PRACTICE ADVISORY:
PROLONGED MANDATORY DETENTION AND BOND ELIGIBILITY IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Updated September 14, 2020

This practice advisory reviews the Third Circuit's decisions in:

- *Diop v. ICE/Homeland Sec.*, 656 F.3d 221 (3d Cir. 2011);
- *Leslie v. Att'y Gen. of the U.S.*, 678 F.3d 265 (3d Cir. 2012);
- *Chavez-Alvarez v. Warden*, 783 F.3d 469 (3d Cir. 2015); and
- *German Santos v. Warden*, 965 F.3d 203 (3d Cir. 2020).

These decisions hold that the Constitution prohibits mandatory immigration detention under 8 U.S.C. § 1226(c) beyond a reasonable period. This practice advisory discusses how individuals subject to prolonged mandatory detention in the Third Circuit can use these decisions to file a habeas petition in federal district court to obtain a bond hearing where the government bears the burden of justifying their continued imprisonment by clear and convincing evidence.

Overview

In *Diop*, the Third Circuit held that the Due Process Clause of the Fifth Amendment permits mandatory detention, without any bond hearing, for only a **"reasonable period of time."**[1] When detention exceeds that reasonable period, the noncitizen is entitled to an individualized bond hearing where the government must show that continued detention is necessary to prevent flight or danger to the community. *Diop* governs both the detention of individuals with pending removal proceedings before an Immigration Judge ("IJ") or the Board of Immigration Appeals ("BIA"), as well as the detention of noncitizens who have obtained a stay of removal pending judicial review of their removal orders.[2]

Recently, the Third Circuit affirmed that the due process holdings of *Diop* and its progeny remain good law despite the Supreme Court's decision in *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018). In *Jennings*, the Supreme Court held that the plain language of § 1226(c) requires mandatory detention, without a bond hearing, until the conclusion of removal proceedings. *Id.* at 846. However, the Supreme Court *reserved* the question of whether *due process* requires a bond hearing when mandatory detention becomes unreasonable in length. *Id.* at 851. In *German Santos*, the Third Circuit recognized that although *Jennings* overturned any limits on prolonged mandatory detention the Third Circuit had previously imposed on statutory grounds, it did not affect the

[1] *Diop*, 656 F.3d at 223.
[2] *Leslie*, 678 F.3d at 270.

constitutional holdings in *Diop*, *Leslie*, and *Chavez-Alvarez* limiting prolonged mandatory detention.[3] Those rulings remain in law of the circuit.

As reaffirmed in *German Santos*, the Third Circuit has declined to adopt a presumptive period of time at which detention without a bond hearing becomes unreasonably prolonged. Instead, "[r]easonableness . . . is a fact-dependent inquiry requiring an assessment of all of the circumstances of any given case."[4] The Court has provided key guidance, most recently in *German Santos*, for district courts to determine when detention becomes unreasonable and a bond hearing is required:

- *First*, the length of detention is the "most important factor" in evaluating the constitutionality of detention without a bond hearing.[5]

- *Second,* courts should consider the likely duration of continued detention. Detention is more likely unreasonable if the detainee's removal proceedings are "unlikely to end soon."[6]

- *Third*, courts may consider which party, if any, is responsible for unnecessary delays in the resolution of the underlying immigration case.[7] Critically, mandatory detention "can still grow unreasonable even if the Government handles the removal proceedings reasonably."[8] However, delay may become relevant when due to the party's carelessness or bad faith. "Absent carelessness or bad faith," courts should "not scrutinize the merits of immigration proceedings and blame whichever party has the weaker hand."[9] Relatedly, courts should not "hold an alien's good-faith challenge to his removal against him, even if his appeals or applications for relief have drawn out the proceedings."[10]

- *Fourth*, detention is more likely unreasonable if the immigrant detainee is held in conditions that are not '"meaningfully different' from criminal punishment."[11]

