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DAMION CLARKE

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

DAMION CLARKE, Petitioner, v. MARKWAYNE MULLIN, et al, Respondents.	Case No. 26-cv-3511-BAS-SBC **Amended Petition**

Introduction and statement of facts

Damion Clarke has been detained pending his immigration proceedings for over ten months without an individualized bond hearing. Clarke was convicted in November, 2024, of conspiracy to distribute a controlled substance, his only criminal conviction. After finishing his sentence, he was taken into ICE custody on October 7, 2025. See, ECF 1, p. 4. He was ordered removed on March 30, 2026, but he has filed an appeal.[1] There is no estimated date when the appeal will be decided.

A bond hearing was held on November 21, 2025, but the Immigration Judge

[1]Clarke initially had difficultly filing his appeal due to an error with the filing fee, and his removal was not stayed. However, he has filed a motion for the appeal to be accepted and is informed that his removal is now stayed.

(IJ) ruled that Clarke was ineligible for bond because of his conviction. In the alternative, the IJ ruled that Clarke had not met his burden to prove that he was not a danger to the community. Exh. A.[2]

Due process requires that Clarke receive an individualized bond hearing, regardless of his criminal conviction. "Arbitrary civil detention is not a feature of our American government." *Rodriguez v. Marin*, 909 F.3d 252, 256 (9th Cir. 2018). As many courts have recently held as to noncitizens subject to prolonged mandatory detention under § 1226(c) as well as § 1225(b), noncitizens may bring as-applied constitutional challenges to their mandatory detention without a bond hearing. See *Rowe v. Archambeault*, No. 26-cv-1744-GPC-DEB, 2026 WL 879487, *3–*7 (S.D. Cal. Mar. 31, 2026) (ordering a bond hearing for a noncitizen detained under § 1226(c) for close to twelve months); see, e.g., *Rodriguez v. Frink*, __ F. Supp. 3d __, 2026 WL 709487, *2–*4 (S.D. Tex. Mar. 13, 2026) (surveying court of appeal decisions approving of such as-applied challenges for § 1226(c) detention, and ordering a bond hearing for a noncitizen detained for five months).

Furthermore, the IJ's finding of dangerousness does not render the error harmless. Under Ninth Circuit precedent, the Government bears the burden of showing by clear and convincing evidence whether a detainee poses a flight risk or danger to the public. See *Rodriguez Diaz v. Garland*, 53 F.4th 1189, 1200 (9th Cir. 2022); see also *Martinez v. Clark*, 124 F.4th 775, 785-86 (9th Cir. 2024) ("[a]t the outset of its decision, the BIA properly noted that the government bore the burden to established by clear and convincing evidence that [detainee] is a danger to the community"), id. at 786 (reiterating that *Singh* found that "due process

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[2]A recording of the bond hearing has been transmitted electronically concurrently with this filing and will be lodged with the court as soon as practicable.

requires . . . the government to prove dangerousness or risk of flight by clear and convincing evidence"). See also *Al-Sadeai v. U.S. Immigr. & Customs Enf't*, 540 F. Supp. 3d 983, 990-91 (S.D. Cal. 2021) (discussing Ninth Circuit precedent establishing the Government's burden and finding the IJ's placement of the burden of proof on detainee violated the Due Process Clause).

This Court should order Respondents to provide Clarke with an individualized bond hearing at which the government bears the burden to prove by clear and convincing evidence that he poses a danger to the community or is a risk of flight, and at which the immigration judge shall consider alternative conditions of release and ability to pay. It should also order Respondents make a complete record of the hearing available to Petitioner and his counsel. See, e.g., *Sandesh v. LaRose*, No. 26-cv-846-JES-DDL, 2026 WL 622690, *2–*4 (S.D. Cal. Mar. 5, 2026) (ordering this relief in a mandatory detention case).

