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UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
[City, State]

In the Matter of:	**File No.: A**	**DETAINED**
In Removal Proceedings	**Immigration Judge**	
	Individual Hearing:	

RESPONDENT'S WRITTEN OBJECTIONS TO THE DEPARTMENT OF HOMELAND SECURITY'S UNTIMELY FILED EVIDENCE AND MOTION TO EXCLUDE EVIDENCE

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Respondent, by and through his representative, [Attorney Name], Esq. of [org], hereby submits these Written Objections to the Department of Homeland Security's Attempt to File Untimely Evidence and Motion to Excluded Evidence. Respondent objects to the admission of the Department's proposed exhibits into evidence because they are untimely and irrelevant. In the alternative, Respondent moves to exclude the Department's Proposed Group Exhibit 6 because its use is fundamentally unfair.

FACTS

Respondent is a gay and HIV-positive man from Jamaica who has been in immigration custody since DATE. Respondent seeks deferral of removal under the Convention Against Torture and filed an I-589 at a master calendar hearing before Immigration Judge (IJ) R on DATE. At that hearing, IJ R set a DATE, 2015 call-up date for evidentiary filings by both parties.[1] Respondent filed several submissions on DATE, 2015. The Department of Homeland Security (The Department) filed no submissions. Respondent's individual hearing on DATE, 2015 was postponed by the court to DATE, 2015. At that hearing, the Department attempted to move seven new exhibits into evidence. The Department's proposed exhibits are as follows:

Exhibit 1: Credible Fear Interview

Exhibit 2: 2002 Immigration Judge's Order Granting Voluntary Departure

Exhibit 3: 2009 Notice of Intent/Decision to Reinstate Prior Order

Exhibit 4: 2012 Notice of Intent/Decision to Reinstate Prior Order

Exhibit 5: 2001 Sentence and Commitment for Petit Larceny

Group Exhibit 6: 2008 "Record of Conviction" for Illegal Reentry

Exhibit 7: 2014 State Department Human Rights Report on Jamaica

[1] *See* [Date], 2015 Notice of Hearing in Removal Proceedings.

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The Department's proposed exhibits contain piecemeal, unsigned, and unreliable documents. IJ C invited Respondent's counsel to submit written objections.

ARGUMENT

I. The Department's Proposed Evidentiary Submission Should Be Rejected Because It Is Untimely

All documents and applications that are to be considered in a proceeding before an immigration judge must be filed with the immigration court[2] and properly served on all parties.[3] Immigration judges may set filing deadlines for submissions,[4] and evidentiary submissions must be timely.[5] If a document is not filed within that deadline, the opportunity to file that document shall be deemed waived.[6] If the attempted filing of an exhibit is untimely, it may be excluded from evidence or given less evidentiary weight.[7]

If a party wants the immigration judge to consider a filing despite its untimeliness, the party must make an oral or written motion to accept the untimely filing.[8] A motion to accept an untimely filing must explain the reasons for the late filing and show good cause for acceptance of the filing.[9] In addition, parties are strongly encouraged to support the motion with documentary evidence, such as affidavits and declarations under the penalty of perjury.[10]

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[2] 8 C.F.R. § 1003.31(a); Immigration Court Practice Manual (hereinafter "Practice Manual") § 3.1(a).
[3] 8 C.F.R. § 1003.32(a); Practice Manual § 3.2(a).
[4] 8 C.F.R. § 1003.31(c); Practice Manual § 3.2(b).
[5] 8 C.F.R. § 1003.31(c); Practice Manual § 3.1(c).
[6] 8 C.F.R. § 1003.31(c).
[7] Practice Manual § 3.1(d)(iii).
[8] Practice Manual § 3.1(d)(iii).
[9] Practice Manual § 3.1(d)(iii).
[10] Practice Manual § 3.1(d)(iii).

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In the present case, IJ R set an evidentiary filing deadline of DATE, 2015. The Department made no evidentiary submissions before that deadline. The Department attempted to enter seven exhibits into evidence on DATE, 2015 at the individual hearing. The Department argued that these documents should be accepted by the court because Department counsel had changed since the last hearing and it was unclear to the newest counsel for the Department which documents in the Respondent's A-file had been entered into evidence. Counsel for the Department further argued that the proposed exhibits are required to be present in Respondent's court file and therefore did not need to be filed with the court and served on opposing counsel.

These documents are untimely and the Department waived the opportunity to file them. The Department's attempt to justify late filing fails because it does not explain the reason for late filing or show good cause. First, jurisdiction properly vests with the court when a charging document is filed with the immigration court.[11] The Department's assertion that there is a requirement for the documents in question to be included in the record is without merit because the filing of the charging document alone properly initiated removal proceedings. While it is permissible for the Department to file additional documents, these documents are not required by the court and all additional documents from the Department must be properly filed and served. Second, a change in counsel for the Department does not justify additional late filing of documents. The filing deadline for evidentiary submissions is set for both parties regardless of their representation. Third, the Department supported its oral motion for acceptance of untimely filing with no documentary evidence explaining the delay. The Department has not met its burden to explain why the documents were not timely filed nor has it shown good cause for late filing of documents and the documents should not be accepted into evidence.