German Santos also makes clear that the government must bear the burden of justifying the person's continued imprisonment by clear and convincing evidence at bond hearings over prolonged detention.[12]

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[3] *German Santos*, 965 F.3d at 209–10.
[4] *Diop*, 656 F.3d at 234.
[5] *German Santos*, 965 F.3d at 211.
[6] *Id.*
[7] *Id.*; *Diop*, 656 F.3d. at 234.
[8] *German Santos*, 965 F.3d at 211.
[9] *Id.* at 212.
[10] *Id.* at 211.
[11] *Id.* (citing *Chavez-Alvarez*, 783 F.3d at 478).
[12] *Id.* at 213–14.

What did the Third Circuit hold in *Diop* and *German Santos*?

Diop held that the Due Process Clause of the Fifth Amendment permits mandatory detention for only a "reasonable period of time."[13] When detention exceeds that reasonable period, the detainee is entitled to an individualized hearing where the government must show that continued detention is necessary to prevent flight or danger to the community.[14]

Diop also construed the mandatory detention statute, 8 U.S.C. § 1226(c), to include an implicit time limitation.[15] This construction of § 1226(c) was invalidated by the Supreme Court in *Jennings v. Rodriguez*, 138 S. Ct. 830, 846–47 (2018). In *Jennings*, the Supreme Court considered the Ninth Circuit's construction of § 1226(c), which had guaranteed bond hearings to immigrant detainees after every six-month period of detention. *Rodriguez v. Robbins*, 804 F.3d 1060, 1089–90 (9th Cir. 2015). The Court found this reading of the statute "implausible" and concluded that § 1226(c) requires mandatory detention until the conclusion of removal proceedings.[16]

The Third Circuit acknowledged in *German Santos* that *Jennings* foreclosed the construction of § 1226(c) adopted in *Diop*.[17] However, because *Jennings* was a statutory case, it did not affect the Third Circuit's *constitutional* holdings in *Diop*, *Leslie*, and *Chavez-Alvarez* on prolonged mandatory detention.[18]

In *German Santos*, the Third Circuit reaffirmed (1) that the Due Process Clause of the Fifth Amendment limits mandatory detention without a bond hearing to a reasonable length of time;[19] (2) noncitizens can bring as-applied constitutional challenges based on a multi-factor test to determine when detention has become unreasonable;[20] and (3) once detention has become unreasonable, noncitizens are entitled to a bond hearing where the government bears the burden of proof by clear and convincing evidence.[21]

(1) Prolonged mandatory detention without a bond hearing violates due process.

In *Demore v. Kim*, the Supreme Court rejected a facial constitutional challenge to the mandatory detention statute, 8 U.S.C. § 1226(c). 538 U.S. 510, 531 (2003). In so holding, the Court relied, in part, on the government's representations that detention under that statute was typically brief.[22] In

[13] *Diop*, 656 F.3d at 223.
[14] *Id*. at 232.
[15] *Id.* at 231.
[16] *Jennings*, 138 S. Ct. at 842.
[17] *German Santos*, 965 F.3d at 209–10 ("*Jennings* abrogated our earlier reliance on the constitutional-avoidance canon to read § 1226(c) as providing a right to a bond hearing.").
[18] *Id.*
[19] *Id.* at 209.
[20] *Id.* at 210–11.
[21] *Id.* at 213–14.
[22] *Demore*, 538 U.S. at 530.

his concurrence, Justice Kennedy noted that detention under the statute could violate due process "if the continued detention became unreasonable or unjustified."[23]

Citing Justice Kennedy's concurrence, the Third Circuit concluded in *Diop* that:

> [T]he constitutionality of [mandatory detention] is a function of the length of the detention. At a certain point, continued detention becomes unreasonable and the Executive Branch's implementation of § 1226(c) becomes unconstitutional unless the Government has justified its actions at a hearing inquiring into whether continued detention is consistent with the law's purposes of preventing flight and dangers to the community.[24]

