PRACTICE ADVISORY:
PROLONGED MANDATORY DETENTION AND BOND ELIGIBILITY IN THE ELEVENTH CIRCUIT

Updated: June 2016

Introduction

This practice advisory reviews the Eleventh Circuit's decision in *Sopo v. Attorney General*, No. 14-11421, 2016 WL 3344236 (11th Cir. June 15, 2016). It discusses how individuals subject to prolonged detention in the Eleventh Circuit can use this decision to request bond from U.S. Immigration and Customs Enforcement ("ICE") or obtain a bond hearing before an immigration judge ("IJ").

Joining five other circuits,[1] *Sopo* holds that the mandatory immigration detention statute, 8 U.S.C. § 1226(c), "'authorizes detention for [only] a reasonable amount of time.'" Once mandatory detention has exceeded a reasonable period, the government must provide a bond hearing to determine whether the person's detention is still justified based on flight risk and danger. *Id*. at *12 (quoting *Diop v. ICE/Homeland Sec.*, 656 F.3d 221, 231 (3d Cir. 2011)).

The Court in *Sopo* 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.'" *Id*. at *13 (quoting *Diop*, 656 F.3d at 234). The Court focused on the following factors to define the "trigger point" for a bond hearing:

- First, the Court focused on length of detention, noting that "[t]he need for a bond inquiry is likely to arise in the ***six-month to one-year*** window." *Id*. at *15 (emphasis added).

- Second, the Court focused on the causes of the delay, including actions by the parties or any errors by the immigration judge ("IJ") or Board of Immigration Appeals ("BIA"). The Court underlined, however, that "aliens should [not] be punished for pursuing avenues of relief and appeals" when determining if their detention without a bond hearing has become unreasonably prolonged. *Id*. at *16.

- Finally, the Court cited several other factors, including the "likely duration of future detention"; the "likelihood that [removal] proceedings will culminate in a final removal order"; the foreseeability of the person's removal if ordered removed; the length of the person's relevant criminal sentence as compared to the length of his immigration detention; and the person's conditions of confinement in immigration detention. *Id*. at *16 (internal quotation marks omitted).

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[1] *Reid v. Donelan*, 819 F.3d 486 (1st Cir. 2016); *Lora v. Shanahan*, 804 F.3d 601 (2d Cir. 2015); *Diop v. ICE/Homeland Sec.*, 656 F.3d 221 (3d Cir. 2011); *Ly v. Hansen*, 351 F.3d 263 (6th Cir. 2003); *Rodriguez v. Robbins* ("*Rodriguez III*"), 804 F.3d 1060 (9th Cir. 2015), *cert. granted Jennings v. Rodriguez*, No. 15-1204 (June 20, 2016).

Departing from the other circuits,[2] the Court declined to require the government to bear the burden of justifying the person's continued detention. Instead, the individual bears the burden of demonstrating that he is not a danger or flight risk, as in an ordinary bond hearing provided under 8 U.S.C. § 1226(a). *See also* 8 C.F.R. § 1236.1(c)(8).

Finally, the Court made clear that a detainee does *not* need to file a habeas petition to obtain a bond hearing. As the Court explained, "[t]he government is constitutionally obligated to follow the law, and the law under § 1226(c) now includes a temporal limitation against the unreasonably prolonged detention of a criminal alien without a bond hearing." *Sopo*, 2016 WL 3344236 at *14 n.8. *Sopo* therefore confirms that individuals can seek review of their prolonged mandatory detention in immigration court, pursuant to regulations that authorize the IJ to determine whether someone is "properly included" under § 1226(c). *See* 8 C.F.R. § 1003.19(h)(2)(ii).

The ACLU is monitoring the implementation of *Sopo*. Should you have questions or require technical assistance, please contact Michael Tan at the ACLU Immigrants' Rights Project, mtan@aclu.org.[3]

What did the Eleventh Circuit hold in *Sopo*?

In *Sopo*, the Court held that § 1226(c) authorizes mandatory detention for only a reasonable period of time. Although the Supreme Court upheld the constitutionality of mandatory detention under § 1226(c) in *Demore v. Kim*, 538 U.S. 510 (2003), it did so only for the "'brief period necessary for . . . removal proceedings'"—what the Court understood to be an average of one-and-a-half to five months. *Sopo*, 2016 WL 3344236, at *10 (quoting *Demore*, 538 U.S. at 513). As Justice Kennedy explained in his concurrence, mandatory detention may come to violate due process "'if the continued detention became unreasonable or unjustified.'" *Id*. (quoting *Demore*, 538 U.S. at 532 (Kennedy, J., concurring)).

To avoid the serious due process concerns presented by prolonged mandatory detention, the Eleventh Circuit joined its sister circuits and construed the mandatory detention statute, § 1226(c), "to contain an implicit temporal limitation." *Id*. at *12. Once "a detained criminal

[2] *Compare Lora*, 804 F.3d at 616; *Diop*, 656 F.3d at 233; *Rodriguez III*, 804 F.3d at 1087.

