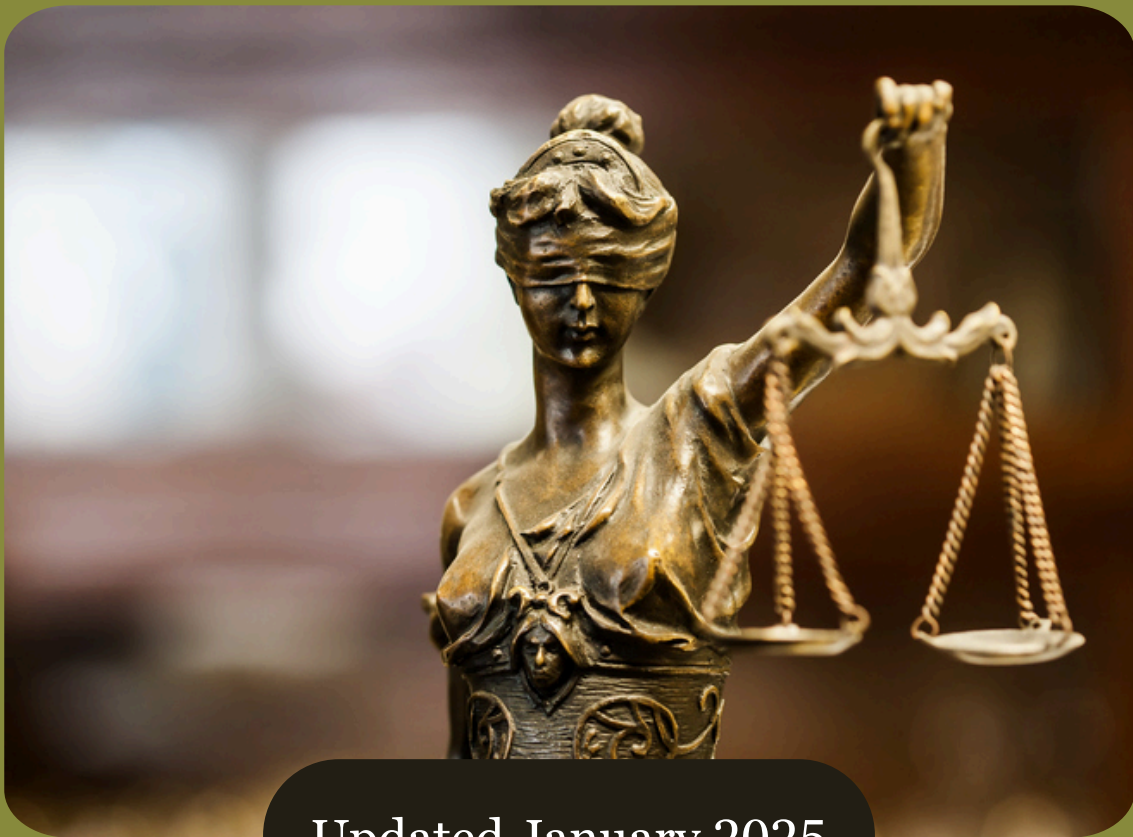


# Index of Immigration Habeas Law



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This index was created by and is updated by Immigration Impact Lab Managing Attorney Austin Rose and Staff Attorney Kendra Blandon.

Special thanks to interns Emma Friedland and Gabriela Dickson La Rotta and volunteers Isaac Bloch, Lauren Hodges, and Rafaella Zabot-Hall for their valuable contributions to the index.



## **Frequently Asked Questions**

### **What is the Amica Center for Immigrant Rights?**

Formerly known as the Capital Area Immigrants' Rights (CAIR) Coalition, the Amica Center for Immigrant Rights strives to ensure equal justice for all immigrant men, women, and children at risk of detention and deportation. We confront the impact that the unjust immigration system has on our clients and communities through direct legal representation, impact litigation, education, and client-centered advocacy. To learn more, please visit our website at [www.amicacenter.org](http://www.amicacenter.org).

### **What is the Immigration Impact Lab?**

The Immigration Impact Lab is Amica Center's federal courts impact litigation program. The team seeks to reduce the disproportionate legal injustices immigrants at risk of detention and deportation face by expanding cutting-edge impact litigation to engender systematic change through legal precedent that benefits broad groups of immigrants. Amica Center's Immigration Impact Lab provides co-counseling, counseling, and amicus support in certain impact case categories throughout the 3rd, 4th, and 11th Circuits. We primarily take on habeas cases and Petitions for Review. Refer a case by emailing us at [lab@amicacenter.org](mailto:lab@amicacenter.org).

### **What do we mean by immigration habeas law?**

This index focuses on immigration detention habeas claims; in other words, litigating in federal district court to challenge a non-citizen's prolonged detention on constitutional or statutory grounds. This type of habeas petition generally asks a federal court to order additional custody review procedures for which the non-citizen petitioner is ineligible by statute or regulation, such as a bond hearing in immigration court. This index does not cover habeas claims challenging a non-citizen's criminal conviction, immigration merits case, or conditions of confinement.

### **How do I use this index?**

Once you've determined which statute governs your client's detention, you may refer to the corresponding section in this index: pre-removal order mandatory detention § 1226(c); pre-removal order discretionary detention § 1226(a); pre-removal order mandatory detention § 1225(b); or post-removal order detention § 1231(a). If you are unsure which statute governs your client's detention, you may be able to find out by looking at your client's charging documents or inquiring with ICE. Please note which statute governs your client's detention may be disputed. Please note that we use the term "non-citizen" instead of "alien." If the case says a petitioner has been detained for "about four months" it will be written as "~ 4 months" in our index. Cases in this index are listed in reverse chronological order under each court. Clicking the case name links users to Westlaw. The Report and Recommendation of a Magistrate Judge, which in many courts precedes the decision of the District Judge, is abbreviated as "R&R."

### **What happens if my habeas petition is granted?**

If granted, your client will typically be scheduled for a bond hearing in immigration court. Jurisdictions differ, but courts generally order the Government to provide a bond hearing within 7-21 days after a habeas petition is granted. Whether the burden of proof is on your client, or the



Government may be stated in the court's order or may be decided on the day of the hearing. The district court may order the immigration judge to consider your client's ability to pay and alternatives to detention (ATD). Alternatively, but rarely, the district court may order your client's immediate release under an Order of Supervision (OSUP). An individual's conditions of release under OSUP are up to ICE. Failing to comply with an OSUP may lead to arrest and deportation.

**May I request assistance on a habeas petition I am litigating?**

Managing Attorney Austin Rose specializes in and frequently litigates immigration habeas petitions along the East Coast. You may contact Austin at [austin.rose@amicacenter.org](mailto:austin.rose@amicacenter.org) for advice and support on your potential or pending habeas cases. Please include all relevant information, including which statute governs your client's detention, whether they have had previous bond hearings, and all equities on dangerousness and flight risk. You may also refer a habeas case to the Lab team at [lab@amicacenter.org](mailto:lab@amicacenter.org). Please note we cannot guarantee we will accept the case.

**How frequently is this index updated?**

This index was first published in November 2023 and accompanied a webinar called "Litigation for Liberation: Habeas Petitions Challenging Prolonged Immigration Detention." We plan to update the index biannually and add case law in other circuits and district courts. If you have suggestions for how to improve this index or have cases you believe should be added, please contact Staff Attorney Kendra Blandon at [kendra@amicacenter.org](mailto:kendra@amicacenter.org).

The information contained in this index is provided for informational purposes only.

It should not be construed as legal advice on any subject matter.

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## **PRE-REMOVAL ORDER MANDATORY DETENTION § 1226(c)**

### **Circuit Courts of Appeal**

#### **Second Circuit**

[\*Black v. Decker\*](#), 103 F.4th 133 (2d Cir. 2024)

**Facts:** This tandem appeals case arose from habeas petitions filed by two unrelated non-citizens. The district court adjudicating Black’s petition granted him relief. The district court adjudicating G.M.’s petition denied relief.

**Holding:** On *de novo* review, the court concluded that a noncitizen’s constitutional right to due process precludes their unreasonably prolonged detention under § 1226(c) without a bond hearing. It further decided that *Mathews v. Eldridge*, 424 U.S. 319 (1976), supplies the proper framework for determining when and what additional procedural protections are due when detention becomes unreasonably prolonged.

**Remedy:** Affirmed Black’s petition grant. Reversed G.M.’s petition denial. Ordered bond hearings for both non-citizens and placed burden on Government with consideration of ability to pay and ATD

#### **Quotes:**

- “Accepting the government’s assertion that the Constitution ‘provides no basis for requiring bond hearings whenever the detention of a criminal non-citizen under § 1226(c)’ exceeds any set duration, we nonetheless read *Zadvydas*, *Demore*, *Jennings*, and *Velasco Lopez* to suggest strongly that due process places some limits on detention under section 1226(c) without a bond hearing.” (145)
- “[*Demore*] said nothing about whether due process may *eventually* require a hearing. If *Demore* had, in fact, foreclosed the due process challenge now before us, the *Jennings* Court would have had no reason to remand to the Ninth Circuit ‘to consider ... in the first instance’ the detainees’ argument that ‘[a]bsent ... a bond-hearing requirement, ... [section 1226(c)] would violate the Due Process Clause of the Fifth Amendment.’” (149)
- “[W]e find it troubling that the government offers no alternative framework for application here. Rather, it states only that “in an extraordinary case, a non-citizen detained under § 1226(c) may have grounds to bring an as-applied challenge asserting that his detention is unconstitutional,” and then summarily concludes that Black’s and G.M.’s appeals “present[ ] no such case.”” (149)
- “More broadly, we, too, “explicitly decline[ ] to adopt a presumption of reasonableness or unreasonableness of any duration” of detention. *German Santos*, 965 F.3d at 211.” (150)

[\*Hechavarria v. Sessions\*](#), 891 F.3d 49 (2d Cir. 2018)

[Subsequent decision pending or not available on Westlaw]

**Holding:** Non-citizen with a circuit court stay of removal pending resolution of Petition for Review (PFR) was detained pursuant to § 1226(c) rather than § 1231(a) because they were not within the “removal period” unless and until the circuit court denied the PFR.

**Length of Detention:** ~ 2.5 years

**Remedy:** Reversed and remanded to the district court to consider the petition under § 1231(a) and to consider the effect of *Jennings*

**Quotes:**

- “There are three scenarios that can trigger the start of the removal period, but only the *latest* of those scenarios is the trigger. The second scenario is the one that applies to immigrants like Hechavarria who have filed petitions for review with a court of appeals and received a stay. However, in that scenario, the removal period is only triggered on ‘the date of the court’s final order.’ We have not yet issued a final order.” (55)
- “Section 1231 does not govern the detention of immigrants whose removal has been stayed pending judicial review. . . . When a court of appeals issues a stay pending judicial review of an underlying removal order, the removal is not inevitable.” (56)

## Third Circuit

[\*German Santos v. Warden Pike County Correctional Facility\*](#), 965 F.3d 203 (3d Cir. 2020)

**Facts:** Petitioner was a lawful permanent resident detained by ICE under § 1226(c) in a prison alongside individuals serving sentences for criminal convictions. Petitioner was confined to a cell for 23 hours a day. He pled guilty in Pennsylvania to possessing marijuana with intent to deliver, which was an aggravated felony under INA. Board of Immigration Appeals (BIA) affirmed. The Third Circuit remanded to the BIA to determine whether the crime was an aggravated felony. In the meantime, Petitioner filed a federal habeas petition. Petitioner argued his detention was unreasonable because it spanned more than two years, removal proceedings were likely to continue for months longer, and repeated legal errors delayed the process.

**Holding:** After *Jennings*, non-citizens can bring as-applied due process challenges to prolonged mandatory detention under a multi-factor reasonableness test: 1) length of detention, 2) whether the detention is likely to continue, 3) reasons for delay, and 4) whether conditions of confinement are meaningfully different from criminal punishment. Here, Petitioner’s prolonged detention violated due process because his detention was unusually long, the recent appeal was likely to



prolong detention, there were no bad faith delays, and his civil detention was indistinguishable from criminal punishment.

**Length of Detention:** More than 2.5 years

**Remedy:** Bond hearing with burden on Government

**Quotes:**

- “Though *Jennings* abrogated our construction of the statute as implicitly limiting detention without a bond hearing, it left our framework for as-applied constitutional challenges intact.” (208)
- “The most important factor is the duration of detention.” (211)
- “[W]e explicitly declined to adopt a presumption of reasonableness or unreasonableness of any duration . . . Nor will we do so here.” (211)
- “[W]e will not hold German Santos’s appeals and applications for discretionary relief against him either.” (212)
- “German Santos has been detained in prison [at Pike County Correctional Center] alongside convicted criminals since late 2017 . . . And at oral argument, the Government represented that he is currently confined to his cell for twenty-three hours per day. Those conditions strongly favor a finding of unreasonableness.” (213)

## **Eighth Circuit**

[Banyee v. Garland](#), 115 F.4th 928 (8th Cir. 2024)

[Subsequent decision pending or not available on Westlaw]

**Facts:** Petitioner was a lawful permanent resident detained after being convicted of robbery involving a dangerous weapon. An Immigration Judge (IJ) granted Petitioner’s application for cancellation of removal. Government appealed to the BIA, which reversed and remanded for further proceedings. On remand, the IJ found petitioner’s conviction was an attempted “theft offense” and ordered removal. Petitioner appealed his removal order to the BIA.

While Government’s BIA appeal was still pending, Petitioner sought habeas relief in the U.S. District Court for the District of Minnesota. After the IJ had denied relief on remand, the district court ordered a bond hearing within 30 days, relying on the balancing test from *Muse v. Sessions*, 409 F. Supp. 3d 707, 715 (D. Minn. 2018). After determining Government had failed to show he was a flight risk or posed a danger, the IJ released Petitioner on bond. Government appealed the habeas decision to the Eighth Circuit.

**Holding:** Where removal is still a possibility, due process imposes no time limit on mandatory detention without bond. The legality of a non-citizen’s detention is not determined by its duration

but by whether it has a termination point. In part, because Petitioner was still awaiting a decision on his appeal of his removal order, his detention was not unconstitutional.

**Length of Detention:** ~ 1 year

**Remedy:** Reversed and remanded for the district court to deny the petition

**Quotes:**

- “...We must also decide whether the year-long detention violated his rights in the first place . . . The answer is no. The rule has been clear for decades: “[d]etention during deportation proceedings [i]s . . . constitutionally valid.” *Demore v. Kim*, 538 U.S. 510, 523 (2003).” (931)
- “[N]othing suggests that length determines legality. To the contrary, what matters is that detention pending deportation “ha[s] a definite termination point”—deporting or releasing the [non-citizen]—making it “materially different” from the “potentially permanent” confinement authorized by other statutes.” (932)
- “These cases leave no room for a multi-factor “reasonableness” test. It is true, as *Banyee* has pointed out, that deciding what process is due ordinarily requires a form of interest balancing. See *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). But *Zadvydas* and *Demore* have already done whatever balancing is necessary.” (932)

**Eleventh Circuit**

[Farah v. U.S. Att’y Gen.](#), 12 F.4th 1312 (11th Cir. 2021)

**Facts:** Petitioner was denied immigration relief by the IJ and BIA. Petitioner’s habeas petition was denied by the S.D. FL., which held that his ongoing detention was governed by § 1231(a). The Eleventh Circuit consolidated the appeals. In the interim, Petitioner was released to comply with a nationwide injunction concerning detainees at heightened risk of contracting COVID-19.

**Holding:** Distinguishing from *Akinwale*, the detention of Petitioner with Eleventh Circuit stay of removal was governed by § 1226(c) rather than § 1231(a) because his immigration proceedings have not yet concluded and thus, he does not yet have a final order of removal. Habeas petition under § 1226(c) was deemed moot because Petitioner’s PFR was denied. Habeas petition under § 1231(a) was not ripe for review because his detention under § 1231(a) would begin after the court issued its orders.

**Length of Detention:** More than 3 years

**Remedy:** Habeas petition remanded to the district court for it to dismiss the habeas petition.

## Quotes:

- “In *Akinwale*, we affirmed the dismissal of a criminal [non-citizen’s] habeas petition because he had not been in custody for a prolonged period when he filed his petition and because he failed to show that his detention would be indefinite. 287 F.3d at 1051–52. In a footnote at the end of our opinion, we identified a third deficiency with his habeas petition: he made deportation impossible by moving for and obtaining a stay of removal. *Id.* at 1052 n.4. Farah argues that this footnote was dicta. But even if it was an alternative holding, it does not compel the conclusion that the government’s detention authority continues to be governed by section 1231(a) after a reviewing court orders a stay of removal. We never addressed in *Akinwale* whether a [non-citizen] continues to be detained ‘[d]uring the removal period’ after the reviewing court orders a stay of removal.” (1332)
- “In the light of our decision to dismiss in part and to deny in part Farah’s petition for review and to dissolve the stay of removal, Farah’s habeas petition is moot insofar as it challenges his detention under section 1226(c), and it is not ripe for review insofar as it challenges his detention under section 1231(a).” (1332)

[Sopo v. U.S. Attorney General](#), 825 F. 3d 1199 (11th Cir. 2016)

[Published decision vacated and dismissed as moot after Petitioner was removed in 890 F.3d 952 (11th Cir. 2018). Abrogated by *Jennings* to the extent that it read time limit into statute]

**Facts:** Cameroonian asylee pled guilty to bank fraud and became removable as an aggravated felon. After serving his criminal sentence, he was transferred to ICE detention and never had a bond hearing over the course of 16 months before he filed his habeas petition. At the time of this decision on appeal, he had been detained for 4 years, and his removal proceedings were ongoing before the BIA.

**Holding:** § 1226(c) implicitly requires an individualized bond hearing when a non-citizen’s detention becomes unreasonably prolonged, which is determined on a case-by-case basis by several factors including 1) length of detention, 2) reasons for delay, 3) likelihood of removal upon removal order, 4) comparison of criminal and immigration detention, and 5) whether conditions of confinement are meaningfully different from criminal punishment. Petitioner’s prolonged detention violated due process because detention was unusually long and Petitioner’s delays were negligible compared to Government’s.

**Length of Detention:** More than 4 years

**Remedy:** Bond hearing with burden on Petitioner

## Quotes:

- “Looking to the outer limit of reasonableness, we suggest that a criminal [non-citizen’s] detention without a bond hearing may often become unreasonable by the one-year mark, depending on the facts of the case.” (1218)

- “Our list of factors is not exhaustive. The reasonableness inquiry is necessarily fact intensive, and the factors that should be considered will vary depending on the individual circumstances present in each case.” (1218)

### **District Courts**

#### **Eastern District of Virginia**

[\*Abreu et al. v. Crawford et al.\*](#), No. 1:24-cv-1782, 2025 WL 51475 (E.D. Va. Jan. 8, 2025)

**Holding:** The detention of all three Petitioners was unreasonably prolonged under the *Portillo* factors where the first factor favored all three, the second and third factors favored some, and the fourth and fifth factors were neutral for all three.

**Length of Detention:** 25 months, 17 months, 13 months

**Remedy:** Bond hearings with burden on Government

#### **Quotes:**

- “Thus, even though Mr. Sawyer was paroled from ICE custody and later apprehended on criminal charges, he remains detained pursuant to § 1225. Notwithstanding Mr. Sawyer's status as an “arriving [non-citizen]” under § 1225, his prolonged detention without bond must undergo the same analysis as the other two Petitioners.” (\*4)

[\*Santos Garcia v. Garland\*](#), No. 1:21-cv-742, 2022 WL 989019 (E.D. Va. Mar. 31, 2022)

**Holding:** Petitioner’s detention was unreasonably prolonged under the *Portillo* factors, and, in the alternative, under the *Mathews v. Eldridge* balancing test where all three factors tipped in Petitioner’s favor.

**Length of Detention:** 55 months

**Remedy:** Bond hearing with burden on Government

#### **Quotes:**

- “As for the second factor—whether civil detention exceeds criminal detention for the underlying offense—Respondents concede that “Petitioner’s detention ... exceeds the sentences that he could have served for his underlying convictions (90 days).” Dkt. 12 at 23. This factor plainly weighs in Petitioner’s favor.” (\*7)

[Martinez v. Hott](#), 527 F. Supp. 3d 824 (E.D. Va. 2021)

**Holding:** Petitioner’s prolonged detention violated due process where two *Portillo* factors (length of detention, crim v. imm detention) favored Petitioner and other three factors (dilatory tactics, procedural/legal errors, likelihood of removal order) were neutral.

**Length of Detention:** 16 months

**Remedy:** Bond hearing with burden on Petitioner

**Quotes:**

- “Petitioner’s now 16-month detention has far-exceeded the typical length of detention for those detained pursuant to § 1226(c) and has become ‘unreasonable or unjustified’ as a matter of fact and as a matter of law.” (836)
- Existing regulations and Fourth Circuit authority guide this Court's determination on this matter. Accordingly, Petitioner “must demonstrate to the satisfaction of the [Immigration Judge] that such release would not pose a danger to property or persons, and that [ ] [he] is likely to appear for any future proceeding.” (838)

[Deng v. Crawford](#), No. 2:20-cv-199, 2020 WL 6387010 (E.D. Va. Sep. 30, 2020) (R&R)

[R&R adopted by 2020 WL 6387326 (E.D. Va. Oct. 30, 2020)]

**Holding:** Petitioner’s prolonged detention violated due process where four *Portillo* factors favored Petitioner (length of detention, crim v. imm detention, procedural/legal errors, likelihood of removal order) and one (dilatory tactics) was neutral.

**Length of Detention:** More than 11 months

**Remedy:** Bond hearing with burden on Government

[Songlin v. Crawford](#), No. 3:19-cv-895, 2020 WL 5240580 (E.D. Va. Sep. 2, 2020)

**Holding:** Petitioner’s prolonged detention violated due process where one *Portillo* factor (length of detention) favored Petitioner, three factors (crim v. imm detention, procedural/legal errors, likelihood of removal order) favored Government, and one factor (dilatory tactics) was neutral.

**Length of Detention:** 16 months

**Remedy:** Bond hearing with burden on Petitioner

**Quotes:**

- “[W]hile the second, fourth, and fifth factors lean in favor of the government . . . [g]iven the importance of the first factor and the significant time Songlin has been detained, the Court finds Songlin’s due process liberty interest outweighs the government’s legitimate,

nonpunitive interest in ensuring that he can be successfully deported if his appeal is denied.” (\*8)

[Gutierrez v. Hott](#), 475 F. Supp. 3d 492 (E.D. Va., Jul. 27, 2020)

**Holding:** Two Petitioner’s prolonged detention violated due process where all five *Portillo* factors favored each Petitioner in their respective case.

**Length of Detention:** More than 23 months and more than 28 months

**Remedy:** Bond hearings with burden on Government

**Quotes:**

- “As to the second factor, which weighs the length of the civil detention against the length of any criminal detention for the underlying offense, Lizama Gutierrez has been detained by ICE for more than 23 months, but he was not sentenced to jail time for any of his underlying criminal convictions. Respondents concede this fact. Moreover, as Lizama Gutierrez observes, even if he had been sentenced to jail time for his marijuana offense, the maximum jail time to which he could have been sentenced for that offense was 30 days, and Virginia has since enacted new legislation that completely removes the criminal penalty for simple possession of marijuana, replacing it with a \$25 civil penalty. Accordingly, this factor weighs heavily in Lizama Gutierrez’s favor.” (497)
- “The Court agrees that Quintanilla Gallegos is entitled to another bond hearing, particularly given that he was not represented by counsel at the time his first bond hearing allegedly occurred, and the significant Padilla issue had not been identified at that time.” (500)

[Urbina v. Barr](#), No. 1:20-cv-325, 2020 WL 3002344 (E.D. Va. June 4, 2020)

**Holding:** Petitioner’s prolonged detention violated due process where two *Portillo* factors (length of detention, crim v. imm detention) favored Petitioner and other three factors (dilatory tactics, procedural/legal errors, likelihood of removal order) were neutral.

**Length of Detention:** 19 months. Released after 16 months, then re-detained for 3 more months

**Remedy:** Bond hearing with burden on Government

**Quotes:**

- “[A]n additional factor of legitimate concern is the threat that COVID-19 currently poses to incarcerated persons as well as the delay that the disease has injected into judicial and administrative proceedings.” (\*7 n.9)

[Bah v. Barr](#), 409 F. Supp. 3d 464 (E.D. Va., Sep. 6, 2019)

**Holding:** Petitioner’s detention was unreasonably prolonged. Petitioner was detained under § 1226(c), rather than § 1231, because he had stay of removal pending PFR.

