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**UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT**

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**Case No.** [REDACTED]

**Alien Reg. No.** [REDACTED]

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[REDACTED]

*Petitioner*

v.

**JEFFERSON B. SESSIONS III, ATTORNEY GENERAL**

*Respondent*

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**PETITIONER’S UNOPPOSED MOTION FOR STAY OF  
REMOVAL FROM THE UNITED STATES PENDING A RULING  
ON HIS PETITION FOR REVIEW OF DECISION OF THE  
BOARD OF IMMIGRATION APPEALS**

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## I. INTRODUCTION

Petitioner [REDACTED], a lawful permanent resident of the United States for almost twenty years, moves for a stay of removal pending this Court's adjudication of his petition for review of a decision of the Board of Immigration Appeals ("Board"), which affirmed an order for his removal from the United States. Petitioner is detained at the Buffalo Federal Detention Facility in Batavia, New York, and is at risk of immediate removal to Nigeria.<sup>1</sup>

The principal issue on the petition for review is narrow but important: whether a child in the sole legal custody of his U.S. citizen father is precluded from meeting the requirement of 8 U.S.C. § 1431(a) that the child be in the "legal and physical custody" of the citizen parent where the father is in prison but otherwise has the sole right and obligation to raise his son. A finding that petitioner is a U.S. citizen would protect him from removal to Nigeria, a country that is essentially foreign to him.

A single member of the Board issued a final order of removal against petitioner on December 4, 2017, dismissing his appeal.

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<sup>1</sup> Counsel for petitioner contacted the ICE deportation officer assigned to [REDACTED] on December 12, 2017. The officer stated that there were no immediate plans to remove [REDACTED], but gave no other assurances.

Although detained in New York, petitioner filed in this Court, as the government's Notice to Appear was filed in Baltimore, Maryland, the Immigration Judge who heard Mr. [REDACTED]'s case sat in Baltimore, Maryland, the case had a Baltimore, Maryland caption, and both the government and Mr. [REDACTED] opposed a change of venue from Baltimore, Maryland.<sup>2</sup> Moreover, on June 21, 2016, the Immigration Judge decided that, based on the requests of the parties, venue would remain in Baltimore, Maryland. (A-209).

## II. ISSUES PRESENTED

On this petition for a stay: whether the Court should stay the removal of petitioner, a lawful permanent resident of the United States, to Nigeria, pending appeal?

On the merits of the petition for review:

(1) whether petitioner was in the "legal and physical custody" of his father in the United States within the meaning of 8 U.S.C. § 1431(a) such that petitioner

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<sup>2</sup> The Immigration and Naturalization Act states: "A petition for review shall be filed with the court of appeals for the judicial circuit in which the immigration judge completed the proceedings." 8 U.S.C. § 1252(b)(2). Accordingly, venue in this Circuit is proper because the Immigration Judge sat in Baltimore. The Seventh Circuit (in an unpublished decision) has held that the internal memorandum cited by the Board (footnote 1) does not over-ride the statute. *See Poroj-Mejia v. Holder*, 397 F. App'x. 234, 236 (7th Cir. Oct. 18, 2010). This Circuit, in any event, has held that section 1252(b)(2) is non-jurisdictional. *Sorcía v. Holder*, 643 F. 3d 117, *cert denied*, 132 S.Ct. 776 (2011).

derived United States citizenship from his father and is therefore protected from removal.

(2) whether the Board should have deferred consideration of removability based on 18 U.S.C. § 16(b) (defining a crime of violence) pending the Supreme Court's decision in *Sessions v. Dimaya*, No. 15-1498 (argued Oct. 2, 2017), in which the Court will address whether that subsection is void for vagueness.

(3) whether the Board erred in its finding that the Immigration Judge correctly determined that petitioner was not entitled to relief from removal under the Convention Against Torture.

### **III. COMPLIANCE WITH RULE 18 AND LOCAL RULE 27(A)**

Petitioner is seeking a stay from this Court without having filed a motion for a stay with the Board. Because petitioner has no open matters before the Board, the Board's practice is to not consider requests for a stay in these situations. Therefore, seeking a stay before the Board "would be impracticable." Fed. R. App. P. 18(a)(2)(A).

Pursuant to Local Rule 27(a), counsel has contacted the Office of Immigration Litigation, U.S. Department of Justice, and informed that office that petitioner intended to file this stay motion. On December 15, 2017, counsel for petitioner discussed this motion with the Department of Justice, and the

Department of Justice has indicated that they do not intend to oppose this request for a stay.

