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**U.S. DEPARTMENT OF JUSTICE**

**EXECUTIVE OFFICE FOR IMMIGRATION REVIEW**

**VARICK STREET IMMIGRATION COURT**

**NEW YORK, NY**

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| In the Matter ofXX**In Removal Proceedings**  | **File No.: A# XX** |

Immigration Judge Next Hearing:

**RESPONDENT’S MOTION TO TERMINATE, OR IN THE ALTERNATIVE, FOR APPROPRIATE SAFEGUARDS**

**U.S. DEPARTMENT OF JUSTICE**

**EXECUTIVE OFFICE FOR IMMIGRATION REVIEW**

**VARICK STREET IMMIGRATION COURT
NEW YORK, NY**

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| In the Matter ofXX**In Removal Proceedings**  | **File No.: A# XX****Respondent’s Motion to Terminate, or in the Alternative, For Appropriate Safeguards** |

The Respondent, XX, by and through his respective undersigned counsel, moves this Court to terminate proceedings because he is not competent to proceed under the definition enumerated by the Board of Immigration Appeals (“BIA”) in *Matter of M-A-M-*, 25 I&N Dec. 474 (BIA 2011). In the event that this Court does not terminate proceedings on this basis, Mr. XX requests that this Court order appropriate safeguards to ensure that Mr. XX has a full and fair hearing as required by the U.S Constitution and the Immigration and Nationality Act (“INA”). *See* INA § 240(b)(3); *see also Reno v. Flores*, 507 U.S. 292, 306 (1993) (holding that Respondents are entitled to due process in removal proceedings); *Matter of M-D-*, 23 I&N Dec. 540, 542 (BIA 2002) (holding that Respondents in removal proceedings are entitled to a full and fair hearing) (*citing Landon v. Plasencia*, 459 U.S. 21, 32-33 (1982)).

**STATEMENT OF FACTS**

**Procedural History**

Mr. XX was detained by Immigration and Customs Enforcement (“ICE”) on XX.ICE charged Mr. XX pursuant to a Notice To Appear (“NTA”) dated XX as removable from the United States for XX.

On XX, Mr. XX appeared *pro se* via video teleconference (“VTC”)for his first Master Calendar Hearing in front of Immigration Judge XX. His case was set over until XX for time to find counsel.On XX, Mr. XX appeared via VTC with undersigned counsel. Counsel for Mr. XX requested a hearing pursuant to *Matter of M-A-M-* based on competency concerns. The Department of Homeland Security (“DHS”) did not oppose a *Matter of M-A-M-* hearing. The Court then scheduled the hearing on the record to XX. Pleadings were not taken nor were applications for relief from removal filed.

On XX, counsel for Mr. XX discovered that the hearing for Mr. XX had been advanced without notice to counsel to XX. On XX counsel filed a joint motion with DHS to move the hearing until the week of XX. This motion was granted on XX and the *Matter of M-A-M-* hearing was scheduled for XX.On XX, Mr. XX requested that this Court adjourn the *Matter of M-A-M-* hearing with evidence that Mr. XX had met with a psychiatrist but required further evaluation to determine competency. The Court adjourned Mr. XX’s *Matter of M-A-M-* hearing to XX.

**Evaluations & Findings**

 Dr. XX, MD, evaluated Mr. XX in person at the XX Jail on March 17, 2019. *See* XX Eval., Respondent’s Submission of Evidence, Tab A. After meeting with Mr. XX, Dr. XX concluded that further psychological testing was necessary and recommended that Mr. XX be evaluated by a neuropsychologist. *See* Respondent’s Letter to the Court. Mr. XX was then evaluated by Dr. XX, PhD, *see infra*, and Dr. XX reviewed Dr. XX’s report in making his final conclusions. Dr. XX ultimately concluded that “the most likely explanation of Mr. XX’s presentation is Korsakoff syndrome.” *See* XX Eval. at 4. Korsakoff syndrome “results from permanent brain damage secondary to thiamine deficiency. Thiamine is a necessary cofactor in the metabolism of brain cells and low levels of it lead to brain cell dysfunction and ultimately to brain cell death.” *Id.* People who abuse alcohol, which has no thiamine, so significantly can develop Korsakoff as they “drink most of their calories.” *Id.* The main symptom of Korsakoff syndrome is “confabulation” which is “occurs when an individual is asked a question and does not realize that because of retrograde amnesia (forgetting past events) that they don’t know the correct answer. Unconsciously, their brain generates an answer which they believe to be true.” *Id.* Dr. XX’s conclusion that Mr. XX suffers from Korsakoff syndrome is based on his expert opinion that Mr. XX “has had serious substance abuse problems.” *Id.* Dr. XX explained that Mr. XX suffers from “cognitive limitations with prominent confabulation [which] are a combination of both psychiatric and neurologic comorbidities [as] is made clear the forensic psychological evaluation completed by Dr. XX.” *Id.* at 1.

 On April 22, 2019, Dr. XX, PhD, met with Mr. XX for an evaluation at the XX. *See* XX Eval, Respondent’s Submission of Evidence, Tab B. During her evaluation, she administered two psychological tests: the Repeatable Battery for the Assessment of Neuropsychological Status (“RBANS”) and the Test of Memory Malingering (“TOMM”).[[1]](#footnote-1) Dr. XX also consulted ICE’s evidence against Mr. XX that included an FBI RAP Sheet, medical records from the XX Jail, the letter submitted by Dr. XX to this Court on XX, and spoke to Mr. XX’s uncle, XX. Dr. XX found that Mr. XX scored in the fourth percentile on the RBANS and that, in one section of the RBANS, he has “pronounced impediments in immediate and delayed memory, and attention (1st percentile).” *See* XX Eval. at 3. Dr. XX also explained that Mr. XX failed “several items” on the TOMM. *Id.* However, she explained that this was not because Mr. XX wanted to “feign a condition,” but rather that he had “difficulties mustering the cognitive resources necessary to focus for sustained lengths of time in a particular task . . . internal preoccupations and . . . anxiety, agitation and emotional deregulation preventing him to perform adequately.” *Id*. at 4. Dr. XX concurred with Dr. XX’s conclusion that Mr. XX is not intentionally being misleading but rather suffers from a symptom called “confabulation – the unconscious production of non-factually accurate information in which the confabulating individuals believes everything shared is factually accurate.” XX Eval. at 3.

