UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

DAMION G.V. DAVIS,

Petitioner,

v. 22-CV-443-LJV

MERRICK B. GARLAND, *et al.*,

Respondents.

RESPONDENTS' MEMORANDUM OF LAW
IN OPPOSITION TO PETITION FOR HABEAS CORPUS

Following this Court's partial grant of the Government's motion to dismiss (Doc. 14), this habeas proceeding is now limited to the narrow issue of whether the bond hearing already provided to Petitioner—that the Middle District of Pennsylvania has repeatedly upheld—suffices to moot this successive habeas petition. This Court asserted that "it is not clear on the current record" whether Petitioner's prior bond hearing was constitutionally sufficient because "this Court cannot discern whether the [Immigration Judge] considered alternatives to detention at the hearing." Doc. 14 at p. 10, 11, n. 8.

The government submits that the prior bond hearing was constitutionally sufficient, and this Court should not issue a decision contradicting the Middle District of Pennsylvania for four reasons.

First, after finding that Petitioner posed a danger to the community, the Immigration Judge was not constitutionally obligated to consider releasing him anyway under alternatives to detention.

Second, Petitioner waived any objection over the Immigration Judge's ("IJ") failure to consider alternatives to detention by not raising the issue before the IJ.

Third, for Petitioner to maintain a due process claim here, he bears the burden of showing that he was prejudiced by the Immigration Judge's failure to expressly consider alternatives to detention. But Petitioner does not argue that here—the issue of consideration of alternatives to detention appears nowhere in the Amended Petition or Petitioner's filings. Regardless, Petitioner cannot show prejudice because any lack of explicit consideration of alternatives to detention would be harmless error. There is no dispute that Petitioner is a violent, recidivist criminal with more than 20

arrests and a dozen convictions, including for theft, cocaine distribution, multiple violations of protective orders, strangulation, assaults, stalking, and multiple DUIs. In one instance he even choked his ex-wife in front of her young children, ripped a baby from her arms, and then fought against the police when they sought to stop him. Release of Petitioner under any conditions would be plainly inappropriate.

Fourth, this habeas proceeding remains subject to dismissal for abuse of the writ. Petitioner could have readily raised the adequacy of consideration of alternatives to detention in his prior habeas proceedings. His failure to do so does not entitle him to bring yet another successive habeas petition.

Finally, to the extent that the Court disagrees, the only appropriate remedy would be a remand to the Immigration Judge to expressly consider whether Petitioner should be subject to release under alternatives to detention.

STATEMENT OF FACTS[1]

Petitioner, a native and citizen of Jamaica, entered the United States on November 2, 1989, as a lawful permanent resident. Bates pp. 000115, 000141.[2]

Criminal and Disciplinary History

In his time in the United States, Petitioner has accrued an extensive criminal history including the following convictions:

[1] The government completed substantially identical habeas litigation brought by Petitioner in the Middle District of Pennsylvania and is currently litigating the same issues in front of the Third Circuit Court of Appeals and accordingly largely repeats its factual presentation from the government's filings and exhibits in those cases.

[2] Bateslabeled page numbers refer to the six-digit numbering at the bottom center of the accompanying Declaration of Daniel B. Moar, with Exhibits 1-12. This was previously filed with the Court as Doc. 12 and the bateslabeled pages have been added for ease of reference.

• Convicted July 14, 2011 of a June 28, 2009 DUI and sentenced to 6 months' probation;

• Convicted July 15, 2011 of a March 4, 2011 DUI and sentenced to 1 month imprisonment and 6 months' probation;

• Convicted August 19, 2011 of a May 28, 2011 – Revocation of Probation for failure to pay fines and costs due on the DUI – Alcohol;

• Convicted December 2, 2015 of a March 10, 2015 Theft by Unlawful Taking and sentenced to 6 months' probation;

• Convicted April 21, 2016 of an April 8, 2016 Disorderly Conduct;

• Convicted January 18, 2017 of an October 30, 2016 Disorderly Conduct;

• Convicted November 3, 2017 of a March 1, 2017 Resisting Arrest and sentenced to 1 day and 23 months' confinement;

• Convicted November 29, 2017 of a May 27, 2017 Disorderly Conduct and sentenced to 12 months' probation;

• Convicted January 29, 2018 of a February 8, 2017 DUI – Alcohol – 3rd Offense and sentenced to 10 days to 2 years imprisonment;

• Convicted February 6, 2018 of a March 28, 2017 Manufacture, Delivery or Possession with Intent to Manufacture or Deliver a Controlled Substance to wit: Cocaine and sentenced to 15-30 months imprisonment; and 9 to 18 months confinement for a Criminal Use of Communication Facility conviction entered the same date. Petitioner's appeal of this conviction was denied. See Commonwealth of Pa. v. Davis, 217 A.3d 449 (Pa. Super. Ct. 2019) (affirming sentence), appeal denied by 222 A.3d 1125 (Pa. 2020);

• Convicted June 5, 2018 of a May 21, 2018 Contempt for Violation of Order and Harassment and sentenced to 14 days to 6 months imprisonment;

• Convicted September 25, 2018 of an October 9, 2018 Contempt for Violation of Order for violating a protection order issued June 5, 2018 and sentenced to 30 days to 6 months' imprisonment;

• Convicted March 25, 2019 of Strangulation and sentenced to 5 to 11 months imprisonment and 1 year probation;

• Convicted May 28, 2019 of an October 19, 2018 Simple Assault and

sentenced to 6 to 12 months' imprisonment;

Bates pp. 000141-143.

