[redacted] **Esq.**
[redacted]

Detained

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
[redacted]

In the Matter of:	
CLIENT	
	File No.: A# 123-456-789
In removal proceedings	

Immigration Judge: [redacted]

Next Individual Hearing: DATE at TIME

RESPONDENT'S MOTION IN LIMINE

MOTION IN LIMINE

Respondent, through undersigned counsel, hereby respectfully requests that this Court enter an Order in Limine, holding that:

(i) The Department of Homeland Security's Exhibit 3, Article: "Massive [redacted] Oxy Ring Busted for Million In Alleged Pill Sales," submitted to this Court on [redacted] 2017, be excluded from the record;

(ii) The Department of Homeland Security's Exhibit 2, *Pre-Sentencing Investigation Face Sheet*, prepared by [redacted] Department of Probation, submitted to this Court on [redacted] 2017, be excluded from the record; and

(iii) Respondent not be questioned, directly or indirectly, regarding the content of the *Pre-Sentencing Investigation Face Sheet*, during the Merits Hearing scheduled for [redacted] 2017; or

In the alternative that this Honorable Court admits into the record the *Pre Sentencing Investigation Face Sheet*, that:

(iv) This Honorable Court give diminished weight to the Pre-Sentencing Investigation Face Sheet when determining whether the Respondent warrants a grant in her application for relief.

In support of this request, Respondent submits the following arguments and legal authorities:

I. THE DEPARTMENT OF HOMELAND SECURITY'S SUBMISSION MARKED AS EXHIBIT 3 SHOULD NOT BE ADMITTED INTO THE RECORD

The Respondent objects to the submission of the news article marked as Exhibit 2, submitted by the Department of Homeland Security (herein, "DHS") on [redacted] 2017.[1] The article is titled, *Massive* [redacted] *Oxy Ring Busted for Million in Alleged Pill Sales*, and it is dated [redacted], 2017.[2] The article is irrelevant to the Respondent's case and should not be admitted into the record.

[1] *See* The DHS's Evidence Submission, Exhibit 3, Article: *Massive* [redacted] *Oxy Ring Busted For Million In Alleged Pill Sales*, filed on [redacted]
[2] *See Id*.

The article details an arrest of a drug-dealing ring selling prescription pills.[3] Nowhere in this article is the Respondent's name mentioned, or anyone related to or associated with the Respondent. This article was also written in [redacted] 2017, which was short of two years after the Respondent was arrested. Thus, because the article's content has no relation to the Respondent's Cancellation of Removal application, it is therefore irrelevant and should be excluded from the record.

II. THE PRE-SENTENCE INVESTIGATION FACE SHEET SHOULD BE EXCLUDED FROM THE RECORD BECAUSE IT IS INADMISSIBLE

The Respondent objects to the submission of the *Pre-Sentence Investigation Face Sheet* (herein, "PSI") marked as Exhibit 2, submitted by the DHS on [redacted] 2017.[4] This Honorable Court should exclude the PSI for the following reasons: 1) the document is irrelevant and inadmissible as hearsay; 2) admitting the document as evidence violates the confrontation clause of the Sixth Amendment; 3) the document is inadmissible because it is more prejudicial than probative; and 4) the document is unreliable.

a. <u>The PSI is Irrelevant and Inadmissible as Hearsay</u>

In the present case, the DHS alleges that the Respondent is removable under section 237(a)(2)(B)(i) of the Immigration and Nationality Act because the Respondent was convicted of two offences relating to a controlled substance.[5] The Respondent conceded removability and is not denying her convictions, thus there is no reason to raise an issue as to the offense that she was charged or convicted with. The DHS is not alleging that the crimes the Respondent was convicted of qualify as aggravated felonies—because they do not—thus admitting the Pre-Sentencing Report into evidence to this case is improper because it is irrelevant.