**Length of Detention:** 2 years

**Remedy:** Bond hearing with burden on Government with consideration of ATD

**Quotes:**

- “As a practical matter, a [non-citizen] who receives a bond hearing bears an initial burden of production to come forward with evidence that favors release. The petitioner is best situated to produce evidence on issues such as his ties to the United States, family connections, and employment history. As a matter of Due Process, the government bears the ultimate burden of persuasion.” (472)

[Portillo v. Hott](#), 322 F. Supp. 3d 698 (E.D. Va., Jul. 3, 2018)

[Established post-*Jennings* test for as-applied due process challenges to prolonged mandatory detention in E.D. Va.]

**Holding:** After *Jennings*, non-citizens can bring as-applied due process challenges to prolonged mandatory detention under a multi-factor balancing test. Here, Petitioner’s prolonged detention violated due process where two factors (length of detention and crim v. imm detention) favored Petitioner, two factors (procedural/legal errors and likelihood of removal order) favored Government, and one factor (dilatory tactics) was neutral.

**Length of Detention:** 14 months

**Remedy:** Bond hearing with burden on Government

**Quotes:**

- “This Court has . . . identified ‘five factors that recur across these cases’ that ‘bear on the reasonableness of a [non-citizen’s] detention’ without being afforded a bond hearing. *Haughton*, 2016 WL 5899285, at \*8. Although these factors were originally adopted in the context of reading an implicit reasonableness limitation into § 1226(c), they also represent a reasonable framework for balancing the due process interests at stake in this petition. The five factors are: ‘(1) the duration of detention, including the anticipated time to completion of the [non-citizen’s] removal proceedings; (2) whether the civil detention exceeds the criminal detention for the underlying offense; (3) dilatory tactics employed in bad faith by the parties or adjudicators; (4) procedural or substantive legal errors that significantly extend the duration of detention; and (5) the likelihood that the government will secure a final removal order.’ *Id.* (citations omitted).” (707)

[Mauricio Vasquez v. Crawford](#), No. 1:16-cv-02422, 2017 WL 1476349 (E.D. Va. Apr. 24, 2017)

**Holding:** Under the pre-*Jennings* test from *Haughton*, Petitioner’s prolonged detention violated due process where one factor (length of detention) favored Petitioner, one factor (crim v. imm



detention) favored Government, and the rest of the factors (procedural/legal errors, likelihood of removal order, dilatory tactics) were neutral.

**Length of Detention:** 15 months

**Remedy:** Bond hearing with burden on Petitioner

**Quotes:**

- “As to the second factor, while the fifteen months here do not exceed the three years of criminal detention Petitioner served for the underlying offense, it is already nearly half that time and so is therefore substantial and more than the approximately one third of the time the petitioner had served in *Haughton*.” (\*4)

[Haughton v. Crawford](#), No. 1:16-cv-634, 2016 WL 5899285 (E.D. Va. Oct. 7, 2016)

[Abrogated by *Jennings* to the extent that it read time limit into statute, but test later used for as-applied due process challenges. See *supra Portillo*]

**Holding:** Petitioner’s prolonged detention violated due process where two factors (length of detention and likelihood of removal order) favored Petitioner, one factor (crim v. imm detention) favored Government, and two factors (dilatory tactics and procedural/legal errors) were neutral. Construed § 1226(c) to contain a reasonable time limit and established a five-factor test for analyzing whether prolonged detention has become unreasonable.

**Length of Detention:** 1 year

**Remedy:** Bond hearing with burden on Government

**Quotes:**

- “District court judges reviewing habeas petitions challenging detention under § 1226(c) may assess whether the Length of Detention without affording the [non-citizen] a bond hearing is reasonable. Considerations regarding whether the [non-citizen] poses a safety threat or a flight risk are reserved for the prospective bond hearing.” (\*8)
- “One can only speculate as to how the BIA will rule on the government’s appeal, but, given the favorable disposition at the IJ level, petitioner has a much stronger argument that a final removal order is unlikely to be forthcoming than does the average [non-citizen] detained under § 1226(c).” (\*10)
- “As to the procedural framework for the bond hearing, neither the government nor the petitioner has made any argument about either the burden or standard of proof. In the absence of briefing, and in the interest of uniformity, this Court adopts the framework established by the Second, Third, and Ninth Circuits—the only courts of appeals to explicitly address these issues—and holds that the government must release the petitioner



unless it can establish by clear and convincing evidence that he poses a risk of flight or a risk of danger to the community.” (\*10)

## District of Maryland

[Mansaray v. Perry](#), No. 21-cv-1044, 2021 WL 2315415 (D. Md. June 6, 2021)

**Holding:** Under *Jarpa* factors post-*Jennings*, Petitioner’s detention violated due process where four factors (length of detention, crim v. imm detention, conditions of confinement, and likelihood of continued detention) favored Petitioner and two factors (impediments to removal and reason for delay) were neutral or slightly favored Government.

**Length of Detention:** 13 months

**Remedy:** Bond hearing with burden on Government and consideration of ability to pay and ATD

### Quotes:

- “In my view, these representations by Petitioner and his counsel do not reflect bad faith, at least on this record. Perhaps Petitioner’s counsel was overly confident about the prospects of his claim for release in the *Coreas* class action. But, that does not equate to bad faith. Moreover, it is conceivable that Petitioner’s counsel may have had encountered logistical challenges in scheduling conversations with Petitioner while he was at HCDC, even though the facility still permitted her entry. I am not persuaded that Petitioner’s counsel acted in bad faith. (\*8)
- “Judge Catherine Blake recently considered both issues in *Dubon Miranda*, 463 F. Supp. 3d at 647-50. In a comprehensive analysis, Judge Blake noted that several courts have concluded that when a [non-citizen] remains detained pursuant to 8 U.S.C. § 1226(a), as a result of a ‘prohibitively high bond amount,’ then the detention ‘is not reasonably related’ to the statute’s purposes. *Id.* at 648 (collecting cases). (\*11)
- “Accordingly, ‘without consideration of a . . . detainee’s ability to pay, where a non-citizen remains detained due to her financial circumstances, the purpose of her detention—the lodestar of the due process analysis—becomes less clear.’ *Id.* at 649. Moreover, Judge Blake drew on the Ninth Circuit’s reasoning in *Hernandez*, 872 F.3d at 993, which determined that ‘the minimal costs to the government’ of a requirement to consider both ability to pay and alternatives to detention ‘are greatly outweighed by the likely reduction it will effect in unnecessary deprivations of individuals’ physical liberty.’ *Dubon Miranda*, 463 F. Supp. 3d at 649; *see also Reid v. Donelan*, 390 F. Supp. 3d 201, 225 (D. Mass. 2019) (concluding that for § 1226(c) detainees, ‘due process requires that an immigration court consider both a [non-citizen’s] ability to pay in setting the amount of bond and alternative conditions of release such as GPS monitoring that reasonably assure the safety of the community and the criminal [non-citizen’s] future appearances.’) I find these decisions persuasive.” (\*11)

[\*Duncan v. Kavanagh\*](#), 439 F. Supp. 3d 576 (D. Md. Feb. 10, 2020)

**Holding:** Under *Jarpa* factors post-*Jennings*, Petitioner’s detention violated due process where three factors (length of detention, conditions of confinement, and likelihood of continued detention) favored Petitioner and three factors (impediments to removal, crim v. imm detention, reason for delay) slightly or fully favored Government.

**Length of Detention:** 4 years

**Remedy:** Bond hearing with burden on Government

**Quotes:**

- “As Duncan’s BIA appeal remains pending, neither the parties nor the court can predict when removal proceedings will conclude. Moreover, in the event of an adverse ruling by the BIA, Duncan has indicated his intention to file a second PFR to the Fourth Circuit, a process which could add several more months to his detention. The court finds that the final *Jarpa* factor weighs in Duncan’s favor.” (590)

[\*Obando-Segura v. Whitaker\*](#), No. 17-cv-3190, 2019 WL 423412 (D. Md. Feb. 1, 2019)

**Holding:** Petitioner’s detention was unreasonably prolonged under *Jarpa* factors.

**Length of Detention:** More than 2 years

**Remedy:** Bond hearing with burden of proof on Government

**Quotes:**

- “Because the Government does not object to remanding this case to the IJ for a bond hearing, all that remains is to determine which party will bear the burden of proof at the hearing. For the purposes of the Court’s analysis, it assumes that Obando-Segura’s two-plus-year detention is unreasonable under the *Jarpa* factors, and that his continued detention without a bond hearing is unconstitutional.” (\*3)
- “Here, Obando-Segura’s prolonged detention compromises his ability to gather the evidence he needs to complete his U Visa application and may also affect his ability to prepare for his Individual Hearing on March 8, 2019. In addition, in the immigration proceedings the Government bears the burden of proof by clear and convincing evidence to show that Obando-Segura committed a removable criminal offense.” (\*4)

[\*Jarpa v. Mumford\*](#), 211 F. Supp. 3d 706 (D. Md. 2016)

[Abrogated by *Jennings* to the extent that it read time limit into statute, but test later used for as-applied due process challenges]

**Holding:** Petitioner’s detention was unreasonable where the likelihood of removal was particularly low because Petitioner was granted adjustment of status and all other factors either favored

Petitioner or were neutral. Construed § 1226(c) to contain an implicit time limit and established a six-factor, case-by-case test for challenging prolonged mandatory detention.

**Length of Detention:** More than 11 months

**Remedy:** Bond hearing with burden on Government

**Quotes:**

- “These circuits collectively consider myriad factors in assessing the reasonableness of a petitioner’s continued detention without an individualized bond hearing. These factors include: (1) the length of time that the criminal [non-citizen] has been detained without a bond hearing; (2) the reason for prolonged detention; (3) whether any impediments exist to final removal if ordered; (4) whether the [non-citizen’s] civil immigration detention exceeds the time the [non-citizen] spent in prison for the crime that rendered him removable; (5) whether the facility for the civil immigration detention is meaningfully different from a penal institution for criminal detention; and (6) the foreseeability of proceedings concluding in the near future (or the likely duration of future detention).” (717)
- “Astonishingly, of the twenty-six opinions this Court reviewed in which lower courts have granted petitioners’ relief, no petitioner had already won his removal proceedings, had his status adjusted, and yet remained in detention without even the opportunity to seek individual consideration for release.” (718)
- “[W]ere Mr. Jarpa required to prove that he is neither a flight risk nor a danger would also logically mean that he is *presumed* validly and constitutionally detained unless he demonstrates otherwise.” (722)

## Middle District of Pennsylvania

Massenat v. Lowe, No. 3:23-cv-01472 (M.D. Pa. Aug. 29, 2024) (R&R)

[R&R and subsequent decisions not available on Westlaw. R&R dismissed and terminated as moot on Nov. 5, 2024, because Petitioner was released with OSUP]

**Facts:** Petitioner was subject to a final order of removal and had a grant of withholding of removal under the Convention Against Torture (CAT), placing Petitioner in the narrow category of non-citizens who are both removable and unable to return to their country of origin. Counsel argued ICE’s continued detention of Petitioner violated its policy, ICE Directive 16004.1, issued in 2004 and reiterated most recently in 2021, in addition to violating *Zadvydas*.

**Holding:** The Magistrate Judge held that Petitioner’s prolonged detention violated due process. ICE failed to follow its longstanding policy requiring the release of non-citizens who have been granted withholding of removal, absent “exceptional circumstances.”

**Length of Detention:** ~ 2 years

**Remedy:** Concluded that Petitioner is entitled to an individualized custody review pursuant to ICE Directive. Recommended that the district court grant the habeas petition

**Quotes:**

- “[T]he detention of non-citizens subject to final orders of removal who have been granted CAT relief is disfavored by the agency and subject to a heightened standard requiring specialized approval of the detention of this narrow and specific class of non-citizens. This longstanding policy, in turn, recognizes an immutable truth: The indefinite detention of non-citizens who cannot be returned to their homelands due to legitimate fears of torture has a fundamentally unfair and potentially Kafkaesque quality to it. It places the non-citizen in a legal limbo where the prospects of immediate relief are slight, and the danger of additional, prolonged detention are great.” (16)

[\*Baptista v. Lowe\*](#), No. 1:23-cv-1666, 2024 WL 3410600 (M.D. Pa. Apr. 30, 2024) (R&R)

[R&R adopted by 2024 WL 3410587 (M.D. Pa. May 7, 2024)]

**Holding:** Petitioner’s prolonged detention violated due process where the first, second, and fourth *German Santos* factors favored Petitioner and the third factor was neutral.

**Length of Detention:** ~ 19 months

**Remedy:** Bond hearing with burden on Government

**Quotes:**

- “Baptista is detained at the Pike County Correctional Facility, where he is housed among convicted criminals and is granted only an hour and a half out of his cell. As the Government concedes, “the Third Circuit found that the conditions at Pike County Correctional Facility were punitive as to immigration detainees.” (Doc. 21 at 29) (citing *German Santos*, 965 F.3d at 213)[.]” (\*3)

[\*McDougall v. Warden\*](#), No. 3:23-cv-759, 2023 WL 6161038 (M.D. Pa. Sep. 21, 2023)

**Holding:** Petitioner’s detention did not violate due process because the length of detention was not sufficiently prolonged under *German Santos*.

**Length of Detention:** 13 months

**Remedy:** Petition denied without prejudice

**Quotes:**

- “While [it] may be true [that Petitioner has only been detained at Pike for a few months], Respondent does not explain how such detention-center conditions differ from those found in a prison setting. Nevertheless, it must also be noted that McDougall has failed to even

mention this factor. Accordingly, this final consideration does not support either side's argument." (\*2)

[Smith v. Ogle](#), No. 3:21-cv-1129, 2023 WL 3362597 (M.D. Pa. May 10, 2023)

[Adopted R&R from 2023 WL 3369154 (M.D. Pa. Jan. 3, 2023)]

**Holding:** Petitioner's prolonged detention violated due process where three of four *German Santos* factors favored Petitioner.

**Length of Detention:** 2.5 years (R&R). Less than 3 years (DJ)

**Remedy:** Bond hearing with burden on Government

**Quotes:**

- "Respondent does not object to Judge Mehalchick's recommendation that Smith should be afforded a bond hearing before an immigration judge. However, he objects to the recommendation that the bond hearing be held in accordance with *Santos*, i.e., that the government bear the burden of proving by clear and convincing evidence that Smith's further detention is justified . . . . Respondent also contends that Smith has previously had a bond hearing with the government bearing the burden of proof by clear and convincing evidence, and that the immigration judge found that Smith posed a danger to the community, and further, that following his bond denial, Smith's detention was reviewed two more times . . . . The court agrees in full with Judge Mehalchick's cogent analysis and will overrule Respondent's objection. The overwhelming majority of federal courts, including the Third Circuit in *Santos*, have held that the Government must justify the continued confinement of a [non-citizen] under Section 1226(c) by clear and convincing evidence . . . . This burden is not relinquished because Smith has previously received a bond hearing at which the government established by clear and convincing evidence that his continued detention is necessary. More than two-and-a-half years have passed since that bond hearing." (\*4)

[Malede v. Lowe](#), No. 1:22-cv-01031, 2022 WL 3084304 (M.D. Pa. Aug. 3, 2022)

**Holding:** Petitioner's prolonged detention violated due process where all four *German Santos* factors favored Petitioner.

**Length of Detention:** 18 months

**Remedy:** Bond hearing with burden on Government

**Quotes:**

- "Given that the final *Santos* factor—the conditions of confinement—"strongly favor[ed] a finding of unreasonableness" in *Santos*, where the petitioner was confined in a facility with convicted criminals and confined to his cell for 23 hours a day, *Santos*, 965 F.3d at 213, it

follows that Malede's conditions of confinement also strongly favor a finding of unreasonableness, particularly in light of his medical concerns, given that he is confined in a facility with convicted criminals and he has been confined to his cell, at least several times, for more than 23 hours a day." (\*7)

[Barradas-Jacome v. Lowe](#), No. 1:21-cv-1885, 2022 WL 256299 (M.D. Pa. Jan. 26, 2022)

**Holding:** Petitioner is not entitled to a bond hearing. His eight-month detention does not support habeas corpus relief, and the other factors do not outweigh the length of detention.

**Length of Detention:** 1.5 years. 8 months since the last bond hearing

**Quotes:**

- "Respondent contends that Barradas-Jacome's detention is governed by 8 U.S.C. § 1231 because he has been issued a final order of removal under the procedures set forth in 8 U.S.C. § 1228...Respondent is mistaken. Petitioners who have been granted temporary stays of removal are detained pursuant to 8 U.S.C. § 1226 rather than § 1231." (\*2)

[Saint Jacques v. Department of Homeland Security](#), No. 1:21-cv-1144, 2021 WL 4494623 (M.D. Pa. Sep. 30, 2021)

**Holding:** Petitioner's detention was not unreasonably prolonged and did not violate due process where only one factor (likelihood of continued detention) favored Petitioner.

**Length of Detention:** 14 months

**Remedy:** Petition denied without prejudice

**Quotes:**

- "District courts in this circuit have frequently found that detention under Section 1226(c) for just over a year does not, in itself, amount to an arbitrary deprivation of liberty or weigh in favor of habeas relief." (\*2).
- "At the time that Saint Jacques filed the instant habeas corpus petition, he was being detained at the York County Prison, located in the Middle District of Pennsylvania." (\*1 n. 1) [Note: The court retained jurisdiction despite an out-of-district transfer]

[Sydykov v. Immigration and Customs Enforcement](#), No. 1:21-cv-00575, 2021 WL 2222732 (M.D. Pa. June 2, 2021)

**Holding:** Petitioner's detention was not unreasonably prolonged where the conditions of confinement were meaningfully different from criminal punishment.

**Length of Detention:** 9 months

**Remedy:** Petition denied without prejudice

**Quotes:**

- “Having reviewed the parties’ arguments, the court finds that the conditions of Sydykov’s detention [at Clinton County Correctional Facility] are meaningfully different from criminal confinement. Most notably, Sydykov is free to move about his unit for the majority of the day, where he is given access to television, books, and recreation activities and is served meals dormitory style with the other residents of the unit. This is in contrast to the much more restricted movements and activities that Sydykov would likely face if he were criminally confined.” (\*4)

[\*Rad v. Lowe\*](#), No. 1:21-cv-1712021, 2021 WL 1392067 (M.D. Pa. Apr. 13, 2021)

**Holding:** Petitioner’s prolonged detention violated due process where the first, second, and fourth *German Santos* factors favored Petitioner, and the third factor was neutral. Petitioner was granted a second bond hearing because the previous hearing did not comport with *German Santos*.

**Length of Detention:** 35 months

**Remedy:** Bond hearing with burden on Government

**Quotes:**

- “Upon review of the record, the Court is unable to conclude that Petitioner’s March 8, 2021 custody determination hearing comports with due process because it does not appear that the evidence presented by the Government to justify Petitioner’s continued detention was “individualized” and supports a conclusion that Petitioner’s continued detention is necessary to prevent him “from fleeing or harming the community.” (\*4)

[\*Baghdad v. Doll\*](#), No. 1:21-cv-293, 2021 WL 1391784 (M.D. Pa. Apr. 13, 2021)

**Holding:** Petitioner’s detention did not violate due process because he was detained for less than a year and the conditions were not unconstitutionally punitive. The court also denied his conditions of confinement claim.

**Length of Detention:** 8 months

**Remedy:** Petition denied without prejudice

**Quotes:**

- “Petitioner [at York County Prison] is not confined to his cell for 23 hours a day, unless he is in medical isolation. (Ritchey Decl. ¶ 17.) Moreover, detainees are provided access to TV, reading materials, recreation, and telephones to the fullest extent possible. The Court is also cognizant of the fact that DHS recently reviewed Petitioner’s custody status on February 4, 2021 . . .” (\*6)



[Buleishvili v. Hoover](#), No. 1:20-1694, 2021 WL 674226 (M.D. Pa. Feb. 22, 2021)

[R&R not available on Westlaw]

**Holding:** Petitioner’s prolonged detention violated due process where two factors (likelihood of continued detention and conditions of confinement) weighed slightly in favor of Petitioner and other two factors (length of detention and reasons for delay) weighed against.

**Length of Detention:** 12 months

**Remedy:** Bond hearing with burden on Government

**Quotes:**

- “However slightly, Judge Schwab determined that the [first and third] *Santos* factors weigh against a finding of unreasonableness. The court has reviewed Judge Schwab’s determination with respect to these factors and finds no clear error of record.” (\*3)
- “Upon review, even if true that petitioner was placed in lockdown due to his symptoms, respondent’s materials do not address the petitioner’s contentions with respect the conditions of confinement [at Clinton County Correctional Facility] while in lockdown for his symptoms. For instance, the petitioner claims that he “wanted to see a doctor or nurse,” but “[i]nstead of receiving medical attention, [he] kept being ignored,” and was “given a ticket” for banging on his cell door to try to get medical attention. (Doc. 16-4). He further claims that he was “denied accommodations to talk to [his] family” and “had to refuse to eat to have someone pay attention to [him] and allow [him] to call [his] wife.” (*Id.*). Such conditions can reasonably be found to be punitive and support a finding of unreasonableness with respect to this final *Santos* factor.” (\*4)

[Gabriel v. Barr](#), No. 1:20-cv-1054, 2021 WL 268996 (M.D. Pa. Jan. 27, 2021)

**Holding:** Petitioner’s detention did not violate due process because the length of detention since the last custody review was not sufficiently prolonged.

**Length of Detention:** 18 months. 14 months since last bond hearing

**Remedy:** Petition denied without prejudice

**Quotes:**

- “At first blush, Gabriel’s detention, approximately eighteen months, would seem to favor granting him an individualized bond hearing as longer periods of detention, in the absence of bad faith, have been found to be so prolonged as to be an arbitrary, and thus an unconstitutional application of § 1226(c) absent a bond hearing . . . However, in the matter *sub judice*, following the IJ’s September 3, 2019 decision terminating the removal proceedings, an IJ held a bond hearing or “custody redetermination” on September 30, 2019, and issued a memorandum decision on November 8, 2019, denying his request for custody redetermination because he failed to demonstrate that he was not a danger to the community. (Doc. 8-2, pp. 31-34). Gabriel appealed the decision to the BIA and, on March



4, 2020, the BIA issued a decision finding no clear error in the IJ's decision and dismissing the appeal. (*Id.* at pp. 35, 36, 118 S.Ct. 978). Hence, it is clear that his detention status has been reviewed in the last ten to eleven months." (\*3)

- "We are also cognizant that, according to the Executive Office of Immigration Review case status website, an IJ recently granted Gabriel CAT deferral which, presumably, would result in a request for a custody redetermination." (\*4)

[\*Acevedo v. Decker\*](#), No. 1:20-cv-1679, 2021 WL 120473 (M.D. Pa. Jan. 13, 2021)

[Adopted R&R from 2020 WL 8120875 (M.D. Pa. Nov. 17, 2020)]

**Holding:** Petitioner's detention did not violate due process because it was not sufficiently prolonged, and the immigration case had thus far proceeded efficiently.

**Length of Detention:** More than 9 months

**Remedy:** Petition denied without prejudice

**Quotes:**

- "The court clarified, however, that no presumption of reasonableness or unreasonableness attaches to any duration of detention. *Id.* Courts therefore are under no obligation to treat detention that lasts for a period of longer than five months as presumptively suspect." (\*2)
- "Nevertheless, determining the effect that the BIA's decision will have on the duration of Acevedo's detention still requires speculation. On remand, the IJ might find in Acevedo's favor, which could end the removal case in short order. Either party might file another appeal to the BIA once the IJ has issued a new decision, which could extend the duration of Acevedo's detention. The court cannot state with certainty whether Acevedo's removal proceedings "are unlikely to end soon." *Santos*, 965 F.3d at 211. Thus, although this factor weighs more heavily in Acevedo's favor than it did before the BIA's decision, the court still sees no reason to depart from Judge Carlson's conclusion that Acevedo's detention is constitutional, as the likelihood that Acevedo's detention will continue for a significant amount of time remains in question." (\*3)

[\*Clarke v. Doll\*](#), 481 F.Supp.3d 394 (M.D. Pa. Aug. 24, 2020)

[Adopted R&R from 2020 WL 4983215 (M.D. Pa. June 30, 2020)]

**Holding:** Petitioner's prolonged detention violated due process where three factors (length of detention, likelihood of continued detention, and conditions of confinement) favored Petitioner and the fourth factor (reason for delay) was neutral.

**Length of Detention:** 18 months (R&R). 20 months (DJ)

**Remedy:** Bond hearing with burden on Government. Ordered both parties to report outcome of bond hearing and that the District Court would conduct a bond hearing if the IJ's bond hearing did not comply with the court order

**Quotes:**

- “By finding that the petitioner was entitled to a bond hearing even when there was no evidence of bad faith by the government, the court effectively refuted respondent’s overarching suggestion *sub judice* that its good faith and the ‘reasonable pace of proceedings’ defeat Clarke’s petition.” (397) (citing *German Santos*)

[\*Davydov v. Doll\*](#), No. 1:19-cv-2110, 2020 WL 969618 (M.D. Pa. Feb. 28, 2020)

**Holding:** Petitioner’s prolonged detention violated due process where two factors (length of detention and likelihood of continued detention) favored Petitioner and the other two factors (likelihood of removal and reason for delay) were neutral. Petitioner’s detention was governed by § 1226(c) because the Third Circuit granted a temporary stay of removal.