#### **IV. STATEMENT OF JURISDICTION**

The Board had jurisdiction over the underlying proceedings pursuant to 8 C.F.R. § 1003.1(b). This Court has jurisdiction to review the decision of the Board pursuant to 8 U.S.C. § 1252. The Board issued its order on December 4, 2017. Mr. [REDACTED]'s appeal was perfected on December 14, 2017. The order issued by the Board was a final order subjecting Mr. [REDACTED] to removal and is therefore properly before this Court.

#### **V. STATEMENT OF FACTS**

Petitioner (“Mr. [REDACTED]”) is a 26-year-old lawful permanent resident of the United States, who entered the United States in January 1998. (A-14-16). He was born in Nigeria. (A-14). His father was a U.S. citizen and his mother Nigerian. (A-193). His mother could not look after him, and he lived initially with his grandmother in Nigeria. (A-191-92). When he was six years old, his father, who lived in the United States, arranged for his son, accompanied by the grandmother, to come to the United States. (A-16). Except for two brief periods in Nigeria, the only home he has ever known has been in the United States, and he has no family or relatives who would be willing to offer care or support in the event that he was deported to Nigeria. (A-21, A-125-26, A-134).

On arrival in the United States in 1998, Mr. [REDACTED] lived with his father and his grandmother. His father was sent to prison, and Mr. [REDACTED] remained under the care of his grandmother, but she was only the day-to-day caregiver. (A-39). His father had sole legal custody and provided financial support and guidance. (A-39). He had the final decision-making authority on large and small decisions in his son's life. *Id.* Mr. [REDACTED] visited his father in prison as often as he could. (A-19-20). Mr. [REDACTED] was in regular communication with his father throughout his childhood. (A-38).

In 2008, when he was seventeen, Mr. [REDACTED] got into trouble and was convicted of various offenses in Baltimore and sent to prison. (A-162.)

In 2010, Mr. [REDACTED] applied for United States citizenship on the ground that he derived citizenship from his father. (A-197-200). The USCIS denied his application. *Id.* In 2015, he was placed in removal proceedings as a result of his criminal convictions, pursuant to INA § 237(a)(2)(iii). (A-162).

The Immigration Judge found that Mr. [REDACTED] had not derived U.S. citizenship from his father, and held that he should be removed to Nigeria. (A-178-79). The IJ stated that Mr. [REDACTED] could not meet the statutory requirement that he have lived "in legal and physical custody of the citizen parent", namely his father. *See* 8 U.S.C. § 1432(a). Notwithstanding that the father had sole legal custody, and that Mr. [REDACTED]'s mother had abandoned him in Nigeria, the IJ

determined that Mr. [REDACTED] was not in “the legal and physical custody” of his father because his father was in prison. (A-174-75). The IJ made no adverse credibility determination. The IJ found that Mr. [REDACTED] had been convicted of a “crime of violence” within the meaning of 18 U.S.C. § 16(b), and ordered him to be removed.

Mr. [REDACTED] appealed to the BIA. On December 4, 2017, the Board dismissed Mr. [REDACTED]’s appeal. The Board did not set aside any factual findings on the role of Mr. [REDACTED]’s father in his upbringing, but the Board held that, because his father was incarcerated, Mr. [REDACTED] could not meet the statutory requirement that he have been in the “physical custody” of his father.

The Board declined to rule on the constitutionality of the ‘residual clause’ found in 18 U.S.C. § 16(b), which was the basis for the order of removal, or to defer a determination pending a decision from the United States Supreme Court on the constitutionality of the residual clause.<sup>3</sup>

## **VI. LEGAL STANDARD FOR A STAY**

The test for injunctive relief applies to stays of removal in the immigration context. *Nken v. Holder*, 556 U.S. 418 (2009). Accordingly, courts deciding whether a stay of removal is appropriate should generally weigh (1) the likelihood

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<sup>3</sup> The case in question is *Sessions v. Dimaya*, Docket No. 15-1498 (argued Oct. 2, 2017).



of success on the merits; (2) the irreparable harm to the petitioner if a stay is not granted; (3) the potential harm to the government if a stay is granted; and (4) the public interest. *Nken* explains that the first two factors are “most critical” and that the last two factors merge, because the government is the respondent. *Id.* at 434, 435. While not a “matter of right,” courts may grant stays in the “exercise of judicial discretion” based on “the circumstances of the particular case.” *Id.* at 433 (internal quotations and citation omitted).

