impact of deportation on families living lawfully in this country demand no less.”<sup>222</sup>

The Supreme Court demonstrated in *Padilla* that it views deportation as harsh and drastic, and the equivalent to, or in some cases worse than, a criminal punishment. The Court also showed that it is concerned with the rights of vulnerable immigrants. In light of the Court’s unequivocal statement in *Padilla* that immigrants are entitled to effective assistance of counsel when deportation is involved due to the severity of the penalty, it simply does not make sense that the Court would sanction a complete lack of a right to appointed counsel in deportation proceedings themselves. In other words, the lack of appointed counsel in removal proceedings, particularly for extremely vulnerable populations such as the mentally ill, is at odds with the *Padilla* decision. Therefore, appointing such counsel would be consistent with the reasoning of the decision. When *Padilla* is read in tandem with *Matter of M-A-M*, an IJ is even more strongly compelled to appoint counsel for the mentally ill in removal proceedings, as explained below.

#### *D. Matter Of M-A-M: Conferring Wide Discretion in Protecting the Integrity of Proceedings Against the Mentally Ill*

As discussed in Part II.A., *supra*, in *Matter of M-A-M* the BIA gave IJs wide discretion in determining what safeguards are appropriate for mentally ill respondents on a case-by-case basis<sup>223</sup> with the goal of ensuring that proceedings are as fair as possible.<sup>224</sup> The BIA deliberately provided a non-exhaustive list of suggested safeguards that IJs might employ. Specifically, the Board stated that the IJ could “decide which of these *or other relevant safeguards* to utilize” in a particular case.<sup>225</sup> Thus, at a minimum, appointing a GAL, appointing counsel, or appointing both as we urge here, is not foreclosed.

In fact, this case should be read in conjunction with the other sources discussed herein to authorize the appointment of counsel and a GAL in cases where a mentally ill respondent faces deportation. Viewing *Matter of M-A-M* and *Padilla* together provides particularly strong support for this conclusion. In *Padilla*, the Supreme Court mandated effective assistance of counsel as a

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<sup>217</sup> *Id.* at 1480.

<sup>218</sup> *Id.* at 1481 (citing *Fong Haw Tan* at 10).

<sup>219</sup> *Id.* at 1483 (citing *INS v. St. Cyr*, 533 U.S. 289, 322 (2001)).

<sup>220</sup> *Padilla*, 130 S. Ct. at 1486 (citing *Delgado v. Carmichael*, 332 U.S. 388, 391 (1947)).

<sup>221</sup> *Id.* at 1484.

<sup>222</sup> *Id.* at 1486.

<sup>223</sup> *Matter of M-A-M*, 25 I. & N. Dec. 474, 482–83 (B.I.A. 2011).

<sup>224</sup> *Matter of M-A-M*, 25 I. & N. Dec. 474, 476 (B.I.A. 2011).

<sup>225</sup> *Id.* (emphasis added).

crucial safeguard, while in *Matter of M-A-M*, the BIA mandated the application of crucial safeguards for the mentally ill in removal proceedings. The logical, syllogistic way to read these two cases together is to provide effective assistance of counsel to the mentally ill in removal proceedings.<sup>226</sup> The fact that the BIA looked to the criminal context when it defined “competency”<sup>227</sup> permits IJs to do the same when defining “safeguards.”

*E. The Department of Homeland Security States that Nothing in the INA Prohibits Appointing Counsel*

Section 292 of the INA is entitled “Right to Counsel,” and specifically states, “In any removal proceedings . . . the person concerned shall have the privilege of being represented (at no expense to the government) by such counsel . . . as he chooses.”<sup>228</sup> INA §240(b)(4), entitled “Alien’s rights in proceedings,” also states that aliens “shall have the privilege of being represented, at no expense to the Government, by counsel of the alien’s choosing. . . .” Recently, the government has stated that these statutes do not prohibit federal funds from being used to fund appointed counsel.