[3] *Sopo* is not binding outside of the Eleventh Circuit but may serve as persuasive authority. Notably, the Second and Ninth Circuits have taken a different approach to prolonged detention by adopting a uniform six-month limit to detention without a bond hearing, rather than an individualized analysis to determine whether such detention has become unreasonable in each case. For more information on those circuits, *see* ACLU, Bond Hearings for Immigrants Subject to Prolonged Immigration Detention in the Ninth Circuit (Dec. 2015), and NYU Immigrant Rights Clinic, Understanding *Lora v. Shanahan* and the Implementation of Bond Hearings for Immigrants in Prolonged Detention (Nov. 18, 2015).

alien's removal proceedings and concomitant mandatory detention become unreasonably prolonged," the government must provide the person with an "individualized bond hearing." *Id*.

What factors are relevant to determining whether mandatory detention has become unreasonable in length?

The Eleventh Circuit 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.'" *Id*. at *13 (quoting *Diop*, 656 F.3d at 234). "[C]ourts must consult the record and balance the government's interest in continued detention against the criminal alien's liberty interest, always seeking to determine whether the alien's liberty interest has begun to outweigh any justification for using presumptions to detain him without bond." *Id*. at *16. (internal quotation marks omitted). "If the balance tips in the alien's favor," the court must order the individual a bond hearing. *Id*.

Sopo focused on several key factors to determine when detention becomes unreasonably prolonged. This list of factors is "not exhaustive," and "the factors that should be considered will vary depending on the individual circumstances present in each case." *Id*. at *12 (internal citations omitted).Likewise, the detainee is not required to satisfy *every* factor to show his mandatory detention has become unreasonable. For example, the Court found that the "sheer length" of Mr. Sopo's mandatory detention "on its own" (i.e., four years, at least three-and-a half of which were under § 1226(c)) entitled him to a bond hearing "long ago." *Id*. at *17. At the same time, in ordering him a bond hearing, the Court did not weigh whether, for example, his removal to Cameroon would be foreseeable if ultimately he were to be ordered removed.

(1) *Length of detention*: The Court noted that "'the constitutional case for continued detention without inquiry into its necessity becomes more and more suspect as detention continues past [the] thresholds'" for removal proceedings contemplated in *Demore*—i.e., one-and-a-half to five months. *Id*. at *15 (quoting *Diop*, 656 F.3d at 234) (emphasis omitted). Specifically, the Court concluded that "[t]he need for a bond inquiry is likely to arise in *the six-month to one-year window*." *Id*. (emphasis added); *see also id*. (describing a one-year mark as the "outer limit of reasonableness"). Notably, in Mr. Sopo's case, the "sheer length" of his detention without a bond hearing—i.e., four years, at least three-and-a-half of which were under § 1226(c)—"on its own" entitled him to a bond hearing "long ago." *Id*. at *17.

(2) *Cause of the delay*: Courts should also "consider whether the government or the criminal alien have failed to participate actively in the removal proceedings or sought continuances and filing extensions that delayed the case's progress. Errors by the immigration court or the BIA that cause unnecessary delay are also relevant." *Id*. at *15 (citations omitted). However, "aliens

should [not] be punished for pursuing avenues of relief and appeals." *Id*. at *16.[4] Thus, courts should *not* count a continuance against the noncitizen when he obtained it in good faith to prepare his removal case. Instead, only "[e]vidence that the alien acted in bad faith or sought to deliberately slow the proceedings"—for example, by "[seeking] repeated or unnecessary continuances, or [filing] frivolous claims and appeals"—"cuts against" providing a bond hearing. *Id*.

In particular, obtaining continuance to find counsel should not be a basis to find someone's prolonged mandatory detention reasonable.[5] As the Eleventh Circuit has recognized, noncitizens have a statutory and constitutional right to seek counsel in removal proceedings.[6] The right to counsel is a fundamental component of a noncitizen's right to fairly present his claims.[7] Continuances to obtain counsel are not unusual, but are rather the most common reason for adjournment.[8] And the government itself has acknowledged that allowing a detainee to obtain counsel promotes the speedier resolution of immigration proceedings.[9]

Sopo does not *require* a showing of government delay or error in order for mandatory detention to be unreasonable. *See id*.[10] However, where delay or error by the government or IJ/BIA has prolonged your client's removal case, it should be especially clear that detention without a bond hearing has exceeded a reasonable period. For example, the Court in *Sopo* specifically faulted the

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[4] *Sopo*, 2016 WL 3344236, at *16 (citing *Ly*, 351 F.3d at 272 ("[A]ppeals and petitions for relief are to be expected as a natural part of the process. An alien who would not normally be subject to indefinite detention cannot be so detained merely because he seeks to explore avenues of relief that the law makes available to him.").

[5] Notably Mr. Sopo himself obtained a brief continuance to find a lawyer, and the Court did not deem his mandatory detention reasonable. *See id.* at *2, 17-18.

[6] *See Frech v. U.S. Atty. Gen*., 491 F.3d 1277, 1281 (11th Cir. 2007)

[7] *See id.*; *see also Ardestani v. INS*, 502 U.S. 129, 138 (1991) (noting that "the complexity of immigration procedures, and the enormity of the interests at stake, make legal representation in deportation proceedings especially important.").

[8] *See* Office of the Inspector General, *Management of Immigration Cases and Appeals by the Exec. Office for Immigration Rev.* 31 (2012), *available at* https://oig.justice.gov/reports/2012/e1301.pdf.

[9] *See id*. at 33.