Additionally, the PSI Report was completed by, reviewed by, and submitted by officers of the New York City Department of Probation and the report purports out-of-court written statements that the DHS is providing to prove the truth of what they assert. Furthermore, the report is based on summaries of what others officers (*i.e.*, arresting officers and their interpreters) allege

[3] *See Id*. at 1-2.
[4] See The U.S. DHS Evidence Submission, *Pre-Sentence Investigation Face Sheet*, filed on [redacted] 2017.
[5] *See* U.S. DHS Form I-682, Notice of Appear in the Matter of [redacted]

occurred during the arrest and at other times of the investigation. Thus, this report consists of double, and in some instances, triple hearsay and is thus inadmissible.

b. The PSI is Inadmissible Because it Violates the Confrontation Clause of the Sixth Amendment

Admitting the PSI, without permitting the Respondent to cross-examine the officer who prepared this report violates her right under the confrontation clause of the Sixth Amendment of the U.S. Constitution. The confrontation clause of the Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right … to be confronted with the witnesses against [her]…." Although this immigration proceeding is civil, Federal Courts have discussed and acknowledge the right to confrontation and cross examination for noncitizens in immigration proceedings.[6] The Courts have held that when the government introduces a hearsay document in immigration proceedings, it must make "reasonable efforts" to ensure the presence of the witness.[7] Thus, if the Respondent does not have the opportunity to confront and cross examine the preparer of the Pre-Sentence Report, admitting the report into evidence will violate the confrontation clause of the Sixth Amendment.

c. The PSI is Inadmissible because it is Prejudicial and its use is Fundamentally Unfair

This Honorable Court should find that the PSI is inadmissible because it is more prejudicial than probative and its use is fundamentally unfair. Federal Courts have held that hearsay evidence is admissible if it is probative and its use is fundamentally fair.[8] Although immigration proceedings are civil, not criminal, the evidence considered must "be probative and its use fundamentally fair, so as not to deprive [a noncitizen] of due process of law."[9] Fairness is determined in large part by the "reliability and trustworthiness" of the evidence.[10] Courts have consistently found that "[w]hile police reports may be demonstrably reliable evidence of the fact that an arrest was made they are

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[6] *See, e.g., Malave v. older*, 610 F.3d 483 (7th Cir. 2010)(holding that an immigration judge's rejection of a noncitizen's subpoena request denied statutory right to cross-examine the ex-husband whose affidavit proved marriage fraud); see also *Olabanji v. INS*, 973 F.2d 1232, 1234-36 (5th Cir. 1992) (finding that ex-wife's affidavit proving marriage fraud was not admissible based on principles of fundamental fairness when the government did not make reasonable efforts to secure her presence); *Baliza v. INS*, 709 F.2d 1231, 1234 (9th Cir. 1983) (holding that the government's introduction of ex wife's affidavit deprived noncitizen of his statutory right to confront and cross examine the witness against him).

[7] *See Olabanji v. INS*, 973 F.2d 1232, 1234-36 (5th Cir. 1992) (finding that ex-wife's affidavit proving marriage fraud was not admissible based on principles of fundamental fairness when the government did not make reasonable efforts to secure her presence).

[8] *See Pouhova v. Holder*, 726 F.3d 1007, 1011 (7th Cir. 2013); *Felzcerek v. INS*, 75 F.3d 112, 115 (2d Cir. 1996); *see also Bustos-Torres v. INS*, 898 F.2d 1053, 1055 (5th Cir. 1990).

[9] *Matter of Velasquez*, 19 I&N Dec. 377, 380 (B.I.A. 1986).

[10] *Felzcerek v. I.N.S.*, 75 f.3D 112, 115 (2d Cir. 1996).

significantly less reliable evidence of whether the allegations of criminal conduct they contain are true."[11] In this case, the PSI is more prejudicial to the Respondent than it is probative because: the report summarizes statements the Respondent allegedly stated through an interpreter; the report summarizes the Respondent's alleged drug use without any source; and the report summarizes the Respondent's arrest that took place without any source on how this information was obtained.[12] Specifically, the report summarizes, what one can only predict are, the arresting officer's summaries and the interpreter's summaries of the arrest, but nowhere does it indicate if the preparer of the report was the first responder, the arresting officer, the interpreter, or the investigator of the case. Further, this report was made in preparation for the sentence imposed on the Respondent after she was convicted, thus it was made with the intention of nothing more than determining the duration of her incarceration, which thus suggests bias. Accordingly, a document that is filled with multiple persons' summaries of the Respondent's arrest and investigation of the crime is unreliable. Thus, for the aforementioned reasons, the use of this document is fundamentally unfair and it is more prejudicial than probative thus it is inadmissible.