In addition, Petitioner has the following arrests that did not result in convictions:

• May 7, 2009 – Possessing Instruments of Crime, Prohibited Offensive Weapons, Simple Assault, and Terroristic Threats;

• October 5, 2009 – Possession of Marijuana;

• December 3, 2010 – Simple Assault and Harassment. The simple Assault charges were not prosecuted and the Harassment was moved to non-traffic docket;

• March 26, 2011 – DUI Alcohol;

• January 2, 2012 – Simple Assault, Harassment;

• January 2, 2012 – Unsworn Falsification to Authorities and False I.D. to Law Enforcement;

• October 4, 2016 – Recklessly Endangering, Disorderly Conduct, Harassment, Criminal Mischief, and Criminal Trespass;

• January 23, 2017 – Simple Assault, Harassment, and Public Drunkenness;

• September 24, 2017 – Stalking and Harassment;

• January 26, 2018 – Contempt for Violation of Order.

Id.; 000117.

Petitioner has also been subjected to disciplinary proceedings due to his repeated misconduct while in detention. Bates pp. 000352-358.

Removal Proceedings

Petitioner came to the attention of ICE due to the multitude of his arrests. Bates pp. 000117, 140. On October 17, 2019, ICE officers accompanied Cumberland County Probation to Petitioner's residence and arrested him for violating the Immigration and

Nationality Act. Id. at 000117, 140-141. That same day, ICE issued a Notice to Appear charging Petitioner as removable from the United States pursuant to Section 237(a)(2)(E)(ii) of the Immigration and Nationality Act ("INA") in that at any time after admission he was enjoined under a protection order and subsequently engaged in conduct violating that order. Id. at 000117, 146-148.

On November 18, 2019, ICE added the following charges of Inadmissibility/Deportability for violating the INA:

- Section 237(a)(2)(B) in that at any time after admission he was convicted of a law relating to a controlled substance;
- Section 237(a)(2)(A)(iii) in that he was convicted of an aggravated felony – illicit trafficking in a controlled substance;
- Section 237(a)(2)(E) in that he was convicted of a crime of domestic violence;
- Section 237(a)(2)(A)(ii) in that he was convicted of two or more crimes involving moral turpitude not arising out of a single scheme of criminal misconduct.

Bates pp. 000118, 150-151. ICE determined that Petitioner would remain in custody due to his status as an aggravated felon. Bates p. 000118.

On February 5, 2020, the parties appeared for the individual merits hearing on Petitioner' charges of removability and his applications for relief from removal. Bates pp. 000152-166. Petitioner requested a continuance based on the fact that he had allegedly retained an attorney the day prior to his hearing. Id. at 000155. The immigration judge denied Petitioner's request for a continuance because it had not received any communication, filings, or an entry of appearance from an attorney. Id. Further, Petitioner had already had several months to find an attorney before his merits hearing. Id. Petitioner's primary reason for seeking an attorney was to present his case for derivative citizenship. Id. The immigration judge found that Petitioner's likelihood of succeeding on that form of relief

was unlikely and denied any further continuance. Id. Petitioner was argumentative with the immigration court during his hearing and did not provide testimony in support of his fear-based application. Id. Rather, even after the immigration judge's ruling, Petitioner continued to argue that he had derived citizenship from his father. Id.

The immigration judge wrote a thorough, detailed opinion sustaining Petitioner's charges of removability, declining to find he had derived citizenship from his father, denying his applications for relief from removal, and directing his removal from the United States. Bates pp. 000119, 152-166. The immigration judge found that Petitioner's claim for derivative citizenship was governed by the former INA § 321 (former 8 U.S.C. § 1432), but that Petitioner failed to qualify for derivative citizenship:

> Since Respondent[3] was born on August 13, 1978, former INA § 321 applies. Here, Respondent's mother did not naturalize until 2000, when Respondent was over eighteen years old, thus both of his parents did not naturalize before he turned eighteen. Further, Respondent's parents were never married. Thus, Respondent was born out of wedlock. A child born out of wedlock can naturalize through his or her mother, if the mother naturalizes before the child is 18 and has not been legitimated by the father. Here, Respondent's mother naturalized after Respondent turned 18. Additionally, since Respondent's parents were never legally married, they cannot be considered legally separated or divorced. A "legal separation" of alien's parents, for purpose of a derivative citizenship claim based on one parent's naturalization, occurs only upon a formal governmental action, such as a decree issued by a court of competent jurisdiction that, under the laws of a state or nation having jurisdiction over the marriage, alters the marital relationship of the parties. For these reasons, the Court found on the record that Respondent did not derive United States citizenship from his father prior to his eighteenth birthday.