## VII. ARGUMENT

### A. Mr. [REDACTED] is Likely to Succeed on the Merits

To receive a stay of removal, an applicant must demonstrate a “strong showing that he is likely to succeed on the merits.” *Nken*, 556 U.S. at 433. As other circuits have held, this does *not* require applicants to demonstrate that success on the merits is “more likely than not.” *Leiva-Perez v. Holder*, 640 F.3d 962, 966 (9th Cir. 2011) (citing *Citigroup Global Mkts., Inc. v. VCG Special Opportunities Master Fund Ltd.*, 598 F.3d 30, 37 (2d Cir. 2010)).

Mr. [REDACTED] satisfies this standard.

#### **1. Mr. [REDACTED] Can Demonstrate Likelihood of Success on the Merits on his Claim for Derivative Citizenship.**

In order to derive citizenship from his father, Mr. [REDACTED] must satisfy 8 U.S.C. § 1431(a), which requires that Mr. [REDACTED] have resided in the legal and physical custody of his citizen parent, in this case his father. In affirming the IJ’s

ruling that Mr. [REDACTED]'s father's incarceration precluded Mr. [REDACTED] from satisfying the physical custody element, the Board incorrectly applied a "clear error" standard of review. Instead, the Board should have reviewed the IJ's legal conclusion de novo, and held as a matter of law that Mr. [REDACTED] derived citizenship from his father, his sole custodian. This led the Board to affirm the IJ's erroneous conclusion that the imprisonment of Mr. [REDACTED]'s father precluded Mr. [REDACTED] from satisfying the "physical custody" aspect of the statutory requirement.

The Board accepted the factual findings of the IJ that Mr. [REDACTED]'s mother had no role in his upbringing and that the father, although incarcerated, played a significant role in his son's life and continued to have the obligation to provide and care for his son. For example, the Board noted that Mr. [REDACTED]'s father "played a supervisory role in [Mr. [REDACTED]] upbringing and provided financial support as well." Under Maryland law, this is the type of care that is descriptive of "physical custody." *See Santo v. Santo*, 448 Md. 620, 627 (2016) (citing and quoting *Taylor v. Taylor*, 306 Md. 290, 296 (1986) (Physical custody means "the right and obligation to provide a home for the child and to make daily decisions as necessary while the child is under that parent's care and control.")).

The decision that Mr. [REDACTED] did not derive citizenship from his father is not consistent with Congress's goal of keeping families intact. If upheld by this Court, the Board's ruling will result in Mr. [REDACTED]'s deportation to Nigeria, where

he knows no one and has no family willing or able to provide care or support for him, and will remove him from those family members with whom he has spent the substantial majority of his life.

In enacting the Child Citizenship Act of 2000, Congress intended two things: (1) to protect non-citizen parental rights by requiring only the citizen parent to have legal and physical custody of the child regardless of whether the non-citizen parent and the citizen parent are legally separated or divorced; and (2) to focus on the preservation of the family unit. 7-98 Immigration Law and Procedure § 98.03 (discussing the first); *Nwozuzu v. Holder*, 726 F.3d 323, 329 (2d Cir. 2013) (discussing the second).

With respect to the first factor, Mr. [REDACTED]'s mother ceded her parental rights to Mr. [REDACTED]'s father very early in Mr. [REDACTED]'s life. (A-185). Thus, Congress's purpose of requiring custody with the citizen parent is satisfied. As to the second, both Mr. [REDACTED] and his father have resided in the United States for the majority of their lives. (A-122, A-181-82). Mr. [REDACTED]'s "family unit" is with his father and his grandmother—the record in this case is undisputed that Mr. [REDACTED]'s father exercised a great deal of oversight and responsibility for his son notwithstanding his incarceration. (A-39-A-40). By contrast, if Mr. [REDACTED] was removed from this country, he would lose those very ties. Congressional intent weighs in favor of finding that Mr. [REDACTED] resided in the physical custody of his

father, and therefore derived citizenship from him. Thus, a stay of deportation should issue pending the resolution of an appeal before this Court.