[10] As the Third Circuit has explained, "detention may be unreasonable even though the Government has handled the removal case in a reasonable way." *Chavez-Alvarez v. Warden York County Prison*, 783 F.3d 469, 475 (3d Cir. 2015). Rather, "individual actions by various actors in the immigration system, each of which takes only a reasonable amount of time to accomplish, can nevertheless result in the detention of a removable alien for an unreasonable, and ultimately unconstitutional, period of time." *Diop*, 656 F.3d at 223.

government for failing to "respond to Sopo's FOIA request [for his prior asylum application] for months." *Id*. at *18. Attorneys looking to seeking a bond hearing under *Sopo* should therefore consider making FOIA requests; asking the government to turn over documents on the record in immigration court; or asking the IJ to order the government to do so as a way to help establish that your client's detention without a bond hearing has exceeded a reasonable period.

Other errors or delays may include, but are not limited to:

- Reversible errors by the IJ/BIA, resulting in remands for further proceedings.[11]
- Failure by the IJ to prepare a proper record for appeal.[12]
- Failure by the government to plead all the charges of removability promptly.[13]
- Failure by the government to produce evidence promptly.[14]
- Failure by the government to initiate removal proceedings while the client was serving his criminal sentence.[15]
- Delays in the scheduling of removal hearings before the immigration court (e.g., because of extensive backlogs),[16] in an IJ's issuance of a decision following a removal hearing,[17] or in the BIA's adjudication of an appeal.[18]

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[11] *See Sopo*, 2016 WL 3344236, at *18 (noting that "[t]he bulk of the government's delay . . . came from the IJ erring several times"); *accord Diop*, 656 F.3d at 234

[12] *See Leslie v. Attorney General*, 678 F.3d 265, 267-68, 271 (3d Cir. 2012) (noting delay caused by "clerical errors" of IJ requiring remand to prepare a complete transcript).

[13] *See Diop*, 656 F.3d at 224 (noting that the government did not charge Mr. Diop with removal for his controlled substance offense until months after initiating removal proceedings).

[14] *See Sopo*, 2016 WL 3344236, at *18 (noting that "the government did not respond to Sopo's FOIA request [for his prior asylum application] for months"); *see also Diop*, 656 F.3d at 224-25, 234 (noting the government's delay in producing evidence of criminal history).

[15] *See, e.g.*, 8 U.S.C. § 1228 (providing for expedited removal of noncitizens with aggravated felony convictions).

[16] *See Leslie*, 678 F.3d at 270-71 (noting nearly seven month delay in scheduling immigration court hearing after remand from Court of Appeals).

[17] *See Ly*, 351 F.3d at 265-66, 272 (finding an IJ's delay in issuing removal order by several months after the merits hearing unreasonably extended petitioner's detention).

- Delays by the government in the processing of applications for relief.[19]

Notably, the Court in *Sopo* held that the error by the IJ trumped any actions by Mr. Sopo that extended his detention.[20] Thus, error by the government or IJ/BIA that has prolonged removal proceedings should similarly trump any dilatory actions by the noncitizen that extend his removal case in assessing whether detention without a bond hearing has become unreasonably prolonged.

(3) "'*The foreseeability of proceedings concluding in the near future (or the likely duration of future detention).*'" *Id*. at *16 (quoting *Reid*, 819 F.3d at 500).

Under this factor, mandatory detention should be found unreasonable where, for example, a detainee will not receive a merits hearing or decision from the IJ in the near future;[21] anticipates lengthy detention during the pendency of a BIA appeal;[22] has a stay of removal pending decision

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[18] *See Tijani v. Willis*, 430 F.3d 1242, 1249 (9th Cir. 2004) (Tashima, J., concurring) (noting that BIA's 13-month delay in adjudicating appeal unreasonably prolonged the petitioner's detention); *see also 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).

[19] *See Alli v. Decker*, No. 4:09-cv-00698, slip op. at 13 (M.D. Pa. Jan. 26, 2010) (finding that one-year delay in adjudicating I-130 petition unreasonably prolonged the petitioner's detention).

[20] *See Sopo*, 2016 WL 3344236, at *18 (noting that delays caused by Sopo's refusal to file a new asylum application and requests for continuances "were negligible compared to the amount of time it took for his case move back and forth between the IJ and the BIA three times.").

[21] *See Araujo-Cortes v. Shanahan*, 35 F. Supp. 3d 533, 549 (S.D.N.Y. 2014) (finding 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"); *Gordon v. Shanahan*, No. 15 Cv. 261, 2015 WL 1176706, at *5 (S.D.N.Y. Mar. 13, 2015) (finding more than eight months of mandatory detention unreasonable given lack of "any evidence that [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.").

[22] *See Chavez-Alvarez*, 783 F.3d at 477-78.

on a petition for review in the court of appeals;[23] or is likely to be remanded back to immigration court for further proceedings.[24]

(4) "'*The likelihood that the [removal] proceedings will culminate in a final removal order*.'" *Id*. at *16 (quoting *Reid*, 819 F.3d at 500).

It should be especially clear that the noncitizen has a meritorious challenge to removal where he has, for example, prevailed on a motion to terminate or application for relief before the IJ, but remains in mandatory detention solely because of the government's appeal to the BIA.

(5) "*[W]hether it will be possible to remove the criminal alien after there is a final order of removal.*" *Id*.

