District Judge Marsha J. Pechman

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ALFREDO PARADA CALDERON, Petitioner, v. DREW BOSTOCK, *et al.*,[1] Respondents.	Case No. 2:24-cv-01619-MJP FEDERAL RESPONDENTS' OBJECTIONS TO THE MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION Noted for Consideration: January 31, 2025

I. INTRODUCTION

This Court should not adopt the Report and Recommendation ("R&R"). Dkt. No. 14. First, the R&R erred in finding that Petitioner Alfredo Parada Calderon's mandatory immigration detention pursuant to 8 U.S.C. § 1226(c) "has become unreasonable such that an individualized bond hearing is required to comport with due process." R&R, at 14. In support of this finding, the R&R did not appropriately weigh the due process test factors used in this District. The R&R determined that two factors favored Parada: (1) the approximate 15-month length of his

[1] Pursuant to Federal Rule of Civil Procedure 25(d), Federal Respondents substitute U.S. Secretary of the Department of Homeland Security Kristi Noem for Alejandro Majorkas, and Acting Attorney General James McHenry for Merrick Garland.

UNITED STATES ATTORNEY
1201 PACIFIC AVE., STE. 700
TACOMA, WA 98402
(253) 428-3800

immigration detention, and (2) the possible duration of his Ninth Circuit Petition for Review ("PFR"), which was only found to weigh slightly in Parada's favor. R&R, at 9-11. The R&R further determined that these factors outweigh the two factors that favor Federal Respondents: (1) Parada is a convicted murderer, and (2) his conviction resulted in a nearly 35-year sentence. However, the undeniable severity of Parada's criminal history and his lengthy criminal sentence should cause both of those factors to weigh *heavily* in favor of Federal Respondents.

Furthermore, Parada's murder conviction falls squarely within Congress's purpose for instituting mandatory detention for certain criminal noncitizens under 8 U.S.C. § 1226(c). *Nielsen v. Preap*, 586 U.S. 392, 396 (2019) (enacting mandatory detention for certain criminal noncitizens as the outcome of bond hearings "were too risky in some instances"). Thus, U.S. Immigration and Customs Enforcement ("ICE") still has a legitimate reason to detain Parada. Parada's continued detention without a court-ordered bond hearing does not violate due process.

Second, the R&R erred in recommending that the Government should bear the burden of proof for continued detention if Parada is granted a bond hearing. This is inconsistent with statute and the Constitution as interpreted by the Supreme Court. If this Court should order a bond hearing for Parada, he should bear the burden of proof.

Accordingly, this Court should not adopt the R&R and dismiss the Petition with prejudice.

II. BACKGROUND[2]

Parada, a native and citizen of El Salvador, became a lawful permanent resident of the United States in 1990. In 1992, Parada was convicted by a California jury of one count of murder and three counts of attempted murder. He was sentenced to prison for a total of 34 years

[2] For a more complete recitation of the facts, the Court is respectfully referred to Federal Respondents' Motion to Dismiss. Dkt. No. 8, Mot., at 3-4.

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1201 PACIFIC AVE., STE. 700
TACOMA, WA 98402
(253) 428-3800

and 8 months to life. ICE took Parada into custody when he was released on parole on October 5, 2023.

On November 1, 2023, an Immigration Judge ("IJ") sustained the charges of removal for his conviction of an aggravated felony (8 U.S.C. § 1227(a)(2)(A)(iii)) and his conviction of an attempted aggravated felony (8 U.S.C. § 1227(a)(2)(A)(iii)). The IJ ordered Parada removed to El Salvador in February of 2024. Parada appealed the removal order to the Board of Immigration Appeals ("BIA"), which resulted in the record being remanded to the IJ to make additional findings. After the record was remanded, the IJ again ordered Parada removed to El Salvador. In July of 2024, Parada appealed this order to the BIA. On November 22, 2024, the BIA dismissed Parada's appeal. Parada filed a Petition for Review ("PFR") with the Ninth Circuit on the same day. *Calderon v. McHenry*, 24-7072 (9th Cir. Oct. 22, 2024).