The evidence before the Court demonstrates that Mr. XX suffers from “a complex mental health picture with comorbidities in the emotional and cognitive domains, mainly: mood disorder, anxiety disorder, and cognitive deficits.” *See* XX Eval. at 4. Dr. XX concurred in finding Mr. XX’s presentation complex, explaining that Mr. XX is “a severely compromised individual.” XX Eval. at 5. Notably, Dr. XX observed that Mr. XX presents a “clinical picture with affective and cognitive deficits (deficits of ‘executive functioning’) impairing his capacity to attend properly to stimuli, think logically, plan actions, consider consequences of his actions, and communicate effectively.” XX Eval. at 4. Dr. XX also explained that Mr. XX suffers from a history of trauma and that it is likely that his presentation could be due to “executive functioning deficits and affect deregulation derived from the comorbidity of trauma and substance abuse.” *Id.* at 5. Dr. XX’s best estimation that Mr. XX suffers from Korsakoff syndrome and that regardless of what the specific diagnoses are, he “is cognitively impaired so significantly that it impairs his ability to realize his own deficits. Further, his cognitive limitations limit his ability to be able to discuss truthfully the events of his life. Most importantly his deficits in cognitive functioning, specifically executive functioning, make it impossible for him to rationally weigh options, assist his counsel and participate in developing a strategy to aid in his legal case.” XX Eval. at 1.

**Background on Mood Disorders**

Mood disorders are mental health illnesses characterized by changes to one’s emotional state. *See* World Health Organization, *Int’l Statistical Classification of Diseases and Related Health Problems*, 10th Revision (2016), http://apps.who.int/classifications/icd10/browse/2016/
en#/F30-F39. Mood disorders include mental health illnesses like depression and bipolar disorder. Post-traumatic stress disorder is “a delayed or protracted response to a stressful event or situation of an exceptionally threatening or catastrophic nature, which is likely to cause pervasive distress in almost anyone.” World Health Organization, *Int’l Statistical Classification of Diseases and Related Health Problems*, 10th Revision (2016), http://apps.who.int
/classifications/icd10/browse/2016/en#/F40-F48. An estimated 360 million people in the world have either depression or bipolar disorder. *Mental Health Disorders*, World Health Organization (2017), http://www.who.int/mediacentre/factsheets/fs396/en/. Additionally, between two to ten percent of the population in surveyed countries currently has PTSD. Lukoye Atwoli et al., *Epidemiology of Posttraumatic Stress Disorder: Prevalence, Correlates and Consequences*, 28 Current Opinion Psychiatry 307 (2015). Approximately 18% of adults in the United States have an anxiety disorder. National Alliance on Mental Illness, *Anxiety Disorders* (Dec. 2017), https://www.nami.org/learn-more/mental-health-conditions/anxiety-disorders. Anxiety causes “feelings of intense fear and distress” and “feelings of apprehension or dread; feeling tense or jumpy; restlessness or irritability; [and] Anticipating the worst and being watchful for signs of danger.” *Id.* While the specific manifestations of these mental health illnesses may be different, both mood disorders, including anxiety, and PTSD lead to a difficulty relevant to court proceedings: overgeneral memory.

People with PTSD or mood disorders may develop coping mechanisms that affect how they recall memories. A common assumption is that people are more likely to remember particular events that recall a heightened emotional state or that occurred during a period of emotional intensity. This is true, but only to a certain extent. *See* Anne E. Van Giezen et al., *Consistency of Memory for Emotionally Arousing Events: A Review of Prospective and Experimental Studies*, 25Clinical Psych. Rev. 935, 936 (2005) (describing how memories of emotionally arousing events are both more vividly remembered but also subject to incomplete recall); *cf.* Shamsul Haque, *Autobiographical Memory and Hierarchical Search Strategies in Depressed and Non-Depressed Participants*, 14 BMC Psychiatry 310, 310 (2014)(describing how depressed patients retrieved memories more quickly but had less specific recall than non-depressed people). What actually happens, particularly for traumatic events, is that while people may recall the event, they forget many peripheral details, an example of what cognitive psychologists call “overgeneral memory.” *See* Haque, *supra*, at 310. Studies indicate that people with PTSD and depression are more likely to have overgeneral memory. *See, e.g.*,Birgit Kleim, et al., *The Impact of Imprisonment on Overgeneral Autobiographical Memory in Former Political Prisoners*, 26 J. of Traumatic Stress 626, 626 (2013) (describing this phenomenon). Psychologists theorize that because retrieval of detailed negative experiences may cause distress, the person retrieving the memory subconsciously avoids these negative feelings by forgetting specific details. *See* Haque, *supra*, at 310.

Because of overgeneral memory, people with anxiety disorder and mood disorder are more likely to confuse names and dates. Their ability to remember details and tell a full-fledged narrative may also suffer. They may have a flat affect that makes them appear cold or unaffected by traumatic or violent events they may have witnesses or experienced. All of these difficulties are manifestations of the person’s mental health conditions. As a result, providing accommodations is crucial to ensure that people such as Mr. XX have a fair opportunity to present their cases in court.

**Background on Cognitive Limitations**

Approximately one to three percent of the global population has an intellectual or cognitive disability, or about 200 million people. *What is Intellectual Disability?*, Special Olympics, https://www.specialolympics.org/about/intellectual-disabilities/what-is-intellectual-disability (last visited Apr. 26, 2019). Cognitive disabilities are characterized by limitations in two major areas: 1) intellectual functioning and 2) adaptive behavior, which includes social and practical living skills. Administration on Intellectual and Developmental Disabilities (AIDD), *AIDD: The President's Committee for People with Intellectual Disabilities* (2016), https://acl.gov/programs/empowering-advocacy/presidents-committee-people (last visited Apr. 26, 2019). Cognitive disabilities vary, but all affect to some degree an individual’s awareness, perception, reasoning, judgment, memory, and communication capacity. People with intellectual or cognitive disabilities also have trouble with learning and processing information, abstract thinking, and using practical problem-solving skills. Nat’l Ctr. Crim. J. & Disability, *Shining a Light on Traditionally Hidden Disabilities* (2014), https://cops.usdoj.gov/html/dispatch/12-2014/shining\_a\_light\_on\_hidden\_disabilities.asp (last visited Apr. 26, 2019). Cognitive and intellectual disabilities are “hidden” disabilities, in that it may not always be readily apparent to an observer that a person has cognitive limitations. *Id*. Exacerbating this issue is the fact that many people with intellectual or cognitive disabilities may pretend to understand in a desire to please others, especially authority figures. *See id*. These characteristics can make immigration court especially challenging for these individuals.