[11] 8 C.F.R. § 1003.14

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II. The Department's Proposed Group Exhibit 6 Should Be Rejected Because It Is Not Relevant

While the Federal Rules of Evidence are not binding in immigration proceedings, they remain instructive and persuasive. The Federal Rules of Evidence state that relevant evidence is that which (1) has any tendency to make a fact more or less probable than it would be without the evidence; and (2) the fact is of consequence in determining the action.[12] Irrelevant evidence is inadmissible.[13]

Under 8 C.F.R. § 1003.41(a)(1), records of conviction are admissible in immigration court as evidence of a criminal conviction.[14] Here, Respondent's criminal convictions are irrelevant because he concedes that he has been convicted of a particularly serious crime. Respondent seeks deferral of removal under the Convention Against Torture, to which there are no criminal bars.[15] Respondent has conceded his removability based on the allegations in the Notice to Appear. Respondent has also disclosed the criminal conviction discussed in the Departments' Proposed Group Exhibit 6 in both his declaration and I-589. Thus, the Department's Proposed Group Exhibit 6 is irrelevant and should be excluded.

III. The Court Should Exclude The Department's Proposed Group Exhibit 6 Because It Is Unreliable

A. The Department's Proposed Group Exhibit 6 Is Not An Authenticated Record Of Conviction

[12] Federal Rules of Evidence (hereinafter F.R.E.) § 401.
[13] F.R.E. § 402.
[14] 8 C.F.R. § 10003.41
[15] *See* 8 C.F.R. § 1208.17(a).

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In *Shepard v. United States*, the Supreme Court held that a record of conviction, to which courts may look to determine whether a criminal conviction occurred, includes only the "statutory definition, charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented." [16] Here, the Department's Proposed Group Exhibit 6 contains a six-page judgment in the [Court] of [State] against Respondent, pages eight and nine of a purported record of a sentencing hearing, and an unsigned presentence report.

The judgment against Respondent does appear to be a copy of an official record, as evidenced by the seal on the first page. If a judgment explicitly relies on factual findings in additional documents, those documents can be considered with a judgment as part of the record of conviction.[17] Here, however, the judgment against Respondent makes no explicit reference to the purported record of sentencing hearing or presentence report; thus these documents cannot be considered part of the record of conviction and cannot be considered as evidence of a criminal conviction.

In immigration court, official records must be authenticated by an "official publication thereof, or by a copy attested by the official having legal custody of the record or by an authorized deputy."[18] The Board of Immigration Appeals has specifically required authentication for records of conviction.[19]

The proposed submission of pages eight and nine of a purported sentencing hearing are not authenticated. Nowhere on the document does Respondent's name or the case number

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[16] *Shepard v. United States*, 544 U.S. 13, 16 (2005) (holding the sentencing court cannot look to police reports in decided whether a crime is a "generic burglary").
[17] *Id*.
[18] 8 C.F.R. § 1287.6
[19] *Matter of Velasquez*, 25 I. & N. Dec. 680, 683-85 (BIA 2012).

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appear. The Department's Proposed Group Exhibit 6 does not contain a page seven, and the purported sentencing hearing begins on page eight, compelling the conclusion that the purported record of sentencing hearing is incomplete. Incomplete documents do not provide context and their use is unfair.[20] Department Counsel should not be able to exclude parts of documents that may have included information favorable to Respondent.

The presentence report is also not authenticated. Though it states that it was prepared in advance of Respondent's sentencing date, the document is unsigned. Furthermore, the Department offers no proof that this is an official document. The document provides no probative value as it is impossible for the court to determine if this is the final version of the document or if it was submitted before the sentencing hearing. The Department's Proposed Group Exhibit 6 should be excluded because is not a proper record of conviction and its unauthenticated and incomplete documents render it unreliable

B. The Presentence Report Included In The Department's Proposed Group Exhibit 6 Is Unreliable

1. Hearsay

Hearsay is a statement made by a declarant outside of the current hearing where a party offers the statement in evidence to prove the truth of the matter asserted.[21] The Third Circuit has found that hearsay is generally inadmissible in immigration proceedings and should be regarded with suspicion[22] "because the statement is inherently untrustworthy: the declarant may not have

[20] F.R.E. § 106 contains the Rule of Completeness which specifies that when an incomplete document is entered into evidence, an adverse party may require evidence of context.
[21] F.R.E. § 801(c).
[22] *Ezeagwuna v. Ashcroft*, 325 F.3d 396, 406 (3d Cir. 2003)

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been under oath at the time of the statement, his or her credibility cannot be evaluated at trial, and he or she cannot be cross-examined."[23]

The Department has not produced a witness list and it does not appear they intend to have WJQ, the probation officer who allegedly completed Respondent's presentence interview, testify. The probation officer's credibility cannot be assessed and he cannot be cross-examined. Over seven years have elapsed since Respondent's presentence report interview, and in that time unreliability of this evidence has increased remarkably. Without the opportunity to cross-examine the declarant, the use of unreliable hearsay evidence against Respondent is fundamentally unfair, and the evidence should be excluded.