**2. The Supreme Court's pending decision in *Sessions v. Dimaya* Could Substantially Affect Mr. [REDACTED]'s rights.**

The Immigration Judge who decided Mr. [REDACTED]'s case initially determined that his conviction for robbery for a dangerous weapon constituted a crime of violence under 18 U.S.C. § 16(a). Upon Mr. [REDACTED]'s motion for reconsideration of that determination, the Immigration Judge determined that Mr. [REDACTED]'s conviction did not in fact fall within the ambit of § 16(a). Instead, and based on an argument raised for the first time in the briefing on the motion for reconsideration, the Immigration Judge found that his conviction constituted a crime of violence under 18 U.S.C. § 16(b). As the constitutionality of this statute is questionable, a stay is appropriate pending the Supreme Court's determination of the issue.

Section 16(b) provides that a felony is a "crime of violence" if it "is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." A similarly-worded statute defining crime of violence in the Armed Career Criminal Act was held unconstitutional in 2015. There, the Supreme Court reasoned that the wording of such a "residual" clause left too much to judicial guesswork and did not provide for a clear framework under which persons could regulate their behavior. *See Johnson v. United States*, 135 S. Ct. 2551, 2557

(2015). Indeed, in that opinion, the Court quoted a Ninth Circuit dissent in which Chief Judge Kozinski stated that, in interpreting what constitutes a crime of violence, “[h]ow does one go about deciding what kind of conduct the “ordinary case” of a crime involves? ‘A statistical analysis of the state reporter? A survey? Expert evidence? Google? Gut instinct?’” *Id.* (quoting *United States v. Mayer*, 560 F. 3d 948, 952 (9th Cir. 2009) (Kozinski, C. J., dissenting from denial of rehearing en banc).

The same problem inures with the residual clause in Section 16(b). A number of circuits have found that it is unconstitutional. *See United States v. Diaz*, 865 F.3d 168, 179 n.7 (4th Cir. 2017) (citing cases from the Third, Sixth, Seventh, and Ninth Circuits, but not deciding the issue). This issue is squarely before the Supreme Court in *Sessions v. Dimaya*. Originally argued in January of 2017, it was reargued on October 2, 2017. The Court has not yet released a decision in the case. Should the Supreme Court find that the Section 16(b) is unconstitutionally vague, it would require a reversal of the Immigration Judge’s finding that Mr. [REDACTED]’s conviction for robbery with a dangerous weapon constituted a crime of violence. This would, in turn, affect Mr. [REDACTED]’s rights. If he was not found guilty of a crime of violence, he would be eligible for cancellation of removal, which is relief he is not presently eligible for. Therefore, a stay should issue pending the outcome of *Dimaya*.

**3. The Board erred in determining that petitioner was not entitled to relief under the Convention Against Torture.**

The Immigration Judge who decided Mr. [REDACTED]'s case determined that it he did not meet the “more likely than not” standard for potential torture, and therefore was not entitled to relief under the Convention Against Torture (“CAT”). This was error.

Where a non-citizen demonstrates past persecution, “a rebuttable presumption arises that [he] has a ‘well-founded fear of future persecution, and the burden then shifts to the Department of Homeland Security to show that the conditions in the country have changed or the alien could avoid a future threat through relocation.” *Liana Tan v. United States*, 446 F.3d 1369, 1375 (11th Cir. 2006). Mr. [REDACTED] demonstrated that he had been the subject of past persecution—he was tormented by fellow schoolchildren on the two occasions that he briefly returned to Nigeria. (A-121-22). On one of the occasions that he returned to Nigeria, in 2001, armed gunmen stopped the car he was in shortly after he and his grandmother arrived in the country and almost kidnapped him. (A-119).

Mr. [REDACTED] also presented unrefuted evidence from two experts in support of his CAT claim. Each opined on the dangers present throughout Nigeria, including specifically the danger to foreigners, and particularly to foreigners with light skin, such as Mr. [REDACTED]. Both experts opined that they believed that removing Mr. [REDACTED] to Nigeria would put his life in severe jeopardy. (A-153-57).

In addition to the evidence from his experts, Mr. [REDACTED] put in evidence myriad news articles and United States State Department warnings about travel to Nigeria, among other things (A-155).

Finally, Mr. [REDACTED] testified about his past persecution in Nigeria and his future fears of persecution. (A-119-27). The IJ noted in her opinion that Mr. [REDACTED] was a credible witness who “appeared fairly honest and straightforward about his criminal history and the circumstances surrounding his convictions” and “testified in detail about his experiences and his fears relating specifically and only to his return to Nigeria, and he did not appear to fabricate elements of his testimony in order to bolster his claim.” (A-217).

Given the weight of the evidence that Mr. [REDACTED] produced before the IJ, it was error for the Board to determine that the IJ’s conclusion was not clearly erroneous. For this reason, a stay of removal should issue pending this Court’s resolution of his petition.