**Background on Korsakoff Syndrome**

 The amount of people suffering from Korsakoff syndrome is unknown, but it is a disability that “causes problems learning new information, inability to remember recent events and long-term memory gaps.” Alzheimer’s Association, *Types of Dementia: Korsakoff Syndrome*, https://www.alz.org/alzheimers-dementia/what-is-dementia/types-of-dementia/korsakoff-syndrome. One symptom of Korsakoff’s is that “[t]hose with Korsakoff syndrome may ‘confabulate,’ or make up, information they can't remember. They are not ‘lying’ but may actually believe their invented explanations.” *Id.* Additionally, “Symptoms include amnesia, tremor, coma, disorientation, and vision problems. The disorder's main features are problems in acquiring new information or establishing new memories, and in retrieving previous memories.” The National Institute of Neurological Disorders and Stroke,

*Wernicke-Korsakoff Syndrome Information Page* (2019), https://www.ninds.nih.gov/
Disorders/All-Disorders/Wernicke-Korsakoff-Syndrome-Information-Page. Korsakoff can also cause “not only jumbled memories but also a heightened risk of confabulating false memories that they believe to be real.” Jerrod Brown, et al., *Wernicke-Korsakoff Syndrome (WKS): A Review for Criminal Justice, Forensic, Legal, and Mental Health Professionals*, Forensic Scholar’s Today (2017), https://online.csp.edu/blog/forensic-scholars-today/wernicke-korsakoff-syndrome-wks.

 Sufferers of Korsakoff syndrome are extremely vulnerable, especially in a criminal justice or legal setting. The deficits caused by Korsakoff “likely undermine the capacity to function (e.g., capacity to waive Miranda rights and competency to stand trial) in criminal justice and legal settings.” *Id.*  Importantly, “the symptoms of WKS may make an otherwise

competent defendant unfit to stand trial or greatly reduce the accuracy of an eyewitness testifying. As a result of these deficits, the likelihood of false confessions may also increase dramatically the longer an interrogation goes on.” *Id.*

**LEGAL STANDARDS**

Pursuant to *Matter of M-A-M-*,

“the test for determining whether an alien is competent to participate in immigration proceedings is whether he or she 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 and cross-examine witnesses.”

25 I&N Dec. 474, 479 (BIA 2011). If a respondent is found incompetent under this framework, then “Immigration Judges have discretion to determine which safeguards are appropriate, given the particular circumstances in a case before them.” *Id.* at 481-82. However, in some cases “concerns may remain” despite the implementation of safeguards. *Id.* at 483. Again, *M-A-M-*, provides a non-exhaustive list of remedies for such circumstances, including “alternatives” such as administrative closure of the case. *Id.* However, as the BIA noted in *M-A-M-*, “The [INA’s] invocation of safeguards presumes that proceedings can go forward, even where the alien is incompetent, *provided the proceeding is* *conducted fairly*.” 25 I&N Dec. at 477 (emphasis added).

**ARGUMENT**

1. **Mr. XX Is Not Competent Under *Matter of M-A-M-* Because He Cannot Consult With His Attorney and Assist In His Own Defense.**

A necessary piece of the competency determination is whether the respondent “can consult with the attorney or representative if there is one.” *M-A-M-*, 25 I&N Dec. at 479. The BIA, in developing its competency standard in *M-A-M-* looked to the criminal standard which it considered “instructive.” *Id.* at 478. The criminal definition of competency used by the BIA is whether the defendant “lacks the capacity to understand the nature and object of the proceedings against him, t*o consult with counsel, and to assist in preparing his defense*.” *Drope v. Missouri*, 420 U.S. 162, 171 (1975) (emphasis added).

Here, Dr. XX concluded that based on Mr. XX’s presentation, “he will have significant difficulties reasoning sensibly, strategizing and communicating effectively toward his own defense. While he is aware of the facts of his legal predicament, his poor judgment, impulsivity, inattention, excitability and irritability become heighted in stressful environments or situations, such as a courtroom or hearing.” *See* XX Eval. at 5. Similarly, Dr. XX explained that “Mr. XX is a severely compromised individual who is unable to strategize wiQ2th his counsel or testify truthfully.” XX Eval. at 5. Dr. XX further explained that “Mr. XX is unable to provide a factual or reasonable account of the events of his life that are related to material events” and that “Mr. XX is cognitively impaired so significantly that it impairs his ability to realize his own deficits. Further, his cognitive limitations limit his ability to be able to discuss truthfully the events of his life. Most importantly his deficits in cognitive functioning, specifically executive functioning, make it impossible for him to rationally weigh options, assist his counsel and participate in developing a strategy to aid in his legal case.” *Id.* at 5.

Mr. XX cannot adequately consult with his attorney nor can he reasonably assist in preparing his own defense. Therefore, under the standard developed by the BIA, he is not competent to proceed. *Matter of M-A-M-*, 25 I&N Dec. at 480 (discussing indicia of incompetency).

* 1. **This Case Should Be Terminated Because Mr. XX is Incompetent In That He is Incapable of Assisting Himself or His Attorney in Preparing His Defense and No Other Remedy Would Adequately Safeguard His Rights.**

Due to the severity of Mr. XX’s condition, the appropriate remedy in this case is termination. *See M-A-M-*, 25 I&N Dec*.* at 481-83 (discussing implementation of safeguards upon finding of incompetency); INA § 240(b)(3). While case law and regulations anticipate that removal proceedings can go forward against incompetent respondents, *see Nee Hao Wong v. INS*, 550 F.2d 521 (9th Cir. 1977), the Fifth Amendment nevertheless entitles noncitizens to due process in removal proceedings. *See Reno v. Flores*, 507 U.S. 292, 306 (1993). This includes the right to present evidence on one’s own behalf. INA § 240(b)(4)(B). However, Mr. XX’s acute symptoms render him incapable of assisting himself or his attorney in preparing his defense and providing reliable evidence, in violation of his due process and statutory rights. For example, his potential applications for relief (Form EOIR 42A, cancellation of removal, and Form I-589, for asylum, withholding and protection under the Convention against Torture), require Mr. XX to affirm the veracity of the information he provides, and subjects the undersigned to potential civil penalties if untruthful information is provided. *See* Form EOIR 42B at 8; Form I-589 at 10. His ability to provide accurate responses to a range of important questions will be compromised by his mental and cognitive illnesses. *See, e.g.,* XX Eval. at 4 (Mr. XX is “plagued with affective and cognitive deficits (deficits of ‘executive functioning’) impairing his capacity to attend properly to stimuli, think logically, plan actions, consider consequences of his actions, and communicate effectively.”); XX Eval. at 4 (“Mr. XX doesn’t know much about his past and doesn’t know that he doesn’t know it. For this reason, he is unable to give a factual account to assist his counsel in developing a strategy in his case.”).