Bates p. 000160 (internal citations omitted).

[3] Petitioner is referred to as "Respondent" in immigration proceedings.

Although not perfected until two months after the deadline, the Board of Immigration Appeals ("BIA") accepted review of Petitioner's appeal of this decision. Bates pp. 000119, 169-172. On June 10, 2021, the BIA issued an equally thorough, detailed opinion explaining why it dismissed Petitioner's appeal. Id. Like the immigration judge, the BIA rejected Petitioner's claim to derivative citizenship, determining that Petitioner's parents were not legally separated and the recognition of common law marriage in the Jamaican Rights of Spouses Act in 2004 did not benefit Petitioner, whose parents separated decades before the enactment of that law. Bates p. 000171.

Third Circuit Petition for Review

On June 28, 2021, Petitioner challenged the BIA's dismissal with a Petition for Review ("PFR") with the Third Circuit. Bates pp. 000005-009, 119. On the same day, pursuant to its standing practice order, the Third Circuit issued a temporary stay of removal pending adjudication of Petitioner's Motion to Stay. Id.; Bates pp. 000011-013.

On August 30, 2021, Petitioner filed his brief in support of his PFR. Bates pp. 000015-046. Petitioner argued to the Third Circuit that he had derivative citizenship. Id. at 000031-033. Petitioner further insisted that ICE arrested him "without a proper warrant or a notice to appear by an immigration judge," Id. at 000017, and sought release from immigration detention. Id. at 000029-030, 036-037. The Third Circuit rejected Petitioner's motion for stay of removal, concluding that he "failed to make a strong showing that he is likely to prevail on the merits of his petition for review. More specifically, Petitioner is unlikely to prevail on his argument that the agency erred in concluding that former 8 U.S.C. § 1432(a)(3)'s 'legal separation' requirement was not satisfied in his case." Bates pp.

000048-049. The Third Circuit further held that "Petitioner's motion for release pending a decision in this case is likewise denied." Id.

On September 29, 2021, the government filed its answering brief. Bates pp. 000051-88. The brief explained why Petitioner did not gain derivative citizenship and was instead subject to removal. Id.

On December 30, 2021, a different panel elected to appoint counsel for Petitioner and issued a stay of Petitioner's removal pending disposition of his PFR. Bates p. 000008. The PFR remains pending before the Third Circuit with Petitioner's supplemental briefing due by January 12, 2023. See Davis v. Attorney General, 3d Cir. 21-2235, Doc. 40.

Middle District of Pennsylvania Habeas Proceedings

Petitioner filed a Petition for a Writ of Habeas Corpus with the Middle District of Pennsylvania[4] on July 19, 2021. Bates pp. 000090-109. The Petition again asserted Petitioner's belief that he had derivatively attained citizenship through his father, that he was arrested without a proper warrant or a notice to appear, and that Petitioner sought an order directing ICE to "immediately release" him. Id. at 000092-094, 101-102. The government filed its response on August 23, 2021. Bates pp. 000115-187.

On April 6, 2022, Petitioner received a bond hearing with the burden of proof on the government to show danger to the community or flight risk by clear and convincing evidence pursuant to then Third Circuit precedent, Guerrero-Sanchez v. Warden York Cnty, 905 F.3d 208 (2018). Bates pp. 000190, 219. In advance of the hearing, the government submitted voluminous evidence of Petitioner's extensive criminal history. Bates pp. 000252-254, 258-

[4] The caption appears to have been copied from Petitioner's PFR and erroneously lists the Court as the Third Circuit and provides the appellate case number.

333. This included a wide range of evidence for much of Petitioner's criminal history, with everything from drug dealing to choking his ex-wife in front of her young children, ripping a baby from her arms, and then fighting against the police when they sought to stop him. Id. at 000297. At the conclusion of the hearing, the immigration judge denied bond, finding Petitioner to be a danger to the community and flight risk. Bates p. 000219.

The government filed a status update with the district court, informing it that the Petitioner's bond hearing rendered his habeas petition moot. Bates pp. 000189-220. The magistrate judge issued a Report and Recommendation ("R&R") recommending that Petitioner's request for release be denied and his request for habeas relief be denied as moot. Bates pp. 000222-235. The R&R noted that "[t]he only remedy for an alien challenging their mandatory detention is a bond hearing," id. at 000229, and that because Petitioner had already received a bond hearing, his request for habeas relief was moot. Id. at 000233. On June 13, 2022, the district court issued an order adopting the R&R and denying the petition for habeas corpus as moot. Bates pp. 000237-238.