**Length of Detention:** 14 months

**Remedy:** Bond hearing with burden up to IJ

[\*Kleinauskaite v. Doll\*](#), No. 4:17-cv-02176, 2019 WL 3302236 (M.D. Pa. 2019)

[References *Kleinauskaite v. Doll*, 2018 WL 6112482 (M.D. Pa. Oct. 9, 2018) (R&R), see *infra* in § 1226(a) cases]

**Facts:** A few weeks before this decision, the court granted the habeas petition and ordered a bond hearing. Petitioner then moved for Equal Access to Justice Act (EAJA) fees.

**Holding:** Petitioner’s detention became unreasonable after 12 months and therefore Government’s position was substantially unjustified. Government ordered to pay her fees incurred after the 12 months of detention.

**Length of Detention:** 18 months

**Remedy:** EAJA fees for Petitioner

**Quotes:**

- “Several cases—*Zadvydas*, *Diop*, and *Chavez-Alvarez*—indicate or imply that determining when unreviewed detention becomes unreasonable is a fact-intensive inquiry. *Chavez-Alvarez*, however, ascertained that, at the one-year mark, unreviewed detention necessarily becomes unreasonable. Although *Chavez-Alvarez* recognized that the exact moment of unreasonableness could have occurred sometime before that moment, this Court finds the twelve-month milestone appropriate in this case for determining when Ms. Kleinauskaite’s detention escaped the realm of reason.” (\*6)

[Chikerema v. Lowe](#), No. 1:18-cv-1031, 2019 WL 3928930 (M.D. Pa. May 2, 2019) (R&R)

[R&R adopted by 2019 WL 3891086 (M.D. Pa. July 19, 2019)]

**Holding:** Petitioner’s detention violated due process where two factors (length of detention and likelihood of continued detention) favored Petitioner, and the other two factors (likelihood of removal and reason for delay) were neutral.

**Length of Detention:** 20 months

**Remedy:** Bond hearing with burden on Government

**Quotes:**

- “Although the Third Circuit’s ultimate rulings in *Diop* and *Chavez-Alvarez* have been abrogated by *Jennings*, and those two cases are no longer binding upon this Court, it does not follow that those two cases should be ignored. The constitutional reasoning that underlays the Third Circuit’s invocation of the constitutional avoidance canon still provides some persuasive guidance as to how this Court should address § 1226(c) claims.” (\*3)
- “The likelihood that removal proceedings will actually result in removal is unknown and unknowable at this time. Accordingly, this factor warrants little weight in our merits evaluation.” (\*9)
- “Further, to the extent that Chikerema has initially instigated this delay by contesting his removal, the petitioner is simply exercising his legal rights in an effort to stave off his removal, something he is entitled to do under our system of laws. In the absence of clear evidence of bad faith on the petitioner’s part, given that a variety of due process considerations must be evaluated by the Court, the absence of an improper delay is not ultimately determinative of the instant constitutional analysis.” (\*9)

[Bah v. Doll](#), No. 3:18-cv-1409, 2018 WL 6733959 (M.D. Pa. Oct. 16, 2018) (R&R)

[R&R adopted by 2018 WL 5829668 (M.D. Pa. Nov. 7, 2018)]

**Holding:** Petitioner’s detention violated due process where two factors (length of detention and likelihood of continued detention) favored Petitioner and the other two factors (likelihood of removal and reason for delay) were neutral. Petitioner’s detention was governed by § 1226(c) because the Third Circuit granted a temporary stay of removal.

**Length of Detention:** 15 months

**Remedy:** Bond hearing with burden on Government

**Quotes:**

- “[D]espite the entry of a final order of removal, by operation of law, the appellate court’s temporary stay reverted Bah’s detention status to a pre-removal status governed by 8 U.S.C. § 1226(c) pursuant to *Leslie v. Att’y Gen.*, 678 F.3d 265, 270 (3d Cir. 2012).” (\*2)

- “[C]ourts still have an independent responsibility to assess whether the duration of any mandatory detention is so extended and unreasonable as to violate due process. Moreover, in those instances where the period of detention has become excessive courts are obliged to grant habeas corpus relief to detained [non-citizens].” (\*3)
- “Thus, the court of appeals has now reaffirmed that its prior holding in *Diop* was a constitutional holding which found that ‘when detention becomes unreasonable, the Due Process Clause demands a hearing, at which the Government bears the burden of proving that continued detention is necessary to fulfill the purposes of the detention statute.’” (\*7) (citing *Guerrero-Sanchez*)

[Vega v. Doll](#), No. 3:17-cv-01440, 2018 WL 3765431 (M.D. Pa. July 12, 2018) (R&R)

[R&R adopted by 2018 WL 3756755 (M.D. Pa. Aug. 8, 2018)]

**Holding:** Petitioner’s prolonged detention violated due process where two factors (length of detention and likelihood of continued detention) favored Petitioner, and the other two factors (likelihood of removal and reason for delay) were in Government’s favor or neutral. Petitioner’s detention was governed by § 1226(c) because the Third Circuit granted a temporary stay of removal.

**Length of Detention:** 21 months

**Remedy:** Bond hearing with burden on Government. Ordered both parties to report outcome of bond hearing and that the District Court would conduct a bond hearing if the IJ’s bond hearing did not comply with the court order

**Quotes:**

- “Although *Diop* and *Chavez-Alvarez* employed the canon of constitutional avoidance to construe a “reasonable” time limitation into the statute, their ultimate decisions were informed by due process principles. In addition, *Diop* and *Chavez* did not utilize the canon of constitutional avoidance to rule that mandatory detention in excess of six months was presumptively unreasonable . . . As such, the Court is of the opinion that *Diop* and *Chavez-Alvarez*, and the constitutional principles upon which they are grounded, are not “patently inconsistent” with the Supreme Court’s decision in *Jennings*.” (\*7-8)
- “[U]nder the Due Process Clause, the reasonability of detention under §1226(c) is an individualized inquiry. Such a constitutional analysis requires the Court to consider factors, derived from the Supreme Court’s decisions in *Demore* and *Zadvydas* . . . Such non-exhaustive factors may include: “(1) whether detention has continued beyond the average times necessary for completion of removal proceedings which were identified in *Demore*; (2) the probable extent of future removal proceedings; (3) the likelihood that removal proceedings will actually result in removal; and (4) the conduct of both the [non-citizen] and the government during the removal proceedings.” (\*10)
- “[T]he Court recommends that this matter be referred to an immigration judge for the initial bond determination, at which time the government will bear the burden of proving that

Vega’s continued detention is necessary. However, to reconcile ‘the deference which should be accorded in the first instance to agency decision-making processes,’ with the District Court’s concurrent jurisdiction stemming from the responsibility to address federal habeas corpus petitions filed by immigration detainees, it is further recommended that the District Court retain the authority to conduct its own individual bond consideration, if necessary.” (\*13)

[\*Soriano v. Sabol\*](#), 183 F. Supp. 3d 648 (M.D. Pa. May 3, 2016)

**Holding:** Petitioner’s prolonged detention was unreasonable under the balancing test from *Chavez-Alvarez*.

**Length of Detention:** 9 months

**Remedy:** Bond hearing with burden on Government

**Quotes:**

- “[T]he court rejects the respondent’s argument that the petition is premature solely because the petitioner has not yet been detained for a full year.” (652)
- “As of today, the petitioner has been detained for nine (9) months. This is longer than the six-month time-frame outlined in *Demore* and also comports with Third Circuit precedent that finds any detention beyond the five month threshold to be suspect. *Diop v. ICE/Homeland Sec.*, 656 F.3d 221, 233–34 (3d Cir. 2011). Further, nine months is within the six to twelve month time-frame contemplated in *Chavez–Alvarez*.” (652)
- “Moreover, regardless of whether the BIA affirms or vacates the IJ’s decision, the petitioner’s removal proceedings will continue for an undetermined amount of time.” (655)

## Western District of Pennsylvania

[\*Abioye v. Oddo\*](#), 704 F. Supp. 3d 625, 2023 WL 8254368 (W.D. Pa. Nov. 29, 2023)

**Holding:** Petitioner’s detention violated due process when two factors (length of detention and likelihood of continued detention) favored Petitioner, one was neutral (reasons for delay), and one (conditions of confinement) favored Government.

**Length of Detention:** 18 months

**Remedy:** Bond hearing with burden on Government

**Quotes:**

- “Abioye is currently detained at Moshannon Valley Processing Center, although the record reflects that was detained from March of 2023 until August of 2023, at Pike County Correctional Facility.” (631)

- “[Though the court considered Petitioner’s testimony], Respondents respond that Abioye’s confinement is meaningfully distinguishable from criminal punishment. Unlike the petitioner in *German Santos*, Abioye is not “being detained in prison alongside convicted criminals” and is not “confined to his cell for twenty-three hours per day.” ... Additionally, unlike criminal prisoners, immigration detainees at MVPC “have access to telephone and video call capabilities.” He is housed in an “immigration processing center” housing only immigration detainees.” (632)

[\*Rivas v. Oddo\*](#), No. 3:22-cv-223, 2023 WL 4361140 (W.D. Pa. June 27, 2023)

[R&R not available on Westlaw]

**Facts:** The Magistrate Judge conditionally recommended that the petition be granted if the Petitioner remained detained beyond 18 months. Petitioner and Government filed timely objections which the court reviewed *de novo*.

**Holding:** Release conditioned only on the duration of detention is inconsistent with the controlling law of *German Santos*. Petitioner’s detention violated due process where two factors (length of detention and likelihood of continued detention) favored Petitioner, and the other two factors (reason for delay and conditions for confinement) were neutral to slightly in Petitioner’s favor.

**Length of Detention:** More than 15 months

**Remedy:** Bond hearing with burden on Government

**Quotes:**

- “As Magistrate Judge Pesto noted regarding the first *German Santos* factor, ‘[i]t is highly likely that detention will continue as long as the U visa application makes a difference to [P]etitioner . . . and that could be years.’” (\*2)
- “Regarding the second factor, the record does not indicate that the length of Petitioner’s detention is attributable to his own requests for continuances or errors causing unnecessary delay . . . Indeed, the Magistrate Judge correctly observed that ‘blame for the length of the U visa process can only be laid at the government’s door.’” (\*2)
- “Lastly, regarding the third factor, the record does not indicate that Petitioner’s conditions of confinement [at Moshannon Valley Processing Center] are any more or less different from criminal punishment at present than they were in March 2023. The Court has no basis for doubting Magistrate Judge Pesto’s supposition that ‘the physical facility at Moshannon Valley’ housing Petitioner ‘is unlikely to have changed much since it expressly was a criminal detention center[.]’” (\*2)
- “The reasoning employed by the magistrate judge is inconsistent with *German Santos* and cannot offer a basis for granting the petition, however, the court will grant his petition and

order a bond hearing held because the duration of Petitioner's detention without hearing is *currently* unreasonable." (\*1-2)

[Adigun v. Department of Homeland Security](#), No. 3:20-cv-12, 2021 WL 9476433 (W.D. Pa. Jan. 7, 2021) (R&R)

[R&R adopted by decision not on Westlaw]

**Holding:** Petitioner's detention violated due process where three factors (length of detention, likelihood of continued detention, and conditions of confinement) favored Petitioner and the fourth factor (reason for delay) was neutral.

**Length of Detention:** More than 18 months

**Remedy:** Bond hearing with burden on Government

**Quotes:**

- "The respondent does not assert that the conditions of confinement for ICE detainees are meaningfully different from those faced by inmates in the general population serving criminal sentences at the Cambria County Prison or the York County Prison, nor does the respondent challenge the petitioner's description of his conditions in civil custody as being substantially less comfortable than those he faced when he was serving a criminal sentence in federal prison." (\*3)

[Madera v. Director of Department of Homeland Security / ICE](#), No. 3:19-cv-0192, 2020 WL 8996799 (W.D. Pa. Apr. 5, 2020) (R&R)

[R&R adopted by 2020 WL 8996788 (W.D. Pa. May 6, 2020)]

**Holding:** Petitioner's detention did not violate due process because it was not sufficiently prolonged.

**Length of Detention:** 8 months

**Remedy:** Petition denied without prejudice

**Quotes:**

- "Based on this constitutional framework, following *Jennings*, district courts in this circuit have largely found that detention for just over a year pursuant to § 1226(c) is insufficient to amount to an arbitrary deprivation of liberty and will thus not suffice to prove that the statute has been unconstitutionally applied. Significantly longer periods of detention, however, in the absence of bad faith, have been found to be so prolonged as to be an arbitrary, and thus unconstitutional, application of § 1226(c) absent a bond hearing." (\*3)



**Southern District of New York**

[Diaz v. Genalo](#), No. 22-cv-3063, 2024 WL 4124756 (S.D.N.Y. Sep. 9, 2024)

[Partially adopted R&R from 2023 WL 5322180 (S.D.N.Y. July 6, 2023)]

**Holding:** Petitioner’s detention was governed by § 1226(c) due to pending PFR at the Second Circuit, which had a forbearance policy preventing removal. Applying *Black*, Petitioner’s prolonged detention violated due process where all three *Mathews* factors weighed in his favor.

**Length of Detention:** More than 3 years

**Remedy:** Bond hearing with burden on Government and consideration of ability to pay and ATD

**Quotes:**

- “Petitioner has been detained for more than three years, far exceeding the “relatively short duration of section 1226(c) detention” envisioned in *Demore*. In addition, given Petitioner’s well documented and severe mental illness, which is itself a private interest that has undoubtably been seriously affected by his prolonged detention, this factor weighs heavily in his favor.” (\*5)
- “[A]s was true with respect to the petitioners in *Black*, “the almost nonexistent procedural protections in place for section 1226(c) detainees markedly increase[ ] the risk of an erroneous deprivation of [Petitioner’s] private liberty interests.”” (\*5)

[Jack v. Decker](#), No. 21-cv-10958, 2022 WL 4085749 (S.D.N.Y. Aug. 19, 2022) (R&R)

[R&R adopted by 2022 WL 16836918 (S.D.N.Y. Nov. 8, 2022)]

**Holding:** Petitioner’s prolonged detention violated due process and he was entitled to a second bond hearing. Petitioner’s detention was governed by § 1226(c) because he had a pending PFR and stay motion, so his removal was stayed by operation of the Second Circuit forbearance agreement. Petitioner was denied immediate release because Petitioner did not show extraordinary circumstances.

**Length of Detention:** 33 months (2 years since last bond hearing)

**Remedy:** Second bond hearing with burden on Petitioner

**Quotes:**

- “Where, as here, a petitioner has already had one bond hearing, courts in this Circuit have applied the same multifactor analysis to determine if due process requires another bond hearing.” (\*10)



- “[B]ecause Jack will be having a second bond hearing, Jack bears an initial burden to establish by a preponderance of the evidence that his circumstances have materially changed since his last bond hearing on June 26, 2020.” (\*15)

[Toussaint v. Garland](#), No. 21-cv-10904, 2022 WL 2354547 (S.D.N.Y. June 30, 2022)

**Holding:** Petitioner’s prolonged detention violated due process and was unreasonable.

**Length of Detention:** 17 months

**Remedy:** Bond hearing with burden on Government and consideration of ability to pay and ATD

**Quotes:**

- “This is particularly so where much of the delay in the adjudication of this case is attributable to the 226 days the BIA took to decide Petitioner’s appeal, which was partially successful, and the fact that the matter is now on remand because the Immigration Judge’s opinion, according to the BIA, did ‘not reflect that she adequately considered the respondent’s evidence’ and ‘erred in relying on country conditions evidence that was not in the record.’ . . . While there is no indication that the Government or the Immigration Court acted in anything but good faith, it remains the case that the clock has been reset on the process due to circumstances that cannot be fairly attributed to Petitioner. Accordingly, this factor is neutral at best, and likely weighs somewhat in Petitioner’s favor.” (\*6)

[Keisy G.M. v. Decker](#), No. 21-cv-4440, 2021 WL 5567670 (S.D.N.Y. Nov. 29, 2021)

[This case was appealed to the Second Circuit. *See supra* [Black v. Decker](#), No. 20-3224, 2024 WL 2789282 (2d Cir. May 31, 2024) in this index]

**Holding:** Petitioner’s detention did not violate due process because Petitioner’s immigration proceedings moved along expeditiously without government-caused delay and Petitioner did not have a viable claim for relief on appeal to BIA.

**Length of Detention:** 14 months

**Remedy:** Petition denied

**Quotes:**

- “[C]ertain factors weigh in Petitioner’s favor. The entirety of Petitioner’s immigration detention—first at the Hudson County Correctional Facility and now at the Etowah County Detention Center in Gadsden, Alabama—has occurred under conditions that are not meaningfully different from penal incarceration. . . . Petitioner also has been detained for nearly fourteen months, which exceeds the “brief period” that the Supreme Court deemed reasonable in *Demore*, 538 U.S. at 530. The analysis, however, does not end there.” (\*8)
- “The contrast between these cases [*Sajous, Vallejo, Hernandez, and Cabral*] and the instant case is stark. Petitioner’s first appearance before the IJ occurred merely eight days after his

arrest by ICE officers, significantly faster than the approximately two-month delay between the petitioner's arrest and his first hearing in Sajous, 2018 WL 2357266, at \*3, the nearly two-month delay in Vallejo, 2018 WL 3738947, at \*1-2, and the over one-month delay in Hernandez, 2018 WL 3579108, at \*2. And all adjournments of Petitioner's hearings in immigration court were at Petitioner's request, with none requested by ICE or sua sponte ordered by the IJ." (\*10)

- And as suggested above, there has been no unreasonable delay in the BIA appellate process, at least thus far. The appeal has been fully briefed for approximately five months. While the Government understandably is unable to provide a specific timeline for a BIA decision, the Government stated at oral argument that it expects a decision soon, which would be consistent with the applicable federal regulations." (\*12)

[Black v. Decker](#), No. 20-civ-3055, 2020 WL 4260994 (S.D.N.Y. July 23, 2020)

[This case was appealed to the Second Circuit. *See supra Black v. Decker*, No. 20-3224, 2024 WL 2789282 (2d Cir. May 31, 2024) in this index]

**Holding:** Utilizing the factors from *Cabral v. Decker*, the court concluded that six factors favored Petitioner and that one factor – the nature of the underlying crimes- favored Government.

**Length of Detention:** 7 months

**Remedy:** Bond hearing with burden on Government

[Hylton v. Decker](#), 502 F. Supp. 3d 848 (S.D.N.Y. 2020)

**Holding:** Petitioner's prolonged detention violated due process where first factor favored Petitioner; second and third factors favored Petitioner because he did not cause delays and asserted viable defenses to removal; fourth and fifth factors favored Petitioner because he was detained at a criminal facility for immigration purposes longer than the jail time for his underlying criminal offense; seventh factor favored Petitioner because his detention would likely continue during the BIA appeal; and sixth factor was neutral because his serious conviction was from more than a decade ago.

**Length of Detention:** 14 months

**Remedy:** Bond hearing with burden on Government

**Quotes:**

- "A number of factors bear on whether a detention has become unreasonable or unjustified. These factors include: (1) the length of time the petitioner has been detained; (2) the party responsible for the delay; (3) whether the petitioner has asserted defenses to removal; (4) whether the detention will exceed the time the petitioner spent in prison for the crime that made the petitioner removable; (5) whether the detention facility is meaningfully different

from a penal institution for criminal detention; (6) the nature of the crimes committed by the petitioner; and (7) whether the petitioner’s detention is near conclusion.” (853) (citing *Cabral, Sajous, Vallejo, and Hernandez*)

- “Mr. Hylton is held at the Orange County Jail, a penal facility. The conditions Mr. Hylton faces at the detention facility are similar to those he would face if he were detained criminally. Mr. Hylton lives in a 7-by-10-foot cell. Hylton Decl. ¶ 26. His toilet has no cover, and he uses his shirt to cover it when he flushes. Id. Because of COVID-19, there are no classes or programs. Id. ¶ 27. None of his family members can visit him.” (854)
- “After *Jennings*, the Court of Appeals for the Second Circuit has now held that the Constitution requires that the Government bear the burden of proof by clear and convincing evidence at bond hearings for [non-citizens] held for prolonged detention pursuant to § 1226(a). *Velasco Lopez*, 978 F.3d at 855-56. There is no reason to believe that the holding should be cabined to § 1226(a) without likewise applying it to prolonged detention pursuant to § 1226(c).” (855)

*Cabral v. Decker*, 331 F. Supp. 3d 255 (S.D.N.Y., Sep. 21, 2018)

**Holding:** Petitioner’s prolonged detention violated due process where first factor favored Petitioner; second and third factors favored Petitioner because he did not cause delays and asserted viable defenses to removal; fourth and fifth factors favored Petitioner because he was detained at a criminal jail for the same time as his underlying criminal conviction; sixth factor favored Government; and seventh factor favored Petitioner.

**Length of Detention:** 7 months

**Remedy:** Release or hold a bond hearing with burden up to IJ

**Quotes:**

- “A number of factors bear on whether a detention has become unreasonable or unjustified. These factors include: (1) the length of time the petitioner has been detained; (2) the party responsible for the delay; (3) whether the petitioner has asserted defenses to removal; (4) whether the detention will exceed the time the petitioner spent in prison for the crime that made him removable; (5) whether the detention facility is meaningfully different from a penal institution for criminal detention; (6) the nature of the crimes committed by the petitioner; and (7) whether the petitioner’s detention is near conclusion.” (261) (citing *Sajous, Vallejo, and Hernandez*)
- “The petitioner has in fact been detained by the immigration authorities in a criminal detention facility. . . . ‘Respondents have held Mr. Gil at the Bergen County Jail, in conditions identical to those of county jail inmates serving criminal sentences . . . .’ This factor favors the petitioner.” (262)

- “The petitioner argues that at the bond hearing the government should have the burden of proving, by clear and convincing evidence, that the petitioner is a danger to the community or risk of flight. The Supreme Court recently held that § 1226 itself does not require the government to carry the clear and convincing evidence burden. See *Jennings*, 138 S. Ct. at 847. . . . However, the Supreme Court left open the question of what the Constitution requires for [non-citizens] detained pursuant to § 1226(c). . . . In the wake of *Jennings*, a number of courts in this District have considered the issue and held that due process requires the government to carry the burden by clear and convincing evidence. . . . But the question of whether the petitioner’s yet-to-happen bond hearing complies with due process is not before this Court. . . . Thus, the Court expresses no opinion on this issue.” (262 n.6)

[Hernandez v. Decker](#), No. 18-cv-5026, 2018 WL 3579108 (S.D.N.Y. July 25, 2018)

**Holding:** Petitioner’s prolonged detention violated due process under both the proposed bright-line rule and under the fact-dependent *Sajous* factors.

**Length of Detention:** 9 months

**Remedy:** Bond hearing with burden on Government

**Quotes:**

- “Only one court within this Circuit has examined the extent to which the constitutional overtones of *Lora* remain good law, concluding that ‘the reasoning of *Lora* remains strong persuasive authority[,]’ though not binding. *Sajous v. Decker*, 18-cv-2447-AJN, 2018 WL 2357266, at \*7 (S.D.N.Y. May 23, 2018).” (\*5)

[Sajous v. Decker](#), No. 18-cv-2447, 2018 WL 2357266 (S.D.N.Y. May 23, 2018)

**Holding:** Petitioner’s prolonged detention violated due process where all factors favored Petitioner.

**Length of Detention:** 8 months

**Remedy:** Bond hearing with burden on Government

**Quotes:**

- “The Court thus concludes that the entirety of the Second Circuit’s decision in *Lora* is no longer binding authority. Nevertheless, consistent with the Second Circuit’s decision in *Brown*, the reasoning of *Lora* remains strong persuasive authority to guide the decision in this case.” (\*7)
- “Rather than employ a brightline rule, the Court concludes that whether mandatory detention under § 1226(c) has become “unreasonable,” *Demore*, 538 U.S. at 532 (Kennedy, J., concurring), and thus a due process violation, must be decided using an as-applied, fact-based analysis.” (\*10)

- “Continued detention will also appear more unreasonable when the delay in proceedings was caused by the immigration court or other non-ICE government officials. The Court thus rejects the Government’s position at oral argument that ‘the Court’s focus should be on ICE’s action as the prosecuting agency’ and that if ‘the immigration court just sits on [a non-citizen’s case] either because of capacity or negligence or something,’ that should not be considered.” (\*11)

## Western District of New York

[\*Kamara v. Garland\*](#), No. 24-cv-743, 2024 WL 4470868 (W.D.N.Y. Oct. 11, 2024)

**Holding:** Under *Black*, Petitioner’s prolonged detention violated due process where all three *Mathews* factors weighed in his favor.

