PLEASE TAKE NOTICE that as soon as counsel may be heard, CLIENT NAME, by and through his counsel, will ask this Court to enter an order granting a stay of the certification of his extradition pending the appeal of the denial of his habeas petition to the Ninth Circuit Court of Appeals.

This motion is made pursuant to the United States Constitution, the Federal Rules of Criminal Procedure, and all other applicable treaties, statutes, case law and local rules, and it is based upon the attached memorandum of points and authorities and all other materials that may come to this Court's attention.

1. Factual and Procedural History

A. Background

Mr. NAME is an eighty-five year old legal permanent resident of this country. He first came to this country in 1962, and then again in 1963 through 1965, in connection with employment. He then returned to Mexico and stayed there for almost forty years. In 2004 he came back to the United States, with permission, and has lived here ever since. He became a legal permanent resident shortly after his return in 2004.

Mr. NAME has lived openly in the Bay Area with his wife, Teresa NAME, since his return in 2004, first in Oakland and then in Hayward, California. He receives bank statements, paychecks, Medi-cal notices and related records at his home address in Hayward. In addition, he has a State of California identification card bearing this address.

Unbeknownst to Mr. NAME, on April 7, 2006, the government of Mexico issued a warrant for his arrest for the charge of attempted homicide. Mr. NAME visited Mexico in 2007 and again in 2009 and was never informed that he had an outstanding warrant for his arrest. Mr. NAME flatly denies that he ever attempted to murder the complaining witness or anyone else. Unfortunately it is not yet clear what other witnesses or records, if any, will still be available to corroborate this and any other available defenses given the three-year delay by Mexican officials in prosecuting this case.

B. Initial Proceedings in Magistrate Court and District Court

On March 5, 2009 – three years after the alleged shooting took place – the Mexican government formally requested the United States to extradite Mr. NAME to Mexico to answer to the charge of attempted homicide. *In the Matter of the Extradition of CLIENT NAME*, No. 09-xxxxx SBA/DMR (N.D. Cal.), Docket No. 22. Following this request, the United States Attorney's Office filed a complaint for provisional arrest on June 26, 2009, to process his extradition to Mexico. *Id*. at Docket No. 1. The case was assigned to U.S. District Court Judge Saundra B. Armstrong. Mr. NAME was arrested in the warrant on September 3, 2009. *Id.* at Docket No. 16.

He made his first appearance on the charge on September 4, 2009. *Id.* at Docket No. 3. On September 15, 2009, a magistrate judge released him on bond. *Id.* at Docket No. 12. Mr. NAME has remained out on bond and under the supervision of the Pretrial Services Office to this day.

On November 3, 2009, Mr. NAME filed a motion to dismiss the complaint on the basis that his rights under the Speedy Trial Clause had been violated. *Id.* at Docket No. 19. On October 31, 2011, Judge Armstrong denied Mr. NAME's motion. *Id.* at Docket No. 38. That same day, Judge Armstrong referred the case to this Court for all further proceedings. *Id.* at Docket No. 39. On April 10, 2012, this Court certified that there was sufficient evidence to sustain the underlying charge and ordered extradition. *Id.* at Docket No. 53.

C. Habeas Petition in District Court

A petitioner may challenge an order of international extradition in federal court by means of a petition for writ of habeas corpus. *See Prasoprat v. Benov*, 421 F.3d 1009, 1013 (9th Cir. 2005). Mr. NAME challenged this Court's order certifying his extradition by filing a petition for writ of habeas corpus in U.S. District Court on May 24, 2012. *NAME v. O'Keefe*, No. 12-xxxxxx LHK (N.D. Cal.), Docket No. 1. The habeas case was assigned to U.S. District Judge Lucy Koh.

On November 12, 2014, Judge Koh issued an order denying the petition and denying a certificate of appealability. *Id.* at Docket No. 8. Mr. NAME filed a timely notice of appeal on December 8, 2014. *Id.* at Docket No. 10.

On January 22, 2015, Mr. NAME filed a request for a certificate of appealability in the Ninth Circuit. *NAME v. O'Keefe*, C.A. No. 14-xxxxx. The Ninth Circuit has not yet ruled on Mr. NAME's pending request for a certificate of appealability.

On February 20, 2015, the government issued a motion to revoke Mr. NAME's bond "so that he may be surrendered to Mexican authorities pursuant to the final extradition decision of the Secretary of State." *In the Matter of the Extradition of CLIENT NAME*, No. 09-xxxxx DMR, Docket No. 64. Mr. NAME files the instant motion in opposition to the government's request to revoke his bond.

2. Argument

A. Standard for Issuing a Stay

In determining whether to issue a stay, the Court considers the following four factors: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Nken v. Holder*, 556 U.S. 418, 434 (2009). The first two factors of this test

(1) Mr. NAME's case presents serious questions regarding the procedural validity of his extradition proceedings.

In interpreting the *Nken* test's first factor, the Ninth Circuit has stated that petitioners "need not demonstrate that it is more likely than not that they will win on the merits." *Leiva-Perez v. Holder*, 640 F.3d 962, 967 (9th Cir. 2011) (per curiam). Instead, the Ninth Circuit stated in

Leiva-Perez that this first requirement is more fairly understood to require a showing that "serious legal questions are raised" in the underlying case. 640 F.3d at 968. In his habeas petition now pending before the Ninth Circuit, Mr. NAME raised a serious legal question as to whether the lapse of time between the underlying charge and the filing of the complaint in this extradition case violated the Speedy Trial Clause of the Sixth Amendment.