Before the district court found Petitioner's Middle District of Pennsylvania habeas petition to be moot, Petitioner filed this successive habeas petition. Doc. 1. Subsequently, the Middle District of Pennsylvania issued further decisions finding Petitioner's habeas claims to be moot. See Davis v. Warden of Pike Cnty. Corr. Facility, 2022 WL 4391686 (M.D. Pa. Aug. 18, 2022); adopted 2022 WL 4389543 (M.D. Pa. Sept. 22, 2022).

Western District of New York Habeas Proceeding

Petitioner filed this habeas proceeding on June 9, 2022—four days before the Middle District of Pennsylvania initially found Petitioner's habeas filing to be moot. Doc. 1.[5] In

5 The Middle District of Pennsylvania issued further decisions finding Petitioner's habeas

response, the Government filed a motion to dismiss. Doc. 12. As relevant here, the Government primarily argued two things in its motion. First, it argued that this Court lacks jurisdiction to consider Petitioner's request for release based on his claim of having obtained derivative citizenship. Second, it argued that Petitioner's claims are moot and an abuse of the writ of habeas corpus because the only remedy Petitioner could receive is a bond hearing and he already received one. Indeed, the Middle District of Pennsylvania already found the bond hearing mooted Petitioner's claim to habeas relief on June 13, 2022 and September 22, 2022.

This Court accepted the Government's first argument, agreeing that it lacked jurisdiction to consider Petitioner's request for relief based on his claim of having derivative citizenship. Doc. 14 at pp. 6-9. Accordingly, this Court granted the Government's motion to dismiss in part.

With respect to the Government's second argument about Petitioner's bond hearing mooting any claim for a bond hearing, which the Middle District of Pennsylvania already agreed with, this Court took a different approach. It held that while the prior bond hearing and associated habeas litigation "might ordinarily moot" this Petition, "it is not clear on the current record" whether this is so. Id. at 10. Specifically, this Court acknowledged the IJ's determination that Petitioner posed a danger and significant flight risk, but also asserted that "the record is not clear about whether the IJ also found that no less-restrictive alternatives to detention could satisfy the government's interest in detaining Davis." Id. at 11. According to this Court, "the Due Process Clause requires that a neutral decisionmaker consider whether alternatives to detention can reasonably serve the government's regulatory interest in

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claims to be moot. See Davis v. Warden of Pike Cnty. Corr. Facility, 2022 WL 4391686 (M.D. Pa. Aug. 18, 2022); adopted 2022 WL 4389543 (M.D. Pa. Sept. 22, 2022).

detaining Davis." Id. at 12.

ARGUMENT

POINT I

AFTER FINDING PETITIONER TO BE A DANGER TO THE COMMUNITY, THE IMMIGRATION JUDGE WAS NOT REQUIRED TO CONSIDER RELEASING HIM ANYWAY UNDER ALTERNATIVES TO DETENTION

Petitioner's habeas claims were found to be moot by the Middle District of Pennsylvania on both June 13, 2002, and September 22, 2022. Bates pp. 000237-238; 2022 WL 4391686, adopted 2022 WL 4389543 (M.D. Pa. Sept. 22, 2022). It therefore follows that the habeas claims were moot when Petitioner commenced this successive habeas proceeding on June 9, 2002. Doc. 1. Petitioner already received the only remedy available to him—a bond hearing—and his filing of this successive habeas petition warrants dismissal.

At Petitioner's bond hearing, the burden of proof was on the Government to show by clear and convincing evidence that continued detention of Petitioner was warranted due to danger to others or flight risk because of the Third Circuit's then binding precedent, Guerrero-Sanchez v. Warden York Cty. Prison, 905 F.3d 208 (3d Cir. 2018); Bates pp. 189-220. The Government produced evidence showing Petitioner is a violent, recidivist criminal with more than 20 arrests and twelve convictions in the ten-year period preceding his detention. Bates pp. 000117, 141-143, 000252-254. 258-333. This included everything from drug dealing to stalking to choking his ex-wife in front of her children, ripping her baby from her arms, and then fighting against the police when they sought to stop him. Id.; Bates p. 000297. Petitioner has also repeatedly violated a restraining order/protection from abuse order. Bates p. 000297. Additionally, Petitioner has been subject to disciplinary proceedings due to repeated misconduct while in detention. Bates pp. 000352-358.

The IJ's decision to deny bond (Bates p. 000219) without expressly addressing alternatives to detention was constitutional. "Due process does not require immigration courts to consider conditional release when determining whether to continue to detain an alien under § 1226(c) as a danger to the community." Martinez v. Clark, 36 F. 4th 1219, 1231 (9th Cir. 2022). Moreover, the Supreme Court has emphasized deference to the executive and never suggested that an immigration judge must consider alternatives to detention for a bond hearing to be constitutional. Cf. Dep't of Homeland Sec. v. Thuraissigiam, 140 S.Ct. 1959, 1966 (2020) ("A major objective of [the Immigration Reform and Immigrant Responsibility Act] was to protect the Executive's discretion from undue interference by the courts; indeed, that can fairly be said to be the theme of the legislation.") (cleaned up); Reno v. Flores, 507 U.S. 292, 306 (1993) ("For reasons long recognized as valid, the responsibility for regulating the relationship between the United States and our alien visitors has been committed to the political branches of the Federal Government. Over no conceivable subject is the legislative power of Congress more complete. Thus, in the exercise of its broad power over immigration and naturalization, Congress regularly makes rules that would be unacceptable if applied to citizens.") (cleaned up).