**Length of Detention:** More than 10 months

**Remedy:** Bond hearing with burden on Government and consideration of ability to pay and ATD

### Quotes:

- “Kamara has had no opportunity to challenge the statutory assumption that there is *any* risk he will flee or endanger the community while his case proceeds. And so, absent a bond hearing, it is not even clear that Kamara’s detention is required to serve the government’s interests. Further, the government has not identified any special interests here that would justify Kamara’s continued detention without an individualized bond hearing.” (\*4)

[\*Akinsanya v. Brophy\*](#), No. 24-cv-732, 2024 WL 4470868 (W.D.N.Y. Oct. 11, 2024)

**Holding:** Under *Black*, Petitioner’s prolonged detention violated due process where all three *Mathews* factors weighed in his favor.

**Length of Detention:** More than 17 months

**Remedy:** Bond hearing with burden on Government and consideration of ability to pay and ATD

[\*Kiptanui v. Searls\*](#), No. 23-cv-672, 2023 WL 7389989 (W.D.N.Y. Oct. 18, 2023)

[Vacated, appeal dismissed: *Kiptanui v. Ball*, 23-7790, 2024 WL 4827387 (2nd Cir. Oct. 17, 2024)]

**Holding:** Petitioner’s prolonged detention did not violate due process because it was not the Government that prolonged his detention, but rather Petitioner’s chosen litigation strategy.

**Length of Detention:** 56 months

**Remedy:** Petition denied

**Quotes:**

- “Following his initial arrest on February 28, 2019, Petitioner has actively litigated whether he may remain in the United States. He has invoked numerous layers of appellate review with respect to removal, including to BIA and the First Circuit Court of Appeals. Petitioner’s chosen litigation strategy inevitably has had the effect of prolonging his removal proceedings to some extent. And there is no indication of delay attributable to the government.” (\*4)
- Because he “holds the keys to release,” there is no governmental deprivation of any liberty interest. Even if a governmental deprivation existed here, the amount of process due to Petitioner “is the amount provided for by Congress.” And Petitioner has availed himself of such process throughout his removal proceedings by, for example, seeking periodic review of his custody status.” (\*4)

[Hodge v. Garland](#), 699 F.Supp.3d 212 (W.D.N.Y. 2023)

[Vacated and remanded in *Hodge v. Brophy*, 23-7988, 2024 WL 5111917 (2nd Cir. Sep. 18, 2024)]

**Holding:** Petitioner’s prolonged detention did not violate due process because Petitioner’s chosen litigation strategy prolonged detention. Petitioner’s option to regain his freedom by returning to his country of origin rendered his detention “quasi-voluntary.” In the absence of facts indicating any apparent inaction or bad faith on Government’s part, there was no violation of due process.

**Length of Detention:** 25 months

**Remedy:** Petition denied

**Quotes:**

- “The collection of resulting outcomes in these recent district court cases turns significantly on the duration of detention and much less on the petitioner’s litigation regarding removal as the reason for the duration. The outcomes turn even less on the reality that petitioners exercise control over the length of detention, by retaining the ability to consent to release to their native countries pending removal proceedings—thereby holding the ‘keys’ to their own release.” (224)
- “The government is not seeking to retain custody of removable [non-citizens] under Section 1226(c). Rather, by following the statute’s mandatory-detention provision, the government seeks to promote public safety within this country and to ensure a means of effecting potential eventual removal. During the pendency of removal proceedings, a [non-citizen] subject to Section 1226(c) may elect to regain his or her liberty—or freedom from detention—by agreeing to return to his or her native country. The quasi-

voluntary nature of the detention undermines any due process claim. Because detention is quasi-voluntary and the [non-citizen] holds the keys to release, there is no governmental deprivation.” (226-27)

- “[Petitioner], of course, may avail himself of all “process” available to him in his removal proceedings—including requesting extensions of time, adding claims or bases for relief from removal, and appealing all adverse decisions. But he cannot expect resulting delay in his removal proceedings to bolster his due process claim. If a petitioner could delay enough and thereby earn release, he could defeat the process.” (227)

[\*Castro-Almonte v. Searls\*](#), No. 22-cv-861, 2023 WL 1931853 (W.D.N.Y. Feb. 9, 2023)

[Vacated as moot in *Castro-Almonte v. Garland*, 23-297, 2024 WL 1551044 (2d Cir. 2024)]

**Holding:** Petitioner’s prolonged detention did not violate due process where the delay was largely attributable to Petitioner’s repeated requests for continuances of his immigration proceedings and administrative closure of his case. In the absence of facts indicating any apparent inaction or bad faith on Government’s part, there was no violation of due process.

**Length of Detention:** 11 months

**Remedy:** Petition dismissed without prejudice

[\*Vazques v. Garland\*](#), No. 1:21-cv-00477, 2022 WL 2467655 (W.D.N.Y. July 6, 2022)

**Holding:** Petitioner’s prolonged detention violated due process under *Cabral* framework where four factors (length of detention, which party is responsible for delays, meritorious defenses to removal, and whether the detention is near conclusion) favored Petitioner, one factor (nature of the criminal history) favored Government, and the last factor (whether the detention facility is meaningfully different from a penal institution) was neutral.

**Length of Detention:** 21 months

**Remedy:** Bond hearing with burden on Government and consideration of ability to pay and ATD

[\*Alvarado v. Garland\*](#), 608 F. Supp.3d 32 (W.D.N.Y. Jun. 17, 2022)

**Holding:** Petitioner’s prolonged detention violated due process where two factors favored Petitioner (length of detention, conditions of detention), and one factor was neutral (whether Petitioner had prolonged his own detention).

**Length of Detention:** 13 months

**Remedy:** Bond hearing with burden on Government and consideration of ability to pay and ATD



**Quotes:**

- “Lopez Alvarado's interest in his freedom pending the conclusion of his removal proceedings deserves great “weight and gravity.” He has an obvious interest in his “[f]reedom from imprisonment—from government custody, detention, or other forms of physical restraint.” ... In fact, his interest in liberty in the United States must indeed be strong for him to subject himself to unreasonably prolonged detention while contesting his deportability.” (41)

[Matos v. Barr](#), 509 F. Supp. 3d 3 (W.D.N.Y., Dec. 21, 2020)

**Holding:** Petitioner’s prolonged detention violated due process where first, third, and seventh factors (length of detention, viable defenses to removal, and likelihood of continued detention) favored Petitioner, fourth and sixth factors favored (crim v. imm detention and nature of offense) favored Government, and second and fifth factors (reasons for delay and conditions of confinement) were neutral.

**Length of Detention:** 2 years

**Remedy:** Bond hearing with burden on Government and consideration of ability to pay and ATD

**Quotes:**

- “For the reasons previously articulated in other decisions by this Court . . . this Court agrees with the overwhelming majority of courts in this Circuit that the multi-factor approach articulated by the court in *Sajous v. Decker*, No. 18-cv-2447 (AJN), 2018 WL 2357266, at \*1 (S.D.N.Y. May 23, 2018), and other courts within this Circuit, is a useful tool for addressing procedural due process claims for [non-citizens] detained pursuant to § 1226(c) in the immigrant habeas context.” (10)
- “The government submits the declaration of Kyle A. Hobart, the Assistant Officer in Charge at the BFDF . . ., in support of its contention that individuals held at BFDF do not face the same level of restrictions as someone held at a prison... However, this Court has previously found that because BFDF ‘houses [non-citizens] against their will with various restrictions on their freedom of movement ... while perhaps not akin to a maximum-security prison, for many [non-citizens] . . . the facility does not seem meaningfully different from at least a low-security penal institution for criminal detention.’” (12) (citing *Singh*)

[Balogun v. Wolf](#), No. 20-cv-6574, 2020 WL 13553495 (W.D.N.Y. Dec. 3, 2020)

**Holding:** Petitioner’s prolonged detention violated due process.

**Length of Detention:** 2 years and 3 months

**Remedy:** Bond hearing with burden on Government and consideration of ATD



## Quotes:

- “This Court, along with many others in this Circuit, generally has “evaluated procedural due process challenges to immigration detention with a two-step inquiry. ‘As the first step, the Court considers whether the [non-citizen’s] detention has been unreasonably prolonged.” *Id.* “If it has not, then there is no procedural due process violation.’ On the other hand, if the Length of Detention has been unreasonably prolonged, the Court ‘proceeds to step two and “identifies the specific dictates of due process” by considering the *Mathews v. Eldridge* factors.” (\*3)
- “In this Court’s view, the factor regarding a [non-citizen’s] defenses to removal simply goes to the question of whether or not the [non-citizen] has conceded his removability. A district court sitting in habeas review of an immigration petition lacks access to the full administrative record, leaving it ill-equipped to assess the relative merits of a non-citizen’s defenses to removal. Moreover, the INA has placed such issues squarely outside the district courts’ jurisdictional purview.” (\*4)
- “After considering the relevant factors, the Court concludes that Balogun’s detention has been unreasonably prolonged, and that additional procedures are necessary to remedy the due process violation. This is so notwithstanding the fact that Balogun had a bond hearing on January 11, 2019, while he was detained under § 1226(a). As this Court and other district courts in this Circuit have held, the process afforded under Section 1226(a) ‘is constitutionally inadequate.” (\*6)
- “To conclude that continued detention is justified, the immigration judge must also find that there is no less restrictive alternative to detention that could reasonably assure Petitioner’s appearance and the safety of the community.” (\*7)

[Ranchinskiy v. Barr](#), 422 F. Supp. 3d 789 (W.D.N.Y. Nov 11, 2019)

**Holding:** Petitioner’s prolonged detention violated due process where first, third, fifth, and seventh factors (length of detention, viable defenses to removal, conditions of confinement, and likelihood of continued detention) favored Petitioner, fourth and sixth factors favored (crim v. imm detention and nature of offense) favored Government, and second factor (reasons for delay) was neutral. Petitioner’s detention was governed by § 1226(c) because he had a pending PFR and stay motion and his removal was stayed by operation of the Second Circuit forbearance agreement. Adopted *Cabral* factors from S.D.N.Y. for analyzing as-applied due process challenges to prolonged mandatory detention post-*Jennings*.

**Length of Detention:** 2 years and 3 months (19 months since last bond hearing)

**Remedy:** Bond hearing with burden on Government and consideration of ability to pay and ATD

## Quotes:

- “[T]he final factor, whether the petitioner’s detention is near conclusion, weighs in Petitioner’s favor. The briefing regarding the petition for review in the Second Circuit has

not yet begun, and it is consequently unclear when the Second Circuit will issue its decision.” (799)

- “[T]he Court acknowledges that some of the factors favor Petitioner and some do not. However, on balance and particularly in view of the length of the detention and the circumstances surrounding that detention, the Court finds that Petitioner’s continued \*800 detention without a bond hearing is constitutionally unjustified.” (799-800)
- “Additionally, the Court finds that both due process and BIA precedent require the IJ to consider ability to pay and alternative conditions of release in setting bond.” (800)

[Kabba v. Barr](#), 403 F. Supp. 3d 180 (W.D.N.Y. Aug. 22, 2019)

**Holding:** Petitioner’s prolonged detention violated due process where the length of detention and the delays in the removal proceedings favored Petitioner. Because there was no evidence in the record about the conditions of detention, the Court declined to address that factor. While Petitioner’s appeal of his removal order was pending before the Second Circuit, the Court noted that the Circuit’s decision to grant Petitioner’s stay of removal was favorable.

**Length of Detention:** 18 months

**Remedy:** Bond hearing with burden on Government and consideration of ATD

[Rosado Valerio v. Barr](#), No. 19-cv-519, 2019 WL 3017412 (W.D.N.Y. July 10, 2019)

**Holding:** Petitioner’s prolonged detention violated due process where the length of detention and conditions of confinement favored Petitioner and the reason for the delay and likelihood of continued detention were neutral. The court assumed Petitioner’s detention was governed by § 1226(c) due to a temporary stay of removal from the Second Circuit.

**Length of Detention:** 16 months

**Remedy:** Bond hearing with burden on Government and consideration of ATD

**Quotes:**

- “Because of the cells, restraints, and discipline in the [Special Housing Unit], conditions at BFDf certainly “resemble penal confinement” for at least some persons detained there. *Muse*, 2018 WL 4466052, at \*5. And while the record contains no facts about the particular conditions of Rosado Valerio’s confinement, she certainly has experienced restraints and is likely to have been locked in a cell both because she has a criminal history and because she is a female detainee. *See* Docket Item 8-3 at 3. So the government has not shown that Rosado Valerio’s detention is “meaningfully different from [detention in] a penal institution.” *Sajous*, 2018 WL 2357266, at \*11. This factor therefore weighs in Rosado Valerio’s favor.” (\*4)

## Middle District of Georgia

[S.C. v. Warden, Stewart Detention Center](#), No. 4:23-cv-64, 2024 WL 796541 (M.D. Ga. Jan. 5, 2024) (R&R)

[R&R adopted by 2024 WL 790377 (M.D. Ga. Feb. 26, 2024)]

**Facts:** Magistrate Judge had previously recommended a bond hearing. The District Judge rejected the recommendation and remanded back to the Magistrate Judge.

**Holding:** Petitioner’s prolonged detention did not violate due process because there was no evidence of intentional Government delay. His removal proceedings were ongoing and timely.

**Length of Detention:** 23 months

**Remedy:** Magistrate Judge reversed prior recommendation to grant petition after District Judge remand. Government’s motion to dismiss granted

### Quotes:

- “The undersigned disagreed with Respondent's argument in the original recommendation and continues to do so. Adoption of Respondent's position would effectively insulate the executive branch from due process challenges to prolonged § 1226(c) detention.” (\*5)
- “Instead, it is clear the Court must review the progress of the underlying removal proceedings themselves to determine whether the detention has served to reasonably facilitate deportation as opposed to some other purpose, such as, for example, to punish a criminal [non-citizen] who has already completed his sentence or to discourage detainees from challenging their removal. If the record demonstrates lengthy periods of detention without any apparent effort by the Government—including immigration courts—to move proceedings along, a fair question could be raised as to whether the detention truly serves the permissible purpose for such detention.” (\*5)
- “In the order remanding this matter, the District Judge did not mention the original recommendation's reliance on *Sopo* as persuasive authority, so it is not clear if he rejected the undersigned's consideration of those factors. Nevertheless, it is clear from the District Judge's order that the undersigned's analysis of the second *Sopo* factor—why removal proceedings have become prolonged—must be modified to adequately account for the underlying purpose of detention, which is to reasonably facilitate deportation.” (\*6)

[O.D. v. Warden, Stewart Detention Center](#), No. 4:20-cv-222, 2021 WL 5413968 (M.D. Ga. Jan. 14, 2021) (R&R)

[R&R adopted by 2021 WL 5413966 (M.D. Ga. Apr. 1, 2021)]

**Holding:** Petitioner detained under § 1226(c) that had a bond hearing at which IJ found him a danger to the community was not entitled to a second bond hearing with burden on Government.

**Length of Detention:** 19 months

**Remedy:** Motion to dismiss granted

**Quotes:**

- “It is true that in conducting its *de novo* review of Petitioner’s custody redetermination, the BIA “presume[d] for purposes of this appeal” that Petitioner was not subject to mandatory detention. Valdes Decl. Ex. P, at 3 n.1. The BIA, though, did not overrule the IJ’s finding that Petitioner was mandatorily detained. Instead, it decided that it need not address the issue because it agreed with the IJ’s alternative finding that Petitioner posed a danger to the community. *Id.* at 3. The BIA’s assumption for the sake of argument that Petitioner was a § 1226(a) detainee does not alter the undisputable fact that Petitioner is detained under § 1226(c) because he is charged as removable for having two convictions for CIMTs. 8 U.S.C. § 1226(c)(1)(B); 8 U.S.C. § 1227(a)(2)(A)(ii). Thus, the fact that he did not receive the benefit of the burden of proof applicable to § 1226(a) detainees pursuant to *J.G.* is not grounds for habeas relief.” (\*5)

*J.N.C.G. v. Warden, Stewart Detention Center*, No. 4:20-cv-62, 2020 WL 5046870 (M.D. Ga. Aug. 26, 2020) (R&R)

[EAJA fees denied in 2021 WL 1841743 (M.D. Ga. May 7, 2021)]

**Holding:** Petitioner’s prolonged detention violated due process where four of five *Sopo* factors favored Petitioner.

**Length of Detention:** 16 months

**Remedy:** Bond hearing with burden on Petitioner

**Quotes:**

- The Court noted that while criminal non-citizens should not be “punished for pursuing avenues of relief and appeals,” district courts should consider whether the [non-citizen] has “sought repeated or unnecessary continuances” or acted in bad faith to delay proceedings. *Id.* The Court also identified three other factors: whether removal of the criminal non-citizen would be possible once a removal order became final, whether the civil detention period exceeded the time the non-citizen spent in prison for the crime rendering him removable, and whether the facility where he was detained was “meaningfully different from a penal institution for criminal detention.” *Sopo*, 825 F.3d at 1218. Finally, the Court stated its list was “not exhaustive” and that the factors to be considered would vary depending on the facts of each case.” (\*2)
- “*Sopo* squarely addressed the burden of proof for bond hearings granted to a § 1226(c) detainee and placed it on the criminal [non-citizen]. The Eleventh Circuit noted that to do otherwise would be to “give criminal [non-citizens] a benefit that non-criminal [non-citizens] do not have.” (\*7)

[\*Hanna v. Lynch\*](#), No. 4:16-cv-375, 2018 WL 547232 (M.D. Ga. Jan. 24, 2018) (R&R)

[R&R dismissed as moot in 2018 WL 4850106 (M.D. Ga. Feb. 23, 2018)]

**Holding:** Petitioner’s prolonged detention was unreasonable where four factors favored Petitioner and one factor (crim v. imm detention) favored Government.

**Length of Detention:** 29 months

**Remedy:** Bond hearing with burden on Petitioner, but Petitioner was released before bond hearing

### **Southern District of Georgia**

[\*Rincon v. DHS\*](#), No. 5:24-cv-12, 2024 WL 4860822 (S.D. Ga. Oct. 30, 2024) (R&R)

[R&R adopted by 2024 WL 4858595 (S.D. Ga. Nov. 21, 2024)]

**Holding:** Petitioner’s prolonged detention did not violate due process under *Sopo* factors where he was detained for more than three years but repeatedly delayed his proceedings by refusing to cooperate, causing BIA to administratively close proceedings.

**Length of Detention:** More than 3 years

**Remedy:** Motion to dismiss granted

[\*Lindsay v. Garland\*](#), No. 5:23-cv-74, 2024 WL 2967271 (S.D. Ga. Apr. 30, 2024) (R&R)

[R&R adopted by 2024 WL 2959309 (S.D. Ga. June 11, 2024)]

**Holding:** Petitioner’s prolonged detention did not violate due process under *Sopo* factors where he had three previous bond hearings and had not yet appealed the removal order.

**Length of Detention:** 9 months since the last bond hearing

**Remedy:** Motion to dismiss granted

[\*Dorley v. Normand\*](#), No. 5:22-cv-62, 2023 WL 3620760 (S.D. Ga. Apr. 3, 2023) (R&R)

[R&R adopted by 2023 WL 3174227 (S.D. Ga. May 1, 2023)]

**Holding:** Petitioner’s prolonged detention violated due process where four *Sopo* factors (length of detention, likelihood of continued detention, comparison to criminal detention, and conditions of confinement) favored Petitioner and the reason for the delay was neutral.

**Length of Detention:** 20 months

**Remedy:** Bond hearing with burden up to IJ

**Quotes:**

- “On this record, I find Dorley has shown his detention at the Folkston ICE Facility is not meaningfully different from a penal institution or criminal detention. The evidence of record supports Dorley's position. Respondents offer no evidence showing the conditions at this ICE Facility are less harsh or even meaningfully different than those at a prison. Based on this record, I find this factor favors Dorley. I decline Dorley's counsel's invitation to take judicial notice of this evidence for this or any future § 2241 petition, however, as the Sopo I factors are to be weighed and determined on a case-by-case basis.” (\*6)
- “Because Dorley raises a due process violation in the context of detention under 8 U.S.C. § 1226(c), the entirety of his detention without an individualized bond hearing, i.e., through the date of this Court's decision, appears to be the proper measure of time. Even if the date the Petition was filed is the relevant date, the distinction is immaterial to this factor in Dorley's case. Dorley was detained without a bond hearing for 15 months, when calculated from the beginning of his detention through date of filing Petition, or 20 months, when calculated from the beginning of detention through the date of the Report and Recommendation. Either way, the period exceeds the 12-month presumptively reasonable period found in Sopo” (\*1, DJ)

[\*Clue v. Greenwalt\*](#), No. 5:21-cv-80, 2022 WL 17490505 (S.D. Ga. Oct. 24, 2022) (R&R)

[R&R adopted by 2022 WL 17489190 (S.D. Ga. Dec. 7, 2022)]

**Holding:** Petitioner’s prolonged detention violated due process where three *Sopo* factors (length of detention, likelihood of continued detention, and conditions of confinement) favored Petitioner and the other two were neutral.

**Length of Detention:** 24 months

**Remedy:** Bond hearing with burden up to IJ

**Quotes:**

- “*Sopo* analysis is “highly instructive as to determining if prolonged detention under § 1226(c) does, in fact, violate a petitioner’s right to procedural due process.” (\*4)
- “At the time of filing his Petition, Clue contended the length of his detention—13 months, or since November 9, 2020—was presumptively unreasonable. Doc. 1 at 2, 13. Respondents concede Clue had been detained, at the time of their Response, for more than a year and this factor is ‘indisputably in his favor.’” (\*4)
- “While Clue’s evidentiary support is sparse, consisting primarily of his own declaration, the evidence supports Clue’s position. Clue has shown the Folkston ICE Facility was previously a BOP facility used to house federal inmates. Clue has also shown his movement is restricted in ways similar to those in criminal detention, his living conditions are similar, and even his permitted clothing is similar.” (\*5)

[Msezane v. Gartland](#), No. 5:19-cv-51, 2020 WL 1042293 (S.D. Ga. Jan. 29, 2020) (R&R)

[R&R adopted by 2020 WL 1046796 (S.D. Ga. Mar. 3, 2020)]

**Holding:** Government ordered to file an answer to further develop the record on habeas petition

**Length of Detention:** More than 20 months

**Remedy:** Denied Government’s motion to dismiss as to prolonged detention claim.

**Quotes:**

- “§ 1226(c) detention without a bond hearing for more than six months may be unreasonable and likely becomes more so with each passing month.” (\*7)

#### **Southern District of Florida**

[Stephens v. Ripa](#), No. 1:22-cv-20110, 2022 WL 621596 (S.D. Fla. Mar. 3, 2022)

[Adopted R&R from 2022 WL 11110104 (S.D. Fla. Feb. 18, 2022)]

**Holding:** Petitioner’s prolonged violated due process where all five *Sopo* factors favored Petitioner, even though Petitioner had a bond hearing roughly one year prior.