(6) "*[W]hether the alien's civil immigration detention exceeds the time the alien spent in prison for the crime that rendered him removable.*" *Id*.

(7) "*Whether the facility for the civil immigration detention is meaningfully different from a penal institution for criminal detention.*" *Id*.[25]

What types of cases does *Sopo* apply to?

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

2) Individuals—like Mr. Sopo himself[26]—subject to prolonged detention under § 1226(c) and whose removal cases are pending before the IJ or BIA for a second or third time after remand from the court of appeals.

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[23] *See 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").

[24] Data on immigration court backlogs is available at TRAC Immigration, Immigration Court Backlog Tool, http://trac.syr.edu/phptools/immigration/court_backlog/. In 2015, the median time from filing to final disposition of agency appeals for Eleventh Circuit was 8.4 months. *See* Admin. Office of the U.S. Courts, Judicial Business of the U.S. Courts: 2014 Annual Report of the Dir., tbl. B-4C (2015), *available at* http://www.uscourts.gov/statistics/table/b-4c/judicial-business/2015/09/30.

[25] *See also Sopo*, 2016 WL 3344236, at *18 (noting that "Sopo's civil immigration detention is in a prison-like facility and is now longer than his prison time for bank fraud.").

[26] *See Sopo*, 2016 WL 3344236, at *5, 17 n.12.

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

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

As the Court noted in *Sopo*, there is a threshold question as to what statute governs detention when an individual's removal order is stayed pending judicial review: 8 U.S.C. § 1226, which authorizes the detention of noncitizens "pending a decision" on removal, or 8 U.S.C. § 1231, which generally provides for detention of noncitizens after entry of a final removal order. *See id.* *17 n.12. The Eleventh Circuit has assumed without analysis that a stay serves to "interrupt[]" the removal period, and that detention pending a judicial stay is therefore governed by § 1231(a)(2). *Akinwale v. Ashcroft*, 287 F.3d 1050, 1052 n.4 (11th Cir. 2002).

This assumption is contrary to the conclusion of every circuit that has addressed the issue.[27] Although § 1231(a) governs the detention of noncitizens "ordered removed," it specifically authorizes detention only "during" and "beyond" the removal period—i.e., the period during which the government must effectuate a noncitizen's removal.[28] Notably, § 1231(a)(1)(B) makes clear that the removal period does *not* begin when a removal order has been stayed pending court of appeals review; it only begins once the court of appeals completes its review and the stay is lifted. Thus, because § 1231(a) authorizes detention only "[d]uring" and "beyond" the removal period, it cannot authorize detention of an individual whose removal order has been stayed pending judicial review, since in those circumstances the removal period has not even begun. Because § 1231 does not govern detention while a judicial stay of removal is in effect, the pre-final-order detention statute, § 1226, must control.

Section 1226 in turn has two subsections: § 1226(c), which mandates the detention of certain noncitizens who are removable on criminal grounds, and § 1226(a), which authorizes discretionary detention. The Ninth Circuit has held that § 1226(a), and not § 1226(c), governs when a removal order is stayed pending judicial review because § 1226(c) applies only during

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[27] *See Leslie*, 678 F.3d at 270; *Prieto-Romero v. Clark*, 534 F.3d 1053, 1059-60 (9th Cir. 2008); *Casas-Castrillon v. Dep't of Homeland Security*, 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).

[28] 8 U.S.C. § 1231(a)(1)(A); *see* 8 U.S.C. §§ 1231(a)(2) (mandating detention "[d]uring the removal period"); 1231(a)(6) (granting government discretion to detain certain noncitizens "beyond the removal period" where removal has not been effectuated).

"removal proceedings" before the IJ and BIA.[29] In contrast, § 1226(a) governs detention "pending a decision on whether the alien is to be removed from the United States"—a period which includes not only the administrative removal process but also the process of judicial review. Moreover, § 1226(a) affords the person a bond hearing before the IJ.

In any event, regardless of whether § 1231, rather than § 1226, governs detention where a removal order has been stayed pending judicial review, detainees whose removal is judicially stayed are entitled to a bond hearing as a matter of both due process and statutory construction. As recognized in *Sopo*, prolonged detention without adequate review raises serious constitutional concerns as it begins to exceed a "reasonable period." *See Sopo*, 2016 WL 3344236, at *12, 13. The period of judicial review inevitably extends far beyond these "reasonable" periods.[30] Because there is no evidence in § 1226(a), § 1226(c), or § 1231 that Congress intended to authorize the prolonged detention of noncitizens whose removal is stayed pending judicial review, without a bond hearing, all three detention statutes must be construed as requiring such a hearing whenever detention becomes unreasonably prolonged.[31]

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

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[29] *See Casas-Castrillon*, 535 F.3d at 948; *see also Demore*, 538 U.S. at 527-28 (noting that "§ 1226(c) was intended only to 'govern[ ] detention of deportable criminal aliens pending their removal proceedings.'"); 8 C.F.R. § 1236.1(c)(1)(i) (interpreting § 1226(c) to apply only "during removal proceedings").

[30] *See* Admin. Office, *supra* n.17 (reporting median time of 8.4 months from filing to final disposition of administrative agency appeals for Eleventh Circuit in 2015); *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.").

