

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA**

**CASE NO: 25-20406-CIV-ALTONAGA/Reid**

**DARYL SANTIAGO**

Petitioner,

v.

**FIELD OFFICE DIRECTOR, MIAMI  
FIELD OFFICE, U.S. IMMIGRATION  
AND CUSTOMS ENFORCEMENT**

Respondent.

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**RESPONDENT'S RETURN TO PETITIONER'S PETITION FOR  
WRIT OF HABEAS CORPUS UNDER 28 U.S.C. § 2241**

Field Office Director, Miami, U.S. Immigration and Custom Enforcement, (Respondent) through the undersigned counsel, hereby responds to Daryl Santiago (Petitioner) Petition for Writ of Habeas Corpus Under 28 U.S.C. § 2241 (Petition) (ECF No. 1). Therein, Petitioner argues that his detention is unconstitutional because it results from Respondent's improper use of a discretionary stay under 8 C.F.R. § 1003.19(i)(1). The Petition should be denied because the District Court lacks subject matter jurisdiction under 8 U.S.C. § 1252(g) since the decision to file a motion for discretionary stay under § 1003.19(i)(1) with the Board of Immigration Appeals (BIA), and subsequent detention of Petitioner, qualify as actions or decisions to commence removal proceedings. Additionally, the District Court lacks subject matter jurisdiction under 8 U.S.C. § 1226(e) to review Respondent's discretionary decision to file the motion for discretionary stay challenging the Immigration Judge's grant of bond. Further, even if there is subject matter jurisdiction, the Petition should be denied because Petitioner failed to meet his burden that his

detention is unconstitutional as a result from Respondent's motion for discretionary stay with the BIA.

## **I. BACKGROUND**

Petitioner is a native and citizen of the Philippines. (ECF No. 1 at ¶ 5). He is a lawful permanent resident of the United States. (*Id.*).

On January 9, 2023, Petitioner was convicted of Willful, Wanton Reckless Driving, and sentenced to time served followed by six months of probation. *See* Exhibit A, Notice to Appear (NTA), at 1.

On September 7, 2023, Petitioner pled guilty to two counts of Trafficking Cocaine and was sentenced to 180 days of confinement and thirty months of probation. *Id.* at 4.

On or about March 4, 2024, Petitioner was taken into immigration custody and placed in immigration removal proceedings. *Id.* at 2.

The NTA charged Petitioner with removability under 8 U.S.C. § 1227(a)(2)(B)(i), as an alien who at any time after admission, has been convicted of a violation relating to a controlled substance (as defined in Section 102 of the Controlled Substances Act, 21 U.S.C. 802), and 8 U.S.C. § 1227(a)(2)(A)(ii) as an alien who at any time after admission, has been convicted of two crimes involving moral turpitude not arising out of a single scheme of criminal misconduct. *Id.*

On September 20, 2024, the Immigration Judge held a custody redetermination hearing wherein she granted Petitioner a bond of \$ 5,000. *See* (ECF No. 1-2 at 2).

On September 22, 2024, as reflected in the certificate of service of the "Order of the Immigration Judge", the Immigration Judge served the parties, including Respondent, with the custody redetermination order ("Bond Order") granting Petitioner's release on a \$5,000 bond. (*Id.* at 3).

On September 23, 2024, Respondent filed an “Emergency Motion for Discretionary Stay” with the Board of Immigration Appeals (BIA) challenging the Immigration Judge’s grant of bond. (*Id.* at 77).

On September 23, 2024, Petitioner posted the \$5,000 bond. *See* Exhibit B, Immigration Bond at 3. On that same date, Petitioner was released to the Miami-Dade Police Department pursuant to an active warrant for his cocaine trafficking conviction. *See* Exhibit C, Arrest Affidavit, at 1, 2.

On September 24, 2024, Petitioner filed his Opposition to the Department of Homeland Security’s Request for Discretionary Stay of Execution of Immigration Judge’s Bond Decision While Bond Appeal is Pending (“Opposition to Emergency Motion for Discretionary Stay”). *See* Exhibit D, Opposition to Emergency Motion for Discretionary Stay. Therein, Petitioner informed the BIA that he was non-detained (he was in state custody as opposed to immigration detention) throughout several portions of the Opposition to Emergency Motion for Discretionary Stay. *See* Exhibit D, generally. He indicated “**RESPONDENT NOT IN ICE CUSTODY**” on the cover (emphasis in original). *Id.* at 1. Additionally, every single page of the Opposition to Emergency Motion for Discretionary Stay, on the top left-hand corner, says “NON-DETAINED ALIEN.” *Id.* at 1-14.