Article 7 of the extradition treaty between the United States and Mexico expressly addresses the issue of whether extradition may be granted when, as here, there has been a lapse in time in the prosecution of the offense: "Extradition shall not be granted when the prosecution or the enforcement of the penalty for the offense for which extradition has been sought has become barred by lapse of time according to the laws of the requesting or the requested Party." Extradition Treaty Between the United States and Mexico, May 4, 1978, art. 7, T.I.A.S. No. 9656.

Here, the prosecution has become barred by the Sixth Amendment's Speedy Trial Clause. The Sixth Amendment to the United States Constitution guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial." U.S. Const. amend. VI. The Sixth Amendment right to a speedy trial is triggered by "arrest, indictment, or other official accusation." *Doggett v. United States*, 505 U.S. 647, 655 (1992). The Supreme Court in *Doggett* held that excessive delay between accusation and arrest may warrant dismissal of the indictment under the Sixth Amendment. *See id.*

The question of whether the "lapse in time" provision in an extradition treaty such as the one here also applies to speedy trial requirements, or just to statutes of limitation, remains unsettled. *See, e.g.*, *In the Matter of the Extradition of Mylonas*, 187 F. Supp. 716, 721 (N.D. Ala. 1960) (holding that the article in the treaty with Greece barring extradition due to "lapse of time" applies to both statute of limitations and Sixth Amendment speedy trial provisions and thus barred extradition); *see also* Michael Abbell, EXTRADITION TO AND FROM THE UNITED STATES § 4-3(9) (2004) (discussing *Mylonas* with approval); *but see Yapp v. Reno*, 26 F.3d 1562, 1568 (11th Cir. 1994) (disapproving of *Mylonas* and holding that the "lapse of time" provision in the treaty with the Bahamas "refers to the running of the statute of limitations and not to a defendant's Sixth Amendment right to a speedy trial").

The Ninth Circuit has not yet squarely decided the issue of whether a "lapse in time" provision may refer to speedy trial requirements as well as statutes of limitations. Indeed, the district court's order denying Mr NAME's habeas petition conceded that "the Ninth Circuit has not addressed whether the lapse of time provision in the treaty . . . incorporates the Sixth Amendment." The district court further noted that it "ha[d] not discovered *any* Court of Appeals decision to address this specific claim" except one issued by the Eleventh Circuit."[1] *Id.* at Docket

[1] *See Yapp v. Reno*, 26 F.3d 1562, 1567 (11th Cir. 1994). As Mr. NAME as urged in prior briefing, the decision in *Yapp* has been roundly criticized by scholars in the field. *See, e.g.,* M. Cherif Bassiouni, International Extradition: United States Law and Practice 780 (5th ed. 2007) (stating that the *Yap* court "confused the questions of statute of limitations, speedy trial and their applications under the treaty" since "[c]learly if a treaty provides for what is tantamount to a 'speedy trial' right under the laws of the requested or requesting state, then

No. 8 (emphasis added). Given the lack of guidance from the Ninth Circuit on the question at issue, and the lack of unity from other courts having considered the question, it is clear that Mr. NAME's case meets the "serious legal question" threshold required under the first factor of the test for issuing a stay.

(2) Mr. NAME will be irreparably harmed absent a stay

There is no question that Mr. NAME will be irreparably harmed in the absence of a stay in this case. Without an order in place prohibiting his extradition, Mr. NAME will be extradited and physically removed from the United States to Mexico during the pendency of his appeal. If he is extradited and removed while his appeal is pending, Mr. NAME's appeal will be deemed moot and his case dismissed.

(3) The other interested parties will not be substantially injured by issuance of a stay and the stay is in the public interest.

As noted *ante*, the remaining two factors – whether issuance of a stay will substantially injure the other interested parties and where the public interest lies – are less critical to the Court's inquiry than the first two factors in the analysis. *Nken*, 556 U.S. at 434. Where the government is the opposing party, the third and fourth factors essentially merge. *Id.* at 435. In addition, the Ninth Circuit has emphasized that "although petitioners have the ultimate burden of justifying a stay . . . the government is obliged to bring circumstances concerning the public interest to the attention of the court." *Leiva-Perez* at 970.

The government will not be substantially injured by issuance of this stay. As the Supreme Court stated in *Nken*, "the whole idea [of a stay] is to hold the matter under review in abeyance because the appellate court lacks sufficient time to decide the merits." *Nken*, 556 U.S. at 432. The stay will do nothing more than maintain the case in its current status until the Ninth Circuit determines whether or not to issue a Certificate of Appealability as to Mr. NAME's habeas appeal. The position of the government with respect to this case will not be altered in any way.

At the same time, there is a compelling and valid public interest that Mr. NAME be given a full and fair opportunity to obtain meaningful judicial review of the denial of his habeas petition. The issuance of a stay would merely preserve the status quo and prevent his extradition during the pendency of his appeal. Without it, his appeal would be rendered moot, denying the Court of Appeals its important role in conducting review of the district court's handling of this fairly uncommon proceeding.

Moreover, the public interest in ensuring the orderly adjudication of an appeal is heightened where, as here, a foreign government is seeking to extradite a legal permanent resident with no criminal history who has resided peacefully in the country with his family for many years.

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clearly it is that treaty provision that trigger the application of the constitutional or statutory right to a speedy trial even though the constitutional and statutory provisions of the subject would not otherwise accommodate that right").

Finally, given that the elderly Mr. NAME has remained out of custody for nearly six years without incident, there is virtually no risk of harm or danger to the public by permitting him to remain in this country and have his appeal heard.

3. Conclusion

For the reasons stated, CLIENT NAME respectfully requests that the Court issue a stay of its order certifying his extradition and removal from the United States pending a final determination of his appeal by the Ninth Circuit Court of Appeals.