IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY
NORTHERN DIVISION AT COVINGTON

Mor Maty Ndiaye, *Petitioner,* v. **Sam Olson**, et. al. *Respondents.*	Case No. 2:25-cv-145-DCR

PETITIONER'S RESPONSE TO RESPONDENTS' OCTOBER 23, 2025, FILING

Petitioner, Mor Maty Ndiaye, filed a Petition for Writ of Habeas Corpus on September 22, 2025. Dkt. 1. On October 23, 2025, after briefing was complete, Respondents submitted a brief declaration from Mr. Ndiaye's deportation officer that provides only vague and speculative information about a possible "third country removal charter flight." Dkt 13-1. This declaration only further demonstrates that Mr. Ndiaye's removal is not reasonably foreseeable. Moreover, it only underscores his claims that he is entitled to proper notice and an opportunity to respond to any third-country removal. As such, for the reasons stated here and in his Petition, Mr. Ndiaye has established that he is entitled to relief, including immediate release.

I. Respondents' Declaration Confirms that Removal Remains Speculative and Not Reasonably Foreseeable.

The vague and conditional language in Respondents' declaration underscores the very basis for this habeas petition. For more than seven months after his grant of withholding of removal became final, Mr. Ndiaye heard virtually nothing from ICE regarding his custody or removal status. When ICE finally met with him in September 2025, he received little information and his removal remained entirely speculative. Dkt. 1-2. Ten days later, he was mistakenly provided an

internal memo that confirmed removal was unlikely, as the memo indicated that all three countries considered for removal had declined to accept him. Dkt. 1-7 at 38. When counsel followed up with Officer Christopher Wiet, the same deportation officer who authored the October 23, 2025, declaration, Officer Wiet confirmed that "ICE ERO Chicago has not yet received the ICE ERO Headquarters custody decision." *Id.* at 3. Since then, neither Mr. Ndiaye nor his immigration counsel have received any further communications from ICE.

Like all prior communication Mr. Ndiaye has received, the government's October 23, 2025, declaration fails to provide any meaningful update demonstrating that removal is reasonably foreseeable. The declaration does not identify the country to which DHS purportedly seeks to remove Mr. Ndiaye, does not provide a removal date, and does not indicate that any travel documents have been obtained or that any third country has agreed to accept him. Dkt. 13-1. The declaration merely states that "ERO received notification that [Mr. Ndiaye] is being *considered* for a third country removal charter flight that is being manifested by ERO Headquarters." *Id.* The declaration simultaneously admits that "ERO Chicago has not yet been informed of a scheduled date for the charter flight or that [Mr. Ndiaye] has been officially manifested on this flight." *Id.*

This type of indefinite and noncommittal language is precisely what necessitated this habeas petition in the first place and confirms that removal is not reasonably foreseeable under *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001). The government's own filing substantiates there is no scheduled removal, no identified country, and no issued travel documentation. These surface-level efforts do nothing to cure the government's ongoing failure to provide any meaningful information about Mr. Ndiaye's custody or removal status. They instead create the illusion of progress while leaving Mr. Ndiaye in indefinite detention without concrete information.

II. Procedural Due Process Requires Notice and a Fair Hearing Before Any Third-Country Removal.

Even if, *arguendo*, DHS can remove Mr. Ndiaye to a third country, he remains entitled to procedural protections to ensure he is not removed to a country where he fears persecution or torture. The Due Process Clause, the Immigration and Nationality Act (INA), and binding treaty obligations, require the Government to provide a noncitizen notice and a hearing where the immigrant can present evidence on his behalf in defense of removal. Dkt. 1, p. 16-20; U.S. Const., Amend. V; 8 U.S.C. § 1229a(b)(4) (an immigrant in removal proceedings "shall have a reasonable opportunity to examine the evidence against the [noncitizen], to present evidence on the [noncitizen's] own behalf, and to cross-examine witnesses presented by the Government"); *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985); *Mathews v. Eldridge*, 424 U.S. 319, 332–33 (1976).

Courts have consistently held that noncitizens facing third country removal must first receive notice and a fair hearing to raise fear-based claims. *Kuhai v. INS*, 199 F.3d 909, 913 (7th Cir. 1999) (holding that the noncitizen must be given the opportunity to brief removal to a third country when there was no indication during removal proceedings that she could be removed there); *Mahdejian v. Bradford*, Case No. 25-cv-00191 (E.D. Tex. July 3, 2025) (where petitioner had been granted withholding of removal as to Iran, court issued injunction prohibiting DHS from removing him to a third country without notice and a meaningful opportunity to establish that his life or freedom would be threatened there); *Ortega v. Kaiser*, 2025 U.S. Dist. LEXIS 121997, *7, 2025 WL 1771438 (N.D. Cal. June 26, 2025) (where petitioner was granted CAT relief as to El Salvador, "there are no countries to which Ortega could currently be removed without his first being afforded notice and opportunity to be heard on a fear-based claim as to that country, as the Fifth Amendment Due Process Clause requires"); *Su Hwa She v. Holder*, 629 F.3d 958, 965 (9th

Cir. 2010) ("It follows that a failure to provide notice and, upon request, stay removal or reopen the case for adjudication of [the noncitizen's] applications as to Burma would constitute a due process violation if Burma becomes the proposed country of removal."); *Romero v. Evans*, 280 F. Supp. 3d 835, 847 n.24 (E.D. Va. 2017) ("DHS could not immediately remove petitioner to a third country, as DHS would first need to give petitioner notice and the opportunity to raise any reasonable fear claims.").