Legal argument

I. This Court has jurisdiction to consider due process claim of unlawful prolonged detention.

The government sometimes argues that this Court's jurisdiction to consider immigration habeas petitions under 8 U.S.C. § 2241 is taken away by 8 U.S.C. § 1252(g). This argument is "mistaken." *Hernandez Cruz v. Noem*, No. 25-cv-2566-SB-MAA, 2025 WL 3482630, *1 (C.D. Cal. Dec. 2, 2025). As the Supreme Court and the Ninth Circuit have both recently clarified, courts "should read § 1252(g) narrowly." *Ibarra-Perez v. United States*, 154 F.4th 989, 991 (9th Cir. 2025) (citing *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 591 U.S. 1, 19 (2020)). That section's jurisdiction-stripping provisions are limited to "three discrete actions": the "decision or action to commence proceedings, adjudicate cases, or execute removal orders." *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 482 (1999) (quoting 8 U.S.C. § 1252(g)). They do not strip jurisdiction and "sweep in any claim that can

technically be said to 'arise from' the three listed actions of the Attorney General. Instead, [the Court] read[s] the language to refer to just those three specific actions themselves." *Jennings v. Rodriguez*, 583 U.S. 281, 294 (2018).

As a result, this Court still has jurisdiction over Clarke's claim. Like many other habeas petitioners in immigration detention, Clarke "is seeking to review the legality of his detention, arguing that the length of time he has been detained here violates due process—rather than challenging the decision to commence proceedings, the adjudication of his removal case, or an action to execute his removal order." *Gao v. LaRose*, 805 F. Supp. 3d 1106, 1109 (S.D. Cal. 2025) (Huie, J.) (finding jurisdiction over § 2241 habeas petition in a prolonged detention case for an arriving noncitizen and ordering an individualized bond hearing). This Court's jurisdiction is "not barred by Section 1252(g)." *Id.*; accord, e.g., *Khorsheed v. LaRose*, No. 25-cv-3346-BTM-KSC, 2025 WL 3638141, *1 (S.D. Cal. Dec. 15, 2025) (same).

II. Claim: The Fifth Amendment's Due Process Clause prohibits Clarke's prolonged immigration detention without a bond hearing.

Clarke's ten-month detention without a bond hearing violates due process.

A. The due process clause prohibits prolonged mandatory detention without a bond hearing under § 1226(c) as well as § 1225(b).

The Fifth Amendment's Due Process Clause countermands the government's statutory authority to detain immigrants without bond hearings. "Nearly all district courts that have considered the issue agree that prolonged mandatory detention pending removal proceedings, without a bond hearing, will—at some point—violate the right to due process." *Banda v. McAleenan*, 385 F. Supp. 3d 1099, 1111 (W.D. Wash. 2019) (cleaned up) (collecting cases); see *Rowe*, 2026 WL 879487 at *3–*5 (ordering a bond hearing as to a noncitizen detained under § 1226(c) due to due process violation in prolonged year-long detention). Indeed, the Ninth Circuit has "grave doubts that any statute that allows for arbitrary prolonged detention without any process is constitutional or that

those who founded our democracy precisely to protect against the government's arbitrary deprivation of liberty would have thought so." *Rodriguez*, 909 F.3d at 256–57.

B. Courts have reached different conclusions about when immigration detention becomes indefinitely prolonged, but Clarke would prevail under any standard.

Though courts agree that due process mandates a bond hearing when detention grows unreasonably prolonged, they disagree about how to assess whether a particular migrant's detention has reached that point. *Sanchez-Rivera v. Matuszewski*, No. 22-CV-1357-MMA (JLB), 2023 WL 139801, at *5–6 (S.D. Cal. Jan. 9, 2023) (Anello, J.) (surveying the various approaches). Some courts have "conclude[d] . . . that detention becomes prolonged after six months and entitles [a petitioner] to a bond hearing." *Rodriguez v. Nielsen*, No. 18-CV-04187-TSH, 2019 WL 7491555, at *6 (N.D. Cal. Jan. 7, 2019). In that case, Clarke would automatically qualify, as he has been detained for ten months.