Importantly, his first argument was that the BIA could not entertain the Emergency Motion for Discretionary Stay because Petitioner is not detained by ICE and because the bond was already executed. Exhibit D at 4 (“[W]e oppose the Discretionary Stay of the Execution of the Bond Order, since it was already executed and the request is moot and/or not ripe because the Respondent is not in ICE Custody.”). Petitioner claims he was instead under the custody of Miami Dade County Jail. *Id.* at 5.

On September 25, 2024, the BIA granted the Emergency Motion for Discretionary Stay. *See* (ECF No. 1-3 at 18).

Thereafter, On October 6, 2024, and October 8, 2024, the Immigration Judge issued an amended bond memorandum and terminated removal proceedings, respectively. *See* (ECF No. 1-3 at 5, 29).

On October 26, 2024, after Petitioner's completion of his criminal case, and pursuant to the BIA's discretionary stay order, Petitioner was transferred into ICE custody. *See* Exhibit ICE E, Warrant of Arrest.

On January 27, 2025, Petitioner filed the Petition wherein he alleges that his detention violates the Due Process Clause of the Fifth Amendment because it results from an alleged improper use of a motion for discretionary stay under § 1003.19(i)(1). *See* (ECF No. 1).

To date, Petitioner remains in Respondent's custody. Respondent's appeals regarding the order to grant Petitioner a bond and the order terminating removal proceedings remain pending before the BIA. The discretionary stay granted by the BIA, pursuant to 8 C.F.R. § 1003.19(i)(1), remains in effect.

## **II. LEGAL STANDARD**

Section 2241 authorizes a district court to grant a petition for writ of habeas corpus whenever a petitioner is "in custody in violation of the Constitution or laws or treaties of the United States." 18 U.S.C. § 2241(c)(3). "In a § 2241 habeas corpus case, '[the] petitioner has the burden of establishing his right to federal habeas relief.'" *United States v. Nickson*, 553 F. App'x 866, 869 (11th Cir. 2014) (quoting *Coloma v. Holder*, 445 F.3d 1282, 1284 (11th Cir. 2006)).

### III. REGULATORY BACKGROUND

In immigration proceedings, the government can seek a “stay of custody order pending appeal by the government” through two main mechanisms:

The first mechanism, the discretionary stay provision under § 1003.19(i)(1), provides:

- (1) **General discretionary stay authority.** The Board of Immigration Appeals (Board) has the authority to stay the order of an immigration judge redetermining the conditions of custody of an alien when the Department of Homeland Security appeals the custody decision or on its own motion. DHS is entitled to seek a discretionary stay (whether or not on an emergency basis) from the Board in connection with such an appeal at any time.

§ 1003.19(i)(1).

The discretionary stay lasts until the pending related appeal or motion is decided by the BIA. Once the pending matter is decided, the stay is lifted. *See* The U.S. Department of Justice, Executive Office for Immigration Review, BIA Emergency Stay Requests Fact Sheet (March 2018), <https://www.justice.gov/eoir/page/file/1043831/dl?inline>

As mentioned in § 1003.19(i)(1), the discretionary stay may be requested in an “emergency basis”. § 1003.19(i)(1). “The BIA generally will consider a stay request an emergency in one of two situations: (1) the respondent’s removal from the United States is imminent, DHS has confirmed a specific removal date and time, the respondent is in the physical custody of DHS, and the respondent requests an emergency stay in writing; or (2) the respondent’s release from custody is imminent, and DHS requests in writing an emergency stay of release from detention.” *Id.*

Below are examples of instances where a request for an emergency stay can be made:

- An appeal of an immigration judge bond decision is pending before the BIA;
- A case is pending before the BIA that has been remanded from a U.S. Circuit Court; or
- The BIA decides, in its own discretion, to grant a stay.

*Id.*

The second mechanism, the automatic stay provision under § 1003.19(i)(2), provides<sup>1</sup>:

- (2) ***Automatic stay in certain cases.*** In any case in which DHS has determined that an alien should not be released or has set a bond of \$10,000 or more, any order of the immigration judge authorizing release (on bond or otherwise) shall be stayed upon DHS's filing of a notice of intent to appeal the custody redetermination (Form EOIR-43) with the immigration court within one business day of the order, and, except as otherwise provided in 8 CFR 1003.6(c), shall remain in abeyance pending decision of the appeal by the Board. The decision whether or not to file Form EOIR-43 is subject to the discretion of the Secretary.