Finally, proceeding with this case under the present circumstances may inevitably result in breaches of the undersigned’s professional responsibilities, including to have a meaningful attorney-client relationship that identifies and follows the client’s goals. *See, e.g.*, N.Y. R. Prof. Cond. 1.2(a) (providing that “a lawyer shall abide by a client’s decisions concerning the objectives of representation and . . . shall consult with the client as to the means by which they are to be pursued”); *see also* American Bar Association, “Representing Detained Immigration Respondents of Diminished Capacity: Ethical Challenges and Best Practices,” (July 2015).

Consequently, the appropriate remedy is termination.[[2]](#footnote-2) *See* 8 C.F.R. 1240.12(c) (“The order of the immigration judge shall direct the respondent’s removal from the United States, *or the termination of the proceedings*, or other such disposition of the case as may be appropriate.” (emphasis added)).

* 1. **Assuming *Arguendo* That This Court Does Not Terminate Proceedings, It Must Order Safeguards To Ensure That Mr. XX’s Constitutional Rights Are Protected.**

Pursuant to the INA, Second Circuit, and BIA caselaw, immigration judges have a responsibility to ensure that immigration proceedings are fundamentally fair. *See* INA § 240(b)(4)(B) (requiring that respondents have a “reasonable opportunity” to examine and rebut evidence against them); *Matter of Tomas*, 19 I. & N. Dec. 464, 465 (BIA 1987) (describing importance of fundamental fairness of immigration proceedings); *Matter of Exame*, 18 I. & N. Dec. 303 (BIA 1982) (same); *United States v. Fernandez-Antonia*, 278 F.3d 150, 156 (2d Cir. 2002) (“Although the Supreme Court has not specifically delineated the procedural safeguards to be accorded to aliens in deportation or removal hearings, it is well settled that the procedures employed must satisfy due process.”).

Federal law and regulations require IJs to prescribe safeguards when necessary to ensure that each respondent has an “adequate opportunity to present his or her case during a hearing.” *Matter of M-A-M*, 25 I&N Dec. 474, 477–78 (BIA 2011) (“The Act’s invocation of safeguards presumes that proceedings can go forward . . . provided the proceeding is conducted fairly.”); INA § 240(b)(3); 8 C.F.R. §§ 1240.4, 1240.43 (2016). The BIA requires immigration courts to make these accommodations for people with mental health conditions regardless of whether the disability rises to the level of incompetency. *See* *Matter of J-R-R-A*, 26 I&N Dec. 609, 610–12 (BIA 2015); *M-A-M-*, 25 I&N Dec. at 480.

 Such accommodations are also required by federal laws that require public entities to accommodate people with mental illness. Section 504 of the Rehabilitation Act compels all executive agencies to provide “reasonable accommodations” for individuals with disabilities. *See* 29 U.S.C. § 794(a); 28 C.F.R. § 39.130 (applying the Rehabilitation Act to the Department of Justice). Under the Act, this Court has an affirmative obligation to make reasonable modifications in “policies, practices, and procedures” to ensure people with disabilities have meaningful access to services and programs. *See, e.g.,* *Franco-Gonzales v. Holder*, 767 F. Supp. 2d 1034, 1051 (C.D. Cal. 2010) (granting safeguards for mentally ill detainees in immigration court under the Rehabilitation Act). The Supreme Court also recognized this duty in *Tennessee v. Lane*, where the Court emphasized that accommodations may be required for disabled individuals in courts as a guarantee of their fundamental right of access to the courts under due process protections. 541 U.S. 509 (2014).[[3]](#footnote-3)

Providing accommodations will also ensure efficient development of the record. Immigration judges have an “affirmative obligation to help establish and develop the record.” Secaida-Rosales v. Immigration and Naturalization Service, 331 F.3d 297, 306 (2d Cir. 2003). Many of the safeguards requested in this motion originated in civil or criminal courts, where there has long been recognition of the usefulness of such safeguards in promoting more efficient and fair development of the record. *See, e.g.*, *United States v. Salameh*, 152 F.3d 88, 127 (2d Cir. 1998) (allowing accommodations in order to develop testimony); *United States v. Archdale*, 229 F.3d 861 (9th Cir. 2000) (permitting leading questions when the subject matter of the questioning was traumatic for witness being questioned). Prescribing these safeguards will enhance, rather than detract, from the Court’s aim of ensuring sufficient development of the record in a fundamentally fair proceeding.

1. **Because of Mr. XX’s Mental Health and Cognitive Impairments, He Must Be Brought to Court for all of his Hearings.**

Producing Mr. XX to Court for his hearings is necessary in order to protect his Fifth Amendment rights to due process and the INA’s guarantee that he be provided a full and fair hearing and a reasonable opportunity to present evidence on his own behalf and examine evidence against him.  INA 240(b)(4)(B); 8 U.S.C. § 1229(b)(4)(B); *see also Flores*, 507 U.S. at 306 (holding that Respondents are entitled to due process in removal proceedings); *M-D-*, 23 I&N Dec. at 542 (holding that respondents in removal proceedings are entitled to a full and fair hearing) (*citing Landon v. Plasencia*, 459 U.S. 21, 32-33 (1982)). As a person suffering from mood disorder, anxiety disorder, and cognitive impairments which could include Korsakoff syndrome, Mr. XX is entitled to certain safeguards to ensure that his due process rights are protected.  Mr. XX is not competent to proceed and Dr. XX recommended that should Mr. XX’s proceedings go forward, he should be brought to Court in person so as to not exacerbate any mental health conditions. *See* XX Eval. at 5 (recommending “in-person hearings with the presence of his attorney by him”).

Furthermore, Section 504 of the Rehabilitation Act (“Section 504”) requires that reasonable accommodations be made for Mr. XX’s conditions in connection with participation in his immigration proceedings.  Failure to produce Mr. XX in person for his hearings would violate Section 504 by denying him the benefit of an opportunity to meaningfully participate in his proceedings. Requiring him to proceed with his hearing via VTC rather than making reasonable modifications to ERO’s policy would lead to discrimination against Mr. XX based on his cognitive deficits and mental illness and denying him the opportunity to fully participate in his proceedings. Mr. XX is an anxious person who requires a “calm” approach. XX Eval. at 5. Mr. XX’s access to counsel and ability to interact in person with his counsel, government counsel, and the Court is crucial to ensure his comprehension of his proceedings and to ensure that he receives the full and fair hearing required under the law. The Court should grant this reasonable accommodation in order to safeguard Mr. XX’s rights.

1. **Because of Mr. XX’s Mental Health and Cognitive Impairments, The Court Should Allow That the Case Proceed Without His Testimony.**

Federal law guarantees to immigrant respondents a reasonable opportunity to examine the evidence against them, present evidence on their own behalf, and cross-examine witnesses presented by the government. INA § 240 (b)(4). This reasonable opportunity may include but does not require the respondent to testify on his or her own behalf. This is the case particularly when the respondent may have other people available to testify in his or her stead, or when relevant evidence can be procured in a way that is not contingent on the respondent’s oral testimony. *See Matter of Carillo*, 17 I. & N. Dec. 30 (BIA 1979) (respondents not required to testify); *Matter of M-A-M*, 25 I. & N. Dec. 474, 483 (BIA 2011) (suggesting use of close friend or family member to testify and provide court with information as a safeguard).