[31] *See Sopo*, 2016 WL 3344236, at *12, 13 (construing § 1226(c)); *Casas-Castrillon*, 535 F.3d at 950-51 (construing § 1226(a)); *Diouf*, 634 F.3d at 1086 (holding that "prolonged detention under § 1231(a)(6), without adequate procedural protections, would raise serious constitutional concerns" and "find[ing] no basis for withholding from aliens detained under § 1231(a)(6) the same procedural safeguards accorded to aliens detained under [§ 1226]" (internal quotation marks and citation omitted)). Detainees whose removal is stayed pending judicial review receive administrative "file reviews" over their custody. *See* 8 C.F.R. §§ 241.4, 241.13. 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."). The Third Circuit in *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").

Section 1225 authorizes the detention of individuals who are seeking admission to the United States, including asylum-seekers and some lawful permanent residents. *See* 8 U.S.C. § 1225(b). The reasoning of *Sopo* should require a bond hearing for detainees subject to prolonged detention under § 1225(b). Notably, the Ninth Circuit has read § 1225 to require a bond hearing after a prolonged period of detention—which it defined as six months—and several district courts have required bond hearings for individuals subject to prolonged detention under § 1225 as well.[32]

5) Individuals subjected to prolonged detention pending withholding-only proceedings.

DHS may reinstate a removal order to a noncitizen if it finds that the noncitizen "has reentered the United States illegally after having been removed or having departed voluntarily, under an order of removal." 8 U.S.C § 1231(a)(5); 8 C.F.R. § 241.8. However, if the noncitizen establishes a reasonable fear of persecution or torture, he is referred for withholding-only proceedings before an IJ. Individuals subject to a final administrative removal order under 8 U.S.C. § 1228(b); 8 C.F.R. § 238.1, are also referred for withholding-only proceedings upon establishing a reasonable fear of persecution or torture.

There is a dispute in the federal district courts about what statute governs detention pending withholding-only proceedings: i.e., § 1226 or § 1231.[33] However, regardless of what provision applies, under the reasoning of *Sopo*, the statute should be construed to require a bond hearing over prolonged detention. *See supra*.[34]

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

Like Mr. Sopo, your client can file a habeas petition in federal district court on the grounds that he has been subject to detention without a bond hearing for an unreasonable period of time, in violation of the INA. *See* 28 U.S.C. § 2241.

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[32] *See Rodriguez III*, 804 F.3d at 1081-84; *see also Bautista v. Sabol*, 862 F. Supp. 375, 379-82 (M.D. Pa. 2012) (requiring bond hearing for returning LPR detained 26 months); *Maldonado v. Macias*, — F. Supp. 3d —, 2015 WL 8958848, at *15-17 (W.D. Tex. Dec. 15, 2015) (ordering bond hearing for arriving asylum seeker detained 26 months); *Chen v. Aitken*, 917 F. Supp. 2d 1013, 1016, 1018-19 (N.D. Cal. 2013) (requiring bond hearing for returning LPR detained nearly eight months).

[33] *Compare, e.g.*, *Guerrero v. Aviles*, No. 14-4367, 2014 WL 5502931 (D.N.J. Oct. 30, 2014) (ruling § 1226 applies) *with Santos v. Sabol*, No. 3:14-cv-00635 (M.D. Pa. June 5, 2014) (ruling § 1231 applies).

[34] Government data shows that detention pending withholding-only proceedings is typically prolonged in nature. *See* Fact Sheet: Withholding-Only Cases and Detention (Apr. 2015), https://www.aclu.org/factsheet/fact-sheet-withholding-only-cases-and-detention.

However, the Court made clear that the individual does not need to file a habeas petition in order to obtain a bond hearing. Instead, the government itself is obligated to make a bond determination when mandatory detention has extended beyond a reasonable period.

> The constitutional principles at play here, of course, apply to the government's conduct—detaining criminal aliens—whether a § 2241 petition is filed or only potentially forthcoming. The government is constitutionally obligated to follow the law, and the law under § 1226(c) now includes a temporal limitation against the unreasonably prolonged detention of a criminal alien without a bond hearing. The government does not need to wait for a § 2241 petition to be filed before affording an alien an opportunity to obtain bond. The government is already responsible for implementing the bond mechanism regulations for non-criminal aliens and is equipped to do the same in this context, at the point when the criminal alien's continuous mandatory detention becomes unreasonably protracted. As explained infra, the criminal alien also can appeal the District Director's initial bond determination to the IJ and BIA. *Sopo*, 2016 WL 3344236, at *14 n.8.

Thus, *Sopo* directs ICE to make a bond determination once someone's mandatory detention has exceeded a reasonable period, and subjects that determination to review by the IJ and BIA. *Sopo* also implicitly confirms that, pursuant to governing regulations, your client can seek a "reasonableness" determination from the immigration court. *See also* 8 C.F.R. § 1003.19(h)(2)(ii) (providing that detainee may "seek[] a determination by an immigration judge that [he] is not properly included within [the mandatory detention statute]"). A sample motion requesting that the immigration court decide a *Sopo* claim is attached to this advisory.

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

The Court has directed the government to apply the bond regulations that govern custody determinations under § 1226(a). *Id*. at 44-45. Pursuant to those regulations, the noncitizen has an opportunity to obtain release from ICE and, if necessary, seek a bond hearing before the IJ. *See* 8 C.F.R. § 1236.1(c), (d). The bond determination is governed by the framework set forth in *Matter of Guerra*, 24 I&N Dec. 37, 40 (BIA 2006). *See Sopo*, 2016 WL 3344236, at *17.