Specifically, in a December 2010 memo entitled “Views Concerning Whether It Is Legally Permissible to Use Discretionary Federal Funding for Representation of Aliens in Immigration Proceedings,” DHS states: “The courts have understandably determined that section 292 does not provide an affirmative right to appointed counsel. None of those decisions, however, directly address whether INA section 292 prohibits the provision of counsel at government expense. In our view, the plain language of section 292 does not lend itself to such interpretation.”<sup>229</sup> The memorandum finishes with, “We conclude that nothing in INA section 240(b)(4), INA section 292, or 5 U.S.C. section 3106 prohibits the use of discretionary federal funding for representation of aliens in immigration proceedings.”<sup>230</sup> Thus, it would be inconsistent for the Department of Homeland Security to stand in the way of IJs appointing counsel for the mentally ill in order to guarantee due process.

*F. The Executive Office for Immigration Review Deputizes Immigration Judges to Take Creative Measures to Ensure Due Process*

In 2009, EOIR released the Immigration Judge Benchbook Guidelines on Mental Health Issues.<sup>231</sup> The Benchbook provides IJs with wide discretion in handling the cases of mentally ill respondents: “Immigration Judges should exercise flexibility when dealing with respondents who may have mental health issues, taking any action consistent with their authorities under the [INA] and regulations that is appropriate and necessary for the disposition of such cases . . . . This may include . . . granting multiple continuances, even *sua sponte*, to afford respondents time to . . . se-

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<sup>226</sup> Some would argue that *Padilla* militates toward appointed counsel for all respondents in immigration removal proceedings. While we do not disagree with this more expansive view of the case, here we argue only that at a minimum, it justifies the appointment of counsel for the particularly vulnerable population of the mentally ill.

<sup>227</sup> *Matter of M-A-M*, 25 I&N Dec. 474, 479.

<sup>228</sup> Immigration and Nationality Act, § 292, 8 U.S.C. § 1362 (2006).

<sup>229</sup> Department of Homeland Security, *Views Concerning Whether It Is Legally Permissible to Use Discretionary Federal Funding for Representation of Aliens in Immigration Proceedings* (Dec. 10, 2010).

<sup>230</sup> *Id.*

<sup>231</sup> See EOIR, *supra* note 7.

cure representation in the form of counsel or a guardian ad litem . . . .”<sup>232</sup>

Further, in Part (I)(2) of the Benchbook’s guidelines, EOIR recommends that upon determining that an individual is incompetent to proceed pro se, judges should “focus on ensuring adequate safeguards are in place, such as finding counsel or a guardian ad litem. . . .”<sup>233</sup> To assist in securing counsel, the Benchbook does not explicitly recommend appointing counsel, but it does offer certain measures that can be used to locate counsel, such as invoking the assistance of DHS trial attorneys, recommending that the respondent reach out to non-profit organizations or Legal Orientation Program (LOP) providers, bringing the respondent’s identity to the attention of LOP providers, and contacting the American Immigration Lawyers Association to seek pro bono counsel.<sup>234</sup> Where counsel or a GAL cannot be located, the Benchbook urges judges to take steps to ensure fundamental fairness, including “administratively closing or terminating proceedings, or searching the record for any potentially available relief if removability is established.”<sup>235</sup> Thus, the Benchbook both recognizes the importance of having counsel in these proceedings, and deputizes IJs to be creative in taking whatever measures are necessary to ensure due process. Appointing a GAL and counsel is consistent with the flexible, fairness-oriented approach prescribed by the Benchbook, and is the only approach that assures the mentally ill respondent a full and fair hearing.