The Government recognizes that the Western District of New York has issued inconsistent decisions as to whether alternatives to detention must be expressly considered. Compare Lopez v. Garland, 2022 U.S. Dist. LEXIS 135301, at *18-*19 (W.D.N.Y. July 29, 2022) ("The decisionmaker also must consider—and must address in any decision—whether there is clear and convincing evidence that

there are no less-restrictive alternatives to physical detention ...."); with Lopez v. Barr, 458 F. Supp. 3d 171, 179-180 (W.D.N.Y. 2020) (rejecting that alternatives to detention must be expressly considered because "[t]he Immigration Judge's decision to deny release on bond because [petitioner] presented both a flight risk and a risk of danger 'necessarily implie[d]' that . . . no alternatives could mitigate the risks he presented."). As explained below, once the Government establishes danger to the community, the Constitution does not mandate consideration of alternatives to detention (either expressly or otherwise) and this Court's decisions to the contrary are wrongly decided.

This Court's first decision mandating consideration of alternatives to detention appears to be Abdi v. Nielsen, 287 F. Supp. 3d 327 (W.D.N.Y. 2018). An examination of what Abdi says (and does not) helps to explain how the Court arrived at this point.

Contrary to some subsequent decisions citing to Abdi, Abdi does not state that an IJ needs to consider alternatives to detention after finding the Government met its burden to show danger to the community by clear and convincing evidence. Instead, Abdi holds that alternatives to detention must be considered after an IJ finds that an immigration detainee should be released—a determination that only occurs when the government fails to establish danger to the community. Specifically, in Abdi, the Court holds that "once an IJ has determined that release is appropriate and bond should be set, the IJ must consider the detainee's ability to pay, as well as alternative conditions of release." Id. at 334. The Court later restates its holding in similar fashion: "the Court concludes that once an IJ

determines that release of the detainee is appropriate, an IJ must consider ability to pay and alternative conditions of release in setting bond ...." Id. at 338. In short, Abdi does not hold that even if an IJ determines that an immigration detainee poses a danger to the community by clear and convincing evidence, the IJ still must consider release under alternatives to detention.

Such a construction of Abdi would also be contrary to the cases Abdi relies upon to reach its holding. Specifically, Abdi cites to the Ninth Circuit's decision in Hernandez v. Sessions, 872 F. 3d 976 (9th Cir. 2017). In doing so, however, Abdi makes clear that Hernandez too requires consideration of alternatives to detention only after release on bond is already deemed appropriate:

> [In Hernandez, t]he Ninth Circuit . . . explain[ed] that the detainees had been determined to be "neither dangerous nor so great a flight risk as to require detention without bond," and held that, under those circumstances, "consideration of the detainees' financial circumstances, as well as of possible alternative release conditions," is "necessary to ensure that the conditions of their release will be reasonably related to the governmental interest in ensuring their appearance at future hearing."

287 F. Supp. 3d at 336 (quoting from Hernandez, 872 F.3d at 990-91). Thus, Abdi cannot be interpreted as mandating consideration of alternatives to detention in all circumstances insofar as it relies on Hernandez.

Additionally, Abdi reaches its holding after consideration of "BIA cases." 287 F. Supp. 3d at 337-338. But the Board of Immigration Appeals does not mandate consideration of alternatives to detention even when an IJ finds a detainee poses a risk to the community. It, like Abdi, supports the opposite conclusion. See, e.g., Perez v. Wolf, 445 F. Supp. 3d 275, 291 (N.D. Cal. 2020) ("Because the IJ determined that Petitioner poses a danger to the community and that bond is inappropriate, the IJ did

not need to consider alternatives to detention."); Ortiz v. Smith, 384 F. Supp. 3d 140, 144 (D. Mass. 2019) ("The immigration judge's determination that [petitioner] is dangerous obviated any need for him to consider conditions of release."); Hernandez v. Lynch, 2016 U.S. Dist. LEXIS 80757, at *11-12 (S.D. Cal. 2016) (rejecting argument that government failed to show danger by clear and convincing evidence and failed to properly consider alternatives to detention where "[t]he IJ considered alternatives to detention, but found that the Board of Immigration Appeals precedent indicates that where there is a finding of danger to the community, 'the respondent shall not be released from custody.' . . . The IJ considered the relevant factors and applied the correct legal standard."); Matter of Urena, 25 I. & N. Dec. 140, 141 (B.I.A. 2009) ("[D]angerous aliens have no constitutional right to be at liberty in the United States pending the competition of proceedings to remove them from the country. An Immigration Judge should only set a bond if he first determines that the alien does not present a danger to the community."). Thus, Abdi also cannot be interpreted as mandating consideration of alternatives to detention in all circumstances insofar as it relies on BIA caselaw.