Thus, "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."[25]

The Court further explained its due process analysis of prolonged mandatory detention in *Chavez-Alvarez*:

> [D]ue process requires us to recognize that, at a certain point—which may differ case by case—the burden to an alien's liberty outweighs a mere presumption that the alien will flee and/or is dangerous. At this tipping point, the Government can no longer defend the detention against claims that it is arbitrary or capricious by presuming flight and dangerousness: more is needed to justify the detention as necessary to achieve the goals of the statute.[26]

This framework for as-applied constitutional challenges to prolonged mandatory detention without a bond hearing remains controlling law in the Third Circuit.[27]

(2) Courts must apply a multi-factor test to determine when detention has become unreasonable under 8 U.S.C. § 1226(c).

The reasonableness of continued mandatory detention "is a fact-dependent inquiry requiring an assessment of all of the circumstances of any given case."[28] Critically, habeas courts "cannot simply rely on the Government's determination of what is reasonable," but rather "must exercise their independent judgment as to what is reasonable."[29]

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[23] *Id.* at 532 (Kennedy, J., concurring).
[24] *Diop*, 656 F.3d at 232.
[25] *Id*. at 233.
[26] *Chavez-Alvarez*, 783 F.3d at 474–75.
[27] *German Santos*, 965 F.3d at 209.
[28] *Diop*, 656 F.3d at 234.
[29] *Id*. (citing *Zadvydas v. Davis*, 533 U.S. 678, 699 (2001)).

In *German Santos*, the Third Circuit listed four key factors for determining when mandatory detention becomes unreasonably prolonged (and thus unconstitutional). These factors are "nonexhaustive," meaning other information may be relevant to the inquiry as well.[30]

a. Length of detention

The amount of time that an individual is detained is the "most important factor" in evaluating the constitutionality of their mandatory detention.[31] This is because the Supreme Court in *Demore* rejected a facial challenge to § 1226(c) on the assumption that detention under that statute would be brief. Although there is no set point in time where detention becomes presumptively unreasonable, it "becomes more and more suspect" after the five-month mark identified in *Demore*.[32] Additionally, a lawful permanent resident's detention likely becomes unreasonable sometime between six months and one year.[33] Being detained for these lengths of time alone does not automatically render one's continued detention unreasonable, but does weigh strongly toward a finding of unreasonableness.[34]

b. Likely duration of future detention

Continued mandatory detention is more likely unreasonable if the detainee's removal proceedings are "unlikely to end soon."[35] For example, in *Chavez-Alvarez*, the Third Circuit held mandatory detention unreasonable where, after nine months of proceedings, the IJ denied the petitioner's good-faith challenge to removal and issued a final removal order, and the petitioner had appealed to the BIA. At that point, the parties "could have reasonably predicted that [his] appeal would take a substantial amount of time, making his already lengthy detention considerably longer."[36] Under this reasoning, mandatory detention likewise should be found unreasonable where, for example, a detainee will not receive a merits hearing or decision from the IJ in the near future;[37] faces lengthy

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[30] *German Santos*, 965 F.3d at 211.
[31] *Id.*
[32] *Id*.
[33] *Id*. (citing *Chavez-Alvarez*, 783 F.3d at 478).
[34] *Id.* at 211–12.
[35] *Id.* at 211.
[36] *Chavez-Alvarez*, 783 F.3d at 477–78.
[37] *See, e.g.*, *Leslie*, 678 F.3d at 270–71 (noting nearly seven-month delay in scheduling immigration court hearing after remand from Court of Appeals); *Tracey M.S. v. Decker*, No. 20-5146 (ES), 2020 WL 2316559, at *7 (D.N.J. May 11, 2020) ("[T]he Court places great weight on the fact that, given the BIA's recent remand to the immigration court for additional factfinding, Petitioner's removal proceedings are likely to continue beyond . . . the one-year mark of Petitioner's detention."); *Saquib K. v. Tsoukaris*, No. 20-3849 (SDW), 2020 WL 2111028, at *2 (D.N.J. May 4, 2020) (yearlong detention unreasonable where immigration court proceedings "likely to continue for at least two months, and possibly considerably longer"); *Amadu K. v. Anderson*, No. 2:20-cv-3220 (BRM), 2020 WL 1864583, at *4 (D.N.J. Apr. 14, 2020) (yearlong detention unreasonable where underlying case was recently remanded to the immigration court from the BIA); *Gordon v. Shanahan*, No. 15 CV 261, 2015 WL 1176706, at *5 (S.D.N.Y. Mar. 13, 2015) (more than eight months of detention unreasonable given lack of "any evidence that