#### *G. Appointing Counsel is Not an Ethical Violation or an Improper Endorsement*

In the spring of 2012, the authors filed an amicus curiae motion urging an IJ to appoint counsel in a case of a mentally ill respondent. Such motions have also been filed by other non-profit organizations in similar cases where a mentally ill respondent appears pro se.<sup>236</sup> The motion made by the authors was denied in a two-paragraph decision in which the IJ cited C.F.R. § 2635.702 of the Office of Government Ethics. That provision prohibits a public employee from endorsing any service or enterprise.<sup>237</sup> Specifically, the decision stated that, “an appointment of counsel would constitute the endorsement of a service or enterprise and could reasonably be construed to imply the Department of Justice’s endorsement of a specific organization or attorney.”<sup>238</sup>

This interpretation of appointed counsel is flawed. The legislative history makes clear that § 2635.703 was primarily directed toward prohibiting executive employees from using their public office to benefit those with whom they already have a relationship outside of their government employment. It was not intended to prohibit all incidental benefits to any private person that may result from their official actions, particularly when those actions are justified by a compelling governmental purpose, such as comports with due process.

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<sup>232</sup> *See id.*

<sup>233</sup> *Id.*

<sup>234</sup> *Id.*

<sup>235</sup> *Id.*

<sup>236</sup> To preserve confidentiality, case specific details, locations, and outcomes are withheld.

<sup>237</sup> 5 C.F.R. § 2635.702 (1997) (“An employee shall not use his public office for his own private gain, for the endorsement of any product, service or enterprise, or for the private gain of friends, relatives, or persons with whom the employee is affiliated in a nongovernmental capacity, including nonprofit organizations of which the employee is an officer or member, and persons with whom the employee has or seeks employment or business relations.”).

<sup>238</sup> The IJ’s decision is not public and the case is still pending. Therefore, the identifying details of the decision have been withheld.

This is apparent in the legislative history, which states: “Issues relating to an individual employee’s use of public office for private gain tend to arise when the employee’s actions benefit those with whom the employee has a relationship outside the office and the language of § 2635.702 is intended to pinpoint this conduct without unreasonably limiting employees in the performance of their official duties.”<sup>239</sup>

Further, the legislative history states that one of the comments it received on the draft of § 2635.702 proposed “that the first sentence of § 2635.702 be rephrased to state that an employee may not use public office for his or her own private gain ‘or for the private gain of anyone else.’”<sup>240</sup> The legislative history notes that the recommendation was not adopted because the recommended language was:

overly broad and could be construed as prohibiting employees from energetically and properly assisting citizens they know only because they have contacted the employee’s agency. It would raise repeated questions about individual employee actions that have less to do with individual conduct than with how agency programs are carried out.<sup>241</sup>

This, as well as the explicit examples in the statute,<sup>242</sup> demonstrates that the statute was intended to prevent actions such as bribery, nepotism, and undue influence of government actions concerning friends or relatives of government employees. It was never intended to prevent judges from taking actions in furtherance of their official duties that might incidentally benefit individuals with no prior relationship to the judge.

In addition, this reasoning flies in the face of the myriad systems of appointed counsel that already exist and are firmly established in criminal and civil cases. *Gideon v. Wainwright* guaranteed that indigent criminal defendants are entitled to appointed counsel under the U.S. Constitution,<sup>243</sup> and 80 to 90 percent of criminal defendants in state courts are represented by appointed counsel, often by public defender services and other non-profit legal services organiza-

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<sup>239</sup> *Id.*

<sup>240</sup> Use of Public Office for Private Gain, 57 Fed. Reg. 35042 (Aug. 7, 1992) (codified at C.F.R. § 2635.702).

<sup>241</sup> *Id.*

<sup>242</sup> Following are two of the illustrative examples provided in § 2635.703, which demonstrate the type of conduct intended to be regulated by the statute:

Example 1: Offering to pursue a relative’s consumer complaint over a household appliance, an employee of the Securities and Exchange Commission called the general counsel of the manufacturer and, in the course of discussing the problem, stated that he worked at the SEC and was responsible for reviewing the company’s filings. The employee violated the prohibition against use of public office for private gain by invoking his official authority in an attempt to influence action to benefit his relative.