The Court declined to require that the government bear the burden of justifying continued detention. *See id*. at *16-17. Instead, pursuant to the regulations, the individual bears the burden of proving that he is not a flight risk or danger to others. *Id*. at *17 (citing 8 C.F.R. § 1236.1(c)(8)).

Finally, you should request an audio recording of any bond hearing before the IJ to preserve the record for appeal.[35] A sample request for such recording is attached to this practice advisory.

What if my client is detained outside the Eleventh Circuit?

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

DETAINED

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

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

MOTION FOR CUSTODY DETERMINATION UNDER *SOPO V, ATTORNEY GENERAL* AND FOR BOND REDETERMINATION HEARING

Pursuant to 8 C.F.R. § 1003.19(h)(2)(ii), Respondent **NAME** requests a determination that **he/she** is not "properly included" under Immigration and Nationality Act ("INA") § 236(c) because **his/her** mandatory detention has exceeded a "reasonable amount of time." *See Sopo v. Attorney General*, No. 14-11421, 2016 WL 3344236, at *12 (11th Cir. June 15, 2016) (internal quotation marks omitted). Respondent further requests an immediate bond hearing to determine whether **his/her** continued detention is justified. The grounds for this motion are as follows.

[35] *See Singh v. Holder*, 656 F.3d 1196, 1208 (9th Cir. 2011) (holding that "due process requires a contemporaneous record of [prolonged detention] hearings").

I. This Court Has the Authority to Determine Whether Respondent's Mandatory Detention Has Exceeded a Reasonable Period of Time and Whether He/She is Therefore Not "Properly Included" Under INA § 236(c).

1. In *Sopo*, the Eleventh Circuit construed the mandatory detention statute, INA § 236(c), as authorizing mandatory detention only for a "reasonable amount of time." When detention exceeds that reasonable period, the noncitizen is entitled to an individualized bond hearing. *Id*.

2. The governing regulations vest this Court with jurisdiction to determine whether Respondent's mandatory detention is unreasonably prolonged under *Sopo* and therefore not authorized by INA § 236(c). *See* 8 C.F.R. § 1003.19(h)(2)(ii) (noncitizen may "[seek] a determination by an immigration judge [IJ] that [he] is not properly included within" the mandatory detention statute). Immigration courts and the BIA routinely hear claims by detainees that they are not subject to INA § 236(c). *See, e.g.*, *Matter of Joseph*, 22 I&N Dec. 799 (BIA 1999) (addressing whether detainee is "deportable" or "inadmissible" within meaning of the statute); *In re Acosta*, A043 971 319, 2010 WL 2224587 (BIA May 12, 2010) (addressing claim that detainee was not taken into immigration custody "when released" from criminal custody); *In re Adreenko*, A070 529 130, 2010 WL 1747388 (BIA Apr. 19, 2010) (addressing same claim); *In re Christmas*,
A40 164 143, 2006 WL 3485565 (BIA Oct. 27, 2006) (addressing same claim).

3. Although this Court lacks jurisdiction to consider constitutional challenges to immigration statutes and regulations, *see Matter of Fede*, 20 I&N Dec. 35, 36 (BIA 1989), the Eleventh Circuit has interpreted the *statute* to prohibit mandatory detention beyond a reasonable period of time. *See Sopo*, 2016 WL 3344236, at *12. Thus, this Court clearly has authority under

applicable regulations to determine whether Respondent is still "properly included" under INA § 236(c) where his/her mandatory detention has extended beyond a reasonable period. *See* 8 C.F.R. § 1003.19(h)(2)(ii).

4. Indeed, the Eleventh Circuit recognized that immigration courts must hear such motions. As the Court explained:

> The government is constitutionally obligated to follow the law, and the law under § 1226(c) now includes a temporal limitation against the unreasonably prolonged detention of a criminal alien without a bond hearing. *The government does not need to wait for a § 2241 petition to be filed before affording an alien an opportunity to obtain bond*. The government is already responsible for implementing the bond mechanism regulations for non-criminal aliens and is equipped to do the same in this context, at the point when the criminal alien's continuous mandatory detention becomes unreasonably protracted. As explained *infra*, the criminal alien also can appeal the District Director's initial bond determination to the IJ and [Board of Immigration Appeals (BIA)] *Sopo*, 2016 WL 3344236, at *14 n.8 (emphasis added).

Thus, *Sopo* directs U.S. Immigration and Customs Enforcement (ICE) to make a bond determination whenever a respondent's mandatory detention has exceeded a reasonable period, and subjects that determination to review by this Court and the BIA. Moreover, *Sopo* confirms that, pursuant to governing regulations, this Court can and must determine whether Respondent's mandatory detention is no longer reasonable in length and **he/she** is therefore entitled to a bond hearing.