§ 1003.19(i)(2).

The automatic stay will lapse 90 days after the filing of the notice of appeal. *See* 8 C.F.R. § 1003.6(c)(4).

#### IV. DISCUSSION

- A. The Court lacks subject matter jurisdiction under § 1252(g) because Respondent's decision to file a motion for discretionary stay under § 1003.19(i)(1) with the BIA, and subsequent detention of petitioner, qualify as actions or decisions to commence removal proceedings.**

Petitioner alleges that his detention is unlawful because it is a result of Respondent's procedurally improper use of a motion for discretionary stay under § 1003.19(i)(1), which was subsequently granted by the BIA. Petitioner maintains if Respondent disagreed with the Immigration Judge's grant of bond, Respondent should have filed an automatic stay under § 1003.19(i)(2) instead of seeking a discretionary stay under § 1003.19(i)(1). *See* (ECF No. 1 at ¶¶ 86-87).

The Court lacks jurisdiction to review Respondent's decision to file a motion for discretionary stay and decision to detain Petitioner because they fall as actions to commence removal proceedings under § 1252(g).

In relevant part, § 1252(g) provides that:

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<sup>1</sup> The regulation was amended in 2006 to permit an automatic stay of up to only 90 days. *Review of Custody Determinations*, 71 FR 57873-01, "[T]he final rule provides that the automatic stay will lapse 90 days after the filing of the notice of appeal."

Except as provided in this section and notwithstanding any other provision of law (statutory or nonstatutory), . . . no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to *commence proceedings*, adjudicate cases, or execute removal orders against any alien under this chapter.

§ 1252(g) (emphasis added).

The Eleventh Circuit Court of Appeals has interpreted the “decision or action...to commence proceedings” as applying not only to the decision to initiate proceedings but also to actions and decisions “securing an alien while awaiting a removal determination.” *Gupta v. McGahey*, 709 F.3d 1062, 1065 (11th Cir. 2013) (“[s]ecuring an alien while awaiting [his removal hearing] constitutes an action taken to commence proceedings.”).

In *Gupta*, the noncitizen argued that ICE violated his Fourth and Fifth Amendment rights by unlawfully “procuring a warrant for his arrest, arresting him unlawfully, illegally searching his apartment and car, illegally seizing his personal items, and wrongfully detaining him.” *Gupta*, 709 F.3d at 1064.

The Eleventh Circuit dismissed the claim finding it lacked subject matter jurisdiction under § 1252(g) stating: “Securing an alien while awaiting a removal determination constitutes an action taken to commence proceedings. Each of Gupta’s claims allege, as his direct injury, an action taken to secure him...while he awaited a deportation hearing.” *Id.* at 1065.

Following *Gupta*, the Eleventh Circuit in *Johnson v. Acting United States AG*, held that “challenges to ICE detainers, notice to appear, detention order, and removal order are ...‘unambiguous[ly]’...included within the exclusionary language of § 1252(g). *Johnson v. Acting United States AG*, 847 Fed. Appx. 801, 802 (11th Cir. 2021).

Here, Respondent’s actions fall within the scope of § 1252(g), as interpreted by *Gupta* and *Johnson*. The purpose of Respondent’s decision to file the discretionary motion to stay the grant

of bond, and subsequent detention of Petitioner once the motion was granted, was to secure his detention until the BIA decided the merits of the pending appeals. Undeniably, but for Respondent's motion for discretionary stay, and subsequent grant by the BIA, Petitioner would not be "secured" in detention. Moreover, *Gupta* and *Johnson* even specifically mention that challenges to ICE detainers fall squarely within the scope of § 1252(g).

Accordingly, the Court lacks subject matter jurisdiction under § 1252(g) because Respondent's decision to file a motion for discretionary stay with the BIA under § 1003.19(i)(1), and subsequent detention of petitioner, qualify as actions or decisions to commence removal proceedings, as interpreted by *Gupta* and *Johnson*.

**B. The Court lacks subject matter jurisdiction under § 1226(e) to review Respondent's discretionary decision to file the motion for discretionary stay challenging the Immigration Judge's grant of bond.**

Petitioner's allegation that Respondent's decision to file a motion for discretionary stay under § 1003.19(i)(1) with the BIA, instead of filing an automatic stay under § 1003.19(i)(2), caused Petitioner to be unconstitutionally detained cannot be reviewed pursuant to § 1226(e).