Example 2: An employee of the Department of Commerce was asked by a friend to determine why his firm’s export license had not yet been granted by another office within the Department of Commerce. At a department-level staff meeting, the employee raised as a matter for official inquiry the delay in approval of the particular license and asked that the particular license be expedited. The official used her public office in an attempt to benefit her friend and, in acting as her friend’s agent for the purpose of pursuing the export license with the Department of Commerce, may also have violated 18 U.S.C. 205.

<sup>243</sup> *Gideon v. Wainwright*, 372 U.S. 335, 344–45 (1963).



tions.<sup>244</sup> In the criminal context, judges have been able to devise a system whereby counsel is appointed for indigent defendants in a relatively fair, unbiased, and ethically acceptable way. Accordingly, it is reasonable to assume that IJs can devise a system for appointing counsel that likewise comports with ethical standards.

Specifically, when the judge appoints counsel in the criminal context, she appoints either a public defender or private counsel from a list of vetted defense attorneys willing to take on such appointments.<sup>245</sup> Analogously, in the removal context, the IJ would appoint counsel from the existing list of low-cost and pro bono legal service providers that is routinely distributed to respondents who appear pro se. Rotating through the providers on the list one-by-one, and having a clerk rather than the appointing IJ administer the appointments, would ensure that there is no favoritism for a particular provider, and would alleviate any risk of impropriety.

In fact, such a system would be preferable, and arguably *more* ethical than the informal system that now exists for drafting counsel for incompetent respondents. As discussed in Part III.D, *supra*, and as is even encouraged by the Benchbook discussed in Part IV.E, *supra*, currently immigration judges lean heavily on attorneys from non-profit organizations to take the cases of mentally ill respondents pro bono. These attorneys frequently appear before the IJs and are well known in immigration court. Arguably, this system is both coercive of the attorneys, who may feel they cannot turn down a case given their frequent appearance before the IJ, and exploitative of the extremely overburdened and underfunded organizations where such attorneys work. A formal system for appointing counsel on a rotating basis would be fairer and less biased than the hit-or-miss method now in practice. Moreover, it would not run afoul of C.F.R. § 2635.702.

## V. TERMINATION IS THE ONLY VIABLE ALTERNATIVE TO DUAL APPOINTMENT OF A GUARDIAN *AD LITEM* AND COUNSEL

### A. *Mired Proceedings and the Attendant Risk of Prolonged Detention*

In the event that courts cannot or elect not to appoint both a GAL and counsel in cases with mentally ill respondents, IJs must terminate proceedings. As previously discussed, the IJ is required to implement safeguards to protect a mentally ill respondent's due process rights, and as such, is vested with discretion to determine which safeguards are appropriate.<sup>246</sup> This discretion includes the power to terminate proceedings where no set of safeguards would protect an incompetent respondent's rights.<sup>247</sup>

While *Matter of M-A-M* did not explicitly cite termination, it made clear that the list of safeguards it described is not exhaustive.<sup>248</sup> Additionally, *Matter of M-A-M* acknowledged that, in some situations, no safeguards would be sufficient to allow proceedings to continue: "In some

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<sup>244</sup> *Representation of Indigent Defendants in Criminal Cases: A Constitutional Crisis in Michigan and Other States?*: Hearing before the H. Subcomm. on Crime, Terrorism, and Homeland Sec. of the H. Comm. of the Judiciary H.R., 111<sup>th</sup> Cong. 3 (2009), available at [http://judiciary.house.gov/hearings/printers/111th/111-20\\_48233.pdf](http://judiciary.house.gov/hearings/printers/111th/111-20_48233.pdf).

<sup>245</sup> See *Appointment of Counsel*, USCOURTS.GOV, <http://www.uscourts.gov/FederalCourts/AppointmentOfCounsel.aspx> (last visited Sept. 6, 2012), for a description of the Federal Defender Service program.