**Length of Detention:** 2 years and 8 months (13 months since last bond hearing)

**Remedy:** Bond hearing with burden on Petitioner

**Quotes:**

- “Accordingly, when a mandatory detention under § 1226(c) becomes unconstitutional remains an unanswered question in this Circuit post-Jennings. It is clear, however, that § 1226(c) “does not foreclose as-applied challenges—that is, constitutional challenges to the applications of the statute[.]” (\*2)
- “Petitioner argues that the bond hearing conducted by the IJ is a legal nullity because it was held pursuant to § 1231(a), but he is being detained under § 1226(c). (ECF No. 17 at 10–12). The R&R did not find the validity of the bond hearing to be a dispositive issue, concluding that “if the January 2021 hearing was a nullity, then Petitioner’s pre-removal detention has spanned over two years without any meaningful due process protection,” and “[i]f the January 2021 hearing was not a nullity, Petitioner has still been in custody over one year without a bond hearing, a period that this Court and courts across the county have found to be unreasonably prolonged.” (ECF No. 19 at 15 n.3). There is some support for the proposition that a second bond hearing is required where detention has been unreasonably prolonged since the first bond hearing.” (\*3)



- “Finally, it does not appear that Petitioner would be immediately removable if a final order of removal is entered. Petitioner has sought deferral of removal under the Convention Against Torture based on his sexual orientation. ECF No. [3-9] at 2:20–4:16. As such, Petitioner could remain detained upon the issuance of an order of removal while the Government seeks deportation to a third country where same-sex relationships are not criminalized.” (R&R \*7)

[Rogers v. Ripa](#), No. 1:22-cv-24433, 2022 WL 574389 (S.D. Fla. Feb. 25, 2022)

[Adopted R&R from 2022 WL 708493 (S.D. Fla. Jan. 22, 2022)]

**Holding:** Petitioner’s prolonged detention violated due process where four of five *Sopo* factors favored Petitioner.

**Length of Detention:** 15 months

**Remedy:** Bond hearing with burden on Petitioner

**Quotes:**

- “Holding that the bond hearing should not be in front of an Immigration Judge would be clearly erroneous and would result in manifest injustice, contradicting the Code of Federal Regulations.” (\*3)
- “Respondents argue that Petitioner misapplies caselaw confusing the burden of proof for detainees pursuant to § 1226(a), while Petitioner is being held pursuant to § 1226(c). DE 28 at 6. Respondents state that if this Court is to grant Petitioner a bond hearing, *Sopo* is again instructive. *Id.* The Court agrees, *Sopo* acknowledges that courts are split on the question of which party should bear the burden.” (\*3)

[Warsame v. Meade](#), No. 20-cv-22401, 2020 WL 13551825 (S.D. Fla. Aug. 18, 2020)

**Holding:** Petitioner entitled to a bond hearing where Government conceded it was necessary

**Length of Detention:** 12 months

**Remedy:** Bond hearing with burden on Petitioner

**Quotes:**

- “The Court declines to undertake a fact-intensive inquiry and weigh the merits of the *Sopo* factors for two reasons. First, Petitioner has been detained for nearly 12 months and will remain detained (at the very least) until the Board of Immigration Appeals decides his appeal. *See Santos Abreu v. Barr*, No. 20-cv-372, 2020 WL 4504986, at \*3 n.2 (W.D.N.Y. Aug. 5, 2020) (collecting cases that found detention near the one-year mark as unreasonably prolonged); *Deng Chol A. v. Barr*, No. cv 19-3143, 2020 WL 1969393, at \*4 (D. Minn. Apr. 22, 2020) (collecting cases granting habeas relief where detention was near the 11-month mark). Second, and most importantly, the Government recommends as an

alternative solution that this “matter [ ] be remanded to the agency for the bond hearing.” (\*4)

[Hamilton v. Acosta](#), No. 20-cv-21318, 2020 WL 3036782 (S.D. Fla. May 8, 2020) (R&R)

[R&R adopted by 2020 WL 3035350 (S.D. Fla. June 4, 2020)]

**Holding:** Petitioner’s prolonged detention did not violate due process because he had not completed his criminal probation sentence for his violent offense before entering ICE detention.

**Length of Detention:** 19 months

**Remedy:** Petition denied without prejudice

**Quotes:**

- “In sum, contrary to the Government’s argument, one-year without a bond hearing under a § 1226(c) detention is not an acceptable starting point because it would more than double the five-month period the Supreme Court relied upon in *Demore*. Petitioner has been in ICE custody since October 4, 2018. . . . Because the Supreme Court thought an average of five months was a reasonable period to spend in ICE detention without a bond hearing, the fact that Petitioner’s detention exceeds that average weighs in his favor.” (\*5)
- “The record also shows Petitioner was placed in ICE custody at his scheduled monthly probation appointment on October 4, 2018. [ECF No. 9-2 at 3]. Because Petitioner has not completed his criminal sentence, this factor should weigh against finding detention without a bond hearing unconstitutional in this case.” (\*5)
- “It is conceivable that a protracted detention, however, could amount to a due process violation should there be ‘unreasonable delay’ in his removal proceedings. Thus, Petitioner could re-file an as-applied due process challenge in the future.” (\*6)

[Mehmood v. Sessions](#), No. 18-cv-21095, 2018 WL 10760347 (S. D. Fla. Nov. 28, 2018) (R&R)

[R&R adopted by 2019 WL 8892625 (S.D. Fla. Jan. 29, 2019). Eleventh Cir. dismissed the appeal as moot and vacated the district court order after Petitioner was removed in 808 Fed. Appx. 911 (11th Cir. 2020)]

**Holding:** Petitioner’s prolonged detention did not violate due process because Petitioner caused delays and posed a significant flight risk.

**Length of Detention:** 21 months

**Remedy:** Petition denied without prejudice

**Quotes:**

- Endorsed “a standard [that] resembles the fact-based analysis other district courts are employing in this post-Jennings landscape.” (\*21)

- “[A]t least without considering additional information, Petitioner’s detention without so much as a bond hearing for twenty-one months while awaiting a final order of removal appears unreasonable.” (\*22)
- “At this point in time, it cannot be said that Petitioner’s due process right to a bond hearing has been violated. While twenty-one months without a bond hearing before a final order of removal has issued is surprising, this case and this Petitioner is different. Petitioner’s criminal background shows that the risk of flight is so great that his detention is used to facilitate removal proceedings, not to incarcerate ‘for other reasons.’ It also serves to protect individuals from suffering economic harm that he will likely cause again in any effort to avoid removal back to Pakistan.” (\*24)

## Middle District of Florida

[\*Lukaj v. McAleenan\*](#), 420 F. Supp. 3d 1265 (M.D. Fla., Oct. 8, 2019)

[Vacated on reconsideration because detention shifted to § 1231 in 2020 WL 248724 (M.D. Fla. Jan. 16, 2020)]

**Holding:** Petitioner’s prolonged detention violated due process where four of five *Sopo* factors favored Petitioner.

**Length of Detention:** 14 months

**Remedy:** Bond hearing with burden on Petitioner

### Quotes:

- “Lukaj’s medical concerns and the purported lack of treatment, which Respondents have not disputed, is a factor which supports a finding that his continued indefinite detention without a bond hearing would be unreasonable.” (1276)

[\*Gjergji v. Johnson\*](#), No. 3:15-cv-1217, 2016 WL 3552718 (M.D. Fl. Jun. 30, 2016)

[Adopted R&R from 2016 WL 3645116 (M.D. Fl. May 19, 2016)]

**Holding:** Petitioner’s prolonged detention was unreasonable where all but one factor favored Petitioner. Found that the court lacked jurisdiction to grant release on bail.

**Length of Detention:** 18 months

**Remedy:** Bond hearing with burden on Petitioner

### Quotes:

- “Gjergji’s civil immigration detention does not appear to be meaningfully different from criminal detention in a penal institution. As Magistrate Judge Richardson pointed out in his

Report, Gjergji currently is being held in the Baker County Jail ‘at the same location, albeit in a different space, as those who have been arrested for committing crimes.’” (\*9)

[Khan v. Whiddon](#), No. 2:13-cv-638, 2016 WL 4666513 (M.D. Fla. Sep. 7, 2016)

**Holding:** Petitioner’s prolonged detention was unreasonable where three *Sopo* factors favored Petitioner, one factor (likelihood of removal) favored Government, and one factor (reason for delay) was neutral.

**Length of Detention:** 4.5 years. 3.5 years since last bond hearing

**Remedy:** Bond hearing with burden on Petitioner

**Quotes:**

- “Although petitioner has filed appeals and sought various forms of relief, such filings are to be expected as a natural part of the process.” (\*5)
- “Petitioner is currently confined at the Glades County Detention Center in Moore Haven, Florida. (Doc. #1, ¶ 2.) This facility is under the direct authority of the Glades County Sheriff and is used to detain individuals who have been arrested for committing crimes. Petitioner’s civil immigration detention does not appear to be meaningfully different from criminal detention in a penal institution.” (\*6)

## Northern District of Alabama

[Moore v. Nielsen](#), No. 4:18-cv-1722, 2019 WL 2152582 (N.D. Ala. May 3, 2019)

**Holding:** Petitioner’s prolonged detention violated due process where two factors (length of detention and conditions of confinement) favored Petitioner and others were neutral. Applied *Mathews* balancing test.

**Length of Detention:** 34 months

**Remedy:** Bond hearing with burden on Petitioner

**Quotes:**

- “The afore-cited litany of cases finding due process protection against prolonged detention applied a largely identical, multi-factor inquiry to determine whether the respondents thereto violated the liberty interest. Based upon the Eleventh Circuit’s use of the same factors in an analogous case, those factors should apply to the determination at bar.” (\*9)
- “ICE detains Moore at the Etowah County Detention Center, which is essentially the jail facility for the Etowah County Sheriff’s Office as well as for Gadsden, Alabama municipal detainees. Therefore, ICE detains Moore at a facility that is not meaningfully different from a penal institution.” (\*12)

- “Finally, there exists a risk of an erroneous deprivation of Moore’s liberty interests through the procedures used. The Government has not indicated whether Moore presents a danger to the community or a flight risk, so presumably Moore’s prolonged detention results from his removal proceedings . . . And paramount, the Government has not afforded Moore any procedure before a neutral adjudicator to determine whether he poses a flight risk and a danger to the community.” (\*13)

## Western District of Louisiana

[Misquitta v. Warden Pine Prairie ICE Processing Center](#), 353 F.Supp.3d 518 (W.D. La., Nov. 16, 2018)

**Holding:** Acknowledged that courts can continue to hear as-applied due process challenges to prolonged mandatory detention after *Jennings*. The court concluded that Petitioner was not likely to succeed in a claim that prolonged detention violated due process where removal proceedings continued at a normal pace and there was no evidence of bad faith.

**Length of Detention:** 10 months

**Remedy:** Denied motion for temporary restraining order compelling a bond hearing

### Quotes:

- “Nevertheless, *Demore* and *Jennings* do not foreclose an ‘as applied’ Due Process Clause limitation on prolonged detentions under section 1226(c) based upon the individual circumstances of a petitioner’s case. The touchstone for this analysis is whether mandatory detention without a bond hearing under the circumstances of the case is so ‘unreasonable or unjustified’ that it amounts to an arbitrary deprivation of liberty.” (526)
- “[It] is unlikely that a petitioner can satisfy this standard absent evidence of government wrongdoing in connection with the removal proceedings, such as actions that unreasonably prolong the removal proceeding or actions taken in bad faith. Where removal proceedings are delayed solely by a party’s good faith exercise of its procedural remedies – whether by the petitioner or the government – continued detention is unlikely to trigger due process concerns in most cases because continued detention until completion of the removal proceedings still serves the purpose of the statute.” (527)
- “Misquitta’s detention under section 1226(c) is not indefinite but has a definite termination point: the exhaustion of Misquitta’s appeals and procedural remedies.” (527)

**District of Minnesota**

[Gach v. Charles](#), No. 24-cv-583, 2024 WL 4774175 (D. Minn. Oct. 23, 2024) (R&R)

[R&R adopted by 2024 WL 4772413 (D. Minn. Nov. 13, 2024)]

**Holding:** After *Banyee*, Petitioner’s prolonged detention did not violate due process.

**Length of Detention:** ~1 year

**Remedy:** Petition denied without prejudice

**Quotes:**

- “Ms. Gach makes many compelling arguments regarding the fairness and correctness of the proceedings in the immigration court regarding her removal, and the Court recognizes those arguments as potentially valid. But the Court cannot address those arguments in a petition for habeas corpus relief. The only question before the Court is whether Ms. Gach’s detention violates “the Constitution or laws or treaties of the United States.” 28 U.S.C. § 2241(c)(3). Under the Eighth Circuit’s decision in *Banyee* and 8 U.S.C. § 1226(c)(1)(B), Ms. Gach’s detention is both constitutionally permitted and statutorily mandated.” (\*2)
- “Under *Banyee*, the Court is not permitted, in ruling on a petition for a writ of Habeas Corpus, to evaluate the proceedings in the immigration court. It is permitted to ask only one question: Are deportation proceedings ongoing? If so, the petitioner’s detention is per se constitutional, and the petition must be denied.” (\*3)

[Pedro O. v. Garland](#), 543 F. Supp.3d 733 (D. Minn. June 14, 2021)

[Adopted R&R not available on Westlaw. Abrogated by *supra Banyee v. Garland*, 115 F.4th 928 (8th Cir. 2024)]

**Holding:** Petitioner’s prolonged detention violated due process under *Muse* factors where Government was appealing the CAT grant.

**Length of Detention:** 13 months

**Remedy:** Bond hearing with burden on Government

**Quotes:**

- “In its objections, the Government does not meaningfully challenge the way the R&R applies these factors. Instead, it asserts that the factors should not come into play at all. . . . These arguments have repeatedly been considered and rejected in similar cases. Whether a detention serves the purpose of § 1226(c) ‘is the ultimate question to be answered at a bond hearing, if one is ordered,’ so it cannot control whether due process requires a bond hearing in the first place.” (738-39)

- “In this particular situation, however, punting the question [of burden of proof] would not serve these interests. First, requiring Pedro to raise his burden-of-proof argument to the immigration judge in the first instance would be “an exercise in futility.” (740)

[Nyyinkpao B. v. Garland](#), No. 21-cv-1817, 2021 WL 8315005 (D. Minn. Dec. 2, 2021) (R&R)

[R&R adopted by 2022 WL 1115452 (D. Minn. Apr. 14, 2022). Reversed in *supra* *Banyee v. Garland*, 115 F.4th 928 (8th Cir. 2024)]

**Holding:** Petitioner’s prolonged detention violated due process where Government was appealing cancellation of removal grant.

**Length of Detention:** 1 year (9 months after initial grant of relief)

**Remedy:** Bond hearing with burden on Government

**Quotes:**

- “Courts in this District ‘resolve due process challenges to Section 1226(c) detention by closely examining the facts of the particular case to determine whether the detention is reasonable using the *Muse* multi-factor test.’” (\*2)

[Deng Chol A. v. Barr](#), 455 F. Supp. 3d 896 (D. Minn. Apr. 22, 2020)

[Abrogated by *supra* *Banyee v. Garland*, 115 F.4th 928 (8th Cir. 2024)]

**Holding:** Petitioner’s prolonged detention violated due process where four factors favored Petitioner (length of detention, likelihood of continued detention, likelihood of removal, conditions of confinement) and where the conviction constituting the sole ground of removability had been vacated.

**Length of Detention:** 11 months

**Remedy:** Bond hearing with burden up to IJ

**Quotes:**

- “Here, however, the court cannot ignore that petitioner is currently detained despite the fact that the conviction underlying the sole charge of removal sustained by the IJ has now been vacated . . . Because the conviction underlying petitioner’s sole charge of removability has been vacated, this factor weighs in favor of relief.” (903)
- “[I]nstead of defaulting to placing the burden of proof on petitioner, and in light of the fact that the statute and BIA precedent relating to bond procedure in other immigration detention settings does not apply to § 1226(c) detainees, the immigration judge should consider what the proper standard of proof is and which party properly carries the burden of proof at the bond hearing.” (905)



[Muse v. Sessions](#), 409 F. Supp.3d 707 (D. Minn. Sep. 18, 2018)

[Established post-*Jennings* test for as-applied due process challenges to prolonged mandatory detention in D. Minn. Abrogated by *supra* *Banyee v. Garland*, 115 F.4th 928 (8th Cir. 2024)]

**Holding:** After *Jennings*, non-citizens can bring as-applied due process challenges to prolonged mandatory detention under a multi-factor reasonableness test that analyzes: 1) length of detention, 2) whether the detention is likely to continue, 3) whether conditions of confinement are meaningfully different from criminal punishment, 4) delays caused by either party, and 5) likelihood of final removal order. Here, Petitioner’s prolonged detention violated due process where three factors favored Petitioner (length of detention, likelihood of continued detention, conditions of confinement), and others were neutral because there were no bad faith delays and the court cannot predict the likelihood of a removal order.

**Length of Detention:** 14 months

**Remedy:** Bond hearing with burden up to IJ

**Quotes:**

- “True, a few courts have upheld § 1226(c) detentions that lasted more than a year. But Muse’s circumstances are materially different from those cases.” (716)
- “The IJ denied Muse’s remaining claims for relief on August 10, 2018. ECF No. 20-1 at 2. Muse has just appealed that decision to the BIA. ECF No. 21. The DHS’s appeal of the IJ’s initial determination was not resolved by the BIA until almost five months after the IJ issued her decision. . . . If Muse loses his administrative appeal, he will undoubtedly seek review in the Eighth Circuit, and it may be another year before he gets a decision.” (717)

## **District of Colorado**

[Martinez v. Ceja](#), No. 24-cv-3056, 2024 WL 5168143 (D. Col. Dec. 19, 2024)

**Holding:** Petitioner’s prolonged detention violated due process under *Singh* factors where the first three factors favored Petitioner and the other three were neutral. Rejected substantive due process argument for immediate release.

**Length of Detention:** 21 months

**Remedy:** Bond hearing with burden on Petitioner

[Viruel Arias v. Choate](#), No. 1:22-cv-2238, 2022 WL 4467245 (D. Col. Sep. 26, 2022)

[EAJA fees later granted in 2023 WL 4488890 (D. Col. July 12, 2023)]

**Holding:** Petitioner’s prolonged detention violated due process under *Singh* factors notwithstanding the recent bond hearing. Denied claim for release under the Rehabilitation Act.

**Length of Detention:** 14 months

**Remedy:** Bond hearing with burden on Government

**Quotes:**

- “[C]ontrary to Respondents’ argument, the fact that Ms. Viruel Arias appeared before the IJ for custody redetermination does not mean ‘no additional process is necessary’. What evidence exists in the record indicates the hearing was brief—the qualified representative declared the hearing ‘took a few minutes’. And there is nothing to show the IJ considered, for instance, Ms. Viruel Arias’ severe health problems. ‘Put another way, the value added by another hearing is great.’” (\*3)
- “Because Ms. Viruel Arias’ medical conditions and treatment did not impact the *duration* of her detention, *see Buhl v. Berkebile*, 612 F. App’x 539, 540-41 (10th Cir. 2015), the Court cannot consider the Rehabilitation Act claim in her Petition. She is free, however, to file a separate civil action asserting her Rehabilitation Act claim and any other discrimination claims against Respondents.” (\*4)

[\*Singh v. Choate\*](#), No. 19-cv-909, 2019 WL 3943960 (D. Col. Aug. 21, 2019)

[Established post-*Jennings* test for as-applied due process challenges to prolonged mandatory detention in D. Col.]

**Holding:** After *Jennings*, non-citizens can bring as-applied due process challenges to prolonged mandatory detention under a multi-factor reasonableness test that analyzes: 1) length of detention, 2) whether the detention is likely to continue, 3) whether conditions of confinement are meaningfully different from criminal punishment, 4) delays caused by either party, and 5) likelihood of final removal order. Here, Petitioner’s prolonged detention violated due process where three factors favored Petitioner (Length of detention, likelihood of continued detention, conditions of confinement), and others were neutral or favored Government because no bad faith delays by either side and cannot predict the likelihood of removal order.

**Length of Detention:** 20 months

**Remedy:** Bond hearing with burden on Government

**Quotes:**

- “In fact, a portion of the delay in this case can be attributed to the BIA granting Petitioner’s motion to remand, which supports his argument that his challenges are being made in good faith. And Petitioner’s requests for continuances have added, at most, three months to the removal proceedings. The government does not argue that the other seventeen months of delay are attributable to Petitioner. Therefore, this factor tips in Petitioner’s favor.” (\*6)
- “To begin, whether Petitioner is detained in a luxurious hotel, a detention facility, or some other building, he is being deprived of his liberty—thus, this factor seems somewhat beside the point. Nonetheless, Petitioner contends the facility is under lock down conditions 24

hours a day and houses other, presumably criminal, detainees of the U.S. Marshals. Thus, this factor weighs in Petitioner’s favor.” (\*6)

#### **District of Massachusetts**

[\*Alphonse v. Moniz\*](#), 635 F.Supp.3d 28 (D. Mass. Oct. 17, 2022)

**Holding:** After *Jennings*, the factors established in *Reid v. Donelan*, 819 F.3d 486 (1st Cir. 2016) are not binding, but remain as guideposts for analysis that will allow courts to consider common issues in § 1226(c) detention litigation. Petitioner’s prolonged detention violated due process where four *Reid* factors (length of detention, foreseeability of proceedings concluding, promptness of immigration authorities, likelihood of removal order) favored Petitioner and only one factor (crim v. imm) favored Government.

**Length of Detention:** 22 months

**Remedy:** Bond hearing with burden on Petitioner

#### **Quotes:**

- The multifactor reasonableness test analyzes: “(1) the total length of the detention; (2) the foreseeability of proceedings concluding in the near future (or the likely duration of future detention); (3) the period of the detention compared to the criminal sentence; (4) the promptness (or delay) of the immigration authorities or the detainee; and (5) the likelihood that the proceedings will culminate in a final removal order.” (500)

#### **Eastern District of California**

[\*Lopez v. Garland\*](#), 631 F.Supp.3d 870 (E.D. Cal. Sep. 29, 2022)

[Established post-*Jennings* test for as-applied due process challenges to prolonged mandatory detention in E.D. Cal.]

**Holding:** Petitioner’s prolonged detention violated due process where two factors (length of detention, likely duration of future detention) favored Petitioner and one factor (delays in the removal proceedings) was neutral.

**Length of Detention:** ~1 year

**Remedy:** Bond hearing with burden on Government

#### **Quotes:**

- “[T]he Court finds that the conditions of detention, the likelihood that the removal proceedings will result in a final order of removal, whether the detention will exceed the time the petitioner spent in prison for the crime that made him removable, and the nature of the crimes the petitioner committed are not particularly suited to assisting the Court in

determining whether detention has become unreasonable and due process requires a bond hearing.” (879)

- “To determine whether § 1226(c) detention has become unreasonable, the Court will look to the total length of detention to date, the likely duration of future detention, and the delays in the removal proceedings caused by the petitioner and the government.” (879)

## Northern District of California

*Doe v. Becerra*, No. 23-cv-04767, 2024 WL 2340779 (N.D. Cal. May 2, 2024)

**Holding:** Petitioner’s prolonged detention violated substantive due process where four factors (length of detention, evidence of danger or flight risk, alternatives to detention, conditions of detention) favored Petitioner and one factor (government’s contribution to any delay) was neutral. Although Petitioner had previously received a bond hearing and was denied, his continued detention had become unconstitutionally punitive.

**Length of Detention:** More than 30 months

**Remedy:** Immediate release from detention with OSUP

### Quotes:

- “Accordingly, even though mandatory civil detention under Section 1226(c) is permissible at the outset of removal proceedings, that detention violates due process if it becomes punitive and the detainee has not been accorded the full constitutional protections required before such punishment may be imposed.” (\*4)
- “Another reason the government argues that detention during removal proceedings is always permissible is that detainees in this situation—unlike, for example, pretrial criminal defendants—always have the option of leaving detention by agreeing to removal. This is true in the abstract, and in cases where a detainee is pursuing a challenge to removability unrelated to the conditions in the country to which they would be removed, their ability to leave the United States pending their removal proceedings might weigh against finding prolonged detention excessive. But the analysis is different in cases like Mr. Doe’s, where the essence of at least one of Mr. Doe’s pending challenges is that he claims he will be tortured or killed if he leaves detention and is deported to Mexico. The merits of Mr. Doe’s claims have not been finally adjudicated. But if Mr. Doe is correct, any “choice” between remaining in detention (with the hope of ultimately staying in the United States) and returning to Mexico may be illusory.” (\*7)
- “Decades-old criminal conduct is relevant but not dispositive in evaluating present danger, and there are serious due process concerns with simply presuming someone remains



dangerous based on past conduct without individualized consideration and any recent evidence.” (\*11)

### **Eastern District of Kentucky**

[M.T.B. v. Byers](#), 2024 WL 3881843 (E.D. Ky. Aug. 20, 2024)

**Holding:** Applying the reasoning from *Black v. Decker*, Petitioner’s prolonged detention violated due process where all three *Mathews* factors (liberty interest, procedural safeguards, and government’s interest) weighed in Petitioner’s favor.

**Length of Detention:** 19 months

**Remedy:** Bond hearing with burden on Government

## **PRE-REMOVAL ORDER DISCRETIONARY DETENTION § 1226(a)**

### **Circuit Courts of Appeal**

#### **First Circuit**

[\*Brito v. Garland\*](#), 22 F.4th 240 (1st Cir. 2021)

[Affirmed in part and vacated in part the decision from 415 F.Supp.3d 258 (D. Mass. Nov. 27, 2019). Decision on remand not available on Westlaw]

**Facts:** Three Petitioners were detained and independently were granted bond hearings with the burden on them. In all three cases, the IJ denied bond. The Petitioners filed a class action complaint for declaratory and injunctive relief in D. Mass.

**Holding:** Due process required Government to have the burden of demonstrating that each non-citizen is a danger or flight risk. District court had jurisdiction to grant classwide declaratory relief, but did not have jurisdiction to issue a classwide injunction.

#### **Quotes:**

- “For the foregoing reasons, we affirm the district court's declaratory judgment to the extent it declared that if the government refuses to offer release subject to bond to a noncitizen detained pursuant to 8 U.S.C. § 1226(a), it must either prove by clear and convincing evidence that the noncitizen is dangerous or prove by a preponderance of the evidence that the noncitizen poses a flight risk.” (\*256-257)

[\*Hernandez-Lara v. Lyons\*](#), 10 F. 4th 19 (1st Cir. 2021)

[Extended to apply to all § 1226(a) bond hearings, regardless of the length of detention, in *supra Brito v. Garland*, 22 F. 4th 240 (1st Cir. 2021)]

**Holding:** Petitioner’s prolonged discretionary detention violated due process where Petitioner had a strong liberty interest, there was a high risk of erroneous deprivation under the existing procedures, and Government’s interest in continued detention was uncertain, if not negative. Due process requires that Government 1) prove by clear and convincing evidence that Petitioner poses a danger to the community or (2) prove by a preponderance of the evidence that Petitioner poses a flight risk.