Other courts have adopted various factors tests. See *Sanchez-Rivera*, 2023 WL 139801, at *5–6 (surveying different approaches). Courts generally agree that relevant factors include:

(1) "the total length of detention to date,"

(2) "the likely duration of future detention," and

(3) "the delays in the removal proceedings caused by the petitioner and the government."

Id. Some courts also consider:

(4) "the conditions of detention," and

(5) "the likelihood that the removal proceedings will result in a different final order."

Id.

Other courts have rejected the fourth and fifth factors, holding that they are "not particularly suited to assisting the Court in determining whether detention has

become unreasonable and due process requires a bond hearing." *Lopez v. Garland*, 631 F. Supp. 3d 870, 879 (E.D. Cal. 2022); accord *Sanchez-Rivera*, 2023 WL 139801, at *5–6.

Clarke would prevail under any of these factors tests.

First, the "most important factor," the length of detention at ten months, favors Clarke. *Banda*, 385 F. Supp. 3d at 1118. In assessing this factor, "[i]t is important to bear in mind the context: The detention that is being examined here is the detention of a human being who has never been found to pose a danger to the community or to be likely to flee if released." *Jamal A. v. Whitaker*, 358 F. Supp. 3d 853, 859 (D. Minn. 2019). With that context, courts have granted bond hearings for persons detained for "similar or shorter lengths of detention." *Rowe*, 2026 WL 879487 at *5 (collecting cases finding detention of between seven and ten months unreasonable). Clarke has been detained for ten months, the high end of this range. This factor therefore clearly favors a bond hearing.

Second, Clarke has reason to anticipate significant future detention. His appeal is pending before the BIA. Even if the BIA denies his claims, he plans to appeal to the Ninth Circuit. ECF 1. All told, "[t]his process may take up to two years or longer." *Banda*, 385 F. Supp. 3d at 1119. Because "Petitioner's future detention can last several more months or even years[,]" this factor favors Clarke. *Abdul Kadir v. Larose*, No. 25CV1045-LL-MMP, 2025 WL 2932654, at *5 (S.D. Cal. Oct. 15, 2025).

Third, the delay factor is neutral. Clarke has diligently pursued his immigration case and there is no evidence he has caused any undue delay.

The fourth factor, the conditions of confinement, weigh in favor of a bond hearing. "'The more that the conditions under which the noncitizen is being held resemble penal confinement, the stronger his argument that he is entitled to a bond hearing.' [Citaitons.] Courts have recognized that the conditions in local detention centers are 'indistinguishable from penal confinement.' [Citations]." *Popov v.*

Warden of Imperial Det. Facility 2026 U.S.Dist.LEXIS 75684, at *10 (S.D.Cal. Apr. 7, 2026, No. 26-cv-1174-JES-BLM) (immigration detainee's detention at Imperial Detention Facility, where Clarke is held, weighed in favor of a bond hearing.)

The fifth factor, the likelihood that Clarke will prevail, does not change this conclusion. Clarke is appealing to the BIA and plans to appeal to the Ninth Circuit. This Court cannot meaningfully evaluate whether Clarke will prevail without essentially deciding the appeal on the merits. In any event, the appeals process will take months or years as described above, during which time Clarke will be detained.

Prayer for Relief

For the reasons just given, the Fifth Amendment Due Process Clause prohibits the government from continuing to detain Clarke without a bond hearing. Accordingly, Petitioner respectfully requests that this Court order that:

1. Petitioner receive an individualized bond hearing before a neutral immigration judge within the next 14 days, at which hearing the government shall bear the burden of proof of establishing by clear and convincing evidence that he poses a danger to the community or is a risk of flight, and at which the immigration judge shall consider alternative conditions of release and Petitioner's ability to pay bond;
2. Respondents make a complete record of the hearing available to Petitioner and his counsel; and
3. Any other relief this Court deems just and proper.

Respectfully submitted,

Date: August 20, 2026

/s/Benjamin B. Kington
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Attorney for Petitioner
DAMION CLARKE