<sup>246</sup> See *supra* Part II.A.

<sup>247</sup> See *Matter of M-A-M*, 25 I. & N. Dec. 474, 481-82 (B.I.A. 2011); see also EOIR, *supra* note 7 (explaining when an immigration judge can terminate a case).

<sup>248</sup> See *Matter of M-A-M*, 25 I&N Dec. 474, 483 (B.I.A. 2011) ("[Immigration judges] will consider the facts and circumstances of an alien's case to decide which of these or other relevant safeguards to utilize.").

cases, even where the court and the parties undertake their best efforts to ensure appropriate safeguards, concerns may remain. In these cases, the Immigration Judge may pursue alternatives with the parties, such as administrative closure,<sup>249</sup> while other options are explored such as seeking treatment for the respondent.”<sup>250</sup>

*Matter of M-A-M* and the BIA’s recent decision in *Matter of Avetisyan*<sup>251</sup> name administrative closure as one possible solution in such cases. However, administrative closure does not necessarily lead to the release of a detained respondent and is insufficient when there is little likelihood that the respondent’s circumstances will improve with the passage of time.<sup>252</sup> Under such conditions, administrative closure could simply result in the indefinite detention of a mentally incompetent individual,<sup>253</sup> raising further constitutional problems.<sup>254</sup>

In instances where an individual’s mental illness renders other safeguards ineffective, termination is the most appropriate remedy. While some federal courts have permitted respondents who are mentally incompetent to continue with proceedings through the adoption of safeguards, those cases are distinguishable from cases where a respondent is unrepresented, or is only represented by a GAL. For example, in *Nee Hao Wong v. INS*, the Ninth Circuit allowed proceedings to continue against a respondent who “was accompanied by his state court appointed conservator, who testified fully in his behalf, and by his counsel” and was therefore able to mount a defense to removal.<sup>255</sup> In *Brue v. Gonzales*, the Tenth Circuit held that the assistance of counsel for a potentially incompetent respondent was a sufficient safeguard to satisfy due process. However, the court emphasized that the respondent was able to testify and “largely was able to answer the questions posed to him and provide his version of the facts surrounding the past,”<sup>256</sup> and that his claims to relief “turned on undisputed facts or legal issues unaffected by his competence.”<sup>257</sup> In *Matter of M-A-M*, the Board interpreted the decision in *Brue* as turning on the question of whether “the alien had an opportunity to be heard at a meaningful time and in a meaningful man-

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<sup>249</sup> HUMAN RIGHTS WATCH, *supra* note 20 at 7 (“Prolonged and even indefinite detention is an additional problem faced by people with mental disabilities. In some cases, immigration judges attempt to introduce procedural safeguards by administratively closing a case—thereby placing it on hold—so the individual facing deportation can find an attorney or get a competency evaluation performed. However, even when a case is closed, the detainee is not released from detention. Rather, he or she remains in detention while the case is temporarily but indefinitely suspended as it waits to be ‘re-calendared.’”).

<sup>250</sup> *Matter of M-A-M*, 25 I. & N. Dec. 474, 483 (B.I.A. 2011).

<sup>251</sup> 25 I. & N. Dec. 688, 691 (B.I.A. 2012) (holding that the IJ or the BIA may close proceedings when doing so is both prudent and in the interest of justice and fairness to the parties). This case overruled *Matter of Gutierrez*, 21 I. & N. Dec. 479, 480 (B.I.A. 1996), which prohibited administrative closure if either party opposed the action. Administrative closure was created as a procedural tool to convenience the IJ or the Board and to enable the independent exercise of judgment and discretion. See C.F.R. §§ 1003.14(a) (2003), 1240.1(a)(1)(iv), (c) (2003)).

<sup>252</sup> *Matter of Avetisyan*, 25 I. & N. Dec. 688, 696.