detention during the pendency of a BIA appeal;[38] has a stay of removal pending decision on a petition for review in the court of appeals;[39] or is likely to have their case remanded back to immigration court for further proceedings.[40]

c. Actions by the parties

Courts may also consider which party, if any, is responsible for unnecessary delays in the underlying immigration case.[41] Such delay must be due to the party's carelessness or bad faith.[42] However, government delay is *not* necessary to make mandatory detention unreasonable. Rather, "detention under § 1226(c) can still grow unreasonable even if the Government handles the removal proceedings reasonably."[43]

[the petitioner's] removal proceedings will end soon;" petitioner "had applied for relief from removal," and "the immigration judge's eventual order [would] be subject to review by the Board of Immigration Appeals and potentially by a court of appeals."); *Araujo-Cortes v. Shanahan*, 35 F. Supp. 3d 533, 549 (S.D.N.Y. 2014) (more than six months of mandatory detention unreasonable where upcoming IJ hearing would likely not resolve petitioner's immigration status and his detention "may continue for a long time while he pursues relief from removal").

[38] *See Chavez-Alvarez*, 783 F.3d at 477–78. Notably, *Chavez-Alvarez* rejected the government's argument that petitioner did not face prolonged detention in the future merely because the government had sought summary affirmance before the BIA. *See id*. *See also Tijani v. Willis*, 430 F.3d 1242, 1249 (9th Cir. 2005) (Tashima, J., concurring) (noting that BIA's 13-month delay in adjudicating appeal unreasonably prolonged the petitioner's detention); *Chikerema v. Lowe*, 1:18-CV-1031, 2019 WL 3928930, at *8 (M.D. Pa. May 2, 2019) (17.5-month detention unreasonable where further administrative and appellate court proceedings would lead to "additional delay of an undefined duration"); *Thomas C.A. v. Green*, No. 18-1004 (JMV), 2018 WL 4110941, at *5–6 (D.N.J. Aug. 29, 2018) (15-month detention unreasonable where BIA appeal "still pending"); *Nwozuzu v. Napolitano*, No. 12-3963, 2012 WL 3561972, at *5 (D.N.J. Aug. 16, 2012) (noting BIA took six months to decide appeal).

[39] *See Nakia H. v. Green*, No. 19-8972 (MCA), 2020 WL 1527950, at *4 (D.N.J. Mar. 31, 2020) (pending petition for review favored finding of unreasonableness); *Davydov v. Doll*, No. 1:19-cv-2110, 2020 WL 969618, at *5 (M.D. Pa. Feb. 28, 2020) (14-month detention unreasonable where resolution of underlying immigration case by the court of appeals would take "at a minimum, an additional month"); *see also Diouf v. Napolitano*, 634 F.3d 1081, 1091 n.13 (9th Cir. 2011) (noting that when a court "grants a stay of removal in connection with an alien's petition for review from a denial of a motion to reopen, the alien's prolonged detention becomes a near certainty").

[40] *See Diop*, 656 F.3d at 224. Data on immigration court backlogs is available at TRAC Immigration.

[41] *German Santos*, 965 F.3d at 211; *Diop*, 656 F.3d at 234.