II. Respondent's Mandatory Detention Has Exceeded a Reasonable Period of Time and He/She Is Entitled to a Bond Hearing.

6. In *Sopo*, the Eleventh Circuit held that once "a detained criminal alien's removal proceedings and concomitant mandatory detention become unreasonably prolonged," the government must provide the person with an "individualized bond hearing." *Id*. at *12. As the Court explained, "[r]easonableness . . . is a fact-dependent inquiry requiring an assessment of all of the circumstances of any given case." *Id*. at *13 (internal quotation marks omitted). "[C]ourts

must consult the record and balance the government's interest in continued detention against the criminal alien's liberty interest, always seeking to determine whether the alien's liberty interest has begun to outweigh any justification for using presumptions to detain him without bond." *Id.* at *16 (internal quotation marks omitted). "If the balance tips in the alien's favor," the court must order the individual a bond hearing. *Id.*

7. Respondent's prolonged mandatory detention clearly exceeds a reasonable period of time under the factors set forth in *Sopo*.[36] First, Respondent has been detained [**insert period of time]**. This far exceeds the periods the Court found permissible in *Sopo*. As the Court explained, "[t]he need for a bond inquiry is likely to arise in *the six-month to one-year window*." *Id.* at *15 (emphasis added); *see also id.* (describing a one-year mark as the "outer limit of reasonableness"). Moreover, "the constitutional case for continued detention without inquiry into its necessity becomes more and more suspect as detention continues past [the] thresholds" for removal proceedings contemplated by the Supreme Court in *Demore v. Kim*, 538 U.S. 510, 527-28 (2003)—i.e., one-and-a-half to five months. *Id.* (internal quotation marks omitted).

- *Consider framing the length of your client's detention in terms of the thresholds in* Demore. *For example:* "Respondent's more than two and a half years of detention far exceeds these thresholds. **His/Her** imprisonment surpasses by nearly 20 times the average 47 days contemplated in *Demore* for the 85% of detainees whose cases conclude

[36] Notably, the list of factors in *Sopo* is "not exhaustive," and "the factors that should be considered will vary depending on the individual circumstances present in each case." *Id.* at *16. Likewise, the respondent is not required to satisfy *every* factor to show his mandatory detention has become unreasonable. *See id.*

before the IJ, and by more than six times the average five month period contemplated for those 15% of detainees who appeal their cases to the BIA." *See* 538 U.S. at 529-30.

- *If helpful, compare the length of your client's immigration detention to his or her relevant criminal sentence. For example*: "Moreover, Respondent's 'civil immigration detention exceeds the time [**he/she**] spent in prison for the crime that rendered [**him/her**] removable,' *Sopo*, 2016 WL 3344236 at *16.
- *If your client has been detained for several years, add the following*: "Indeed, in Mr. Sopo's case, the Court found that the 'sheer length' of his detention without a bond hearing—i.e., four years, at least three-and-a-half of which were under § 1226(c)—'on its own' entitled him to a bond hearing 'long ago.' *Id*. at *17. Likewise, here the 'sheer length' of Respondent's mandatory detention—[**insert period of time**]—requires a bond hearing."

8. Second, Respondent faces an unreasonable period of future mandatory detention. *See id.* at *16 (citing "the foreseeability of proceedings concluding in the near future (or the likely duration of future detention)" (internal quotation marks omitted)).

- *Explain further. For example, your client may not receive a merits hearing or decision from the IJ for some months; anticipates lengthy detention during the pendency of a BIA appeal; has a stay of removal pending decision on a petition for review in the court of appeals; or is likely to be remanded back to immigration court for further proceedings. Such review could take months or years to conclude, during which time Respondent would be subject to further unreasonably prolonged mandatory detention.*

9. Third, the error and delay in Respondent's case make it especially clear that his/her detention is unreasonably prolonged. *See id*. at *15-16, 18.[37]

Explain. Such errors or delay may include, but are not limited to:

- Reversible errors by the IJ/BIA, resulting in remands for further proceedings. *See id*. at *18 (noting that "[t]he bulk of the government's delay . . . came from the IJ erring several times"); *accord Diop*, 656 F.3d at 234.

- Failure by the IJ to prepare a proper record for appeal. *See Leslie v. Attorney General*, 678 F.3d 265, 267-68, 271 (3d Cir. 2012) (noting delay caused by "clerical errors" of IJ requiring remand to prepare a complete transcript).

- Failure by the government to plead all the charges of removability promptly. *See Diop*, 656 F.3d at 224 (noting that the government did not charge Mr. Diop with removal for his controlled substance offense until months after initiating removal proceedings).

- Failure by the government to produce evidence promptly. *See Sopo*, 2016 WL 3344236, at *18 (noting that "the government did not respond to Sopo's FOIA request [for his prior asylum application] for months"); *see also Diop*, 656 F.3d at 224-25, 234 (delay in producing evidence of criminal history).

- Failure by the government to initiate removal proceedings while your client was serving his criminal sentence. *See, e.g.*, 8 U.S.C. § 1228 (providing for expedited removal of noncitizens with aggravated felony convictions).