III. DHS SHOULD NOT BE PERMITTED TO QUESTION THE RESPONDENT REGARDING THE CONTENTS OF THE PSI

This Court should not permit the DHS to use the PSI as an opportunity to question Respondent directly or indirectly regarding the contents of the PSI because such questioning is not relevant to the inquiry into whether or not the Respondent favors a grant for relief. Even if determined as relevant, the contents of the PSI are unreliable and prejudicial for the aforementioned reasons. The report is a summary of alleged statements the Respondent made during the arrest and investigation, but there is no reference to the source of these statements. Thus questioning the Respondent about events summarized by various officers—in anticipation of litigation—without the Respondent having a fair opportunity to cross examine the witness, prejudices the Respondent in her application for relief.

[11] *United States v. Johnson*, 710 F.3d 784, 789 (8th Cir. 2013), *citing United States v. Bell*, 785 F.2d 640, 644 (8th Cir. 1986).
[12] *See* DHS's Evidence submission, Exhibit 2, Pre-Sentence Investigation, filed on [redacted] 2017.

IV. IN THE ALTERNATIVE THE PSIIS ADMITTED, THE COURT SHOULD GIVE IT DIMINISHED WEIGHT

In the alternative that this Honorable Court finds that the PSI is admissible, the report should only be given diminished weight when this Court is determining whether the Respondent warrants relief because the document is unreliable.

While "police reports and complaints, even if containing hearsay and not part of the formal record of conviction, are appropriately admitted for the purposes of considering an application for discretionary relief,"[13] they should be afforded weight *only* when the underlying arrest led to a conviction *or* they are otherwise corroborated.[14] Notwithstanding the Board of Immigration Appeals (herein, "BIA" or "the Board") and Circuit precedent allowing the consideration of police reports in the discretionary context, a recent, albeit unpublished, BIA decision resolutely recognized the unreliability of police reports. In *In re: Noe Cesar Hernandez-Avila*, the Board sustained a finding that the police report was "'inherently unreliable' because it was not incorporated into the guilty plea, was not substantiated by the respondent's admissions, and was not corroborated by independent witness testimony."[15] In doing so, the Board affirmed the immigration judge's statement that "arrest reports are one-sided recitations of events aimed at establishing probable cause or reasonable suspicion in criminal proceedings."[16]

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[13] *Carcamo v. U.S. Department of Justice*, 590 F.3d 94, 98 (2d Cir. 2007).

[14] *Compare Matter of Teixeira*, 21 I&N Dec. 316 (B.I.A. 1996) (convicted of firearms violation) *and Matter of Grijalva*, 19 I&N Dec. 713 (B.I.A. 1988) (convicted of possession of marijuana), *with In Re Arreguin De Rodriguez*, 21 I. & N. Dec. 38, 42 (BIA 1995) ("[W]e are hesitant to give substantial weight to an arrest report, absent a conviction or corroborating evidence of the allegations contained therein.") *and In Re Sotelo-Sotelo*, 23 I. & N. Dec. 201, 205 (BIA 2001) ("[I]n the absence of a conviction, we find that the outstanding warrant should not be considered an adverse factor in this case."); *cf. Sorcia v. Holder*, 643 F.3d 117, 126 (4th Cir. 2011), *as amended* (July 21, 2011) ("[I]nsofar as the BIA declined to give substantial weight to [appellant's] charge, it was following, rather than contradicting, precedent."); *Henry v. I.N.S.*, 74 F.3d 1, 6-7 (1st Cir. 1996) ("[T]he lesson of *Arreguin* is that . . . [the BIA] will accord virtually no weight to an arrest record . . . unsupported by corroborating evidence.").

[15] [redacted] (BIA Jan. 18 2013).

[16] *Id.* (quoting 05/27/11 I.J. Dec. at 6).