<sup>253</sup> See, e.g., *Franco-Gonzalez*, 767 F.Supp. 2d 1037-1038 (noting that petitioner had been in detention for more than four years after his case was administratively closed due to his severe mental disabilities); see also *Petition for Writ of Habeas Corpus, Gomez-Sanchez v. Baker*, No. 10-CV-0652 (C.D. Cal. Mar. 26, 2010) (showing petition for writ of habeas corpus filed on behalf of an individual with mental disabilities who had been detained for over four years following administrative closure).

<sup>254</sup> See *infra* Part V.B.

<sup>255</sup> *Nee Hao Wong v. INS*, 550 F.2d 521, 523 (9th Cir. 1977).

<sup>256</sup> *Brue v. Gonzales*, 464 F.3d 1227, 1234 (10th Cir. 2006).

<sup>257</sup> *Id.*

ner where the alien was represented and was able to answer the questions posed to him and provide his version of the facts.”<sup>258</sup> Where the incompetent respondent cannot meaningfully participate in his defense, and there is no counsel and no GAL, the proceedings cannot fairly proceed and must be terminated. If the respondent is detained, then she must either be released or a bond hearing must be held (with the assistance of counsel and a GAL) to prevent the constitutional problem of indefinite detention.

### B. *Indefinite Detention is Unconstitutional*

In *Zadvydas v. Davis*, the Supreme Court held that, “A statute permitting indefinite detention of an alien would raise a serious constitutional problem,”<sup>259</sup> and that the Due Process Clause only authorizes immigration detention for a “reasonable period of time.”<sup>260</sup>

Various Circuit Courts of Appeal have applied and elaborated on the *Zadvydas* holding. Recently, in *Diop v. ICE/ Homeland Security*,<sup>261</sup> the Third Circuit considered whether DHS may indefinitely detain individuals who are otherwise subject to mandatory detention. The Court held that when detention exceeds the reasonable period of time permitted by the Supreme Court, a respondent is entitled to an individualized bond hearing during which time the government must show that continued detention is necessary to prevent flight or danger to the community.<sup>262</sup> The government’s interest grows weaker over time, and at each custody review DHS must make a more and more robust showing as to why continued detention is necessary when balanced against the compelling interests of the respondent. The Court held:

[T]he constitutionality of [mandatory detention] is a function of the length of the detention. At a certain point, continued detention becomes unreasonable and . . . unconstitutional unless the Government has justified its actions at a hearing inquiring into whether continued detention is consistent with the law’s purposes of preventing flight and dangers to the community.<sup>263</sup>

As the Court explained, neither the statute nor any legislative history indicated that Congress “intended to authorize prolonged, unreasonable, detention without a bond hearing.”<sup>264</sup> In *Diouf v. Napolitano*,<sup>265</sup> the Ninth Circuit likewise held that prolonged detention of aliens in removal proceedings without a custody hearing is unconstitutional. Thus, in cases where a fair hearing cannot be obtained for a mentally ill respondent in detention, she either must be released or a bond hearing must be held to justify her continued detention.

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<sup>258</sup> *Matter of M-A-M*, 25 I. & N. Dec. 474, 482-83 (B.I.A. 2011).

<sup>259</sup> *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001).

<sup>260</sup> *Id.* at 682, 699, 701 (holding this period to presumptively be six months for those detainees whose orders to be deported were not reasonably foreseeable).

<sup>261</sup> 656 F.3d 221 (3d Cir. 2011).

<sup>262</sup> *Id.* at 223.

<sup>263</sup> *Id.* at 232.

<sup>264</sup> *Id.* at 235.

<sup>265</sup> 634 F.3d 1081, 1084–85 (9th Cir. 2011).