§ 1226(e) provides:

The Attorney General's discretionary judgment regarding the application of [§ 1226] shall not be subject to review. No court may set aside any action or decision by the Attorney General under this section regarding the detention or release of any alien or the grant, revocation, or denial of bond or parole.

§ 1226(e).

Therefore, "§ 1226(e) precludes an alien from challenging a 'discretionary judgment' by the Attorney General or a 'decision' that the Attorney General has made regarding his detention or release.'" *Jennings v. Rodriguez*, 583 U.S. 281, 295 (2018) (quoting *Demore v. Kim*, 538 U.S. 510, 516 (2003)).

In this case, Respondent made the discretionary decision to file the motion for discretionary stay of the bond grant under § 1003.19(i)(1), instead of an automatic stay under § 1003.19(i)(2), with the legal authority from the BIA.<sup>2</sup> This was a strategic decision that entailed the additional procedural safeguard of overview by the BIA. Respondent selected this mechanism, instead of the automatic stay, which would have allowed Respondent to automatically detain Petitioner without the need of an order from the BIA.

This discretionary and strategic decision to file a discretionary stay of the bond order falls within the purview of § 1226(e) because it is an action by Respondent regarding the detention of the alien that is subject to mandatory detention under 8 U.S.C. § 1226(c).<sup>3</sup> It is through that action that Respondent seeks to properly re-detain Petitioner, who is subject to mandatory detention, contrary to the Immigration Judge's erroneous finding that he is not.

Thus, the Court lacks subject matter jurisdiction under § 1226(e) to review Respondent's discretionary decision to file the motion for discretionary stay challenging the Immigration Judge's grant of bond.

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<sup>2</sup> Respondent had the option of filing an automatic stay because the notice of appeal and motion for discretionary stay were filed on September 23, 2024; one day after the Immigration Judge served the written decision on the parties. § 1003.19(i)(2) ("In any case in which DHS has determined that an alien should not be released...any order of the immigration judge authorizing release (on bond or otherwise) shall be stayed upon DHS's filing of a notice of intent to appeal the custody redetermination (Form EOIR-43) with the immigration court within one business day of the order."). *See* (ECF No. 1-3 at 3, 77).

<sup>3</sup> The issue of whether Petitioner is subject to mandatory detention under 8 U.S.C. § 1226(c) is on appeal and yet to be decided by the BIA. Respondent maintains that Petitioner is subject to mandatory detention as result of his convictions for trafficking cocaine.

**C. Even if the Court had subject matter jurisdiction, Respondent's decision to file a discretionary motion to stay under § 1003.19(i)(1) instead of seeking an automatic stay under § 1003.19(i)(2) does not violate Due Process under the Fifth Amendment.**

Even if the Court had jurisdiction, Respondent's decision to file a motion for discretionary stay does not violate Due Process. In sum, Petitioner argues the motion for discretionary stay violates Due Process because (1) it was filed three days after the Immigration Judge's custody order, (2) it was filed after the Petitioner had posted bond, (3) the BIA was not aware that Petitioner had posted bond, (4) Respondent failed to prove there was a material change in circumstances, and (5) the decision to use a motion for discretionary stay at § 1003.19(i)(1), instead of the automatic stay at § 1003.19(i)(2), "contradicts the governing regulations" and "subverts the regulatory framework's intent."

First, Petitioner alleges that Respondent's filing of the motion for discretionary stay three days after the Immigration Judge's order violates Due Process. *See* (ECF No. 1 at ¶ 107). However, the motion for discretionary stay was filed one day after receipt of the written decision granting bond. On September 22, 2024, the Immigration Judge served the written decision granting bond. *See* (ECF No. 1-3 at 2). Respondent filed the motion for discretionary stay on September 23, 2024, the day after. (*Id.* at 77). Nonetheless, even if it was filed three days after the oral decision, as Petitioner alleges, the motion for discretionary stay does not violate Due Process because § 1003.19(i)(1) allows Respondent to file the motion at any time. § 1003.19(i)(1) ("DHS is entitled to seek a discretionary stay (whether or not on an emergency basis) from the Board in connection with such an appeal at any time.").

