STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the Immigration Judge properly undertook the modified categorical approach in determining whether Mr. *** was convicted of an aggravated felony. The government contended that Respondent's conviction under FLA. STAT. §893.13(1)(A)(2) is an illicit trafficking offense and therefore an aggravated felony. The Supreme Court has specifically stated illicit trafficking in a controlled substance refers to a generic crime. *Nijhawan v. Holder*, 129 S.Ct 2294 (2009). Ageneric offense requires the application of the categorical method to determine whether the conviction is an aggravated felony. The Immigration Court may only go beyond the mere fact of conviction in a narrow range of cases where a judge or jury was actually required to find all the elements of the generic crime (the modified categorical approach). *Taylor v. United States*, 495 U.S. 575 (1990); *Chambers v. U.S.*, 555 U.S. 122 (2009); *Gonzales v. Duenas-Alvarez,* 549 U.S. 183, 186 (2007) (applying the categorical approach to an immigration proceeding and noting that under the formal categorical approach a court "should normally look not to the facts of the particular prior case, but rather to the state statute defining the crime of conviction." The Immigration Judge did not make a ruling stating that all the elements of the generic crime were found in Respondent's case and therefore the modified categorical approach should apply, which includes consideration of the record of conviction. Instead, the Immigration Court found the government's "Conviction Record" (Government's Conviction Record Submitted as Exhibit 3 at the September 22, 2011 Master

Calendar Hearing) to be a "conviction record" and considered only part of that conviction record to find that Respondent was convicted of an illicit trafficking offense and therefore an aggravated felon.

2. If the Board finds the Immigration Judge did properly undertake the modified categorical approach to determine whether or not Mr. *** was convicted of an aggravated felony, the Immigration Judge would not have the discretion to find a requisite element of the conviction satisfied because more than a reasonable challenge to the validity of the record was made, including one based on a substantive error going to the heart of the conviction itself on page one of the government's own "conviction record." *Gousse v. Ashcroft*, 339 F.3d 91 (2d Cir. 2003). *Gousse* states,

Where the record of conviction thus supplies an element of the offense, a court may find that element satisfied ***absent any reasonable challenge to the validity of the record****. See Kuhali v. Reno,* 266 F.3d 93, 106 (2d Cir.2001)*; see also Hamdan v. INS,*98 F.3d 183, 189 (5th Cir.1996) *("The general rule is that, absent specific evidence to the contrary in the record of conviction, the statute must be read at the minimum criminal conduct necessary to sustain a conviction under the statute.") (*citing*United States ex rel. Guarino v. Uhl,*107 F.2d 399 (2d Cir.1939) (L.Hand, J.) *[emphasis added]*. Mr. *** presented the following, showing a more than reasonable challenge to the validity of the record of conviction:

   a. A substantive error made by the Clerk of the Circuit Courts for the Circuit

Court of Duval County, Florida contained on page one of the "conviction record" submitted by the government itself to the Immigration Judge. Page one of the government's conviction record references a conviction to a non-existent section of Florida Statue 893.13(1)(A)~~24~~. The conviction is listed as "sale or delivery of cannabis." The Immigration Judge conceded the reference to a non-existent statute was a factual error and as such excluded this page from consideration in making the determination that Mr. *** was convicted of an aggravated felony based on the record of conviction.

b. Mr. ***, through undersigned counsel, presented the official docket entry of the conviction recorded by Clerk of the Circuit Courts for the Circuit Court of Duval County, Florida again referencing a conviction to a non-existent section of Florida Statue 893.13(1)(A)~~24~~. The conviction is listed again as "sale or delivery of cannabis." The Immigration Judge also excluded this record from consideration in making the determination that Mr. *** was convicted of an aggravated felony based on the record of conviction.

c. Mr. ***, through undersigned counsel, presented the official "Charge Information" documented by the Jacksonville Sheriff's Office, the same agency that investigated and arrested Mr. ***, documenting a conviction under the proper section of the Florida Statutes but then describing the

conviction under that section not only in a highly prejudicial and unequivocally erroneous fashion but at the same time also referring to a non-existent crime, to wit: "Florida Statute 893.13(1)(A)(2) Description: ARMED: SELL MARIJUANA." Undersigned counsel is informed and believes there is no such crime as "Armed: Sell Marijuana" in the entirety of the Florida Statutes.