Mr. XX is unable to tell a coherent story and presents as someone who “does not realize that because of retrograde amnesia (forgetting past events) that they don’t know the correct answer. Unconsciously, their brain generates an answer which they believe to be true.” XX Eval. at 4. He also cannot focus and was unable to “remain in task” for a five-minute test administered by Dr. XX as he was “consistently preoccupied with ‘not being bad, or crazy.’” XX Eval. at 4. Most information provided by Mr. XX is therefore unreliable not because he is attempting to be evasive or engage in “conscious deception” *see* XX Eval. at 4, but rather because he is actually incapable of “communicat[ing] effectively” *see* XX Eval. at 4 and because of a potential medical syndrome, provides “non-factually accurate information [which he] believes . . . is factually accurate.” XX Eval. at 3.

People with severe mood disorders vary in their ability to communicate effectively in the courtroom environment. Additionally, as explained *supra*, people with Korsakoff and other cognitive impairments can unconsciously testify as to information that would be considered by others to be “beyond belief.” XX Eval. at 3. If, upon counsel’s advice and the conclusions of Dr. XX and Dr. XX, Mr. XX does not testify, the Court should not draw any adverse inference from this decision. Mr. XX’s inability to testify reflects only the complexity of developing evidence in light of his mental health and cognitive limitations, rather than an invocation of the privilege against self-incrimination. Silence alone is never enough to establish removability. *See* *Matter of Guevara*, 20 I. & N. Dec. 238, 243 (BIA 1990) (respondent’s silence not enough to establish deportability); *Matter of J-*, 8 I. & N. Dec. 568, 572 (BIA 1960) (“Suspicion cannot be solidified into proof by the mere silence of respondent.”).

1. **Because of Mr. XX’s Cognitive Impairments and Mental Health Conditions, This Court Should Allow Counsel to Proffer Her Own Statements on Mr. XX’s Applications for Relief from Removal.**

One of the ways in which Mr. XX’s mental and cognitive deficits can impact his immigration case is that he suffers from “diminished insight into the severity” of his condition. XX Eval. at 5. During his interview with Dr. XX, Mr. XX “appeared consistently preoccupied with ‘not being bad, or crazy.’” *Id.* at 4. Dr. XX similarly observed that Mr. XX consistently downplayed his substance abuse issues explaining that his Korsakoff syndrome diagnoses is not inconsistent with Mr. XX’s denial of substance abuse because due to Mr. XX’s “unconscious production of non-factually accurate information . . . I believe Mr. XX believes he has never suffered from any substance use disorder.” XX Eval. at 3-4.

The fact that Mr. XX is unable to appreciate or acknowledge the severity of his condition therefore constrains his ability to articulate certain grounds for relief from removal. Specifically, in the asylum context, Mr. XX could qualify for inclusion in certain particular social groups on account of his mental illness and cognitive impairments. *See, e.g., Kholyavskiy v. Mukasey,* 540 F.3d 555, 573 (7th Cir. 2008) (explaining that mental illness is an immutable trait); *Temu v. Holder*, 740 F.3d 887 (4th Cir. 2014) (“individuals with bipolar disorder who exhibit erratic behavior” is a particular social group). *See also*, *E-D-H-*, AXXX-XXX-523 (BIA Aug. 29, 2017) (accepting “indigent Mexicans without familial support and with chronic and perceptible mental illness involving psychosis” as a cognizable particular social group); *J-M-*, AXXX-XXX-934 (BIA Nov. 15, 2013) (“individuals from Ghana who suffer from severe mental illness, such as bipolar disorder, and are indigent and lack family support” is a cognizable social group).
 Because Mr. XX, on account of his mental and cognitive impairments, cannot articulate the acuity of his disabilities and symptoms, counsel requests that the Court allow her to make claims for relief related to Mr. XX’s cognitive and mental health on his behalf.

1. **Appropriate Safeguards Should Include Granting Permission to Ask Leading Questions During Direct Examination.**

If the Court orders that Mr. XX must testify despite his disabilities, the Court should permit Mr. XX’s counsel to ask leading questions during direct examination. Courts have long recognized an exception to the bar on use of leading questions during direct-examination when such questions are “necessary to develop the witness’s testimony,”Fed. R. Evid. 611(c). People with mental illness and cognitive deficits like Mr. XX frequently struggle to remember things like dates, places and times. *See* Jane Herlihy et al., *Discrepancies in Autobiographical Memories: Implications for the Assessment of Asylum Seekers*, 324 BMJ 324 (2002). Their difficulties with dates and times only increase in times of anxiety or distress. *See id*. Additionally, people with cognitive disabilities frequently struggle to remember things like dates, places and times. *See* Thomas Leyhe et al., *Impairment of Episodic and Semantic Autobiographical Memory in Patients With Mild Cognitive Impairment and Early Alzheimer’s Disease*, 47 Neuropyschologia 2464 (2009) (describing and comparing the memory problems of people with mild cognitive impairment to those with Alzheimer’s disease). Indeed, Dr. XX noted in his report that “Mr. XX doesn’t know much about his past and doesn’t know that he doesn’t know it. For this reason, he is unable to give a factual account to assist his counsel in developing a strategy in his case.” XX Eval. at 4.

Direct examination allows respondent’s counsel to present the legal elements of a claim in an orderly fashion, and to build a case narrative through testimony for the court. Although a familiar person conducts direct examination, the formalized style of questioning and the unfamiliar, high-pressure setting may be jarring even for witnesses without the mental health limitations of Mr. XX. Most attorneys address this by spending extensive time preparing their client for direct-examination. However, for an individual with disabilities like Mr. XX, even substantial preparation may not fully prepare the person for questioning. Allowing respondent’s counsel to ask foundational/leading questions regarding certain uncontested facts (e.g., “Did you arrive in the United States on April 3?” or “Is it true that you worked at the post office for fifteen years?”) could help alleviate this problem.