**Length of Detention:** 10 months

**Remedy:** Second bond hearing with a bifurcated burden of proof on Government

## Quotes:

- “During that time, she was separated from her fiancé and unable to maintain her employment. But for the relief ordered in this action, she would still be incarcerated more than two years after the jailor first locked the door behind her. There is no question that Hernandez suffered a substantial deprivation of liberty.” (28)
- “We recognize that removal proceedings have an end point and that the liberty interest of a non-citizen detained under section 1226(a) may therefore be slightly less weighty than that of individuals facing indefinite and prolonged detention. But only slightly less: The exact Length of Detention under section 1226(a) is impossible to predict and can be quite lengthy, as Hernandez’s case illustrates well.” (29)
- “[P]roving a negative (especially a lack of danger) can often be more difficult than proving a cause for concern.” (31)
- “This very case evidences how the allocation of the burden of proof can affect the likelihood of such error...Yet as the IJ’s rulings make clear, the placement of the burden of proof on Hernandez decisively exploited her inability to rebut the Red Notice, even though it did not specify a single act of criminal or dangerous conduct.” (31)

## Second Circuit

[Velasco Lopez v. Decker](#), 978 F.3d 842 (2d Cir. 2020)

**Holding:** Petitioner’s prolonged discretionary detention violated due process under *Mathews* factors because Petitioner’s liberty interest outweighed Government’s minimal interest in continued detention.

**Length of Detention:** 15 months

**Remedy:** Second bond hearing with burden on Government

## Quotes:

- “The longer the duration of incarceration, the greater the deprivation.” (852)
- “We believe that individuals subject to prolonged detention under § 1226(a) must be afforded process in addition to that provided by the ordinary bail hearing, just as the Supreme Court in *Demore* has suggested criminals subjected to prolonged detention under § 1226(c) may be entitled to further process.” (854)
- “[S]hifting the burden of proof to the Government to justify continued detention promotes the Government’s interest—one we believe to be paramount—in minimizing the enormous impact of incarceration in cases where it serves no purpose. The Government has not convinced us that requiring it to justify [petitioner’s] detention by clear and convincing evidence substantially undermines its legitimate interests . . .” (854)



- “While the Government’s interest may have initially outweighed short-term deprivation of Velasco Lopez’s liberty interests, that balance shifted once his imprisonment became unduly prolonged.” (855)

## Third Circuit

[Borbot v. Hudson County Correctional Facility](#), 906 F.3d 274 (3rd Cir. 2018)

**Holding:** Petitioner’s prolonged detention under § 1226(a) is distinguishable from § 1226(c) detention because he has already been provided with a bond hearing and the length of his detention alone does not entitle him to another one.

**Length of Detention:** More than 15 months

**Remedy:** Affirmed District Court’s decision denying the petition

### Quotes:

- “Borbot draws an analogy between his detention and mandatory detention under 8 U.S.C. § 1226(c). In particular, he relies on two cases in which this Court held that [non-citizens] detained under § 1226(c) were entitled to a bond hearing if their detention became unreasonably long: *Diop v. ICE/Homeland Sec.*, 656 F.3d 221 (3d Cir. 2011) and *Chavez Alvarez v. Warden York Cty. Prison*, 783 F.3d 469 (3d Cir. 2015). Because of the differences between mandatory detention under § 1226(c) and detention under § 1226(a), however, Borbot’s analogy is inapt.” (277)
- “The Supreme Court recently overruled *Diop*’s interpretation of 8 U.S.C. § 1226(c)... *Jennings* did not, however, address the constitutionality of § 1226(c), instead remanding to the Ninth Circuit to decide that question in the first instance... Accordingly, *Jennings* did not call into question our constitutional holding in *Diop* that detention under § 1226(c) may violate due process if unreasonably long.” (278)
- “Borbot complains that he has borne the burden of proof throughout his detention. The burden must eventually shift to the government, he argues, regardless of the process he was initially afforded under § 1226(a). Borbot is correct to point out that *Diop* places the burden of proof on the government in § 1226(c) cases, whereas under § 1226(a) the burden remains on the detainee at all times.” (279)
- “Because Borbot does not challenge a particular action or decision, but rather ‘the statutory framework that permits his detention without bail,’ *Demore*, 538 U.S. at 517, 123 S.Ct. 1708, § 1226(e) does not deprive the District Court or this Court of jurisdiction over Borbot’s petition. But unlike the § 1226(c) context, in which a habeas petition seeks to compel a bond hearing where there has been none, Borbot’s habeas petition seeks to compel a second bond hearing despite alleging no constitutional defect in the one he received. This comes close to asking this Court to directly review the IJ’s bond decision, a task Congress has expressly forbidden us from undertaking.” (279)

- “We recognize Borbot’s concern that, despite an initial bond hearing, detention under § 1226(a) might become unreasonably prolonged, whether by virtue of government delay or some other cause. But Borbot fails to identify a basis in the record to demonstrate that this is such a case. We therefore need not decide when, if ever, the Due Process Clause might entitle a [non-citizen] detained under § 1226(a) to a new bond hearing in order to conclude that Borbot’s due process rights were not violated.” (280)

## **Fourth Circuit**

[Miranda v. Garland](#), 34 F.4th 338 (4th Cir. 2022)

**Facts:** The class action lawsuit argued that in bond hearings for non-citizens detained under § 1226(a), Government carried the burden to justify prolonged detention by clear and convincing evidence and that a failure to enforce this standard violated due process. The district court issued a class-wide preliminary injunction.

**Holding:** On appeal, the Fourth Circuit vacated the preliminary injunction, holding that § 1252(f)(1) limited the district court’s jurisdiction to “enjoin or restrain” the immigration laws on a class-wide basis. Held that the district court abused its discretion when it relied on and expanded upon the holdings of *Mathews v. Eldridge*. Held that bond hearings that place the burden on Petitioner and do not require consideration of ability to pay or ATD do not violate due process. Held that administrative exhaustion before the BIA is not a prerequisite.

**Length of Detention:** 5-6 months

**Remedy:** Preliminary injunction vacated

## **District Courts**

### **Eastern District of Virginia**

[Rodriguez v. Perry](#), No. 1:24-cv-651, 2024 WL 4024047 (E.D. Va. Sep. 3, 2024)

**Holding:** Petitioner was properly categorized as detained under § 1226(a), not § 1225(b) because he was arrested by ICE on a warrant after he had been granted Special Immigrant Juvenile Status (SIJS). Petitioner’s SIJS status gave him enhanced due process rights, and his prolonged detention without bond violated due process.

**Length of Detention:** 14 months

**Remedy:** Bond hearing with burden on Government

**Quotes:**

- “It is undisputed that USCIS granted Sandoval SIJ status in January 2017, when he was 11 years old. When ICE arrested and detained him in June 2023, he had been an SIJ designee for more than six years—that is, he had been living in the United States with a special status intended to promote his ties to this country for more than a third of his life.” (\*5)
- “The Haughton and Portillo decisions remain good authority and are persuasive on the merits. Accordingly, to afford Sandoval the process he is due at the bond hearing, the government must demonstrate by clear and convincing evidence that Sandoval is either a flight risk or a danger to the community. If the government fails to meet this burden, Sandoval must be released on bond.” (\*7)

[Khan v. Byers](#), No. 1:210-cv-00764, 2021 WL 4973249 (E.D. Va. Oct 22, 2021)

**Holding:** Petitioner’s prolonged discretionary detention violated due process because Petitioner’s liberty interest outweighed Government’s minimal interest in continued detention. The court concluded that all three *Mathews* factors weighed in Petitioner’s favor.

**Length of Detention:** More than 36 months

**Remedy:** Second bond hearing with burden up to IJ and consideration of ATD

[Cardona Tejada v. Crawford](#), No. 1:21-cv-314, 2021 WL 2909587 (E.D. Va. May 19, 2021)

**Holding:** Petitioner’s prolonged discretionary detention violated due process because their liberty interest outweighed Government’s minimal interest in continued detention.

**Length of Detention:** 25 months (22 months since last bond hearing)

**Remedy:** Second bond hearing with burden on Petitioner and consideration of ATD

**Quotes:**

- “Respondents necessarily must admit that subsequent bond hearings for detained non-citizens provide an important check against erroneous deprivations of liberty. This is so because the Department of Justice has enacted 8 C.F.R. § 1003.19(e), a regulation that provides non-citizens such as Petitioner the right to seek “subsequent bond redetermination[s]” before an Immigration Judge, thereby providing credence to the very position here that a current bond hearing is appropriate. Thus, absent a bond hearing, there is a significant risk that Petitioner is being erroneously detained.” (\*2)
- “If Respondents are as confident as they are now that Petitioner does not have a compelling case for release on bond, then the administrative burden of conducting a bond hearing is minimal and a hearing should be welcomed by Respondents to confirm their view.” (\*4)

## Middle District of Pennsylvania

[Gomez v. Barr](#), No. 1:19-cv-1818, 2020 WL 1504735 (M.D. Pa. Mar. 30, 2020)

[R&R not available on Westlaw]

**Holding:** Where Petitioner sought habeas relief after being denied bond, Petitioner’s argument that Government must bear the burden of proof in § 1226(a) bond hearing was foreclosed by *Borbot*.

**Length of Detention:** More than 5 months

**Remedy:** Rejected Magistrate Judge’s recommendation to place burden of proof on Government. Remanded to the Magistrate Judge to consider the remaining arguments that the first bond hearing violated the right to confront witnesses and that prolonged detention violates the INA.

### Quotes:

- “Gomez argues that the Constitution requires the government to bear the burden of proof during a § 1226(a) bond hearing . . . . The Third Circuit considered this issue in *Borbot*, 906 F.3d at 279, but the report and recommendation concludes that the discussion of the issue in *Borbot* constitutes dicta . . . . This court respectfully disagrees.” (\*2)

[Campoverde v. Doll](#), No. 4:20-cv-332, 2020 WL 1233577 (M.D. Pa. Mar. 13, 2020)

[Decision affirmed by *Campoverde v. Warden York County Prison*, 2021 WL 2879505 (3rd Cir. 2021)]

**Holding:** Where Petitioner sought habeas relief after being granted a bond with an amount he could not pay, the District Court lacked subject matter jurisdiction to consider Petitioner’s claim that IJ must consider the ability to pay. The argument that Government must bear burden of proof in § 1226(a) bond hearing was foreclosed by *Borbot*.

**Length of Detention:** More than 12 months

**Remedy:** Petition denied

### Quotes:

- “Exhaustion is excused, however, where a petition raises “constitutional or statutory claims” that the administrative agency “can neither consider nor correct.” *Milosevic v. Ridge*, 301 F. Supp. 3d 337, 344 (M.D. Pa. 2003) (citing *Sewak v. Immigration & Naturalization Serv.*, 900 F.2d 667, 670 (3d Cir. 1990)). That is precisely the case here: *Campoverde*’s petition argues that § 1226(a) and the Constitution require the government to bear the burden of proof during a bond hearing. Such statutory and constitutional questions cannot be decided by an immigration judge or the BIA, and accordingly

*Campoverde* was not required to exhaust his administrative remedies before bringing this claim in federal court.” (\*10)

- “Like the petitioner in *Borbot*, Campoverde argues that both the INA and the Constitution require the government to bear the burden of proof during § 1226(a) bond hearings. Because an identical claim was directly addressed by the Third Circuit in *Borbot*, that case controls the court’s analysis here.” (\*11)

*Orozco Arroyo v. Doll*, No. 4:19-cv-490, 2019 WL 6173753 (M.D. Pa. Oct. 10, 2019) (R&R)

[R&R adopted by 2019 WL 6130483 (M.D. Pa. Nov. 19, 2019)]

**Holding:** Where Petitioner argued that his conviction did not subject him to mandatory detention under § 1226(c), the District Court declined to reach that question but held that, whether detained under § 1226(c) or § 1226(a), his prolonged detention violated due process.

**Length of Detention:** Less than 6 months

**Remedy:** Bond hearing with burden on Government

**Quotes:**

- “Third Circuit has held that when a Court of Appeals has issued a stay of removal, as has the Third Circuit in Arroyo’s case, the [non-citizen] is not detained under § 1231, but remains detained under § 1226.” (\*4)
- “Arroyo is entitled to a bond hearing whether he is being detained under § 1226(a) or § 1226(c). If he is detained under § 1226(a), he is entitled to a bond hearing pursuant to that statute and implementing regulations. And, assuming for the sake of argument that he is detained under § 1226(c), given his prolonged detention, he is entitled to bond hearing.” (\*6)

*Kleinauskaite v. Doll*, No. 4:17-cv-02176, 2018 WL 6112482 (M.D. Pa. Oct. 19, 2018) (R&R)

[R&R adopted by 2018 WL 6079544 (M.D. Pa. Nov. 21, 2018)]

**Holding:** Although § 1226(a) does not authorize a bond hearing for Petitioner, who was detained after overstaying a visa issued through the Visa Waiver Program, Petitioner is entitled to a bond hearing on due process grounds after prolonged detention.

**Length of Detention:** More than 16 months

**Remedy:** Bond hearing with burden of proof on Government

**Quotes:**

- “At a certain point, detention without a bond hearing violates due process. *See Chavez-Alvarez*, 783 F.3d at 474–75; *Diop*, 656 F.3d at 232. And that point has been reached in this case. Kleinauskaite has been detained for more than 16 months. Her detention is the

result of her good faith pursuit of administrative and judicial review of the denial of her asylum application.” (\*12)

- “The warden of the prison where the petitioner is held is considered the custodian for purposes of a habeas action. *Rumsfeld v. Padilla*, 542 U.S. 426, 442 (2004).” (\*4)

## Western District of New York

[\*Resheroop v. Garland\*](#), 577 F.Supp.3d 180 (W.D.N.Y. Jan. 3, 2022)

**Holding:** Petitioner was detained under § 1226(a) rather than § 1226(c). Petitioner’s continued detention did not violate due process. By withdrawing his request for a bond hearing, Petitioner failed to exhaust the administrative remedies available to him before he filed his habeas petition. Additionally, because his removal was reasonably foreseeable and there were no facts to indicate Government had delayed removal proceedings, his continued detention was not unconstitutionally prolonged.

**Length of Detention:** 9 months

**Remedy:** Petition dismissed

### Quotes:

- “[T]he Court cannot hold that where a detainee has withdrawn his request for a bond hearing, and nothing in the record indicates he did so under circumstances suggesting that his procedural rights have been violated, a detainee has created an exception to the prudential requirement that he exhaust his administrative remedies before filing a habeas corpus petition in federal court.” (188)

[\*Hemans v. Searls\*](#), No. 18-cv-1154, 2019 WL 955353 (W.D.N.Y. Feb. 27, 2019)

**Holding:** Petitioner was detained under § 1226(a) rather than § 1226(c). Petitioner’s prolonged detention violated due process where the length of detention and the delays in the removal proceedings both favored Petitioner. Because there was no evidence in the record about the conditions of detention, the Court declined to address this factor.

**Length of Detention:** 27 months

**Remedy:** Bond hearing with burden on Government and consideration of ATD

**Southern District of New York**

[\*Joseph v. Decker\*](#), No. 18-cv-2640, 2018 WL 6075067 (S.D.N.Y. Nov. 21, 2018)

**Holding:** Petitioner’s prolonged detention violated due process, and he was entitled to a second bond hearing after IJ terminated his removal proceedings. Government’s appeal was pending before the BIA.

**Length of Detention:** More than 14 months

**Remedy:** Bond hearing with burden on Government

**Quotes:**

- “Respondents argue that 8 U.S.C. § 1226(e), § 1252(b)(9), and § 1252(g) all bar this Court’s review of Joseph’s petition... This Court has jurisdiction over Joseph’s statutory and constitutional challenges to his ongoing civil detention.” (\*5)
- “Regardless of whether Joseph’s detention and its attendant consequences amount to irreparable harm, exhaustion is excused here because any administrative appeal would have been futile and unable to address Joseph’s substantial constitutional claims.” (\*6)

**Middle District of Georgia**

[\*J.G. v. Warden, Irwin County Detention Center\*](#), 501 F.Supp.3d 1331 (M.D. Ga., Nov. 16, 2020)

[Partially rejected R&R where the Magistrate Judge recommended that a bond hearing be held with burden on Petitioner in 2020 WL 12655513 (July 17, 2020)]

**Holding:** Petitioner’s continued detention after a bond hearing in which Petitioner bore burden of proof violated due process under the *Mathews* test where Petitioner had a strong liberty interest, there was a high risk of erroneous deprivation, and Government’s interest in continued detention was neutral.

**Length of Detention:** 24 months

**Remedy:** Second bond hearing with burden on Government

**Quotes:**

- “This Court joins the Ninth and Second Circuits as well as ‘the overwhelming majority of district courts’ that hold the Government must bear the burden of proof to justify a non-citizen’s detention pending removal proceedings.” (1335)
- “Petitioner has been incarcerated for nearly two years without a criminal conviction or final order of removal lodged against him. Rather, prolonged immigration proceedings have stalled his removal case. Petitioner’s appeal of the denial of his asylum application is currently pending at the BIA. At oral argument before this Court, the Government surmised



that the BIA likely requires an additional year to resolve Petitioner’s appeal and conclude.” (1336-37)

- “Even if a subsequent bond hearing is granted, an incarcerated non-citizen faces the same problems he encountered at his first bond hearing: lack of resources to prove his case. Appeal to the BIA following denial of bond redetermination potentially entails another six months of incarceration while awaiting the BIA’s decision.” (1338)

### **Southern District of Florida**

[Dos Santos v. Meade](#), No. 1:20-cv-22996, 2020 WL 6565212 (S.D. Fla. Nov. 9 2020)

**Holding:** The court did not have jurisdiction to determine whether Petitioner’s conviction qualified as a material change in circumstances for revoking the bond.

**Length of Detention:** ~ 5 months

**Remedy:** Petition denied

#### **Quotes:**

- “Because Petitioner was detained through the Attorney General’s discretionary authority . . . the Court is without jurisdiction to consider the Petition. While Petitioner frames his claims as constitutional violations, ‘the facts and substance of the claims alleged, not the jurisdictional labels attached, [ ] ultimately determine whether a court can hear a claim.’ The Court must therefore ‘look beyond the labels to the underlying facts of the complaint to evaluate jurisdiction.’” (\*3)
- “Here, the underlying facts of the Petition clearly demonstrate that . . . Petitioner’s claims stem directly from the Attorney General’s discretionary authority to ‘at any time ... revoke a bond ..., rearrest the [non-citizen] under the original warrant, and detain the [non-citizen].’” (\*4)

### **Western District of Louisiana**

[Asonfac v. Wolf](#), No. 6:20-cv-01218, 2021 WL 1016245 (W.D. La. Mar. 1, 2021) (R&R)

[R&R adopted by 2021 WL 1011077 (W.D. La. Mar. 16, 2021)]

**Holding:** Petitioner’s detention was not unreasonable, and he was not entitled to a bond hearing with burden on Government, because their detention was neither excessive nor of an indefinite nature. There was no indication that his custody would last longer than his removal proceedings.

**Length of Detention:** More than 15 months

**Remedy:** Petition dismissed without prejudice

**Quotes:**

- “A fifteen- month period of pre-removal order detention in this case is reasonable. Other courts have found longer periods were not unreasonable for detention during removal proceedings. See *Barrera-Romero*, 2016 WL 7041710, at \* 5 (twenty months’ detention); *Kim v. Obama*, 2010 WL 10862140 (W.D. Tex. 2012) (one-and-a-half years detention); *Garcia v. Lacy*, 2013 WL 3805730, \*5 (S.D. Tex. 2013) (27 months’ detention).” (\*2)
- “Finally, Petitioner seeks release based on his allegation that he is highly vulnerable to serious injury or death should he contract COVID-19 . . . While Courts in this district, including this one, have previously handled Covid-19 relief claims in the context of § 2241 the Fifth Circuit recently spoke on this issue in the published decision of *Rice v. Gonzalez*, 985 F.3d 1069 (5th Cir. 2021)...It found, therefore, that it was not authorized to grant the extension of federal habeas corpus law sought.” (\*3)

**Western District of Texas**

[\*Ayobi v. Castro\*](#), No. 19-cv-01311, 2020 WL 13411861 (W.D. Tex. Feb. 25, 2020)

**Holding:** Petitioner’s prolonged detention violated due process under the *Mathews* test when the length of detention, delays, and conditions of confinement weighed in Petitioner’s favor. The court concluded that his chance of winning his underlying immigration case was, at least, a non-negligible chance.

**Length of Detention:** More than 30 months

**Remedy:** Second bond hearing with burden on Government. Ordered the IJ to make specific findings on the record and provide Petitioner with an audio recording of the bond hearing

**Quotes:**

- “Petitioner was prejudiced by the burden assigned at his second bond hearing, and until the government has adequately justified Mr. Ayobi’s continued detention at a bond hearing at which it bears the burden of proof, Petitioner continues to suffer actual prejudice.” (\*8)
- “Indeed, the deprivation of a “verbatim record and timely written findings” certainly impacts “the ability to effectively appeal adverse determinations” such that it poses a threat to a detainee’s liberty interest. *Padilla*, 379 F. Supp. 3d at 1176. But the *Mathews* balancing test requires that the Court balance that risk with other factors, and after doing so, the Court does not necessarily agree that Mr. Ayobi’s requested relief—namely that he and other § 1226(a) detainees be provided with contemporaneous written findings—is the relief that is necessarily mandated by the Constitution.” (\*9)

## PRE-REMOVAL ORDER MANDATORY DETENTION § 1225(b)

### District Courts

#### Eastern District of Virginia

[\*Leke v. Hott\*](#), 521 F. Supp. 3d 597 (E.D. Va. Feb 23, 2021)

**Holding:** Petitioner’s detention was unreasonably prolonged and violated due process under *Mbalivoto*.

**Length of Detention:** 24 months

**Remedy:** Bond hearing with burden up to IJ

#### Quotes:

- “Although neither party has cited controlling Supreme Court or circuit authority, only a moment’s reflection is needed to confirm that the Fifth Amendment applies to arriving [non-citizens] in this respect. Consider that, if the Fifth Amendment did not apply to protect against prolonged and indefinite detention, then an arriving [non-citizen] could thus be held without a bond hearing for 5 years, 10 years, or even life.” (602)
- “The parties’ citations to *Zadvydas v. Davis*, 533 U.S. 678, 121 S.Ct. 2491, 150 L.Ed.2d 653 (2001) and *Jennings v. Rodriguez*, — U.S. —, 138 S. Ct. 830, 200 L.Ed.2d 122 (2018), two foundational cases on [non-citizen] detention, do not control the Fifth Amendment analysis here.” (602)
- “The parties have identified conflicting authority on the standard of proof at a bond hearing. It is for the Immigration Judge, in the first instance, to determine the appropriate standard of proof at the bond hearing. Compare *Guzman Chavez*, 940 F.3d at 882; with *Velasco Lopez v. Decker*, 978 F.3d 842, 856 n.14 (2d Cir. 2020).” (n. 10)

[\*Mbalivoto v. Holt\*](#), 527 F. Supp. 3d 838 (E.D. Va. Aug. 11, 2020)

**Holding:** Petitioner’s prolonged detention violated due process due to his extended detention, absence of bad faith delays in removal proceedings, likelihood of success in applying for relief, and risk of contracting COVID-19.