- Delays in the scheduling of removal hearings before the immigration court (e.g., because of extensive backlogs), *see Leslie*, 678 F.3d at 270-71 (noting nearly seven month delay in scheduling immigration court hearing after remand from Court of Appeals), in an IJ's

[37] To be sure, *Sopo* does not *require* a showing of government delays or errors in order for mandatory detention to be unreasonable. *See Sopo*, 2016 WL 3344236, at *16. Indeed, "detention may be unreasonable even though the Government has handled the removal case in a reasonable way." *Chavez-Alvarez v. Warden, York County Prison*, 783 F.3d 469, 475 (3d Cir. 2015); *accord Diop v. ICE/Homeland Security*, 656 F.3d 221, 223 (3d Cir. 2011) (noting that "individual actions by various actors in the immigration system, each of which takes only a reasonable amount of time to accomplish, can nevertheless result in the detention of a removable alien for an unreasonable, and ultimately unconstitutional, period of time."). However, where, as here, government delay and error have extended detention, it is especially clear that mandatory detention has become unreasonable and a bond hearing is required.

issuance of a decision following a removal hearing, *see Ly v. Hansen*, 351 F.3d 263, 265-66, 272 (6th Cir. 2003) (IJ's delay in issuing removal order by several months after the merits hearing unreasonably extended petitioner's detention), or in the BIA's adjudication of an appeal. *See Tijani v. Willis*, 430 F.3d 1242, 1249 (9th Cir. 2004) (Tashima, J., concurring) (noting that BIA's 13-month delay in adjudicating appeal unreasonably prolonged the petitioner's detention); *see also Nwozuzu v. Napolitano*, No. 12–3963, 2012 WL 3561972, at *5 (D.N.J. Aug. 16, 2012) (noting the BIA took six months to decide appeal).

- Delays by the government in the processing of applications for relief. *See Alli v. Decker*, No. 4:09-cv-00698, slip op. at 13 (M.D. Pa. Jan. 26, 2010) (finding that one-year delay in adjudicating I-130 petition unreasonably prolonged the petitioner's detention).

10. Nor may the government justify Respondent's unreasonably prolonged detention based merely on his/her decision to prosecute his/her removal case. As the Court held in *Sopo*, "aliens should [not] be punished for pursuing avenues of relief and appeals." 2016 WL 3344236, at *16 (citing *Ly*, 351 F.3d at 272 ("[A]ppeals and petitions for relief are to be expected as a natural part of the process. An alien who would not normally be subject to indefinite detention cannot be so detained merely because he seeks to explore avenues of relief that the law makes available to him.")). "Although an alien may be responsible for seeking relief, he is not responsible for the amount of time that such determinations may take." *Ly*, 351 F.3d at 272. Indeed, "[t]o conclude that [a detainee's] voluntary pursuit of such challenges renders the corresponding increase in time of detention reasonable, would effectively punish [him] for pursuing applicable legal remedies." *Leslie*, 678 F.3d at 271 (internal quotation marks omitted). Indeed, in order for detention to be prolonged, a detainee *always* will have chosen to prosecute his case. Instead, only "[e]vidence that the alien acted in bad faith or sought to deliberately slow the proceedings"—for example, by "[seeking] repeated or unnecessary continuances, or [filing] frivolous claims and

appeals"—"cuts against" providing the noncitizen a bond hearing. *Sopo*, 2016 WL 3344236, at *16. There is no such evidence here.

11. Respondent also satisfies several other *Sopo* factors. *Address the following factors if applicable to your client:*

- For example, it is unlikely that Respondent will receive a final removal order as he/she has a strong challenge to removal. *See id*. at *16. [*This should be especially clear if, for example, **he/she** prevailed before the IJ in **his/her** removal case but remains in detention due to the government's appeal to the BIA.*]

- For example, Respondent's removal if **he/she** were ultimately to be ordered removed is not reasonably foreseeable. *See id*. [This factor most clearly applies where the person is stateless or from a country with whom the U.S. lacks a repatriation agreement.]

- Finally, Respondent's "civil immigration detention is [not] meaningfully different from a penal institution for criminal detention." *Id*. *See also id*. at *18 (noting that "Sopo's civil immigration detention is in a prison-like facility and is now longer than his prison time for bank fraud."). [**Describe conditions of confinement**].

CONCLUSION

As set forth above, Respondent's mandatory detention has clearly exceeded a reasonable period. Thus, this Court should hold that **he/she** is not properly included under the mandatory detention statute and order an immediate bond hearing.

Respectfully submitted,

Date: _____ _____

DETAINED

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

In the Matter of:	)	
	)	
[Name]	)	File No. A
	)	
Respondent	)	In Removal Proceedings
	)	

ORDER OF THE IMMIGRATION JUDGE

Upon due consideration of the respondent's Motion for Bond Hearing, it is HEREBY ORDERED that the motion be □ GRANTED □ DENIED because:

□ DHS does not oppose the motion.
□ The respondent does not oppose the motion.
□ A response to the motion has not been filed with the court.
□ Good cause has been established for the motion.
□ The court agrees with the reasons stated in the opposition to the motion.
□ The motion is untimely per _____.
□ Other:

Deadlines:
□ The application(s) for relief must be filed by _____.
□ The respondent must comply with DHS biometrics instructions by_____.

_____ _____
Date Immigration Judge

Certificate of Service

This document was served by: [ ] Mail [ ] Personal Service

To: [ ] Alien [ ] Alien c/o Custodial Officer [ ] Alien's Atty/Rep [ ] DHS

Date:_____ By: Court Staff_____

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

Respondent respectfully requests through the undersigned counsel that the Immigration Court audio record Respondent's bond redetermination hearing. Due process requires a "contemporaneous record" of Respondent's bond redetermination hearing to facilitate review by the Board of Immigration Appeals should such review be necessary. *Singh v. Holder*, 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___,

_____

XXX