Permitting leading questions on direct also expedites the proceedings and leads to more efficient development of the record. Courts frequently employ this exception for adults with communication difficulties, children, witnesses with disabilities, survivors of traumatic events, and witnesses who are “nervous” or “confused.” *See United States v. Salameh*, 152 F.3d 88, 128 (2d Cir. 1998) (permitting use of leading questions for nervous witness during direct examination); *United States v. Vazquez-Larrauri*, 778 F.3d 276, 290 (1st Cir. 2015) (allowing use of leading questions to develop foundational testimony); *United States v. Cisneros-Gutierrez*, 517 F.3d 751 (5th Cir. 2008) (permitting leading questions on direct for witness with extensive “memory problems”); *Jordan v. Hurley*, 397 F.3d 360, 363 (6th Cir. 2005) (leading questions on direct examination permissible for person with cognitive limitations); *People v. Cuttler*, 270 A.D.2d 654, 655 (N.Y. App. 3d 2000) (trial court judge did not abuse discretion when he permitted use of leading questions on direct examination for child sexual assault victim). Mr. XX is someone who, as a result of his mental and cognitive disabilities, speaks “in a rapid and uninterruptable fashion.” XX Eval. at 1. For example, Dr. XX was unable to explain the purpose of why he was there until 15 minutes had passed in his evaluation of Mr. XX. *Id.* Dr. XX agreed and explained that Mr. XX “spoke rapidly and circumstantially, not responding directly or clearly to questions asked, but rather persevering in topics of concern.” *Id.* This is the exact type of communication difficulty that asking leading questions can help mitigate.

Use of leading questions in Mr. XX’s case merely reaffirms this longstanding principle and helps to ensure the fundamental fairness of Mr. XX’s immigration proceedings. An additional and related safeguard would require the Court to defer to the established documentary record when there is an inconsistency between that record and the respondent’s hearing testimony. If the respondent has previously submitted documentary evidence that clearly establishes a particular fact, but on the day of the hearing respondent omits or forget that foundational fact (for example, his or her address or last place of employment), the Court should not penalize the respondent for the discrepancy but defer to the documentary evidence instead.

1. **Appropriate Safeguards Should Include Permitting Breaks Between Questioning and Closely Monitoring the Tone and Form During Cross-Examination**

The default structure of cross-examination is currently not conducive to yielding cogent and accurate testimony from people who have limitations like Mr. XX’s. The brusque manner of many cross-examiners and the time pressured environment may increase anxiety in people with mental illness that is more likely to elicit inconsistent or inaccurate answers. Such results detract from, rather than enhance, the ability of the Court to discern the validity of the testimony at issue. Dr. XX noted that Mr. XX is afflicted with “anxiety, agitation and emotional deregulation.” XX Eval. at 4.

 Generally, cross-examination proves especially difficult for individuals with mental health and cognitive issues. *See* Adrian Keane, *Cross-Examination of Vulnerable Witnesses—Towards A Blueprint for Re-Professionalisation*, 16 Int’l J. Evid. & Proof 175, 176 (2012) (describing the difficulties that “vulnerable witnesses,” including witnesses who have survived traumatic events, have with cross-examination); Phoebe Bowden, Terese Henning & David Plater, *Balancing Fairness to Victims, Society and Defendants in the Cross-Examination of Vulnerable Witnesses: An Impossible Triangulation?*, 37 Melbourne U. L. Rev. 539, 541 (2014) [hereinafter *Balancing Fairness*] (“It is well-established that the cross-examination of children and persons with intellectual disabilities can cause them to give unreliable evidence.”). Difficulties with cross-examination for individuals with mood disorders and cognitive limitations come up for several reasons. Individuals with these conditions are typically more prone to anxiety than other witnesses, which can adversely affect their recall. *Id*. at 556.

Difficulties with cross-examination for individuals with cognitive disabilities occur for several reasons. Such individuals are typically more prone to anxiety than other witnesses, which can adversely affect their recall. *Id*. at 556. People with cognitive disabilities also tend to be more suggestible when questioned by an unfamiliar or authoritative figure. *See* *id*.; Nat’l Ctr. Crim. J. & Disability, *Shining a Light on Traditionally Hidden Disabilities Part Two* Community Policing Dispatch(2014), https://cops.usdoj.gov/html/dispatch/12-2014/shining\_a\_light\_on\_hidden\_disabilities.asp. For these reasons, careful monitoring of the tone of cross-examination can be vital to ensuring that respondents answer truthfully.

Proper accommodation during cross-examination also requires attention to the form and context of questions. Questions with double negatives, multipart questions, and questions with complex vocabulary and sentence structure are all examples of types of questions that people with intellectual or cognitive disabilities struggle to answer accurately. Mark R. Kebbell et al., *Witnesses with Intellectual Disabilities in Court: What Questions are Asked and What Influence Do They Have?* 9Legal & Criminological Psych. 25 (2004). A person with a cognitive or intellectual disability usually faces some difficulty with processing language. Rebecca Milne & Ray Bull, *Interviewing Witnesses With Learning Disabilities for Legal Purposes*, 29 British J. Learning Disabilities 93­, 94 (2001). Complicated questions only exacerbate these difficulties. People with cognitive disabilities are also accustomed to hiding difficulties with comprehension in order to blend in with others, and so may not always seek clarification of confusing or complex questions. *See Balancing Fairness* at 541(making this point). To minimize the risk that Mr. XX will become confused or nonresponsive during cross-examination, counsel for Mr. XX asks that the Court limit the scope of cross-examination questions, permit breaks, and closely monitor the nature of the questioning of the government’s attorney. This would include ensuring that the government attorney uses simple language and speaks in a respectful tone that does not threaten or intimidate Mr. XX, ensuring that all questions “focus the language and demeanor to a range that the client best understands.” Exec. Off. Immigr. Rev., *Immigration Judge Benchbook*: *Mental Health Issues*, DOJ, https://web.archive.org/web/20170429183441/

https://www.justice.gov/eoir/immigration-judge-benchbook-mental-health-issues.

Dr. XX recommended that Mr. XX be presented with “a calm, non-adversarial approach toward him by all parties” on account of his deficits and explained that because of his difficulties “it may not be conducive for him to testify on his own behalf, much less to be cross-examined, given the adversarial nature of such process.” XX Eval. at 5. For these reasons, careful monitoring of the tone of cross-examination and the allowance of breaks can be vital to ensuring that respondents answer truthfully.

1. **The Court Should Allow for Modifications to the Courtroom Environment.**

As the Executive Office of Immigration Review (EOIR) has acknowledged in the context of unaccompanied minors, members of vulnerable populations like Mr. XX benefit greatly from accommodations to the courtroom environment. In its guidelines for accommodations for unaccompanied minors, EOIR noted that such modifications “need not alter the serious nature of the proceedings,” but can actually help foster an atmosphere in which a person is better able to present a claim and participate more fully in the proceedings. *See* Memorandum to All Immigration Judges et al., from David L. Neal, Chief Immigration Judge, *Operating Policies and Procedures Memorandum 07-01: Guidelines for Immigration Court Cases Involving Unaccompanied Alien Children*, May 22, 2007, at 5. Many of the recommendations for unaccompanied minors are readily applicable to adults with mental illness. These accommodations include: closing courtrooms, removing robes and conducting hearings in separate rooms, and/or unshackling Mr. XX in the courtroom. Such accommodations were recommended by Dr. XX who wrote that “accommodations intended to ease [Mr. XX’s] anxiety and avoid triggering his irritability may improve his diminished chances to act effectively.” XX Eval. at 5.

