



U.S. Department of Justice

REDACTED

Executive Office for Immigration Review

Board of Immigration Appeals  
Office of the Clerk

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5107 Leesburg Pike, Suite 2000  
Falls Church, Virginia 22041

Pleasants, Gregory  
3255 Wilshire Blvd., #902  
Los Angeles, CA 90010

U.S. DHS/SPD  
606 S. Olive Street, 8th Floor  
Los Angeles, CA 90014

Name: [REDACTED]

As [REDACTED]

Date of this notice: 5/2/2008

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

Sincerely,

*Donna Carr*

Donna Carr  
Chief Clerk

Enclosure

Panel Members:  
GRANT, EDWARD R.

Falls Church, Virginia 22041

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File: A [REDACTED] CA

Date:

MAY - 2 2008

In re: [REDACTED]

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Gregory Legare Pleasants, Esquire

This case was last before us on May 29, 2007, when we denied the respondent's motion to reopen and remand the record based on his alleged mental incompetence. In that decision, we found that the respondent, who appeared *pro se* and provided only an affidavit from a fellow inmate to attest to his behavior, had failed to demonstrate his mental incompetence so as to warrant a reopening of our previous March 13, 2007, dismissal of his appeal. The respondent, through counsel, has now filed a second motion to reopen proceedings, with voluminous supporting documentation, in which he argues, *inter alia*, that he lacked the capacity to knowingly and intelligently waive his right to counsel before the Immigration Judge at his June 28, 2006, master calendar hearing (Tr. at 6). The Department of Homeland Security (DHS) has not responded to the pending motion, which will be granted. Because the motion is untimely, we will reopen proceedings under *our sua sponte* authority pursuant to 8 C.F.R. § 1003.2(a). See *Matter of J-J*, 21 I&N Dec. 976 (BIA 1997).

In support of his motion, the respondent has filed a psychiatric evaluation from Dr. [REDACTED] supporting his contention that he suffers from chronic paranoid schizophrenia, and that, based on the "available evidence that is most proximal to his removal proceedings, more likely than not ... he was unable to rationally consult with and aid counsel regarding his immigration case or to present his arguments and defenses for purposes of contesting removal in *pro se* at that time." ([REDACTED] affidavit at 2).<sup>1</sup> The respondent has also submitted various documents, including records from the [REDACTED] Therapeutic Center, the [REDACTED] Sheriff's Department Transfer Records, and the [REDACTED] Psychiatric Mobile Response Team, which all indicate that the respondent

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<sup>1</sup> Dr. [REDACTED] further indicates that the respondent is currently unable to "rationally consult with ... counsel regarding his immigration case; nor is he currently able to represent himself in *pro se*." While the respondent's counsel alternately argues that the respondent is mentally incompetent for purposes of his hearing, we need not address this issue in order to remand the record for further proceedings. The respondent's competency may be addressed as a factual issue before the Immigration Judge. However, we do note that if an alien is incompetent and therefore it is impractical for an alien to be present at a proceeding the Attorney General "shall prescribe safeguards to protect the rights and privileges of the alien." 8 U.S.C. § 1229a(a)(3). Under 8 C.F.R. § 1240.4 the attorney, legal representative, legal guardian, near relative, friend or the custodian of the respondent may appear on his or her behalf.

A [REDACTED]

experienced psychotic episodes in April, 2004, shortly after his criminal trial, as well as in April, 2006, shortly before his master calendar hearing. *See Drope v. Missouri*, 420 U.S. 162 (1975)(competency is fluid and should be re-assessed vigilantly).<sup>2</sup>

The respondent has a right to representation by counsel of his choice in removal proceedings. Sections 240(b)(4)(A), 292 of the Act, 8 U.S.C. §§ 1252(b)(2), 1362; 8 C.F.R. § 1240.10(a)(1); *see Matter of Madrigal*, 21 I&N Dec. 323 (BIA 1996). Because the right to counsel is an important right often essential to the fundamental fairness of a hearing, meticulous care must be exercised to ensure that a waiver of this right is competently and understandingly made. *Matter of Gutierrez*, 16 I&N Dec. 226 (BIA 1977). The transcript of record indicates that the respondent was informed of his right to counsel at the master calendar hearing on June 28, 2006, and that the respondent acknowledged this right (Tr. at 6). Thereafter, on July 19, 2006, the respondent indicated that he was representing himself (Tr. at 14), and no further inquiry regarding the respondent's competency or understanding was made at the respondent's further hearings on July 19, 2006, August 16, 2006, or on August 19, 2006. In light of the evidence provided in the respondent's motion to remand, it appears that the Immigration Judge may not have been able to obtain a valid waiver of representation in the respondent's case. We find, that this evidence, in conjunction with the lack of a DHS response and the respondent's *pro se* status in all previous proceedings, creates an exceptional circumstance warranting a reopening of his record for further proceedings regarding the respondent's competency and his removal from the United States. *See id*; *see also Stoll v. Runyon*, 165 F.3d 1238 (9<sup>th</sup> Cir. 1998).

Accordingly, the motion will be granted.

ORDER: The motion to reopen is granted and the record is remanded for further proceedings consistent with the above opinion.

  
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FOR THE BOARD

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<sup>2</sup> This portion of the respondent's argument is in response to our recognition, in our March 13, 2007, dismissal of his appeal, that the court which heard the respondent's criminal case was "satisfied that the respondent was 'mentally competent to stand trial'" (March, 2007, Bd. Dec. at 1). While we find no error in our acknowledgment of the respondent's competency during his 2004 criminal case, we also recognize counsel's argument regarding the fluidity of competency in light of the evidence submitted with the instant motion. *Id.*