Second, Petitioner claims the motion for discretionary stay violates Due Process because it was filed after Petitioner posted bond. As explained above, § 1003.19(i)(1) allows Respondent

to seek the discretionary stay “at any time.” § 1003.19(i)(1). The plain text of § 1003.19(i)(1) does not limit the filing of the discretionary stay to only when a noncitizen is detained.

Moreover, a noncitizen does not even have to be detained for the BIA to consider an *emergency* motion for discretionary stay. The BIA “will consider a stay request an emergency” if “the respondent’s [noncitizen] *release from custody is imminent*, and DHS requests in writing an emergency stay of release from detention.”<sup>4</sup> See BIA Emergency Stay Requests Fact Sheet, *supra*. (emphasis added). Consequently, the BIA’s regulations do not require a noncitizen to be in custody but only that release from custody is imminent.<sup>5</sup> Petitioner’s release from custody was imminent because the Immigration Judge served her written order granting bond the day before the motion for discretionary stay was filed. See (ECF No. 1-3 at 3, 77). In fact, Petitioner posted his bond, and Respondent filed the motion for discretionary stay, on the same date. See (*Id.* at 77), Exhibit C.

Third, Petitioner claims the motion for discretionary stay violates Due Process because the BIA was not aware that Petitioner had posted bond. See (ECF No. 1 at ¶ 107). However, the BIA was aware the Petitioner had posted bond because the Petitioner said so numerous times in his opposition to the motion for discretionary stay. He indicated “**RESPONDENT NOT IN ICE CUSTODY**” on the cover, and every single page of the opposition says “NON-DETAINED ALIEN.” See Exhibit D at 1-14. Further, his first argument was that the BIA could not “entertain”

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<sup>4</sup> Importantly, the BIA does not require the noncitizen be in custody before the emergency motion for discretionary stay is filed. It is sufficient if release from custody is imminent. This logically prevents a “race to the courthouse” scenario whereby an immediate post of a bond moots an emergency stay not on merits but on timing by a matter of minutes or hours.

<sup>5</sup> This is consistent with the BIA’s grant of Respondent’s “Emergency Motion for Discretionary Stay” despite Petitioner’s opposition claiming the stay could not be granted because he had posted bond and was no longer in immigration custody but in state custody. See ECF No. 1-3 at 18; Exhibit D at 4-5.

the motion for discretionary stay because Petitioner is not detained by ICE since the bond was already executed. *Id.* at 4.

Fourth, Petitioner argues that Respondent failed to prove there was a material change in circumstances before revoking the bond. (ECF No. 1 at ¶ 90). Contrary to Petitioner's assertion, Respondent did not need to prove there was a material change in circumstances before re-detaining him. Petitioner's reliance on *Matter of Sugay*, 17 I&N Dec. 637 (BIA 1981), is misplaced. Petitioner contends that *Sugay* prohibits Respondent from re-detaining a noncitizen released on bond absent a material change in circumstances. (ECF No. 1 at ¶ 90).

However, this argument fails. *Sugay* concerns the revocation of a bond. *See Matter of Sugay*, generally. In this case, a bond was never revoked by Respondent. Instead, the BIA stayed the grant of the bond. The BIA's nullification of the Immigration Judge's bond order allowed Respondent to re-detain Petitioner pursuant to mandatory detention under § 1226(c) after he was released from state custody.

Fifth, Petitioner alleges Respondent's motion for discretionary stay pursuant to § 1003.19(i)(1), instead of the automatic stay in § 1003.19(i)(2), "contradicts the governing regulations, subverts the regulatory framework's intent, and violates due process." (ECF No. 1 at ¶ 95).

On that front, he compares the discretionary stay procedure under § 1003.19(i)(1) to the *former* automatic stay found in 8 CFR § 3.19(i)(2)), which several district courts outside the Eleventh Circuit, found unconstitutional. (*Id.* at ¶ 99).

Petitioner specifically refers to the reasoning in *Zavala v. Ridge* as persuasive in this matter. *Zavala v. Ridge*, 310 F. Supp. 2d 1071 (N.D. Cal. 2004). In *Zavala*, the district court found the automatic stay of former § 3.19(i)(2) violated Due Process because it permitted "unilateral

government detention of individuals without a case-by-case determination after a reasoned finding that they do not pose threat to safety or a risk of flight.” *Zavala*, 310 F. Supp. 2d at 1077<sup>6</sup>. The *Zavala* court found the appropriate relief was to vacate the stay and allow ICE to file an emergency discretionary stay under § 1003.19(i)(1). *Id.* at 1080 (“this one-week stay of this Court’s order will afford the Government an opportunity to seek from the Board an emergency stay of the custody redetermination order by the Immigration Judge under 8 C.F.R. § 1003.19(i).”).