[42] *German Santos*, 965 F.3d at 212 ("Absent carelessness or bad faith, we will not scrutinize the merits of immigration proceedings and blame whichever party has the weaker hand").

[43] *Id.* at 211 (citing *Chavez Alvarez*, 783 F.3d at 475).

i. Delay by the detainee

A detainee's good-faith pursuit of relief or appeals do not count against him or her even if they lengthened the underlying proceedings.[44] This is because courts "cannot effectively punish [detainees] for choosing to exercise their legal right to challenge the Government's case against them by rendering the corresponding increase in time of detention [as] reasonable."[45] A good-faith claim is one "legitimately raised" and "challenges aspects of the Government's case that present real issues, for example: a genuine factual dispute; poor legal reasoning; reliance on a contested legal theory; or the presence of a new legal issue."[46]

By contrast, actions taken by a petitioner in "bad faith" to game the system and delay their removal weigh against finding a due process violation.[47] Whether a delay involved bad faith is a fact-specific inquiry. And even where there has been some delay due to "carelessness or bad faith," that delay must be considered in context of the overall length of detention.[48]

If your client did request continuances in their underlying immigration case, you should emphasize that there are legitimate, good-faith reasons why your client needed more time to prepare. For example, an IJ often grants multiple continuances in an asylum case for good cause (to allow the applicant time to gather evidence or engage an attorney, for instance).[49] You may emphasize that it is more difficult for detained individuals to collect the evidence necessary to support their cases due to limited access to telephones, the Internet, and translators in detention.[50]

ii. Delay by the government

Delay by the government does not weigh toward a finding of unreasonableness absent a showing of bad faith or carelessness.[51] This standard may be met when the government has needlessly prolonged your client's removal case, e.g., where the IJ failed to prepare a proper record for appeal,[52] the government failed to produce evidence promptly,[53] or the government failed to plead

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[44] *Id*.
[45] *Chavez-Alvarez*, 783 F.3d at 476.
[46] *Id*.
[47] *Id*.
[48] *See German Santos*, 965 F.3d at 212 (acknowledging that petitioner was responsible for nine days of delay for failure to pay a filing fee, but not counting this against him because the delay was "just a drop in the bucket" compared to his detention overall and because he did not seek "any substantial continuances").
[49] Decl. of the Honorable Carol King ¶ 20–21, *Abdi v. Nielsen*. 17-cv-721 (EAW) (W.D.N.Y. Dec. 7, 2018), ECF 99-2.
[50] *See id*. ¶ 23.
[51] *German Santos*, 965 F.3d at 211.
[52] *See*, *e.g.*, *Leslie*, 678 F.3d at 267–68, 271 (noting delay caused by "clerical errors" of IJ requiring remand to prepare a complete transcript).
[53] *See*, *e.g.*, *Diop*, 656 F.3d at 234 (explaining that, in Mr. Diop's case, "the immigration judge's numerous errors, combined with the Government's failure to secure, at the earliest possible time,

all charges of removability promptly.[54] Frivolous legal arguments may be indicative of bad faith.[55]

d. Conditions of confinement

Because removal proceedings are civil rather than criminal, courts consider whether an immigrant detainee is held in conditions that are "'meaningfully different' from criminal punishment."[56] "[M]erely calling a confinement 'civil detention' does not, of itself, meaningfully differentiate it from penal measures"—if a detainee is housed alongside criminal defendants, their detention without a bond hearing is more likely unreasonable.[57] Courts give more weight to this factor as the length of detention grows.[58]

(3) If the district court orders a bond hearing, the government must bear the burden of justifying your client's continued detention by clear and convincing evidence.

German Santos also clarified that, at the bond hearing, the government must prove by clear and convincing evidence that continued detention is necessary to prevent your client from fleeing or harming the community, based on the particular facts of your client's case.[59] If the government fails to meet this high bar, the bond court "must release" your client.[60]

What types of cases does *German Santos* apply to?