C. *Resistance to Termination Recedes: A Look at Recent IJ Decisions and DHS' Response*

There is growing precedent for IJ termination of cases where a mentally ill respondent is either wholly unrepresented or is represented by counsel but lacks a GAL. In a written decision, an IJ in Arizona terminated a case because the respondent was “unable to effectively participate in a coherent manner, to comprehend the nature and consequences of the proceedings, to communicate with the Court in any meaningful dialog, to assert or waive any rights, and to seek various forms of relief.”<sup>266</sup> The IJ found that, despite having counsel, the respondent was “inadequately represented” because the respondent could not effectively communicate with counsel, making it impossible for counsel to represent the respondent’s interests.<sup>267</sup> The BIA dismissed DHS’ appeal in this case after DHS withdrew it following a thorough and well-reasoned amicus curiae brief submitted by the American Immigration Council, the American Immigration Lawyers Association, and the Pennsylvania Immigration Resource Center.

In another written decision, an IJ in California terminated proceedings for a pro se mentally ill respondent<sup>268</sup> The court held that:

[Given the] higher duty the Court must impose to insure that a pro se incompetent respondent’s rights and privileges in removal proceedings are protected, and out of an abundance of caution, . . . the NTA [Notice to Appear] was not properly served upon the Respondent, since it is extremely unlikely that the Respondent was competent to be served with the NTA at that time.<sup>269</sup>

Finally, in another decision in Arizona, an IJ terminated proceedings despite the respondent being represented by pro bono counsel because:

[W]hile pro bono counsel has entered an appearance in this matter, the respondent’s lack of mental competency and fitness has rendered counsel’s representation ineffective and inadequate in the relief stage of these proceedings . . . [T]he respondent’s mental health has affected his ability to effectively communicate with his pro bono counsel, and has rendered him incapable of properly assisting or otherwise participating in his legal representation.<sup>270</sup>

When viewed in the totality, recent circuit decisions demonstrate a movement toward increased protections for immigrants and a bolstering of their liberty interests and due process rights. IJs appear to be trending toward the same, enacting stronger protective measures in instances where proceeding against an incompetent respondent is at a minimum inequitable, and in its more extreme outcomes, catastrophic for the individual involved.

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<sup>266</sup> Matter of L-T-, Eloy, AZ (Sept. 14, 2010) at 2, available at <http://www.legalactioncenter.org/sites/default/files/docs/lac/Matter%20of%20L-T-IJ%20decision.pdf>.

<sup>267</sup> *Id.* at 4.

<sup>268</sup> Mr. Ever Francisco Martinez-Rivas, who later went on to become one of the plaintiffs in the *Franco-Gonzales v. Holder* litigation.

<sup>269</sup> Matter of Ever Francisco Martinez-Rivas, San Diego, CA (Sept. 16, 2010) at 9.

<sup>270</sup> Matter of B-Z, Eloy, AZ (Dec. 1, 2010) at 14.

## VI. CONCLUSION: WHERE REASON NOW LEADS US

The lamentable reality of a vulnerable mentally ill respondent caught in a complicated immigration system is rendered more disturbing when one visualizes the individual—indigent and detained, without a guardian or advocate, facing imminent deportation. IJs are charged with the difficult task of mitigating these regrettable circumstances, although they may have previously believed that they lacked the authority to enact truly effective, protective measures.

The sands have shifted. Presumptions and arguments against appointed counsel and guardians have atrophied, and support has swelled. The totality of the case law, including *Padilla* and *Matter of M-A-M*, statutes, including the INA and the Rehabilitation Act, and other authoritative documents such as the Benchbook and DHS's own memorandum on the issue, now support appointing counsel and a GAL for the mentally ill in immigration proceedings. Appointing one without the other is deeply problematic; rather, both are essential to guarantee due process. Such fairness and justice-oriented action by IJs presents no more of an ethical dilemma than the status quo, or than other systems of appointed counsel in the civil and criminal contexts. Where appointment is infeasible, termination is required. While legal theory and analysis lead us to this solution, so too do the canons of common sense and compassion. Dual appointment of counsel and guardians *ad litem* for the mentally ill in removal proceedings is warranted and it is justified.