In the Sixth Circuit, "[i]t is undisputed that all applicants for withholding of removal or other forms of similar relief enjoy a Fifth Amendment right to a full and fair hearing," *Saif v. Holder,* 452 Fed. Appx. 631, 635-36 (6th Cir. 2011), which requires "that [a noncitizen] have a reasonable opportunity to examine the evidence against him, to present evidence on his own behalf, and to cross-examine witnesses presented by the government.'" *Juncaj v. Holder,* 316 F. App'x 473, 480 (6th Cir. 2009) (quoting *Mikhailevitch v. I.N.S.,* 146 F.3d 384, 391 (6th Cir.1998)).

Here, Mr. Ndiaye has received no concrete information regarding removal to a third country. To comply with its obligations under the Constitution, INA, and Convention Against Torture, the government must first give Mr. Ndiaye notice of the country it is pursuing removal to and an opportunity to respond, including the opportunity to express a fear of removal. A detained noncitizen may not seek protection from any theoretical third country until the Government has affirmatively designated that country for removal. Dkt. 1, p. 19-20. That has not happened here. The government's barebones assertion that "should [Mr. Ndiaye] be manifested on the third country removal charter flight, he will be notified of his destination and served with the proper third country notifications", Dkt. 13-1, does nothing to ensure compliance with these obligations. The declaration makes no reference to designating a country for removal or providing Mr. Ndiaye

an opportunity to seek fear-based relief to that country in reopened removal proceedings. Without these protections, Mr. Ndiaye is at risk of removal to a country where he will face persecution and torture. This is especially true where evidence demonstrates that the countries the government has recently pursued for third country removals are dangerous, commit human rights violations, including chain-*refoulement*, and/or mistreat deportees while denying them due process and the ability to seek asylum.[1]

For these reasons and those stated in his Petition, this Court should order the government to provide Mr. Ndiaye notice and an opportunity to be heard regarding removal to any third country.

III. Release Remains the Appropriate Remedy.

Even *if* the Government found a third country willing to accept Mr. Ndiaye, and even *if* Mr. Ndiaye's proceedings were reopened to seek protection from that alternative country, the Government would be months if not years away from being able to remove Mr. Ndiaye to a third country upon completion of removal proceedings for that country. Dkt. 1, p. 19-20. Given that Mr. Ndiaye suffers from serious mental illnesses, any potential third country removal would likely give rise to protection claims. As emphasized in his petition, absent this Court's intervention, Mr. Ndiaye remains detained solely on the pretext of this hypothetical scenario, towards which the Government has not even taken the first step.

Further, even assuming DHS had the ability to remove Mr. Ndiaye to a third country, his continued detention is not reasonably related to its stated purpose when alternative conditions of release could mitigate flight risk. *Bell v. Wolfish*, 441 U.S. 520, 536-39 (1979) (observing that

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[1] *See generally* The New York Times, *Inside the Global Deal-Making Behind Trump's Mass Deportations* (June 25, 2025), https://www.nytimes.com/2025/06/25/us/politics/trump-immigrants-deportations.html; Rolling Stone, *ICE is Deporting People to Africa on Nearly Un-Trackable Military Flights* (Sept. 21, 2025), https://www.rollingstone.com/politics/politics-features/ice-deporting-africa-military-flights-1235431848/.

pretrial detention not reasonably related to a legitimate government purpose would constitute punishment in violation of Due Process). DHS regularly utilizes orders of supervision when releasing individuals from its custody when a final order of removal is in place. An order of supervision operates like terms of probation, with the ability to impose "conditions of supervision" on individuals. *See* 8 C.F.R. § 241.5(a). For example, noncitizens released on such orders regularly are prohibited from leaving the state in which they reside without advance permission from an ICE officer. *Id.*(a)(4). They may also be required to report to an ICE officer in person or by telephone on a periodic basis. *See Fernandez Aguirre v. Barr*, No. 19-CV-7048 (VEC), 2019 WL 4511933, at *5 (S.D.N.Y. Sept. 18, 2019) (listing alternatives to detention, "such as home detention, electronic monitoring, and so forth"); *Mathon v. Searls*, 623 F. Supp. 3d 203, 218 (W.D.N.Y. 2022) ("[T]he form used by ICE to list the terms of supervision (Form I-220B) includes a section for 'other specified conditions', which implies that ICE has flexibility in imposing release terms."). Such conditions of release would be sufficient to ensure Mr. Ndiaye's presence in the unlikely event that removal to a third country becomes possible.

As such, the appropriate remedy is to order Mr. Ndiaye's immediate release. *See Malam v. Adducci,* 452 F. Supp. 3d 643, 661 (E.D. Mich. 2020), as amended (Apr. 6, 2020) (citing *Swann v. Charlotte–Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15–16 (1971) ("Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies.")).

CONCLUSION

For the foregoing reasons, this Court should grant the petition and order Mr. Ndiaye's immediate release.

Dated: October 24, 2025

Respectfully submitted,

s/ Sarah C. Larcade

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CERTIFICATE OF SERVICE

I, Sarah Larcade, hereby certify that on October 24, 2025, I filed the foregoing with the Clerk of Court using the CM/ECF system, which sent notice of filing to all parties receiving electronic notice.

s/ Sarah C. Larcade
Attorney for Petitioner