The next Western District of New York case mandating consideration of alternatives to detention is Hechavarria v. Sessions, 2018 U.S. Dist. LEXIS 188499 (Nov. 2, 2018). It initially announces the requirement of considering alternatives to detention in a precedentless footnote. See Id. at *22 n.13 ("Whether detention is necessary to serve a compelling regulatory purpose requires consideration of whether a less restrictive alternative to detention, such as release on bond in an amount that the petitioner can reasonably afford, would also address those purposes.") (without citation). However, when the case returned to the Court, it

explained that it was relying on the Supreme Court's statement that "[w]hen a plausible, less restrictive alternative is offered to a 'regulation burdening a constitutional right, 'it is the Government's obligation to prove that the alternative will be ineffective to achieve its goals." Hechavarria v. Whitaker, 358 F. Supp. 3d 227, 241-42 (quoting United States v. Playboy Entm't Grp., 529 U.S. 803, 816 (2000)).

Playboy Entm't Group, however, considered a First Amendment content-based speech restriction on U.S. citizens that was subject to strict scrutiny. 529 U.S. 803. Such a heightened standard has nothing to do with that applicable to noncitizens in immigration detention. The Supreme Court has been clear such a standard does not apply. See Demore v. Kim, 538 U.S. 510, 528 (2003) ("But when the Government deals with deportable aliens, the Due Process Clause does not require it to employ the least burdensome means to accomplish its goal."); Gomez-Arias v. United States Immigration & Customs Enf't, 2020 U.S. Dist. LEXIS 202388, at *31, *33 (D. N.M. Oct. 30, 2020) ("When the government is managing deportable aliens, it is not required 'to employ the least burdensome means to accomplish its goal.' . . . . Although supervised release, conditional release, GPS monitoring, and other methods may sufficiently ensure Petitioner's presence at legal proceedings, it is not a due process violation to instead detain the individual. Petitioner does not have a due process right to an individualized determination as to the least restrictive way to secure his appearance at removal proceedings.") (citing Demore).

This year, two Circuit Court have also expressly rejected reliance on the

application of heightened standards to noncitizens in immigration detention. First, in Miranda v. Garland, the Fourth Circuit made clear that precedents outside the immigration context are not to be relied upon in defining the procedures due to a detained noncitizen because doing so "fail[s] to recognize . . . Supreme Court precedent establishing that aliens are due less process when facing removal hearings than an ordinary citizen would have." 34 F.4th 338, 361 (4th Cir. 2022). The Fourth Circuit further emphasized that noncitizens "facing removal proceedings, although entitled to due process under the Constitution, are not entitled to the same process as citizens." Id. at 365. Finally, the Fourth Circuit rejected the Ninth Circuit's (now circumscribed) holding that alternatives to detention were a necessary consideration in an immigration bond hearing. Id. at 366 ("And the Ninth Circuit's Hernandez v. Sessions decision, 872 F.3d 976, 990-91 (9th Cir. 2017), which concluded that due process required immigration judges . . . to consider . . . possible alternative release conditions, suffers from the same flaws. In equating the due-process rights of aliens with that of citizens, it relied upon criminal cases involving citizens, and Zadvydas [v. Davis, 533 U.S. 678 (2001)], which the Supreme Court, as we have already discussed, cabined to the context where a statute would 'permit[] indefinite detention of an alien.'").

Shortly after Miranda v. Garland, the Ninth Circuit followed suit and made clear that the Constitution does not mandate consideration of alternatives to detention for noncitizens found to be a danger to the community and that its prior Hernandez decision was being misconstrued. The Ninth Circuit squarely addressed the issue here:

> Martinez finally argues that the BIA had to consider alternatives to detention, such as conditional parole, before denying him bond. Martinez suggests that the BIA must import consideration of conditions of release from the criminal pretrial release context, such as GPS monitoring, drug testing, and counseling, to the immigration custody context. In Martinez's view, failing to do so violates due process or constitutes legal error. We reject Martinez's argument.

Instead, the Ninth Circuit held that "[d]ue process does not require immigration courts to consider conditional release when determining whether to continue to detain an alien under § 1226(c) as a danger to the community." Martinez v. Clark, 36 F.4th 1219, 1231 (9th Cir. 2022). The Ninth Circuit also rejected the Petitioner's reliance on Hernandez, which it emphasized was limited to facts where the noncitizen was already determined not to be dangerous or flight risks. Id. at 1231-32.