III. LEGAL STANDARD

Properly lodged objections to an R&R are reviewed *de novo*. *See* 28 U.S.C. § 636(b)(1) ("A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made."). "The district judge may accept, reject, or modify the recommended disposition; receive further evidence; or return the matter to the magistrate judge with instructions." Fed. R. Civ. Pro. 72(b)(3).

IV. ARGUMENT

A. Parada has failed to establish a due process violation that would entitle him to a court-ordered bond hearing.

Parada's detention does not require a court-ordered bond hearing to comport with due process. The R&R employed a multifactor test (the "*Martinez* test") when analyzing whether Parada's prolonged detention pursuant to Section 1226(c) satisfies due process. *Martinez v. Clark*, No. 18-cv-1669, 2019 WL 5968089 (W.D. Wash. May 23, 2019) (Report and

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TACOMA, WA 98402
(253) 428-3800

Recommendation) (applying multi-factor due process analysis), *adopted by*, 2019 WL 5962685 (W.D. Wash. Nov. 13, 2019). The R&R erred in concluding that the *Martinez* test establishes that Parada's detention has become unreasonable without a court-ordered bond hearing. R&R, at 14. In *Martinez*, the district court analyzed

> (1) the total length of detention to date; (2) the likely duration of future detention; (3) whether the detention will exceed the time petitioner spent in prison for the crime that made him removable; (4) the nature of the crimes that petitioner committed; (5) the conditions of detention; (6) delays in the removal proceedings caused by petitioner; (7) delays in the removal proceedings caused by the government; and (8) the likelihood that the removal proceedings will result in a final order of removal.

Martinez, 2019 WL 5968089, at *9 (W.D. Wash. May 23, 2019) (Report and Recommendation) (applying multi-factor due process analysis), *adopted by*, 2019 WL 5962685 (W.D. Wash. Nov. 13, 2019). While Federal Respondents do not agree with the R&R's individual factor analyses, or even that all the factors in the *Martinez* test are relevant to the question of due process here, the specific objection before this Court is to how the R&R weighed the *Martinez* test factors. R&R, at 14.

The R&R's individual analyses described one factor as weighing in favor of Parada (Factor 1: the length of detention), one factor as weighing "only slightly in favor" of Parada (Factor 2: likely duration of future detention), and two factors as weighing in favor of the Government (Factors 3 & 4: criminal history). The R&R states that "two factors weigh in favor of [Parada], including the first and most important factor. Next, two of the eight factors weigh in favor of Respondents, and the remaining four factors are neutral." R&R, at 14. The assessment ignores its prior statement that Factor 2 weighs "only slightly in favor" of Parada. *Id.*, at 10. However, even without this adjustment, Parada's murder conviction and decades-long sentence outweigh the factors that the R&R found to favor him.

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TACOMA, WA 98402
(253) 428-3800

The congressional purpose behind Section 1226(c) should be the most important factor used to assess whether mandatory immigration detention of criminal noncitizens has become unreasonably delayed. Section 1226(c) ensures that criminal and terrorist noncitizens that Congress deemed most dangerous and most likely to abscond complete their removal proceedings. *Demore v. Kim*, 538 U.S. 510, 520 (2003). Congress reviewed evidence and concluded that, "even with individualized screening, releasing deportable criminal [noncitizens] on bond would lead to an unacceptable risk of flight." *Id.* Thus, "[t]hese factors are indicative of whether the detainee would be a danger to the community or a risk of flight such that a bond hearing would be futile." *Anyanwu v. United States Immigr. & Customs Enf't Field Off. Dir.*, No. 2:24-CV-00964-LK-GJL, 2024 WL 4627343, at *5 (W.D. Wash. Sept. 17, 2024), *report and recommendation adopted sub nom.*, 2024 WL 4626381 (W.D. Wash. Oct. 30, 2024).

Federal Respondents acknowledge that the *Martinez* test weighs the first factor as the most important factor. However, this factor alone should not eclipse the legitimate reason for Congress's decision to ensure that criminal and terrorist noncitizens, like Parada, that Congress deemed most dangerous and most likely to abscond, complete their removal proceedings. *Demore*, 538 U.S. at 520. This Congressional intent is highlighted by the fact that the statute allows detention to end prior to the conclusion of removal proceedings "only if the [noncitizen] is released for witness-protection purposes." *Jennings v. Rodriguez*, 583 U.S. 281, 304 (2018) (internal quotation marks and citations omitted).