(1) Individuals subject to prolonged detention under § 1226(c) and whose removal cases are pending before an IJ or the BIA.[61]

(2) Individuals who have obtained a stay of removal pending adjudication of a petition for review of a removal order.

German Santos also applies to individuals who have obtained a stay of removal pending court of appeals review of their removal order. Indeed, such detainees are especially vulnerable to

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evidence that bore directly on the issue of whether Mr. Diop was properly detained, resulted in an unreasonable delay").

[54] *See*, *e.g.*, *id.* at 224 (noting that the government did not charge Mr. Diop with removal for his controlled substance offense until months after initiating removal proceedings).

[55] *Cf. Chavez Alvarez*, 783 F.3d at 476 ("[A good-faith claim] challenges aspects of the Government's case that present real issues, for example: a genuine factual dispute; poor legal reasoning; reliance on a contested legal theory; or the presence of a new legal issue.").

[56] *German Santos*, 965 F.3d at 211 (citing *Chavez-Alvarez*, 783 F.3d at 478).

[57] *Chavez-Alvarez*, 783 F.3d at 478.

[58] *German Santos*, 965 F.3d at 211.

[59] *Id.* at 213–14.

[60] *Id.* at 214.

[61] *See id.* at 206.

unreasonably prolonged periods of detention given the time necessary for the court to adjudicate a petition for review.[62]

In *Leslie*, the Third Circuit resolved a threshold question regarding which statute governs the detention of detainees with a final order of removal that has been stayed pending review by the court of appeals: 8 U.S.C. § 1226, which authorizes the detention of noncitizens "pending a decision" on their removal, or 8 U.S.C. § 1231, which generally provides for detention of noncitizens after entry of the removal order. Joining all but one of the circuits that have addressed the issue, the Court held that where removal is judicially stayed, § 1226—and not § 1231—continues to govern detention.[63] Moreover, such detention is subject to the reasonableness analysis.[64]

(3) Individuals subject to prolonged detention under § 1226(c) and whose removal cases are pending before an IJ or the BIA once again after remand from the court of appeals.

German Santos also applies to detainees under § 1226(c) who are facing removal proceedings once again after remand from the court of appeals.[65]

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[62] *See* Admin. Office of the U.S. Courts, Judicial Business of the U.S. Courts: 2019 Annual Report of the Dir., tbl. B-4C (2019), *available at* https://www.uscourts.gov/statistics/table/b-4c/judicial-business/2019/09/30 (reporting median time of 20.2 and 11.0 months from filing to final disposition of administrative agency appeals for Second and Third Circuits, respectively, in 2019); *see also Diouf*, 634 F.3d at 1091 n.13 (noting that when a court "grants a stay of removal in connection with an alien's petition for review from a denial of a motion to reopen, the alien's prolonged detention becomes a near certainty").

[63] *Leslie*, 678 F.3d at 270. *Accord Prieto-Romero v. Clark*, 534 F.3d 1053, 1059–60 (9th Cir. 2008); *Casas-Castrillon v. DHS*, 535 F.3d 942, 947 (9th Cir. 2008); *Wang v. Ashcroft*, 320 F.3d 130, 147 (2d Cir. 2003); *see also Bejjani v. INS*, 271 F.3d 670, 689 (6th Cir. 2001), abrogated on other grounds by *Fernandez-Vargas v. Gonzales*, 548 U.S. 30 (2006) (holding that § 1231 does not authorize detention pending judicial stay of removal); *but see Akinwale v. Ashcroft*, 287 F.3d 1050, 1052 n.4 (11th Cir. 2002) (assuming, without analysis, that a stay serves to "interrupt[]" the removal period, and that detention pending a judicial stay is therefore governed by § 1231).