**Length of Detention:** 22 months

**Remedy:** Bond hearing with burden on Government with consideration of ATD

#### Quotes:

- “[T]he Court concludes, based on *Zadvydas*, *Demore*, and *Thuraissigiam*, that Petitioner is not foreclosed from the relief he seeks with respect to his detention either because he is an entering [non-citizen], as opposed to an entered [non-citizen], or because there remains

a discernable statutory purpose for his detention. Rather, in determining whether Petitioner’s continued detention without an individualized bond hearing is constitutionally reasonable, the Court has considered the statutory remedies available to Petitioner, and whether those remedies constitute constitutionally adequate process.” (848)

- “In short, that parole process has none of the features of an individualized bond hearing; and the Court concludes that the statutory parole remedy available to Petitioner is not constitutionally adequate at this point. In that regard, the Court has considered Respondents’ relied-upon distinction between entering [non-citizens] and entered [non-citizens] in determining what process is due. That distinction quickly becomes constitutionally suspect as the dispositive operative principle when one considers the arbitrary results it produces when applied to immigration detention, as opposed to admissibility . . . these disparities in treatment become even more difficult to justify based on the facts of this case where, unlike many [non-citizens] held under § 1226(a) or (c), Petitioner has not engaged in any conduct while in the United States that makes him inadmissible; and, after 22 months, an Immigration Judge has determined Petitioner is entitled to asylum or, in the alternative, deferral of removal under CAT and his lawful presence in the United States appears to be a realistic, if not probable outcome.” (849)
- “[T]he Court joins those other courts that have concluded that an individualized bond hearing is required at that point when an entering [non-citizen’s] continued detention under 1225(b) becomes unreasonable and constitutionally infirm without one.” (850)

## Middle District of Pennsylvania

[\*Radez-Suarez v. Doll\*](#), No. 1:19-cv-1946, 2020 WL 362696 (M.D. Pa. Jan. 22, 2020)

**Holding:** Petitioner was not entitled to a bond hearing because detention was not sufficiently prolonged.

**Length of Detention:** 8 months

**Remedy:** Petition denied without prejudice

### Quotes:

- “This Court and others have previously determined that arriving [non-citizens] who have been subject to detention under § 1225(b) for longer periods of time were not entitled to bond hearings because their detention had not yet reached the point of being arbitrary or unreasonable.” (\*3)

[\*Pierre v. Doll\*](#), 350 F. Supp. 3d 327 (M.D. Pa., Oct. 26, 2018)

**Holding:** Petitioner’s detention without bond was unreasonably prolonged and Petitioner had some procedural due process rights as an arriving non-citizen.

**Length of Detention:** 2 years

**Remedy:** Bond hearing with burden on Government

**Quotes:**

- “[T]he Court agrees with the weight of authority finding that ‘arriving [non-citizens] detained pre-removal pursuant to § 1225(b) have a due process right to an individualized bond consideration once it is determined that the duration of their detention has become unreasonable.’” (332)

[\*Singh v. Sabol\*](#), No. 1:16-cv-2246, 2017 WL 1659029 (M.D. Pa. Apr. 6, 2017) (R&R)

[R&R adopted by 2017 WL 1541847 (M.D. Pa. Apr. 28, 2017)]

**Holding:** Petitioner’s detention without bond was unreasonably prolonged

**Length of Detention:** 17 months

**Remedy:** Bond hearing with burden on Government

**Quotes:**

- “[I]t is well-settled that [non-citizens] in the post-removal context possess the same fundamental due process protections whether they were admitted to the United States or denied admission.” (\*4)

## **Southern District of New York**

[\*Mendez Ramirez v. Decker\*](#), 612 F. Supp. 3d 200 (S.D.N.Y. 2020)

**Holding:** Petitioner’s detention without a bond hearing did not violate due process because Petitioner had diminished due process rights due to their status as an arriving non-citizen and, regardless, case-by-case balancing factors were mixed.

**Length of Detention:** 10 months

**Remedy:** Petition denied

**Quotes:**

- “Mr. Mendez Ramirez also suggests that the position adopted by the Court implies that he ‘has *no* due process rights.’ Resp. at 18. That is incorrect. The issue is not *whether* Mr.

Mendez Ramirez has a right to due process, ‘but rather the *scope* of the constitutional protections available to him—and on that question, *Mezei* is controlling.’ *Poonjani*, 319 F. Supp. 3d at 650.” (220)

[\*Lett v. Decker\*](#), 346 F. Supp. 3d 379 (S.D.N.Y., Oct. 10, 2018)

[Judgement vacated and dismissed as moot on appeal in 2020 WL 13558956]

**Holding:** Petitioner’s prolonged detention without bond violated due process and he was entitled to an individualized bond hearing due to Government’s responsibility for delays.

**Length of Detention:** 9 months

**Remedy:** Bond hearing with burden on Government

**Quotes:**

- When “it comes to prolonged detention, the Court sees no logical reason to treat individuals at the threshold of entry seeking asylum under § 1225(b), like Petitioner, differently than other classes of detained [non-citizens] . . . . Thus, while arriving [non-citizen’s] rights may be limited in other respects, they possess sufficient Due Process rights to challenge their prolonged mandatory detention.” (386)
- “Applying the above [three *Sajous v. Decker*] factors, the Court finds that Petitioner’s continued detention pursuant to § 1225(b) without access to a bond hearing is unreasonable, and thus unconstitutional, as applied to him. Petitioner has already been detained for nearly ten months and there is significant reason to believe that his detention will continue, either because a decision on his application for asylum is not yet ready, or because he would remain detained throughout the course of an appeal by either side.” (387)

[\*Perez v. Decker\*](#), No. 18-cv-5279, 2018 WL 3991497 (S.D.N.Y. Aug. 20, 2018)

**Holding:** Petitioner’s prolonged detention without bond violated due process.

**Length of Detention:** 9 months

**Remedy:** Immediate release or second bond hearing with burden on Government

**Quotes:**

- “The primary factors are (1) the length of time the person has already been detained, with detention for more than six months being more likely to be unreasonable; (2) whether the person is responsible for the delay, with delay caused by immigration officials, the immigration court, or other governmental actors weighing in favor of finding continued detention unreasonable; and (3) whether the person has asserted defenses to removal, as it is less appropriate to presume an individual with defenses will eventually be deported, and thus less reasonable to detain him without a bond hearing.” (\*4)

**Western District of New York**

[Singh v. Barr](#), No. 1:19-cv-1096, 2020 WL 1064848 (W.D.N.Y. Mar. 2, 2020)

**Holding:** Petitioner was detained pursuant to § 1225(b) rather than § 1226(a) and was entitled to a bond hearing on due process grounds.

**Length of Detention:** 20 months

**Remedy:** Bond hearing with burden on Government

**Quotes:**

- “Petitioner was detained within 100 miles of the border and within 14 days of his entry into the United States. (Dkt. 5-1 at ¶ 5). Additionally, Petitioner established a credible fear of persecution and was subsequently detained. (Id. at ¶ 7). Accordingly, the Court finds Petitioner is detained under § 1225(b).” (\*3)
- “In the instant matter, Petitioner was provided a bond hearing where he bore the burden of proving that he was not a risk of danger to the community or a flight risk. The other process available to Petitioner is the opportunity to apply for discretionary parole pursuant to 8 U.S.C. § 1182(d)(5). The Court finds that the risk of erroneous deprivation of Petitioner’s liberty under both of these procedures is high.” (\*7)

**Western District of Louisiana**

[Tahtiyork v. U.S. Dept. of Homeland Security](#), No. 20-cv-1196, 2021 WL 389092 (W.D. La. Jan. 12, 2021) (R&R)

[R&R adopted by 2021 WL 372573 (W.D. LA. Feb. 3, 2021)]

**Holding:** Petitioner was neither statutorily nor constitutionally entitled to a bond hearing.

**Length of Detention:** 17 months

**Remedy:** Petition dismissed

**Quotes:**

- “Petitioner’s [Zadvydas] claim, however, is premature because his appeal before the BIA is pending and thus his order of removal is not final.” (\*2)
- “Here, constrained by this authority, Petitioner is not constitutionally entitled to a bond hearing. As in *Ford*, Petitioner’s ‘detention ends when the removal proceedings end.’ *Id.* As Respondents phrase it: ‘The Petitioner’s second appeal, which he chose to file in this matter, is pending. Upon completion of the appeal process, Petitioner will be subject to removal from the United States, or will be granted asylum.’” (\*7)



[Ford v. Ducote](#), No. 3:20-cv-1170, 2020 WL 8642257 (W.D. La. Nov. 2, 2020)

[Declined to adopt R&R from 2020 WL 8642258 (W.D. La. Sep. 30, 2020)]

**Facts:** The Magistrate Judge recommended that the court order a bond hearing.

**Holding:** Petitioner was neither statutorily nor constitutionally entitled to a bond hearing because he was classified as an arriving non-citizen with diminished due process rights and detention was not indefinite like *Zadvydas*.

**Length of Detention:** 15 months

**Remedy:** Petition dismissed with prejudice

**Quotes:**

- “The *Kim* Court held that *Zadvydas* was materially different because the detention of the [non-citizens] in *Zadvydas* was “indefinite” and “potentially permanent.” Therefore, the correct standard to apply is to determine whether Ford’s detention is “indefinite” or “potentially permanent.” (\*3)
- “Ford’s detention is not “indefinite” or “potentially permanent.” Ford’s detention ends when the removal proceedings end. Ford’s focus on “unreasonable detention” is incorrect. As long as Ford’s detention is not “indefinite” nor “potentially permanent,” Ford’s due process rights are not violated. See also *Jennings v. Rodriguez*, 138 S.Ct. 830 (2018).” (\*3)

**Middle District of Georgia**

[D.A.V.V. v. Warden, Irwin County Detention Center](#), No. 7:20-cv-159, 2020 WL 13240240 (M.D. Ga. Dec. 7, 2020) (R&R)

[Habeas petition was voluntarily dismissed before the court could consider R&R]

**Holding:** Petitioner did not have a procedural due process right to a bond hearing. As an “arriving non-citizen,” Petitioner had to seek release under the parole procedure outlined in 8 USC § 1182(d)(5). The court followed *Thuraissigiam* in the analysis of due process rights of arriving non-citizens, holding that Petitioner had no due process rights beyond what the Immigration and Nationality Act provides.

**Length of Detention:** ~ 24 months

**Remedy:** Petition dismissed

**Quotes:**

- “[T]he fact that Petitioner was physically present and criminally confined in the United States for a lengthy period since she first arrived at a port-of-entry and sought admission does not alter her immigration status.” (\*4)

[D.A.F. v. Warden, Stewart Detention Center](#), No. 4:20-cv-79, 2020 WL 9460341 (M.D. Ga. July 24, 2020)

[Partially adopted R&R from 2020 WL 9460467 (M.D. Ga. May 8, 2020)]

**Facts:** Petitioner was an arriving non-citizen who was denied admission and given an administratively final removal order. That order was appealed, and the Court of Appeals issued a stay of removal pending the resolution of the appeal.

**Holding:** Petitioner’s detention did not violate due process because there was no unnecessary Government delay. Petitioner was detained under § 1225(b) rather than § 1231. Since Petitioner’s removal order was being reviewed, the 90-day removal period does not begin to run until that appeal is completed. In other words, although the removal order became administratively final, the order did not initiate the removal period due to the stay of removal.

**Length of Detention:** ~ 18 months

**Remedy:** Petition dismissed

**Quotes:**

- “Since Petitioner’s removal order is being reviewed by the Court of Appeals, which has also issued a stay of removal, the 90-day removal period does not begin to run until that appeal has been completed and a final order issued.” (\*1)
- “Requiring Petitioner to remain detained without a bond hearing during this process and under these circumstances does not violate his constitutional or statutory rights.” (\*2)

**Note:** The R&R cites *Padilla v. ICE* in surveying other courts’ treatment of due process rights for non-citizens classified as “arriving.” It states the 11th Circuit does not have case law on this issue, but that *Sopo* is the closest case on point, though it cannot be applied precisely to § 1225(b) cases and is no longer binding law. (\*9)

[Kameron v. Dep’t of Homeland Sec.](#), No. 7:19-cv-16, 2020 WL 9460465 (M.D. Ga. Mar. 27, 2020)

[R&R not available on Westlaw]

**Holding:** Petitioner was not entitled to a bond hearing, in part because he prolonged his own detention by appealing the IJ’s decision and filing an I-130.

**Length of Detention:** 18 months

**Remedy:** Petition dismissed

**Southern District of Texas**

[\*da Silva v. Nielsen\*](#), No. 5:18-cv-932, 2019 WL 13218461 (S.D. Tex. Mar. 29, 2019)

**Holding:** Petitioner’s prolonged detention without bond violated due process. Petitioner was entitled to an individualized bond hearing due to Government’s responsibility for delays.

**Length of Detention:** 11 months

**Remedy:** Bond hearing with burden on Government

**Quotes:**

- “Having considered the case law, ‘the Court agrees with the weight of authority finding that arriving [non-citizens] detained pre-removal pursuant to § 1225(b) have a due process right to an individualized bond consideration once it is determined that the duration of their detention has become unreasonable.’ *Pierre*, 350 F. Supp. 3d at 332 . . . . The same concerns that underlay *Zadvydas* apply to detained asylum-seekers. (\*10)
- “The only remaining question is whether the duration of Petitioner’s detention has in fact become unreasonable. To make that determination, the Court adopts the three-pronged test used by the Southern District of New York in several post-*Rodriguez* immigration habeas cases. The Court must examine: ‘(1) the length of time Petitioner has already been detained; (2) whether Petitioner is responsible for the delay; and (3) whether Petitioner has asserted defenses to removal.’” (\*11) (citing *Sajous*)

**District of Minnesota**

[\*Jamal A. v. Whitaker\*](#), 358 F. Supp.3d 853 (D. Minn. Jan. 22, 2019)

[R&R not available on Westlaw]

**Holding:** Petitioner’s prolonged detention violated due process under the *Muse* factors where four factors (length of detention, likely duration of future detention, conditions of detention, delays in removal proceedings caused by non-citizen) favored Petitioner, one factor (delays in the removal proceedings) favored Government, and the last factor (likelihood that the removal proceedings would result in a final order of removal) was neutral because the Court did not have sufficient information to make such a determination.

**Length of Detention:** More than 19 months

**Remedy:** Bond hearing with burden up to IJ

## Quotes:

- “In theory, if [non-citizens] detained under § 1225(b)(2)(A) receive less protection under the Due Process Clause than [non-citizens] detained under § 1226(c), then the former can be detained somewhat longer than the latter. But everyone seems to agree that, under the Due Process Clause, neither group of [non-citizens] can be detained indefinitely (at least without some kind of showing that they are likely to flee or harm the community). And in deciding whether an [non-citizen’s] continued detention would violate the Due Process Clause, most courts seem to apply pretty much the same factors—regardless of whether the court agrees that [non-citizens] detained under § 1225(b)(2)(A) receive less protection than [non-citizens] detained under other provisions.” (858)
- “It 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.” (859)
- “Notably, immigration courts have been struggling to keep pace with the high volume of removal proceedings—and that was before many of those courts were shuttered by the ongoing government shutdown. See *East Bay Sanctuary Covenant v. Trump*, 909 F.3d 1219, 1230 (9th Cir. 2018) (stating that immigration courts have a “total backlog of nearly 800,000 removal cases”). Given this backlog, given Jamal’s right to appeal an adverse decision of the IJ to the BIA, and given Jamal’s right to ask the Eighth Circuit to review an adverse decision of the BIA, Jamal might well be detained for two years or longer before he gets a final decision regarding his removal.” (859)

## POST-REMOVAL ORDER DETENTION § 1231(a)

### Circuit Courts of Appeal

#### Second Circuit

[\*Hassoun v. Searls\*](#), 968 F.3d 190 (2d Cir. 2020)

[Rehearing *en banc* denied by 976 F.3d 190 (2d Cir. 2020). Panel rehearing denied by 2020 WL 7422066 (2d Cir. 2020)]

**Holding:** The procedures in 8 C.F.R. § 241.14(d) satisfy due process but should be construed narrowly and invoked rarely, for situations where terrorism or a risk to national security may result from the individual's release. Here, Government was likely to succeed on the argument that Petitioner's continued detention under § 241.14(d) did not violate *Zadvydas* or due process.

**Length of Detention:** 33 months

**Remedy:** Stayed District Court's order to release Petitioner

#### Quotes:

- “In promulgating 8 C.F.R. § 241.14(d), the Attorney General avoided the serious constitutional questions identified in *Zadvydas* by focusing narrowly on those ‘specially dangerous individuals’ implicated in ‘terrorism or other special circumstances’ that the Supreme Court said were not subject to its holding . . . Indeed, this class of [non-citizens] is so narrow that ‘this is only the second time 8 C.F.R. § 241.14(d) has been invoked since its promulgation in 2001.’” (199)

#### Third Circuit

[\*Guerrero-Sanchez v. Warden York Cty. Prison\*](#), 905 F.3d 208 (3d Cir. 2018)

[Overruled by *Arteaga-Martinez*, but as-applied due process challenges remain available. See *Michelin* and *Cabrera Galdamez* below]

**Holding:** Petitioner's prolonged detention violated due process. Non-citizens with reinstated removal orders are detained under § 1231(a)(6) rather than § 1226, but construed to avoid constitutional issues, § 1231(a)(6) requires a bond hearing after six months of detention with burden on Government by clear and convincing evidence.

**Length of Detention:** Less than 2 years

**Remedy:** Affirmed District Court's decision to grant Petitioner bond hearing with burden on Government

## Quotes:

- “We therefore find that it *may* be the case that the Due Process Clause prohibits prolonged detention under § 1231(a)(6) without a bond hearing.” (222)
- “We see no substantial distinction between the liberty interests of [non-citizens] detained under § 1226(a) and § 1231(a)(6) because “[r]egardless of the stage of the proceedings, the same important interest is at stake—freedom from prolonged detention”—accordingly, ‘[t]he liberty interests of persons detained under § 1231(a)(6) are comparable to those of persons detained under § 1226(a).’ *Diouf*, 634 F.3d at 1087.” (223)

## Fourth Circuit

[\*Castaneda v. Perry\*](#), 95 F.4th 750 (4th Cir. 2024)

**Facts:** In withholding-only proceedings following a reinstated removal order, Petitioner won CAT protection twice and ICE appealed twice, with the BIA remanding each time. On the second remand, the IJ denied relief. Petitioner appealed, and while the appeal was pending, the U.S. District Court for the Eastern District of Virginia denied habeas relief. Petitioner appealed the habeas denial to the Fourth Circuit. While this appeal was pending, the BIA remanded again to the IJ.

**Holding:** Petitioner’s nearly five-year detention did not violate *Zadvydas* because his ongoing withholding-only proceedings were finite and would eventually end. Neither did Petitioner prove exceptional circumstances sufficient to justify due process relief in the form of a bond hearing.

**Length of Detention:** 54 months

**Remedy:** Affirmed District Court’s dismissal of petition

## Quotes:

- “In this case, Vasquez Castaneda's detention simply is not the type of ‘indefinite and potentially permanent’ detention at issue in *Zadvydas*. Vasquez Castaneda is being detained pending the completion of withholding-only proceedings that he voluntarily initiated. Critically, withholding-only proceedings are finite. In the ordinary course, they continue only for such time as a determination can be made concerning the legality of removing the [non-citizen] to the designated country. If the [non-citizen] fails to obtain withholding-only relief, and absent any other diplomatic or logistical barriers, then the government can—and must—promptly carry out the [non-citizen’s] removal to the designated country. If the [non-citizen] prevails, then the government may still remove the [non-citizen] to another country, assuming it continues to pursue removal at all. In either case, however, the withholding-only proceedings end. And if the withholding-only

proceedings have a definite ending point, then so too must the detention pending the resolution of those proceedings.” (757)

## Eleventh Circuit

[\*Singh v. U.S. Att’y Gen.\*](#), 945 F.3d 1310 (11th Cir. 2019)

[Subsequent decision not available on Westlaw]

**Holding:** District Court (N.D. Ala.) erroneously denied the habeas petition because factual issues regarding blame for removal delay were left unresolved.

**Length of Detention:** 31 months

**Remedy:** Remanded for an evidentiary hearing.

### Quotes:

- “[T]he threshold question for Mr. Singh is whether his removal period extended by law because he did not return a complete travel document application. 8 U.S.C. § 1231(a)(1)(C). If the removal period did not extend, then Immigration and Customs Enforcement has detained Mr. Singh for well over the presumptively permissible six-month period . . . .” (1314)

[\*Vaz v. Skinner\*](#), 634 Fed. Appx. 778 (11th Cir. 2015)

**Holding:** Petitioner’s continued detention was not unreasonable under *Zadvydas* because Petitioner prevented removal by refusing to sign a travel document. Petitioner’s release claim based on inadequate medical care was not cognizable through § 2241 habeas petition.

**Length of Detention:** More than 36 months

**Remedy:** Affirmed District Court’s denial of habeas petition

### Quotes:

- “[T]he [Brazilian] Consulate has indicated that it cannot issue Petitioner a travel document unless he voluntarily signs for it. It follows that the Consulate would issue Petitioner a travel document if he signed for it and expressed his willingness to return to Brazil. And, if Petitioner were issued a travel document, he would be released from detention and removed.” (783)

[\*Benitez v. Wallis\*](#), 402 F.3d 1133 (11th Cir. 2005)

**Holding:** Under *Clark v. Martinez*, 543 U.S. 371 (2005), *Zadvydas* applies to inadmissible non-citizens who are ordered removed. Petitioner’s continued detention violated *Zadvydas* where



Petitioner was detained for more than 6 months and removal to Cuba not reasonably foreseeable due to lack of diplomatic relationship.

**Length of Detention:** More than 6 months

**Remedy:** On remand from Supreme Court, the 11<sup>th</sup> Cir. ordered Petitioner's conditional release

**Quotes:**

- “*Clark* effectively ends this case. There is no contention that conditions in Cuba have changed so that Benitez’s removal to Cuba is reasonably foreseeable. Therefore, until this Country’s relationship with Cuba changes so that removal is reasonably foreseeable or Congress amends 8 U.S.C. § 1231(a)(6) to distinguish between resident [non-citizens] and inadmissible [non-citizens], *Clark* dictates that Benitez is entitled to be released and paroled into the country.” (1135)

[\*Akinwale v. Ashcroft\*](#), 287 F.3d 1050 (11th Cir. 2002)

[Partially abrogated by *supra Farah*]

**Holding:** Petition was not ripe for review under *Zadvydas* because Petitioner was detained for less than six months when they filed for habeas relief. Alternatively, the Eleventh Circuit stay of removal tolled the removal period, and therefore detention still had not exceeded six months post-order at the time of the circuit court decision on appeal.

**Length of Detention:** 4 months

**Remedy:** Affirmed District Court’s denial of habeas petition

**Quotes:**

- “This six-month period thus must have expired at the time Akinwale’s § 2241 petition was filed in order to state a claim under *Zadvydas*.” (1052)

### **District Courts**

#### **Western District of Pennsylvania**

[\*Michelin v. Oddo\*](#), No. 3:23-cv-22, 2023 WL 5044929 (W.D. Pa. Aug. 8, 2023)

[Government’s motion for reconsideration denied in 2023 WL 5672278 (W.D. Pa. Sep. 1, 2023). EAJA fees partially granted in 2024 WL 3937228 (W.D. Pa. Aug. 26, 2024)]

**Holding:** Petitioner’s prolonged detention pending motion to reopen violated due process under *German Santos* where all four factors favored Petitioner and post-order custody reviews were inadequate. The court did not decide whether removal was reasonably foreseeable under *Zadvydas*.

**Length of Detention:** More than 18 months

**Remedy:** Bond hearing with burden on Government

**Quotes:**

- “[U]ntil very recently, and for about 18 months, ICE detained Petitioner at Moshannon. He submitted evidence to the Court, which Respondents do not contest, to support his position that the conditions there were similar to penal incarceration. (Pet’s Ex. H, Thompson Decl., ECF 4-1 at pp. 93-97.) Thus, this factor also weighs in Petitioner’s favor.” (\*7)
- “In any event, the Court finds that the January 2023 custody review did not provide Petitioner with meaningful and adequate process. It is undisputed that although he had counsel who was actively involved for many months in seeking relief on his behalf, his counsel was not notified of the custody review until it was completed. Petitioner’s counsel could not submit any evidence or advocate on his behalf.” (\*8)
- “Additionally, as discussed above, the Third Circuit in *Guerrero-Sanchez* observed that the regulations that implement the government’s detention authority under § 1231(a)(6) “themselves ‘raise serious constitutional concerns.’ ” 905 F.3d at 227 (quoting *Diouf*, 634 F.3d at 1091). Although *Arteaga-Martinez* abrogated the Third Circuit’s statutory analysis of § 1231(a)(6) and its application of the canon of constitutional avoidance, the Third Circuit’s discussion on why it was necessary to invoke that canon, including its concerns about the insufficient process afforded to non-citizens in the regulations, remains persuasive.” (\*8)

**Southern District of New York**

[Cabrera Galdamez v. Mayorkas](#), No. 22-cv-9847, 2023 WL 1777310 (S.D.N.Y. Feb. 6, 2023)

**Holding:** Petitioner’s prolonged detention after reinstatement of prior removal order violated due process under *Mathews* factors where there was a high risk of erroneous deprivation of liberty through the post-order custody review procedures. Government had minimal interest in detention without bond. The court rejected the *Zadvydas* claim because removal would be imminent if IJ denied withholding-only relief.