The discretionary stay mechanism in § 1003.19(i)(1) is different from former § 3.19(i)(2). The discretionary stay process contains the separate procedural safeguard of appellate review by the BIA. It is the BIA that decides whether ICE can detain an individual pending the resolution of the appeal. § 1003.19(i)(1) (“the Board of Immigration Appeals (Board) has the authority to stay the order of an immigration judge redetermining the conditions of custody of an alien when the Department of Homeland Security appeals the custody decision or on its own motion.”).

That additional BIA appellate review is not included in any of the automatic stays, under either the former version of § 3.19(i)(2) or the current version § 1003.19(i)(1). Unlike the discretionary stay process, the automatic stay allows Respondent to automatically stay the custody redetermination without a decision from the BIA. § 1003.19(i)(2) (“In any case in which DHS has determined that an alien should not be released...any order of the immigration judge authorizing release (on bond or otherwise) shall be stayed upon DHS’s filing of a notice of intent to appeal the custody redetermination.”).

Next, contrary to Petitioner’s argument, the discretionary stay is not a “limitless stay” but of limited duration. (ECF No. 1 at ¶ 108). It lasts only until the pending appeal or motion is decided

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<sup>6</sup> The regulation, 8 C.F.R. § 3.19(i)(2), was amended in 2006 to permit an automatic stay of up to only 90 days. *Review of Custody Determinations*, 71 FR 57873-01, “[T]he final rule provides that the automatic stay will lapse 90 days after the filing of the notice of appeal.”

by the BIA. Once the pending matter is decided, the stay is lifted. *See* BIA Emergency Stay Requests Fact Sheet, *supra*.

Furthermore, Petitioner argues that the discretionary stay can only be filed to extend the automatic stay. *See (Id. at ¶¶ 104-106)*. It is true that the discretionary stay *may* be filed to extend the automatic stay, but a discretionary stay is not limited to only that scenario. It can be used in other procedural postures. The BIA Emergency Stay Requests Fact Sheet explains when emergency stays—like an emergency discretionary stay at issue here—will be considered. Examples of emergency stays include when an appeal of an immigration judge’s bond decision is pending before the BIA, when a case has been remanded from a Circuit Court of Appeals, or when the BIA, on its own discretion, grants a stay. *See* BIA Emergency Stay Requests Fact Sheet, *supra*. There is no mention of automatic stay being a prerequisite. Notably, the latter two situations, remand by the Circuit Court of Appeals and by the BIA’s own discretion, typically occur much later after the Immigration Judge has issued a decision, rendering the need for an automatic stay superfluous.

Lastly, even if the Court had jurisdiction, and Respondent used the incorrect mechanism of discretionary motion for stay under § 1003.19(i)(1) instead of the automatic stay under § 1003.19(i)(2), Petitioner has not met his burden to show that his custody is in violation of the Constitution or laws or treaties of the United States. 28 U.S.C. § 2241(c)(3). Respondent was legally able to detain Petitioner because the BIA, in its discretion, granted the motion for discretionary stay. Petitioner was detained because the BIA, who is not a respondent in this matter as it does not have custody of Petitioner, allowed Respondent to detain him, after considering the same argument in this Petition: that the BIA could not grant a discretionary stay because Petitioner had bonded out. Now, Petitioner raises the same argument but couched in that Respondent violated Due Process by filing the discretionary motion for stay to fit it in the habeas framework, as opposed

to the BIA not having the authority to entertain the motion for discretionary stay because Petitioner was not detained by Respondent. The rephrasing of the issue does not create habeas jurisdiction. *Arias v. U.S. Att'y Gen.*, 482 F.3d 1281, 1284 (11th Cir. 2007) (“[a] petitioner may not create the jurisdiction that Congress chose to remove simply by cloaking an abuse of discretion argument in constitutional garb.”).

**V. CONCLUSION**

Accordingly, the Petition should be denied for lack of subject matter jurisdiction under § 1252(g) and § 1226(e). Further, even if there is subject matter jurisdiction, the Petition should be denied because Petitioner failed to meet his burden to show that his detention is unconstitutional resulting from Respondent’s discretionary decision to file a motion for discretionary stay with the BIA.

**Respectfully submitted,**

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