[64] *Leslie*, 678 F.3d at 270. Detainees whose removal is stayed pending judicial review currently receive administrative "file reviews" over their custody. *See* 8 C.F.R. §§ 241.4, 241.13. *Leslie* recognized that such reviews are no substitute for a bond hearing. *Leslie*, 678 F.3d, at 267 n.2 (holding that a file custody review where "neither Leslie nor counsel . . . was present" and no actual hearing was held was not a "bond hearing"). The Ninth Circuit has specifically held the custody review process to be inadequate to safeguard the liberty interests threatened by prolonged detention. *Diouf*, 634 F.3d at 1091 (concluding that "[t]he regulations do not afford adequate procedural safeguards because they do not provide for an in-person hearing, they place the burden on the alien rather than the government and they do not provide for a decision by a neutral arbiter such as an immigration judge").

[65] *See Erron A. v. Ahrendt*, No. 18-13149 (JMV), 2019 WL 3453269, at *1 (D.N.J. July 31, 2019) (considering an as-applied challenge to § 1226(c) detention by petitioner whose case was

In addition to these groups of detainees, the reasoning of *German Santos* arguably applies to:

(4) Individuals detained pursuant to 8 U.S.C. § 1225(b) for a prolonged period while litigating their cases before an IJ or the BIA and who have never received a bond hearing.

Section 1225 authorizes the detention of individuals, including asylum-seekers and some lawful permanent residents, who are seeking admission to the United States. *See* 8 U.S.C. § 1225(b). Several district courts within the Third Circuit have recognized that, under the reasoning of *Diop*, detention without a bond hearing beyond a reasonable period of time under § 1225 violates the Due Process Clause.[66]

What should I do to obtain a bond hearing for my client under *German Santos*?

Your client should file a habeas petition in federal district court for a bond hearing on the grounds that they have been subject to detention without a bond for an unreasonable period of time in violation of the Due Process Clause. *See* 28 U.S.C. § 2241.

If my client obtains a bond hearing, what will the bond hearing entail?

If your client's detention is found to be unreasonable, he is entitled a bond hearing before an IJ, or possibly the habeas court. That bond hearing should largely resemble a bond redetermination hearing under 8 U.S.C. § 1226(a), except that the government—and not your client—bears the burden of proof and "must put forth clear and convincing evidence that continued detention is necessary."[67]

At the bond hearing, the reviewing judge should determine whether your client may be released based on whether your client is (1) a danger to the community, (2) a threat to national security, or (3) a flight risk.[68] If your client is found to be dangerous, the IJ may deny bond entirely and order continued detention.[69] IJs weigh a number of factors in making bond eligibility determinations.[70]

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remanded to the BIA by a court of appeals); *Vega v. Doll*, 3:17-CV-01440, 2018 WL 3765431, at *2 (M.D. Pa. July 11, 2018) (same).

[66] *See, e.g.*, *Adel G. v. Warden*, No. CV 19-13512 (KM), 2020 WL 1243993 at *2 (D.N.J. Mar. 13, 2020) (collecting cases) *appeal filed sub nom Ghanem v. Warden*, No. 20-1988 (3d Cir. May 11, 2020).

[67] *German Santos*, 965 F.3d at 213.

[68] *Matter of Siniauskas*, 27 I. & N. Dec. 207, 207 (BIA 2018).

[69] *Id.*

[70] IJs have "broad discretion" in which factors they consider and how much weight to give them. *Matter of Guerra*, 24 I&N Dec. 37, 40 (B.I.A. 2006). They are encouraged to consider:

> (1) whether the alien has a fixed address in the United States; (2) the alien's length of residence in the United States; (3) the alien's family ties in the United States, and whether they may entitle the alien to reside permanently in the United States in the future; (4) the alien's employment history; (5) the alien's record of

Although the government bears the burden of proof, the court will likely expect your client to present evidence showing that your client is not a flight risk or danger to the community. Your client should be prepared to present testimonial and documentary evidence about the following:

i. *Criminal history*: details regarding arrests and convictions; rehabilitation, including programs during detention; and reasons why your client will not engage in criminal activity if released.

ii. *Likelihood of success in removal case*: the merits of your client's removal case and why they are likely to eventually succeed on his or her claim to relief or defense against removal.

iii. *Activities in detention*: organized activities and positive activities that your client participated in while detained (reading, exercise, attending church, participating in skills programs, etc.).

iv. *Other information*: family and community ties, education, work history, etc.

v. *Alternatives conditions of release*: If the government argues that your client is a flight risk, you should also identify alternatives to detention that are available to address the government's concerns, ranging from posting a bond to reporting requirements and/or electronic monitoring.