Ultimately, the Western District of New York decisions mandating that even when an IJ finds a noncitizen to be a danger to the community by clear and convincing evidence the IJ must still consider release anyway on conditions are unmoored from precedential support. The Ninth Circuit decision in Hernandez—which forms the basis for this Court's Abdi decision—does not even mandate consideration of alternatives to detention in these circumstances. Moreover, while this Court has relied on an expansive interpretation of Hernandez (via Abdi), the Ninth Circuit itself has made plain the holding should be narrowly construed and that the Constitution does not uniformly mandate consideration of alternatives to detention. Additionally, Supreme Court and Circuit precedent emphasizes that district courts should not be imposing procedures due to noncitizens based on criminal and other precedent applicable to citizens. Accordingly, Hechavarria and

its citing cases should not be followed.

In short, Petitioner was expressly found by the IJ to present a danger to the community by clear and convincing evidence. This is all that is required and Petitioner's claims are moot—just as the Middle District of Pennsylvania has twice held.

POINT II

PETITITONER WAIVED ANY OBJECTION REGARDING THE IJ'S FAILURE TO CONSIDER ALTERNATIVES TO DETENTION BY NOT RAISING THE ISSUE BEFORE THE IJ

While this Court *sua sponte* raised the issue over whether the IJ considered alternatives to detention in this proceeding, Petitioner himself did not present the issue to the IJ. By failing to raise this argument before the IJ, Petitioner is precluded from bringing it for the first time here. In re Matter of Maria de Rodriguez-Echeverria, 2010 Immig. Rptr. LEXIS 7843, at *17 (B.I.A. Nov. 30, 2010) (refusing to consider authentication arguments that the noncitizen had never raised before the IJ); Garcia-Aguilar v. Lynch, 806 F.3d 671, 676 (1st Cir. 2015) (noncitizen's argument against the use of certain evidence from removal proceedings in bond hearing "founders" where the noncitizen did not raise it below). To hold otherwise would create a perverse incentive for a petitioner to strategically lie in wait and assert a seemingly endless number of successive habeas petitions with new arguments that could have been but were not raised before the Immigration Judge.

POINT III

PETITIONER CANNOT SHOW PREJUDICE NEEDED TO SUSTAIN HIS HABEAS CLAIM

As recognized by this Court, even if Petitioner's bond hearing was deficient—which the Middle District of Pennsylvania has already held not to be the case—Petitioner cannot successfully bring a habeas claim here absent a showing of prejudice. Onosomba-Ohindo v. Barr, 483 F. Supp. 3d 159, 190 (W.D.N.Y. 2020) ("In cases where a petitioner detained pursuant to § 1226(a) has already received a bond hearing, albeit one where unconstitutional procedures were used, this Court has required a showing of prejudice before ordering a new bond hearing.").[6] Moreover it is Petitioner that bears the burden to show prejudice. Id.; Rivera v. Sessions, 903 F.3d 147, 151 (1st Cir. 2018) ("before a petitioner in an immigration case may advance a procedural due process claim, he must allege some cognizable prejudice fairly attributable to the challenged process."). Additionally, as this Court recognized "Second Circuit caselaw is in accord that such a showing of prejudice is necessary." Onosomba-Ohindo v. Searls, 2021 U.S. Dist. LEXIS 59627, at *19 (W.D.N.Y. Mar. 29, 2021) (collecting cases).

Petitioner has not met his burden. There is no reference whatsoever in the Amended Petition to prejudice that Petitioner suffered from the IJ's failure to consider alternatives to detention. Simply put, Petitioner cannot meet a burden on something he has never argued.

[6] The preliminary injunction imposed in Onosomba-Ohindo was ultimately vacated on consent on appeal to the Second Circuit. Agustin v. Searls, 2022 U.S. App. LEXIS 30205 (2d Cir. Aug. 26, 2022).

Nor can prejudice be found in these circumstances under harmless error analysis, as required for Petitioner to meet his burden. See Solis v. Clark, 2009 U.S. Dist. LEXIS 21294, at *9 (W.D. Wash. 2009). Beyond the shocking volume of crimes committed by Petitioner—with at least 12 convictions and 10 further arrests in just 10 years—the nature of Petitioner's crimes amply demonstrates he cannot be released under any alternatives to detention. The evidence before the IJ showed that Petitioner has repeatedly violated protective orders. Bates p. 000117 (noting January 26, 2018 arrest for contempt for violation of order); 143 (same, plus noting separate May 21, 2018 arrest and June 5, 2018 conviction for violation of protection from abuse ("PFA") order); 297 ("From prior experience with D. DAVIS I can confirm that he shows up on a regular basis knowing that he is not to be within the borough limits or around his wife and kids as per a PFA that was placed on him."). In one incident, Petitioner smashed his ex-wife's 8-month-old baby's head into a door because Petitioner was trying to get at his ex-wife so he could choke her—which he did. Bates p. 000297 ("Upon arrival back at the house A. DAVIS ran inside, D. Davis followed hitting the 8-month old's head off the door as it shut on them. D. DAVIS never attempted to check to see if the 8-month-old was ok. D. DAVIS then pinned A. DAVIS against the wall again this time choking her in front of the 3 small kids in the house. A. DAVIS broke free and ran back upstairs where D. DAVIS pinned her down on the bed with the 8-month-old and began choking her again."). Petitioner also has repeated arrests and convictions for DUI and drug dealing. Bates pp. 00117, 141-143. Simply put, Petitioner has repeatedly ignored protective orders, repeatedly hurt people, repeatedly driven under the influence, and

repeatedly dealt in narcotics. There is thus no basis under a harmless error analysis to conclude that Petitioner should be released under any alternatives to detention.