**B. Mr. [REDACTED] will be Irreparably Harmed Absent a Stay**

To receive a stay of removal, an applicant must next demonstrate that it will be irreparably harmed absent a stay. *Nken*, 556 U.S. at 433. Mr. [REDACTED] has satisfied this factor as well.

As noted above, the only home Mr. [REDACTED] has ever known is the United States. Although his mother lives in Nigeria, as a result of prior violence towards

him while in Nigeria, no family members would be able or willing to provide any support to him upon his return. (A-125-26). As a result of his foreign status, it is unlikely that he would be able to find gainful employment in Nigeria. (A-126). And, because he is easily identified as an American and a Christian, he faces a substantial risk of violence towards his person should he be removed from this country. (A-123-25). In sum, were Mr. [REDACTED] to be removed to Nigeria, it is highly likely that he would in short order become homeless in a country foreign to him, with few prospects that that status would ever change, and with substantial risk of bodily harm. (*Id.*)

Further, if Mr. [REDACTED] is removed while this Court considers his petition for review, the government would not necessarily return him to the United States, even if his requested relief is granted. Although U.S. Immigration and Customs Enforcement facilitates the return of some removed aliens following a remand, it is unclear whether petitioner would qualify for such assistance. (*See* U.S.C.I.S. Directive 11061.1, “*Facilitating the Return to the United States of Certain Lawfully Removed Aliens*,” (Feb. 24, 2012)).

**C. The Issuance of a Stay will Not Substantially Injure the Respondent and will Not be Contrary to the Public Interest**

After assessing the applicant’s likelihood of success and the potential for irreparable harm if the stay is not granted, the court must proceed by “assessing the harm to the opposing party and weighing the public interest. These factors merge



when the Government is the opposing party.” *Nken*, 556 U.S. at 435. The Supreme Court noted in *Nken* that the first two factors of the stay inquiry (likelihood of success and irreparable harm) are the “most critical.” *Id.* at 434. While there is “always a public interest in the prompt execution of removal orders,” there is a countervailing “public interest in preventing aliens from being wrongfully removed.” *Id.* at 427. The public interest in efficient execution of removal orders cannot trump the irreparable harm that would suffer should this stay be denied.

The Government’s interest in the efficient deportation of individuals is considerably outweighed by the harms that Mr. [REDACTED] would face in the event of his deportation to Nigeria, as evidenced by his CAT claim raised in proceedings below and before this Court. The two experts that Mr. [REDACTED] put before the Immigration Judge detailed the rampant crime and corruption present in Nigeria, as well as the violence that Christians like Mr. [REDACTED] faced as a result of pervasive militant activity around the country. (A-153-57). Coupled with the fact that Mr. [REDACTED] is a light-skinned African-American man, with an obvious American accent, and myriad tattoos proclaiming his Christian faith, his experts opined that it was very likely that Mr. [REDACTED] would be the victim of violence upon his return. (*Id.*). It would not be contrary to the public interest for a stay to issue. Nor would

the government suffer any substantial injury if Mr. [REDACTED] remains in the country pending the disposition of his appeal.

### VIII. CONCLUSION

For the foregoing reasons, petitioner asks that this court grant the emergency stay of removal and afford him an opportunity to seek protection in this country.

Dated: December 18, 2017

/s/ Anthony Vale

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**CERTIFICATE OF COMPLIANCE WITH  
TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS,  
AND TYPE STYLE REQUIREMENTS**

Pursuant to Federal Rule of Appellate Procedure 27(d), I hereby certify the following:

1. The foregoing motion complies with the type-volume limitations of Rule 27(d)(2). The motion contains 3,837 words according to the Microsoft Word 2010 word-counting function, excluding the parts of the motion exempted by Federal Rules of Appellate Procedure 27(a)(2)(B) and 27(d)(1).

2. The foregoing motion complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6). The motion has been prepared in a proportionately spaced typeface using Microsoft Word 2010 in 14-point Times New Roman type style.

Dated: December 18, 2017

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**CERTIFICATE OF SERVICE**

I, Anthony Vale, hereby certify that on December 18, 2017, I served the foregoing Petitioner's Unopposed Motion for Stay of Removal from the United States Pending a Ruling on his Petition for Review of Decision of the Board of Immigration Appeals upon the Respondent via CM/ECF.

Dated: December 18, 2017

/s/ Anthony Vale