1. **Closed Courtrooms.**

People with mental illness can be very sensitive to their environments. For people who had traumatic experiences with authority figures in their home countries, for example, being in a courtroom can be particularly re-traumatizing. *See* Ctr. L. & Court Tech., *Accommodating PTSD in Our Courts* (2014) http://www.legaltechcenter.net/download/whitepapers/Accommodating
%20PTSD%20in%20our%20Courts.pdf. Closing the courtroom will not only protect Mr. XX’s privacy as sensitive issues may be discussed, but will reduce distractions that stem from having other people in the courtroom that could further inhibit Mr. XX’s ability to testify if the Court orders that testimony is necessary. Such accommodations are also consistent with what immigration courts already do with unaccompanied minors. *See* Memorandum to All Immigration Judges et al., from David L. Neal, Chief Immigration Judge, *Operating Policies and Procedures Memorandum 07-01: Guidelines for Immigration Court Cases Involving Unaccompanied Alien Children*, May 22, 2007, at 8.

1. **Removing Robes and Conducting Hearings in Conference Rooms.**

Clothing has the power to shape and influence our perceptions and behavior. *See* Hajo Adam & Adam D. Galinksy, *Enclothed Cognition*, 48 J. Experimental Soc. Pscyh. 918 (2012) (describing results of experiments where people wearing a lab coat that they were told was a doctor’s coat performed better on tasks requiring attention to detail). A judge’s robe is a symbol of independence and authority. *See Jenevein v. Willing*, 493 F.3d 551, 560 (5th Cir. 2007) (describing judge’s robe as setting aside the “judge’s individuality and passions.”). But a judge’s robe can also be intimidating and retraumatizing for a person with a mental health disability. When working with children, many courts, including immigration courts, are cognizant of the dual nature of the judge’s robe, and recommend removing the robe, and if possible, proceeding in a separate room in order to make respondent more comfortable. *See* Memorandum to All Immigration Judges et al., from David L. Neal, Chief Immigration Judge, *Operating Policies and Procedures Memorandum 07-01: Guidelines for Immigration Court Cases Involving Unaccompanied Alien Children*, May 22, 2007, at 8 (making this recommendation). The same justifications for removing robes when working with children also apply to adults with mental health conditions such as mood and anxiety disorders. A simple gesture like removing one’s robe could play an important role in reducing Mr. XX’s agitation.

1. **Unshackling Mr. XX.**

Shackling of parties in civil or criminal trials is disfavored absent a specific finding that such restraints are necessary. *See Deck v. Missouri*, 544 U.S. 622 (2005); *Davidson v. Riley*, 44 F.3d 1118 (2d Cir. 1995). This rule has longstanding roots in common law. *See* *Deck*, 544 U.S. at 626–27. There are two primary justifications for this rule. The first justification is so that the defendant’s mental and cognitive faculties will not diminish in light of the pain or discomfort they may feel while in restraints. *Id*. (internal citations omitted) (explaining that defendants should not be constrainted “ so that their pain shall not take away any manner of reason” and allow them to testify with “free will”). There is abundant social science literature demonstrating the deleterious effects of physical restraints in other contexts. *See, e.g.,* Nicholas G. Castle, *Mental Health Outcomes and Physical Restraint Use in Nursing Homes*, 33 Admin. Pol’y Mental Health & Mental Health Servs. Res. 696 (2004) (showing that nursing home residents subject to physical restraints are more likely to suffer from cognitive impairment and depression). This is no less true in the immigration context. *See* Complaint at 5, *Abado-Peixoto v. Dep’t of Homeland Security*, No. CV-11-1001, (N.D. Cal. 2011) (describing swollen legs and mental retraumatization of a domestic violence survivor who was shackled during her immigration proceedings).

The second justification for the rule against physical restraints is the prejudicaleffect that use of visible restraints has on the factfinder, the judge. Both the Supreme Court and the Second Circuit recognize that visible schackles can have a prejudicial effect on the proceedings. *See Holbrook v. Flynn*, 475 U.S. 560, 569 (1986) (describing shackles as as “inherently prejudicial”); *Davidson v. Riley*, 44 F.3d 1118, 1122 (2d Cir. 1995) (“Forcing a party to appear at jury trial in manacles and others shackles may well deprive him of due process . . . ). In both civil and criminal courts, judges permit the use of restraints on a witness or litigant after an *individualized* determination that the witness or litigant requires the use of such restraints. *See Davidson*, 44 F.3d at 1122. Immigration courts are also beginning to recognize the importance of an individualized determination as a matter of due process. In 2014, the Department of Homeland Security signed a settlement agreement agreeing not to shackle immigration respondents during bond and merits hearings absent specific findings of danger, and to allow for respondents to be unrestrained during master calendar hearings if they indicate that they suffer from a health condition (including mental health conditions) that would make use of restraints inhumane. *See* Notice of Proposed Class Action Settlementat 3–4, *Abadia-Peixoto v. U.S. Dep’t Homeland Sec’y*, No. 3:11-cv-4001 RS (N. D. Cal. 2014).

For people such as Mr. XX, who are already susceptible to anxiety and retraumatization, shackling only exacerabates their anxiety and may debilitate their cogntive faculties. The Court should follow the protocol already used in both civil and criminal courts and not permit shackling in courts absent a particularized, individualized determination that such restraints are necessary.

1. **Should Mr. XX Be Required to Testify, When Evaluating Mr. XX’s Testimony as a Whole for Credibility and Other Discretionary Determinations, the Court Must Consider Mr. XX’s Mental Health and Cognitive Limitations.**

If Mr. XX is ordered to testify, the Court must consider Mr. XX’s mental health conditions in assessing his testimony. This includes factoring in Mr. XX’s mental health and cognitive conditions in the Court’s “totality of the circumstances” analysis and taking into account Mr. XX’s mental health and cognitive conditions when assessing discretionary factors like Mr. XX’s rehabilitation or expressions of remorse.

The INA requires the Court to consider the “totality of the circumstances” when evaluating a petitioner’s credibility. INA § 208(b)(1)(B)(iii) (“Considering the totality of the circumstances, and all relevant factors, a trier of fact may base a credibility determination on [list of factors].”). When evaluating Mr. XX’s credibility, the Court must include his mental health and cognitive conditions in its “totality of the circumstances” analysis.