Parada is a convicted murderer who was sentenced to almost 35 years in prison. There should be no dispute that murdering another person is one of the most serious violent crimes with very lengthy sentences, as is the case here. While the length of Parada's immigration detention is prolonged, his detention has not become unconstitutionally prolonged.

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(253) 428-3800

The R&R erred in automatically discounting the weight of his criminal history. "Due process is flexible and calls for such procedural protections as the particular situation demands." *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976). The Supreme Court "has firmly and repeatedly endorsed the proposition that Congress may make rules as to [noncitizens] that would be unacceptable if applied to citizens." *See Demore*, 538 U.S. at 522 (citations omitted). The facts here demand that Parada's serious criminal history outweigh the length of his detention and be of more value than the speculative potential of future detention. This approach would be consistent with Congress's purpose of mandating detention for certain criminal noncitizens.

Finally, this is not an instance where the detainee has not received any process. While Parada has been subject to mandatory detention because of his undisputed criminal convictions, he has consistently been litigating his removal proceedings before the IJ, the BIA, and now the Ninth Circuit. He has had the opportunity to oppose his removal. Now Parada has only one avenue of relief that remains available to him. And the BIA recently dismissed his appeal of the IJ's denial of that application for relief, which is now the subject of his PFR. Therefore, the likelihood of his removal is strong.

Accordingly, this Court should find that the two factors in Federal Respondents' favor demonstrate that Parada's continued detention without a court-ordered bond hearing is not unreasonable.

B. If this Court orders a bond hearing, Parada should bear the burden of proof to justify his release.

This Court should not adopt the R&R's recommendation that ICE should bear the burden of supporting continued detention at a court-ordered bond hearing. R&R, at 14-17. If this Court should find a due process violation, this Court should order that Parada bear the burden of proof

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TACOMA, WA 98402
(253) 428-3800

at his bond hearing. This ruling would be consistent with statute and the Constitution as interpreted by the Supreme Court.

Starting with the statute, in the sole instance 8 U.S.C. § 1226(c) permits release of a noncitizen, the statute places the burden of proof on the noncitizen, not the Government. *See* 8 U.S.C. § 1226(c)(2). The Supreme Court affirmed that the statute is clear on this point in *Jennings v. Rodriguez*, 138 S. Ct. 830, 836, 846-47 (2018).

Similarly, the Constitution does not require the government to bear the burden of proof at an immigration court bond hearing. Simply put, the Supreme Court has *always* affirmed the constitutionality of detention pending removal proceedings, notwithstanding that the government has *never* borne the burden to justify such detention by clear and convincing evidence. *See, e.g.*, *Demore*, 538 U.S. at 522, 532; *Rodriguez Diaz v. Garland*, 53 F.4th 1189, 1211 (9th Cir. 2022) ("We are aware of no Supreme Court case placing the burden on the government to justify the continued detention of [a noncitizen], much less through an elevated 'clear and convincing' showing."). In fact, even when considering a noncitizen subjected to potentially indefinite detention after the conclusion of removal proceedings, the Supreme Court has placed the burden on the noncitizen, as opposed to the Government, to justify release. *See Zadvydas v. Davis,* 533 U.S. 678, 701(2001). Thus, the Court should not order ICE to bear the burden of proof at a Section 1226(c) bond hearing; instead, the burden should be placed on the noncitizen.

The R&R relied on *Singh v. Holder*, 638 F.3d 1196 (9th Cir. 2011), and other courts' reliance on *Singh*, to find that the burden should be placed on ICE. R&R, at 14-16. In *Singh*, the Ninth Circuit applied the canon of constitutional avoidance to interpret the pre-final order detention statutes. "[T]he Ninth Circuit held that § 1226(c) detainees subject to prolonged detention are entitled to a bond hearing before an [immigration judge] wherein the government bears the burden of proving the detainee is a danger or flight risk by clear and convincing

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1201 PACIFIC AVE., STE. 700
TACOMA, WA 98402
(253) 428-3800

evidence." *Id.* (citing *Singh*, 638 F.3d at 1203–04). But *Singh* and its burden-shifting framework are not applicable to this case.