POINT IV

THIS PROCEEDING SHOULD BE DISMISSED FOR ABUSE OF THE WRIT

As discussed above, the Middle District of Pennsylvania has twice held that Petitioner's habeas claims are moot because Petitioner received a bond hearing with the burden of proof on the government by clear and convincing evidence. Those decisions were made after Petitioner filed the habeas petition now before this Court. There is thus no way that this Court can issue a decision granting Petitioner habeas relief without undermining the finality of the judgment of the Middle District of Pennsylvania.

Nor should it under an abuse of the writ analysis. It is immaterial that the Middle District of Pennsylvania did not consider the alternatives to detention argument raised by this Court. "District courts have the power to dismiss a habeas corpus petition . . . for abuse of the writ by barring claims that could have been or were raised in an earlier habeas petition." Alsop v. Warden, 2019 U.S. Dist. LEXIS 143098, at *11 (N.D.N.Y. Aug. 22, 2019). Petitioner could have raised the alternatives to detention argument in either of his two prior habeas proceedings and his failure to do so does not warrant relief here. Petitioner's filing of this habeas petition—his third—is an abuse of the writ that should not be countenanced.

POINT V

THE ONLY REMEDY AVAILABLE TO PETITIONER IS A BOND HEARING LIMITED TO ALTERNATIVES TO DETENTION

While Petitioner seeks release from immigration detention, the law is quite clear that

the only remedy available would be a bond hearing. See Demore v. Kim, 538 U.S. 510 (2003) ("respondent could be entitled to an individualized determination as to his risk of flight and dangerousness if the continued detention became unreasonable or unjustified.") (Kennedy, J., concurring); Davis v. Warden, 2022 WL 4391686 (M.D. Pa. Aug. 18, 2022) ("The only remedy for an alien challenging their mandatory detention is a bond hearing."); Funez-Galvez v. Doll, 3:CV-17-1931, 2018 WL 487844, at *3 (M.D. Pa. Jan. 19, 2018) ("[t]he only relief this Court may grant . . . is a bond hearing before an Immigration Judge, not release.") (citing Diop v. ICE/Homeland Sec., 656 F.3d 221, 235 (3d Cir. 2011); Morrison v. Elwood, 2013 WL 323340, at * (D.N.J. Jan. 28, 2013) ("This Court's power to entertain habeas applications ensures solely from the narrowly-tailored mandate of 28 U.S.C. § 2241, which—with respect to the claims raised by pre-removal order alien detainee's—allows relief limited to a directive of a bond hearing.").

Petitioner's request for an order of release should be rejected. If anything, this Court should order a bond hearing limited to whether alternatives to detention could suffice to warrant Petitioner's release. This is because "[o]rdinarily, the remedy in a lawsuit involving an administrative agency's actions is remand to the agency. This approach acknowledges the agency's unique expertise and its responsibility to execute the law by allowing the agency to reformulate its objectives and exercise its discretion in planning to fulfill them." Montana Wilderness Ass'n v. United States Forest Serv., 146 Fed. Supp. 2d 1118, 1126 (D. Mon. May 21, 2001), rev'd, in part, on other grounds by 314 F.3d 1146 (9th Cir. 2003); see also Tomas v. Rubin, 935 F.2d 1555 (9th Cir. 1991) ("In our opinion, we articulated a standard not previously applied by the Agencies . . . In light of the Agencies' 'interest in applying [their] expertise, correcting [their] own errors, making a proper record, and

maintain an efficient, independent administrative system,' it is appropriate to give the Agencies the opportunity to apply the correct standard . . . made on the facts of this case.").

In fact, even in cases where this Court has found an error in a bond hearing, it has generally ordered further proceedings before the IJ. See, e.g., Vides v. Wolf, W.D.N.Y. 20-cv-6293-EAW, Doc. 32; Blandon v. Barr, 434 F. Supp. 3d 30 (W.D.N.Y. Jan. 22, 2020). Thus, to the extent that the Court thinks that the bond hearing Petitioner already received was not properly conducted, it should order remand to the IJ to expressly consider alternatives to detention.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for habeas corpus.

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TRINI E. ROSS
United States Attorney
Western District of New York

BY: s/DANIEL B. MOAR
Assistant United States Attorney
138 Delaware Avenue
Buffalo, New York 14202
(716) 843-5833
Daniel.Moar@usdoj.gov