d. Mr. ***, through undersigned counsel, presented evidence of threats made by the Department of Homeland Security to make Mr. ***'s removal "rough" if Mr. *** did not become a confidential informant for ICE (despite the fact that Mr. *** has no other criminal history in the ten years he has resided in the United States as a Lawful Permanent Resident). The Department of Homeland Security, through its agents, James Burns and Donnie Wells (ICEField Office, Jacksonville, Florida) stated "We can do anything we want. We can say anything we want. We are the ones in control." The ICE agents then pointed out to Mr. *** that they would be the ones to return for him at the start of his removal proceedings. The ICE agents disregarded Mr. ***'s repeated invocations to right to counsel and continued to question Mr. *** in utter and flagrant disregard of his constitutional right to counsel. The allegations against these Department of Homeland Security agents were serious enough to lead to a week-long series of interviews conducted by a 23 year veteran member of ICE pulled off her detail in Atlanta, Georgia. It is unknown to what extent, if any,

these same Department of Homeland Security agents were involved in the original investigation and arrest of Mr. *** and if any other constitutional violations occurred during that investigation and arrest. As such, Mr. *** timely submitted information requesting the results of an ICE Office of Professional Responsibility (OPR) investigation as instructed, through a Freedom of Information Act request. The Department of Homeland Security initially responded that no responsive documents existed. Obviously, that was a patent inaccuracy given that an OPR Investigation was undertaken and the ICE agents in question, undersigned counsel and Mr. *** were all interviewed by the OPR Investigator, ICE Agent Sarah Rideout. When Mr. *** appealed the FOIA non-response, the Department of Homeland Security stated "it is likely that additional responsive records may be found in locations the agency has not yet searched" and indicated it was responding to Mr. ***'s appeal by submitting the FOIA for reprocessing.

3. The record of conviction submitted by the government itself contained a substantive error on the very first page of that record. The Immigration Judge conceded the error contained within the government's conviction record. Mr. *** submitted additional evidence mirroring the same substantive error on the official docket of the County Clerk documenting the conviction. Mr. *** submitted additional evidence otherwise challenging the reliability of the record of conviction. The Immigration Judge may find that a required element of an

offense satisfied in the record of conviction "***absent <u>any reasonable challenge</u> to the validity of the record***."See*Kuhali v. Reno*, 266 F.3d 93, 106 (2d Cir.2001);see also*Hamdan v. INS*, 98 F.3d 183, 189 (5th Cir.1996)("*The general rule is that, absent specific evidence to the contrary in the record of conviction, the statute must be read at the minimum criminal conduct necessary to sustain a conviction under the statute*.") (citingUnited States ex rel. *Guarino v. Uhl*, 107 F.2d 399 (2d Cir.1939) (L.Hand, J.).When an Immigration Judge exercises his or her discretion and finds a required element of the offense satisfied in the record of conviction, there is a presumption of the absence of "any reasonable challenge" to that record of conviction. Mr. ***well surpassed the threshold showing of"any reasonable challenge" to the record of conviction. As such, the Immigration Judge may not have found a required element of an offense satisfied in the record of conviction and as such, "the statute must be read at the minimum criminal conduct necessary to sustain a conviction under the statute." *United States ex rel. Guarino v. Uhl*,107 F.2d 399 (2d Cir.1939). Instead, the Immigration Judge simply excluded from consideration the parts of the record of conviction that contained substantive errors. With those erroneous portions of conviction record excluded, the Immigration Judge afforded "full faith and credit" to the remaining portions of the record of conviction and found that Mr. *** had been convicted of an illicit trafficking offense and therefore an aggravated felony.

4. To allow an Immigration Judge to simply exclude unequivocally relevant evidence—including evidence submitted on page one of the government's own

conviction record, the exclusion of which is fundamentally prejudicial to Mr. ***, in order to render an otherwise unreliable record of conviction, reliable, makes a mockery of the fundamental tenets of evidentiary jurisprudence.