You should also make sure to put the length of your client's detention into the record. Because your client will have been detained for a prolonged period of time, you should argue that the justification for detention must be stronger than in typical bond cases, and must take into account the availability of less restrictive alternatives to detention that would address the government's interests.

The immigration court should address the detainee's *current* risk of flight or danger. As the Third Circuit has explained, "[t]he fact that some aliens posed a risk of flight in the past does not mean they will forever fall into that category. Similarly, presenting danger to the community at one point by committing crime does not place them forever beyond redemption."[71] "Due process is not satisfied . . . by rubberstamp denials based on temporally distant offenses," but rather "requires an opportunity for an evaluation of the individual's current threat to the community and his risk of flight."[72]

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appearance in court; (6) the alien's criminal record, including the extensiveness of criminal activity, the recency of such activity, and the seriousness of the offenses; (7) the alien's history of immigration violations; (8) any attempts by the alien to flee prosecution or otherwise escape from authorities; and (9) the alien's manner of entry to the United States.

Id.

[71] *Ngo v. INS*, 192 F.3d 390, 398 (3d Cir. 1999).

[72] *Id.*

If the judge deems your client eligible for release, you should also argue that both due process and equal protection require consideration of your client's financial circumstances and alternative conditions of release in setting bond. Due process requires that detention be reasonably related to the government's legitimate interests in preventing flight and ensuring community safety.[73] If an IJ finds that an individual is neither a flight risk nor a danger to the community, consideration of non-monetary conditions of release is necessary to prevent them from being detained solely because of their indigence, which is not a legitimate government interest.[74]

Finally, you should request an audio recording of the hearing in order to preserve the record for appeal.[75] A sample request for such recording is attached to this practice advisory.

What if my client is detained outside the Third Circuit?

German Santos is not binding outside the Third Circuit but may serve as persuasive authority. For assistance with evaluating the merits of a case outside the Third Circuit, please contact Michael Tan at the ACLU Immigrants' Rights Project, mtan@aclu.org.

[73] *Zadvydas*, 533 U.S. at 690–91.
[74] *Hernandez v. Sessions*, 872 F.3d 976, 990–91 (9th Cir. 2017); *see also Dubon Miranda v. Barr*, No. 20-1110, 2020 WL 2794488, at *11 (D. Md. May 29, 2020); *Brito v. Barr*, 415 F. Supp. 3d 258, 271 (D. Mass. 2019); *Abdi v. Nielsen*, 287 F. Supp. 3d 327, 338 (W.D.N.Y. 2018).
[75] *See Singh v. Holder*, 638 F.3d 1196, 1208 (9th Cir. 2011) (holding that "due process requires a contemporaneous record of [prolonged detention] hearings").

DETAINED

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
[CITY, STATE]

In the Matter of:	)	
	,)	In Bond Proceedings
A#	)	
	)	
Respondent	)	
	)	

REQUEST FOR AUDIO RECORDING OF HEARING

I respectfully request that the Immigration Court audio record my bond redetermination hearing. Due process requires a "contemporaneous record" of my bond redetermination hearing to facilitate review by the Board of Immigration Appeals should such review be necessary. *Singh v. Holde*r, 638 F.3d 1196, 1208 (9th Cir. 2011) (requiring audio recordings for hearings conducted pursuant to prolonged detention hearings).

Respectfully submitted this _____ day of _____, 20___,

_____

Respondent, pro se