The BIA requires this in *Matter of J-R-R-A*, 26 I. & N. Dec. 609, 612 (BIA 2015). In *J-R-R-A*, the Board remanded an IJ for failing to consider the respondent’s cognitive limitations in his finding that the respondent’s testimony regarding his asylum claim was not credible. *Id*. at 609. The respondent’s attorney had mentioned his suspicions that his client may have had cognitive limitations, and the IJ had noted during the hearing that the respondent often appeared confused during the proceedings and was at times nonresponsive. Yet in his decision the IJ did not mention these concerns.

The BIA, in ordering the remand, recognized that there may be instances where, “inconsistencies, implausibilty, inaccuracy of details, inappropriate deameanor, and nonresponsiveness—may be reflective of a mental illness or disability, rather than an attempt to deceive the Immigration Judge.” *Id*. at 611. In the case, the respondent had incorrectly stated that 2006 was “last year” when it was actually seven years ago, confused the year in which he first arrive in the United States, and laughed inappropriately. In response to these indicia of cognitive limitations, the Board created an accommodation appropriate for the respondent, stating that “where a mental health concern may be affecting the reliability of the applicant’s testimony, the Immigration Judge should, as a safeguard, generally accept that the applicant belives what he has presented.” *Id*.

The logic of *J-R-R-A* should sensibly extend to that of people suffering from mood disorders, anxiety disorders, and cognitive limitations. Mr. XX’s diagnoses are also mental health concerns that may affect how the Court perceives his testimony. As discussed *infra*, people such as Mr. XX who suffer from mental health issues and cognitive limitations may also forget details like dates and names, and in addition could have an overly excitable and evasive affect or be easily re-traumatized by the subject matter of certain questions. The Second Circuit and other federal courts already recognize that inconsistencies in testimony must be considered in light of conditions like PTSD. *See Kasongo v. Gonzales*, 161 Fed. Appx. 147, 148–49 (2d Cir. 2006) (remanding case where IJ used minor inconsistencies in testimony as unwarranted given respondent’s “extremely emotionally fragile” state and his “classic presentation of posttraumatic stress disorder.”); *see also Cordova-Manzanarez v. Holder*, 429 Fed. Appx. 659 (9th Cir. 2011) (remanding case in which IJ failed to take into account expert testimony regarding petitioner’s mental health impairments); *Zubeda v. Ashcroft*, 333 F.3d 463, 476–77 (3d Cir. 2003) (cautioning against placing too much weight on inconsistencies in testimony in light of petitioner’s mental health conditions).

Like the respondent in *Matter of J-R-R-A*, individuals with mental health and cognitive limitations are often unable to remember peripheral details of events, including dates and names. In Mr. XX’s case, because of his disabilities, he is unable to provide accurate information and cannot stay on topic when asked a question. As the BIA itself acknowledges, such lapses are not indicative of malevolent intent, but rather reflect the reality of his symptoms. *Matter of J-R-RA*, at 611 (“factors that would otherwise point to a lack of honesty in a witness—maybe be reflective of an illness or disability, rather than an attempt to deceive the Immigration Judge.”). Because failure to consider Mr. XX’s disabilities may unduly prejudice the Court’s credibility determination and undermine the fundamental fairness of the proceeding, counsel respectfully requests that the Court include consideration of Mr. XX’s mental health and cognitive issues when evaluating his testimony.

Similarly, the Court must also consider Mr. XX’s mental health and cognitive conditions when evaluating discretionary factors such as the extent of rehabilitation and remorse. An immigration judge’s evaluation of Mr. XX’s demeanor and responsiveness factors into the “totality of the circumstances” analysis the Court must adopt when assessing credibility. *See* INA § 208(b)(1)(B)(iii) (listing demeanor and responsiveness as two of many factors immigration judges can consider when assessing credibility). Demeanor and responsiveness are also factors the IJ considers when determining whether someone has expressed genuine rehabilitation or remorse. *See, e.g.*, *In Re Mendez-Morales*, 21 I. & N. Dec. 296 (BIA 1996).

However, as discussed extensively *supra*, Mr. XX suffers from mental and cognitive impairments that directly affect both his demeanor and responsiveness—specifically, Mr. XX’s mental health and cognitive conditions diminish his range of emotional responses. Importantly, Mr. XX’s disabilities prevent him from acknowledging just how serious his issues are and therefore he will struggle to appear remorseful for behavior he does not understand. *See* XX Eval. at 1 (“Mr. XX is unable to provide a factual or reasonable account of the events of his life that are related to material events.”). To comply with procedural fairness, the Court must take into account Mr. XX’s mental health and cognitive conditions when using demeanor and responsiveness to evaluate discretionary determinations like rehabilitation and remorse.

**CONCLUSION**

Because Mr. XX cannot assist in his own defense and cooperate with counsel, proceedings must be terminated. However, assuming that the Court does not terminate proceedings, it must order appropriate safeguards. Accommodating Mr. XX’s mental health conditions is an important part of ensuring that his proceedings are fundamentally fair. Such accommodations will also assist in the further development of the record, and are simply good practice given the circumstances.

Dated: April 29, 2019 Respectfully submitted,

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1. The RBANS is “cognitive measure that assesses several neuropsychological domains such as immediate memory (the ability to recall auditory verbal information), visual-spatial/construction (the ability to construct complex designs), attention, and delayed memory (the ability to recall verbal and non-verbal information after a delay).” XX Eval.at 3. The TOMM is a “visual recognition test designed to help distinguish between non-genuine versus true memory impairments.” *Id.*  [↑](#footnote-ref-1)
2. As Mr. XX’s condition is so severe, and there is no indication that he could be restored to competency given the likely permanent nature of his cognitive deficits, the undersigned respectfully submits that administrative closure would be an inadequate legal remedy. *See Matter of Avetisyan*, 25 I&N Dec. 688, 696 (BIA 2012) (providing that administrative closure is inappropriate when based on a “purely speculative” event). Additionally, *Avetisyan* was recently overturned so administrative closure is no longer an option in this case. *See Matter of Castro-Tum*, 27 I&N Dec. 271 (A.G. 2018). [↑](#footnote-ref-2)
3. In *Lane*, the Court considered court-provided accommodations under Title II of the Americans with Disabilities Act (ADA). Although the ADA does not apply to federal entities, both Acts prescribe the exact same obligations and courts generally consider both provisions interchangeably. *See Harris v. Mills*, 572 F.3d 66, 73 (2d Cir. 2009) (“[I]n most cases, the standards are the same for actions under both statutes.”). [↑](#footnote-ref-3)