**Length of Detention:** 16 months

**Remedy:** Bond hearing with burden on Government

**Quotes:**

- “As of the date of this decision, Petitioner has been detained approximately sixteen months, a period significantly longer than the presumptively reasonable period of six months contemplated in *Zadvydas* and radically longer than the “standard” 90-day removal period

laid out in § 1231. His detention is not the result of a criminal adjudication. Nevertheless, he has been incarcerated in the Orange County Correctional Facility, subject to punitive conditions largely indistinguishable from criminal confinement. *See id.* at 852 (‘The longer the duration of incarceration, the greater the deprivation.’). He has been detained in jail, cannot maintain employment, cannot see his family or friends and has had limited to no access to the telephone, internet and email. Under such conditions for a period of sixteen months and counting, Petitioner’s private interest at stake is apparent.” (\*5)

- “[T]hese [custody reviews] suffer from three significant shortcomings. First, the regulations place the burden on Petitioner rather than the Government. *See Moncrieffe v. Holder*, 569 U.S. 184, 201 (2013) (noting detained non-citizens “have little ability to collect evidence”); *Hernandez-Lara*, 10 F.4th at 31 (“[P]roving a negative (especially a lack of danger) can often be more difficult than proving a cause for concern.”). Second, the decision is by ICE itself, not an outside arbiter such as an immigration judge. Finally, the regulations do not provide for an in-person hearing, where Petitioner can present his argument, call witnesses and confront the Government’s evidence.” (\*6)

[Portillo v. Decker](#), 2022 WL 826941 (S.D.N.Y. Mar. 18, 2022)

**Holding:** Petitioner’s detention was not unreasonable because removal was reasonably foreseeable where Petitioner had already been successfully twice removed to Honduras and ICE was only holding off on removal due to a pending PFR of negative reasonable fear interview finding.

**Length of Detention:** ~ 11 months

**Remedy:** Petition dismissed

**Quotes:**

- “The only thing that appears to be holding up Portillo’s removal is the litigation in the Second Circuit—which he brought himself. For obvious reasons, a non-citizen’s use of the American judicial process, to the extent it delays removal, does not warrant release under *Zadvydas*.” (\*5)
- “That defeats Portillo’s Fifth Amendment claim, as the Second Circuit has held that under *Zadvydas*, a non-citizen’s ‘due process rights are not jeopardized by his continued detention as long as his removal remains reasonably foreseeable.’” (\*6)

[S.N.C. v. Sessions](#), 2018 WL 6175902 (S.D.N.Y. Nov. 26, 2018)

**Holding:** The court stayed Petitioner’s removal and ordered her release based on exceptional circumstances to allow Petitioner to proceed with her T-visa and VAWA applications.

**Length of Detention:** 4.5 months

**Remedy:** Stay of removal and release from detention

**Quotes:**

- “[T]his Court has jurisdiction over Petitioner’s claims because her T-Visa application is not inextricably linked to the validity of her removal order.” (\*4)
- “Petitioner does not challenge the wisdom of ICE’s decision to remove her, but disputes ICE’s legal authority, despite the constraints imposed by the Due Process Clause, to remove her while her visa applications are being adjudicated.” (\*5)
- “Petitioner’s case also presents extraordinary circumstances that require granting bail for any remedy related to the adjudication of her visa applications to be effective. First, Petitioner is not pursuing a routine application to adjust her status. Instead, she is applying for a specific form of relief that Congress made available for victims of domestic violence and human trafficking, including those with final orders of removal pending against them. See 8 C.F.R. § 214.11(d)(1)(ii). Second, Petitioner’s personal circumstances are not that of the usual Petitioner. Petitioner’s psychologist confirms that the difficulties she faced as a human trafficking and domestic abuse survivor have left her with post-traumatic stress disorder, a condition that the detention environment aggravates.” (\*6)

**Western District of New York**

*Cyclewala v. Searls (Cyclewala II)*, No. 6:21-cv-06372, 2021 WL 5989781 (W.D.N.Y. Dec. 16, 2021)

[Subsequent cases not available on Westlaw]

**Holding:** Petitioner provided sufficient evidence to preliminarily show that removal was not reasonably foreseeable under *Zadvydas*. Ordered Government to supplement their submission to rebut Petitioner’s showing.

**Length of Detention:** 22 months

**Quotes:**

- “Finally, in this case, despite Respondent confirming that the affidavit and letters submitted by three of Petitioner’s friends were forwarded to the Indian consulate in March of 2021, Petitioner contends that as of August 2021, at least two of those individuals had not yet been contacted by immigration officials in the United States or India...These facts support Petitioner’s contention that efforts to obtain his travel documents have not been zealous and substantiate his required showing.” (\*6)
- “The Court thus instructs Respondent to file any supplement to his opposition to the petition by no later than January 18, 2022. The Court is particularly interested in any

information as to efforts to obtain the issuance of travel documents that have been made since Respondent's last submission and the status of those efforts." (\*6)

## **District of Massachusetts**

[Quezada-Martinez v. Moniz](#), 722 F. Supp.3d 7 (D. Mass. Mar. 8, 2024)

**Holding:** Petitioner's prolonged detention in withholding-only proceedings, without bond, violated *Zadvydas* where Petitioner's pending BIA appeal was expected to be remanded to the IJ, which would substantially decrease the likelihood he would be removed in the reasonably foreseeable future.

**Length of Detention:** More than 11 months

**Remedy:** Bond hearing ordered with burden up to IJ

### **Quotes:**

- "Here, Mr. Quezada-Martinez's detention has been detained since April 2, 2023, a little over eleven months. His detention has already surpassed the six-month period set forth in *Zadvydas*. Therefore, the reasonableness of continuing Mr. Quezada-Martinez's custody turns on whether he has made a showing that there is no significant likelihood of removal in the reasonably foreseeable future." (\*11)
- "Thus, the bare fact that the Government may be able to secure Mr. Quezada-Martinez's removal at some remote point in the future is insufficient, without more, to rebut the showing that there is no significant likelihood of removal in the reasonably foreseeable future." (\*12)

## **District of Rhode Island**

[Zavala v. Martin](#), 21-cv-500, 2022 WL 684147 (D.R.I. Mar. 8, 2022)

**Holding:** Petitioner was entitled to bond hearing under *Guerrero-Sanchez*.

**Length of Detention:** ~ 11 months

**Remedy:** Bond hearing with burden on Government

### **Quotes:**

- "Faced with similar factual circumstances, the Third and Ninth Circuits found that petitioners detained pursuant to § 1231(a)(6) for longer than six months are generally entitled a bond hearing before an immigration judge. ... Like the [First Circuit] district

court in *Rivera-Medrano*, this Court finds the reasoning applied by the Third Circuit in *Guerrero-Sanchez* compelling.” (\*4-\*5)

- “It is true that the Supreme Court in *Guzman Chavez* concluded that § 1231 ‘governs the detention of [non-citizens] subject to reinstated orders of removal, meaning those [non-citizens] are not entitled to a bond hearing while they pursue withholding of removal.’ 141 S.Ct. at 2280. But the question at issue in *Guzman Chavez* was not whether non-citizens pursuing withholding of removal are constitutionally entitled to a bond hearing. ... [The] Supreme Court [in *Guzman Chavez*] did not separately analyze the due process considerations discussed by the Third and Ninth Circuits in *Guerrero-Sanchez* and *Diouf*, and therefore did not address those constitutional concerns related to prolonged detention.” (\*5)
- “Petitioner has been detained for nearly eleven months. Although the appeal of his application for withholding only removal is now with the BIA, his proceedings are likely to last several more months. *See Guzman Chavez*.” (\*6)

## District of Minnesota

[Chuol P.M. v Garland](#), No. 21-cv-1746, 2022 WL 2442600 (D. Minn. Jan. 7, 2022) (R&R)

[R&R rejected in 2022 WL 2302635 (D. Minn. June 27, 2022). There, the court ordered a bond hearing with burden on Government]

**Facts:** At Government’s request, Petitioner applied for identity documents from South Sudan, but since he grew up in a refugee camp in Ethiopia and arrived in the United States long before South Sudan was a country, no travel documents could be obtained. An expert witness testified that removal is unlikely since the government of South Sudan is barely functional. Petitioner’s removal order had been administratively final for approximately one year. Petitioner was held under §1231(a)(6) due to his criminal convictions.

**Holding:** An applicant with a removal order who is detained pursuant to § 1231(a) for nearly a year may be eligible for habeas relief when there is no significant likelihood they will be removed in the reasonably foreseeable future.

**Length of Detention:** 18 months

**Remedy:** Release under OSUP

## Quotes:

- “The statute does not specify a time limit on how long DHS may detain a [non-citizen] in the post-removal-period. However, the Supreme Court has read an implicit limitation into the statute “in light of the Constitution’s demands” and has held that a [non-citizen] may

be detained only for “a period reasonably necessary to bring about that [non-citizen’s] removal from the United States.” *Guzman Chavez*, 141 S.Ct. at 2281 (quoting *Zadvydas*, 533 U.S. at 689).” (\*5)

- “The Court finds that Chuol P.M. has been in prolonged detention and has provided good reason to believe there is no significant likelihood he will removed in the reasonably foreseeable future, which Respondents have not rebutted. Therefore, under *Zadvydas* his continued detention is unreasonable. See *Zadvydas*, 533 U.S. at 699-700 ... Accordingly, Chuol P.M. must be released from custody.” (\*10)

### **Northern District of Florida**

[\*Chebib v. DHS\*](#), 2020 WL 2561958 (N.D. Fla., Apr. 1, 2020) (R&R)

[R&R adopted by 2020 WL 2561277 (N.D. Fla., May 20, 2020)]

**Holding:** Petitioner’s detention was unreasonably prolonged where they met burden under *Zadvydas* of showing removal was not reasonably foreseeable. The court found no evidence for Government’s claims that Petitioner would be removed while this petition was pending and that he delayed his own removal.

**Length of Detention:** ~ 15 months

**Remedy:** Release with OSUP

### **Middle District of Florida**

[\*Manson v. Barr\*](#), No. 3:20-cv-133, 2020 WL 3962235 (M.D. Fla. July 13, 2020).

**Holding:** Petitioner’s detention was unreasonably prolonged. Both prongs of *Zadvydas* were satisfied and Petitioner was entitled to release when two countries to which he could’ve been removed denied multiple requests to accept him. The burden shifted to Government, which failed to prove the likelihood of removal in the reasonably foreseeable future.

**Length of Detention:** ~ 13 months

**Remedy:** Release under OSUP

[\*Joseph v. Mukasey\*](#), No. 4:08-cv-389, 2009 WL 331558 (M.D. Fla. Feb. 10, 2009)

**Holding:** Petitioner’s detention was unreasonably prolonged. Both prongs of *Zadvydas* were satisfied and Petitioner was entitled to release when one country to which he could’ve been removed refused to issue a travel document and removals to the second possible country had been suspended.



**Length of Detention:** 12 months

**Remedy:** Release under OSUP

**Southern District of Florida**

[Shaikh v. Meade](#), No. 21-cv-23752, 2022 WL 844420 (S.D. Fla., Mar. 22, 2022) (R&R)

[Partially adopted R&R from 2022 WL 1110066 (S.D. Fla. Jan. 4, 2022)]

**Holding:** Petitioner’s detention is not unreasonably prolonged because repatriation to Pakistan was possible. Also held that the Magistrate Judge erred by ordering a bond hearing because non-citizens subject to removal under § 1231 are not entitled to a bond hearing according to *Guzman Chavez*.

**Length of Detention:** ~10 months

**Remedy:** Petition denied

**Quotes:**

- “[A] delay in issuance of travel documents does not, without more, establish that a petitioner’s removal will not occur in the reasonably foreseeable future, even where the detention extends beyond the presumptive 180 day (6 month) presumptively reasonable period.” (\*4)
- The fact that ICE first obtained incorrect travel documents for him from Pakistan Consulate “does not establish a good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future.” (\*4)

[Ortiz v. Barr](#), No. 20-cv-22449, 2021 WL 6280186 (S.D. Fla. Feb. 1, 2021) (R&R)

[R&R adopted by 2022 WL 44632 (Jan. 5, 2022)]

**Holding:** Petitioner’s detention was not unreasonably prolonged. Petitioner was detained beyond *Zadvydas*’ presumptively reasonable period but failed to show that there was no reasonable likelihood of removal in the foreseeable future.

**Length of Detention:** 16 months (14 months post-order)

**Remedy:** Petition denied without prejudice

**Quotes:**

- “Other than his formulaic recitation that there is “no significant likelihood of his removal in the reasonably foreseeable future” [ECF No. 1 at 4], he fails to plead any facts to support such a claim. Rather, as argued by the Respondent [ECF No. 8 at 11], Petitioner has been accepted for removal by the Cuban Government, and the Enforcement and Removal Operations (‘ERO’) Office expected Petitioner to be removed as soon as removal flights to

Cuba were scheduled to resume in August. [ECF No. 8-5, Ex. E at 2-3]. While that ultimately did not happen, Petitioner has not filed anything else in the record to indicate that there is no significant likelihood of removal in the foreseeable future. Thus, he fails to meet his burden under the second prong of *Zadvydas*.” (\*4-\*5)

[Almeida v. Sessions](#), No. 17-civ-23418, 2017 WL 11696863 (S. D. Fla., Sep. 26, 2017)

**Holding:** The claim is premature and the *Zadvydas* period has not yet expired, even if it was unclear that Petitioner could be repatriated to Cuba.

**Length of Detention:** ~ 2 months

**Remedy:** Petition denied

### Middle District of Georgia

[A.O.J. v. Warden, Stewart Detention Center](#), No. 4:20-cv-252, 2021 WL 357359 (M.D. Ga. Feb. 2, 2021) (R&R)

[Subsequent decisions not available on Westlaw]

**Holding:** Petitioner’s detention was not unreasonably prolonged.

**Length of Detention:** ~ 24 months. 3 months after a stay of removal was lifted

**Remedy:** Petition dismissed without prejudice

#### Quotes:

- The first presumptively reasonable removal period ended when Petitioner filed a petition for review with the Eleventh Circuit and obtained a stay of removal, and the clock restarted when the stay was lifted. “Thus, Petitioner is only approximately three months into his statutory removal period, which is well short of the six months required to state a claim under *Zadvydas*.” (\*3)

[Phouk v. Warden](#), 378 F. Supp. 3d 1209 (M.D. Ga. 2019)

**Holding:** Petitioner showed good cause for limited discovery where the fundamental issue was the likelihood of removal in the reasonably foreseeable future as defined in *Zadvydas*.

**Length of Detention:** More than 6 months

**Remedy:** Motion to authorize discovery granted. Parties ordered to submit a joint discovery plan

#### Quotes:

- “A habeas petitioner, ‘unlike the usual civil litigant in federal court, is not entitled to discovery as a matter of ordinary course.’ But, habeas petitioners are not to be left without

any method for developing facts in support of their claim. Rule 6 of the Rules Governing § 2254 Cases in the United States District Courts (‘Habeas Rules’) provides that ‘[a] judge may, for good cause, authorize a party to conduct discovery under the Federal Rules of Civil Procedure’ in a habeas proceedings.” (1211)

- “Good cause exists ‘where specific allegations [ ] show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that [they are] entitled to relief.’” (1211)
- “Petitioner has shown good cause for discovery by making specific allegations that are both capable of further factual development and fundamental to the merits of his claim for relief. In his motion seeking discovery, he insists he ‘needs access to information clarifying a factual question created by existing information in the case.’” (1213)

[\*Adu v. Bickham\*](#), No. 7:18-cv-103, 2018 WL 6495068 (M.D. Ga. Dec. 10, 2018)

**Holding:** Petitioner’s prolonged post-order detention exceeded both the statutory removal period and the presumptively reasonable period under *Zadvydas*.

**Length of Detention:** More than 5 years

**Remedy:** Released under an order of supervision

**Quotes:**

- The court concludes that considering the petitioner’s appeals as an applicant-caused delay “would punish Petitioner for pursuing the legal remedies available to him. This comports with neither the spirit or letter of the law.” (\*3)
- “The detention statute’s two primary goals can clearly be met without physical detention. See *Zadvydas*, 533 U.S. at 690 (“The statute, says the Government, has two regulatory goals: ensuring the appearance of [non-citizens] at future immigration proceedings and preventing danger to the community.”). Petitioner has not shown a propensity for failing to appear at immigration proceedings or that he is a danger to the community.” (\*3)

[\*Ndjoko v. Holder\*](#), No. 7:12-cv-164, 2013 WL 2405420 (M.D. Ga. May 31, 2013)

**Holding:** Petitioner’s detention was justified. Petitioner failed under *Zadvydas* because it was uncontested that Petitioner’s removal was likely in the reasonably foreseeable future.

**Length of Detention:** More than 2 years. About 1 year post final order of removal

**Remedy:** Petition denied

**Quotes:**

- [He] refused to get on the airplane or caused such a disturbance on the aircraft that he had to be removed from the aircraft, and United Airlines notified ICE that “it will no longer accept [him] as a passenger.” (\*1)

- “[T]he ninety-day removal period may be extended ‘if the [non-citizen] fails or refuses to make timely application in good faith for travel or other documents necessary to the [non-citizen’s] departure or conspires or acts to prevent the [non-citizen’s] removal subject to an order of removal.’” (\*2) (citing 8 U.S.C. § 1231(a)(1)(C))
- “In fact, the only reason that Petitioner has not already been removed is because [he] has repeatedly refused to cooperate with his removal....” (\*3)

**Western District of Louisiana**

[\*Barco v. Witte\*](#), No. 6:20-cv-00497, 2020 WL 7393924 (W.D. La. Nov. 19, 2020) (R&R)

[R&R adopted by 2020 WL 7393786 (W.D. La. Dec. 16, 2020)]

**Holding:** Petitioner’s detention was unreasonable, where U.S.-Venezuela diplomatic relations had deteriorated, and travel restrictions are still in place because of COVID-19. Removal was unlikely in the foreseeable future.

**Length of Detention:** More than 12 months

**Remedy:** Immediate release

**Quotes:**

- “The Court agrees that it appears less likely today than it did in May and September of 2020...that Petitioner will be removed in the foreseeable future. Neither ICE’s belief that Petitioner will be removed, nor the information provided by Respondent, satisfy the government’s burden to rebut Petitioner’s showing that she will not be removed in the foreseeable future.” (\*4)

[\*Balza v. Barr\*](#), No. 6:20-cv-00866, 2020 WL 6143643 (W.D. La. Sep. 17, 2020) (R&R)

[R&R adopted by 2020 WL 6064881 (W.D. La. Oct. 14, 2020)]

**Holding:** Petitioner’s detention was now unreasonable and Petitioner’s continued detention by Government constituted irreparable injury sufficient to justify injunctive relief, where there was a diplomatic standoff between the U.S. and Venezuela, and the Venezuelan airspace remains closed because of COVID-19.

**Length of Detention:** More than 9 months

**Remedy:** Release under OSUP

**Quotes:**

- “Respondents’ continued violation of Petitioner’s constitutional right to substantive due process – her indefinite detention – is itself an irreparable injury. No further showing of irreparable injury is necessary.” (\*6)
- “[E]ven after this Court orders injunctive relief, Petitioner will be released by ICE under an order of supervision...She will be released with the same kind of supervision ICE has imposed on hundreds of other Venezuelans that ICE has already released in recognition that there is no likelihood of their removal to Venezuela in the reasonably foreseeable future.” (\*6)

[Diaz-Ortega v. Lund](#), No. 1:19-cv-670, 2019 WL 6003485 (W.D. La., Oct. 15, 2019) (R&R)

[R&R adopted by 2019 WL 6037220 (W.D. La. Nov. 13, 2019)]

**Holding:** Petitioner’s continued detention was not unreasonable where Petitioner could not show that there was no significant likelihood of removal in the reasonably foreseeable future.

**Length of Detention:** 18 months

**Remedy:** Petition denied without prejudice. Government ordered to conduct 180-day custody reviews in compliance with § 241.4.

**Quotes:**

- “In her Petition (Doc. 1), Diaz-Ortega claims that her continued detention is unconstitutional. The Government maintains that Diaz-Ortega’s Petition is meritless given the inevitability of a decision by the BIA, and “premature” given the stay of her removal less than 90 days after she was detained. (Doc. 12).” (\*3)
- “DHS/ICE arrested Diaz-Ortega 12 years, 5 months, and 23 days later...The Government must believe that Diaz-Ortega’s 90-day removal period ‘restarted’ when she was arrested. The Court has found no opinion of the Fifth Circuit or another district court in our circuit that directly addresses the Government’s position. And other courts have not reached a clear consensus. In fact, the jurisprudence seems to contain three identifiable approaches – two in direct conflict with one another, and a third which relies upon a critical factor that is not present in this case.” (\*7)
- “For all of these reasons, the court adopts the expiration approach. Diaz-Ortega’s removal period expired on October 19, 2005, and did not restart when she was arrested on April 11, 2018.” (\*10)
- “Because § 214.4 has not been followed in all respects, some relief is warranted. On balance, the most appropriate relief is to require DHS/ICE to comply with § 241.4. While imperfect, this relief affords Diaz-Ortega appropriate access to procedural rights.” (\*16)

## **Southern District of Mississippi**

[Carreno v. Gillis](#), No. 5:20-cv-44, 2020 WL 8366735 (S.D. Miss. Dec. 16, 2020) (R&R)

[R&R adopted by 2021 WL 310971 (S.D. Miss. Jan. 29, 2021)]

**Holding:** Petitioner’s continued detention was now unreasonable because Government received travel documents for Petitioner from the Venezuelan Embassy nine months ago and they had since expired.

**Length of Detention:** 16 months

**Remedy:** Removal or release under OSUP

[Sharifi v. Gillis](#), No. 5:20-cv-5, 2020 WL 7379211 (S.D. Miss. Oct. 9, 2020) (R&R)

[R&R adopted by 2020 WL 7364984 (S.D. Miss. Dec. 15, 2020)]

**Holding:** Petitioner’s detention was now unreasonable, as the government of Iran had not indicated that it would accept Petitioner.

**Length of Detention:** 21 months

**Remedy:** Ordered to be removed or released from custody within 30 days

### **Quotes:**

- “Petitioner emphasizes that Iran has refused to issue him a travel document and that ICE has not submitted all of the documentation (original birth certificate and passport) Iran demanded. Petitioner has provided good reason to believe there is no significant likelihood of removal in the reasonably foreseeable future. Thus, Petitioner has met his initial burden under *Zadvydas*.” (\*2)
- “Petitioner has been in custody awaiting removal for more than sixteen months. At this point, ‘Petitioner’s removal need not necessarily be imminent, but it cannot be speculative.’ *Hassoun v. Session*, 2019 WL 78984, at \*4.” (\*3)

[McKenzie v. Gillis](#), No. 5:19-cv-4139, 2020 WL 5536510 (S.D. Miss. July 30, 2020) (R&R)

[R&R adopted and modified in 2020 WL 5535367 (S.D. Miss. Sep. 15, 2020)]

**Holding:** Petitioner’s detention was now unreasonable, where British Consulate declined to issue Petitioner a passport because he was not a citizen of the United Kingdom but a “belonger” to the Turks and Caicos Islands. Turks and Caicos had not offered assistance in securing travel documents.

**Length of Detention:** 19 months

**Remedy:** Ordered to be removed or released from custody within 30 days

**Quotes:**

- “Six months have passed since Morrow stated that Petitioner’s removal was imminent. Yet, Petitioner remains in ICE custody, and nothing in Benavidez’s declaration demonstrates that Petitioner will be removed anytime soon” (\*3)

[Palma v. Gillis](#), No. 5:19-cv-112, 2020 WL 4880158 (S.D. Miss. July 7, 2020) (R&R)

[R&R adopted by 2020 WL 4876859 (S.D. Miss. Aug. 19, 2020)]

**Holding:** Petitioner’s detention was now unreasonable, where Government’s request for travel documents from Venezuela had been pending for more than seven months without cooperation from Venezuelan officials.

**Length of Detention:** More than 12 months

**Remedy:** Ordered to be removed or released from custody within 30 days

**Quotes:**

- “Respondent offers nothing—other than unsubstantiated belief—to suggest that a response from Venezuelan officials is forthcoming or that ICE is capable of removing Petitioner to Venezuela.” (\*2)

## **Southern District of Texas**

[Ali v. DHS](#), 451 F.Supp.3d 703 (S.D. Tex. 2020)

**Holding:** Petitioner’s continued detention was unreasonable where there was no significant likelihood of removal in the foreseeable future because Pakistan closed its borders at the height of the COVID-19 pandemic and Petitioner was neither a danger to the community nor a flight risk.

**Length of Detention:** ~ 4 months. Previous detention lasted 3 years.

**Remedy:** Release under OSUP

**Quotes:**

- “With no significant likelihood of removal in the foreseeable future, Petitioner's detention, the sole purpose of which was to effectuate imminent removal, no longer serves its intended purpose, and thus, is unreasonable.” (708)





- “Indeed, the present detention is all the more unreasonable in that it follows a previous detention, on the same grounds, of three years. Under 1231(a)(6) and *Zadvydas*, such unreasonable detention is unauthorized.” (708)