Even if an arrest does result in formal charges, as in the present case, these should not be considered conclusive evidence of wrongdoing.[17] Under BIA and Second Circuit precedent, while charging documents and arrest reports can be admitted for the purpose of weighing discretionary factors, an Immigration Judge ("IJ") "may not base its decision denying relief upon the assumption that the facts contained in such documents are true."[18] As the Third Circuit recently noted, such criminal complaints "implicate[] the Supreme Court's recent admonitions to be wary of attempts to relitigate prior convictions based on documents 'the meaning of [which] will often be uncertain,' or when 'the statements of fact in them may be downright wrong.'"[19]

Rather, the IJ's task is to assess the *credibility* of Respondent's testimony in light of all the evidence in the record. Indeed, the Seventh Circuit recently overturned a denial of 212(c) relief on the basis that *Arreguin* was contravened where "significant weight" was given to "uncorroborated arrest reports" even though the respondent was found credible.[20] Similarly, in *Billeke-Tolosa v. Ashcroft*, the Sixth Circuit relied on *Arreguin* in finding that it was impermissible for the immigration judge to deny discretionary relief based on charges for sexual misconduct when the charges had been pled down to simple assault and disorderly conduct.[21] In the present case, the PSIdoes not state anywhere that it is corroborated by the Respondent's sworn statements or

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[17] Prosecutors have an essentially exclusive role in bringing charges and negotiating plea deals in criminal cases in the United States. *See* H. Michael Caldwell, *The Prosecutor Prince: Misconduct, Accountability, and a Modest Proposal*, 63 Cath. U.L. Rev. 51, 62 (2014). This broad discretion creates a significant risk that prosecutors will abuse this system in order to obtain more guilty pleas and in turn resolve more cases. Setting a goal of plea bargains incentivized prosecutors to give themselves more and better bargaining chips in the plea negotiation process. *Id.* To improve their position in these negotiations, prosecutors frequently "overcharge" defendants so they can negotiate them down to a guilty plea on the actual charge they seek. Generally, this includes a "lesser included offense" for which the prosecutor actually intends to seek a conviction. *Id.* at 705. That prosecutors overcharge defendants with the specific intent of inducing a plea bargain is one of the main criticisms raised by defense counsel pertaining to prosecutorial discretion. *See* ABA Standards for Criminal Justice Prosecution and Defense Function 76 (3d ed. 1993).

[18] *Padmore v. Holder*, 609 F.3d 62, 69-70 (2d Cir. 2010); *see also Matter of Arreguin De Rodriguez*, 21 I&N Dec. 38, 42 (BIA 1995) ("Just as we will not go behind a record of conviction to determine the guilt or innocence of an alien, so we are hesitant to give substantial weight to an arrest report, absent a conviction or corroborating evidence of the allegations contained therein.").

[19] *Rojas v. Attorney Gen.*, 728 F.3d 203, 220 (3d Cir. 2013) (citing *Descamps v. United States*, 133 S.Ct. 2276, at 2289 (2013)); *see also Padmore*, 609 F.3d at 69 (underscoring "the knottiness inherent in any such inquiry").

[20] *See Avila-Ramirez v. Holder*, 764 F.3d 717, 725 (7th Cir. 2014).

[21] 385 F.3d 708, 712 (6th Cir. 2004).

admissions, nor has the Respondent's alleged "statement," been submitted by the DHS to corroborate the report. This report is even more unreliable than a police report since it summarizes the arresting officers' summaries and the Respondent's alleged statement. Thus, for the aforementioned reasons, if this Honorable Court finds the PSI is admissible, it should give it little weight when determining whether the Respondent warrants a grant for relief.

IV. Conclusion.

WHEREFORE, the Respondent respectfully requests of this Honorable Court to enter an Order in Limine, holding that:

(v) The Department of Homeland Security's Exhibit 3, Article: "Massive [redacted] Oxy Ring Busted for Million In Alleged Pill Sales," submitted to this Court on [redacted] 2017, be excluded from the record;

(vi) The Department of Homeland Security's Exhibit 2, *Pre-Sentencing Investigation Face Sheet*, prepared by [redacted] Department of Probation, filed in this Court on [redacted] 2017, be excluded from the record; and

(vii) Respondent not be questioned, directly or indirectly, regarding the contents of the *Pre-Sentencing Investigation Face Sheet*, during the Merits Hearing scheduled for [redacted] 2017; or

In the alternative that this Honorable Court admits into the record the *PSI*, that:

(viii) This Honorable Court give diminished weight to the PSI when determining whether the Respondent warrants a grant in her application for relief.

Respectfully submitted by the Respondent's attorney,

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[redacted]

Dated: [redacted]

TABLE OF CONTENTS