2. Presentence Reports Are Inherently Unreliable

After a federal criminal conviction, a presentence investigation and report is required.[24] A probation officer must interview the defendant and write a report covering their criminal history and any other factors the probation officer deems relevant.[25] Defendants who receive presentence reports are not put under oath for their interview and the presentence report is not a direct transcript of the interview. The presentence report is instead the probation officer's summary and recommendation for sentencing purposes.

The Third Circuit has not specifically addressed the reliability of presentence reports (PSRs). Respondent's presentence interview occurred in the state of New York, and the Second Circuit Court of Appeals has questioned the reliability of presentence reports (PSRs). The Court in *Dickson v. Ashcroft*, specifically describes its concerns about PSRs completed in New York:

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[23] *U.S. v. Reilly*, 33 F.3d 1396, 1409 (3d Cir.1994).
[24] Fed. R. Crim. P. 32(c)(1)(A).
[25] Fed. R. Crim. P. 32(d)(1)-(2).

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> "New York law permits a PSR to include information and analysis of 'the circumstances attending the commission of the offense, the defendant's history of delinquency or criminality, and the defendant's social history, employment history, family situation, economic status, education, and personal habits." N.Y.Crim. Proc. Law §§ 390.30(1), (3)(a) (McKinney 2003). Because the factual narratives contained in the PSR are prepared by a probation officer on the basis of interviews with prosecuting attorneys, police officers, law enforcement agents, etc., they may well be inaccurate. They may include allegations that were not proven at trial, as well as alleged facts that would have been inadmissible at trial had the prosecution attempted to present them. . . . **Such a narrative is not a highly reliable basis for a decision of such importance as deportation.**"[26]

The Third Circuit has recognized the unreliability of records of alleged statements made by respondents before the commencement of removal proceedings; specifically, the Court has questioned the reliability of summary reports of airport interviews. In *Balasubramanrim v. INS,* the Court identified factors to consider in determining the reliability of statements made in prior interviews, including whether information regarding how the interview was conducted and the document prepared is available, whether the questions posed were designed to elicit the same information relevant to the form of relief sought, and whether the Respondent may be fearful of government officials because of past persecution at the hands of the state.[27] The manner in which the information offered by the Respondent was elicited is key to determining its probative value and its bearing on credibility.[28]

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[26] *Dickson v. Ashcroft*, 346 F.3d 44, 54 (2d Cir. 2003) (emphasis added) (citing *Hili v. Sciarrotta,* 140 F.3d 210, 216 (2d Cir.1998) (noting that the inclusion of hearsay statements and inaccurate information in a PSR is "virtually inevitable"); *Dorman v. Higgins,* 821 F.2d 133, 138 (2d Cir.1987) (noting that verification of the information contained in a PSR is "desirable ... [but] not always possible")). Though this case specifically describes a presentence report under New York state law, the federal rules mandating the procedure for presentence reports, like Respondent underwent, are substantially similar.

[27] *Balasubramanrim v. I.N.S.*, 143 F.3d 157, 162-63 (3d Cir. 1998). *See also Senathirajah v. INS*, 157 F.3d 210, 218-21 (3d Cir. 2003); *Zubeda v. Ashcroft*, 333 F.3d 463, 476-77 (3d Cir. 2003); *Mulanga v. Ashcroft*, 349 F.3d 123, 137 (3d Cir. 2003); *Dia v. Ashcroft*, 353 F.3d 228, 257-8 (3d Cir. 2003).

[28] *Ezeagwuna v. Ashcroft*, 325 F.3d 396, 408 (3d Cir. 2003).

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Similar to airport interviews, presentence reports are not verbatim accounts of what Respondent said. There is no indication that Respondent was put under oath or information regarding the manner in which the interview was conducted. At best, the document allegedly contains a summary of the notes and impressions of a probation officer. This manner of collecting information, paired with the lack of authentication and use of unreliable hearsay, renders presentence reports unreliable like airport interviews. This court should be as concerned with the unreliability of PSRs as the Third Circuit was with the unreliability of airport interviews. The Department's Proposed Group Exhibit 6 should be excluded because it is unreliable and its use against Respondent is fundamentally unfair.

CONCLUSION

While immigration courts have broad discretion in applying evidentiary rules, fundamental principles of fairness apply. This requirement of fundamental fairness exists to protect the rights of vulnerable individuals like Respondent, who, while detained, is fighting removal to a place where his life is at risk because he is gay and HIV-positive. The Department should be held to at least as high of a standard of fairness as Respondent. Accordingly, Counsel submits these written objections to the Department's proposed evidentiary submission and moves on the Respondent's behalf to exclude from evidence the Department's Proposed Group Exhibit 6.

Respectfully submitted,

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