Singh applied to a type of bond hearing required by prior Ninth Circuit case law that is no longer good law. As the Ninth Circuit stated in *Rodriguez Diaz*, "*Singh*'s holding about the appropriate procedures for those bond hearings . . . was expressly premised on the (now incorrect) assumption that these hearings were statutorily authorized." *Rodriguez Diaz*, 53 F.4th at 1196. "*Singh* did not purport to establish a freestanding set of constitutionally mandated procedures that would apply to any detained [noncitizen]." *Id.* As noted by the R&R, *Singh*'s applicability remains an open question in the Ninth Circuit. R&R, at 16. However, the Ninth Circuit has noted that "key aspects" of *Singh* are no longer good law. *Rodriguez Diaz*, 53 F.4th at 1196.

While other courts in this Circuit have applied *Singh* to court-ordered bond hearings in Section 1226(c) detention cases, this Court should require the petitioner to bear the burden to demonstrate that he should be released. This Court should consider the dissenters in *Jennings*, 138 S. Ct. at 882 (Breyer, J. dissenting): "[P]roceedings should take place in accordance with customary rules of procedure and burdens of proof rather than the special rules that the Ninth Circuit imposed." Section 1226(c)(2) provides that a noncitizen may be granted release if he "satisfies the Attorney General" of certain requirements. The "to the satisfaction" standard is equivalent to a preponderance of the evidence standard. *See Matter of Barreiros*, 10 I. & N. Dec. 536, 537 (BIA 1964). Thus, at any bond hearing ordered by the Court, Parada should bear the burden by proving by a preponderance of the evidence that he warrants release.

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1201 PACIFIC AVE., STE. 700
TACOMA, WA 98402
(253) 428-3800

C. Federal Respondents do not object to adding the Facility Administrator of Golden State Annex as a respondent to this litigation.

The R&R recommends that Federal Respondents be required to show cause why the Warden of the Golden State Annex ("GSA") should not be added as the proper respondent in this action. R&R, at 17. As the R&R references, the Ninth Circuit recently found that the proper respondent for an immigration habeas petition is the individual directly in charge of the detention facility. *Doe v. Garland*, 109 F.4th 1188, 1195 (9th Cir. 2024) ("The plain text of the federal habeas implementation provision delineates that petitions must include the name of 'the' person maintaining custody over the petitioner."). As a result, the only proper Respondent is the Facility Administrator (and de facto warden) of the GSA, where Parada is detained. *See Doe*, 109 F.4th at 1194-95 (holding that the Facility Administrator, "who was the de facto warden," not the ICE Field Office Director, was sole proper Respondent when a noncitizen brings a 28 U.S.C. § 2241 habeas petition).

However, the GSA Facility Administrator is not a federal employee. Therefore, undersigned counsel does not represent the Facility Administrator, and Federal Respondents' return and motion to dismiss was not filed on behalf of the Facility Administrator. Therefore, the addition of the Facility Administrator at this stage of litigation would subject that person to an order by this Court without having been served with or an opportunity to respond to the Petition.

V. CONCLUSION

For the foregoing reasons, the Court should not adopt the R&R's recommendation and, instead, this Court should dismiss the Petition with prejudice.

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UNITED STATES ATTORNEY
1201 PACIFIC AVE., STE. 700
TACOMA, WA 98402
(253) 428-3800

DATED this 31st day of January, 2025.

Respectfully submitted,

TESSA M. GORMAN
United States Attorney

s/ Michelle R. Lambert
MICHELLE R. LAMBERT, NYS #4666657
Assistant United States Attorney
United States Attorney's Office
Western District of Washington
1201 Pacific Avenue, Suite 700
Tacoma, Washington 98402
Phone: (253) 428-3800
Fax: (253) 428-3826
Email: michelle.lambert@usdoj.gov

Attorneys for Federal Respondents

I certify that this memorandum contains 2,553 words, in compliance with the Local Civil Rules.