PRACTICE ADVISORY:
Guerrero-Sanchez v. Warden, York County Prison

Bond Hearings for Individuals Subject to Prolonged Detention Under 8 U.S.C. § 1231(a)(6) in the Third Circuit

October 18, 2018

This practice advisory discusses the Third Circuit's recent decision in *Guerrero-Sanchez v. Warden, York County Prison*, Nos. 16-4134 & 17-1390, 2018 WL 4608970 (3d Cir. 2018). *Guerrero-Sanchez* reached three main holdings:

- First, the detention of individuals with reinstated orders of removal and who are placed in withholding-only proceedings is ***authorized by 8 U.S.C. § 1231 and not 8 U.S.C. § 1226.***

- Second, 8 U.S.C. § 1231(a)(6) generally requires ***a bond hearing after six months of detention***. This requirement applies to *all* individuals detained under Section 1231(a)(6), and not only individuals in withholding-only proceedings.

- Third, at the six-month bond hearing, the ***government bears the burden of proving by clear and convincing evidence*** that that the person is a flight risk or danger to the community to justify his or her continued detention.

Guerrero-Sanchez is of immediate significance to those detained in the Third Circuit and who are in withholding-only proceedings or otherwise subject to Section 1231. Although the government may petition for rehearing of the panel decision, unless and until the Third Circuit vacates the decision, *Guerrero-Sanchez* remains the law of the circuit and is binding on the agency.

It is presently unclear how the government will implement the decision. In the meantime, the ACLU advises practitioners to move immediately for a bond hearing in immigration court for eligible detainees. Attached to this practice advisory is a sample immigration court motion. The ACLU is also monitoring the implementation of *Guerrero-Sanchez* and available to provide technical assistance. Please contact ProlongedDetention@aclu.org for more information. This advisory will be updated as

new developments occur.[1]

Factual Background

In 1998, Mr. Guerrero-Sanchez was ordered removed and removed from the United States. He later reentered, and in 2013, was arrested and convicted of federal narcotics offenses. On May 19, 2015, upon discharge from his criminal sentence, he was transferred to U.S. Immigration and Customs Enforcement ("ICE") custody.

ICE reinstated his 1998 order of removal, but an asylum officer concluded that Mr. Guerrero-Sanchez had a reasonable fear of persecution in Mexico, and so referred him to a withholding-only hearing before an Immigration Judge ("IJ"). The IJ denied his claims, the Board of Immigration Appeals ("BIA") affirmed, and Mr. Guerrero-Sanchez appealed. In a separate, unpublished decision, the Third Circuit granted his Petition for Review, vacated the Order and remanded for further proceedings.

Mr. Guerrero-Sanchez filed a petition for writ of habeas corpus to challenge his detention on December 17, 2015—six months after his ICE detention began, while his removal claims were pending on appeal to the Board. The District Court agreed with his primary argument that his detention was governed by the pre-removal order detention statute, 8 U.S.C. § 1226(a), and not the post-removal statute, 8 U.S.C. § 1231, and that he was due a bond hearing before the IJ.

The IJ, however, denied bond, finding that Mr. Guerrero-Sanchez was a flight risk and/or danger to the community. Mr. Guerrero-Sanchez sought further relief in District Court, which found the IJ's bond hearing legally insufficient, held an independent bond hearing, and ordered release on conditions of supervision. He was released in February 2017—637 days after he was placed in ICE custody. The government appealed the district court's first decision granting Mr. Guerrero-Sanchez a bond hearing.[2]

What Did the Third Circuit Decide in *Guerrero-Sanchez*?

First, the Third Circuit held that detention during withholding-only proceedings is governed by Section 1231 and not Section 1226. The ruling deepens a circuit split on the question. *Compare Padilla-Ramirez*, 882 F.3d 826, 832 (9th Cir. 2017) (holding that Section 1231(a) governs), *with Guerra v. Shanahan*, 831 F.3d 59, 64 (2d Cir. 2016) (holding that Section 1226(a) governs).

[1] This advisory is not a substitute for independent legal advice by a lawyer who is familiar with an individual's case.

[2] The government did not appeal the district court's second decision to hold a bond hearing and order release outright. Mr. Guerrero-Sanchez argued both for affirmance of the decision below and, in the alternative, that if the government was correct and his detention fell under Section 1231(a)(6), that a bond hearing was nonetheless compelled by that statute.

This first holding is of significance only to detainees who are in reinstatement proceedings and have been found to have a reasonable fear of persecution. It is the subject of continuing litigation across the circuits. The government takes the position that detention falls under Section 1231(a) and not Section 1226(a). If detention falls under Section 1226(a)—as the Second Circuit held in *Guerra*—then, at the detainee's request, a bond hearing must be held at the outset of the proceedings. If Section 1231(a) authorizes detention—as is the law in the Ninth Circuit and now the Third Circuit—then withholding-only detention is subject to the same substantive and procedural limits that apply to post-order detention more generally.

Second, the Third Circuit held that the prolonged detention under Section 1231(a)(6) of individuals in withholding-only proceedings raises serious constitutional problems and, following *Diouf v. Napolitano*, 634 F.3d 1081 (9th Cir. 2011), construed the statute generally to require bond hearings after six months. "Critically, [the] holding [] necessarily applies to *all aliens detained under § 1231(a)(6)*, not just those, like Guerrero-Sanchez, who have reinstated removal orders under § 1231(a)(5) and are pursuing withholding-only relief." Slip Op. 33-34 (emphasis added). *See also id*. at 35 ("Our interpretation applies to all classes of aliens that are enumerated in § 1231(a)(6)—i.e., aliens who are inadmissible under 8 U.S.C. § 1182, removable under 8 U.S.C. § 1227(a)(1)(C), (a)(2), or (a)(4), or who have 'been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal,' 8 U.S.C. § 1231(a)(6).").[3]

Like the Ninth Circuit in *Diouf*, the Court agreed that a bond hearing is *not* required if "the alien's release or removal is imminent." *Id*. at 38 n.15 (quoting *Diouf*, 634 F.3d at 1092 n.13). However, the Court underlined that "this exception is *narrow*." *Id*. (emphasis added).

Critically, the Third Circuit rejected the government's argument that the Supreme Court's limiting construction of Section 1231(a)(6) adopted in *Zadvydas v. Davis*, 533 U.S. 678, 701 (2001)—namely, that a person's detention is prohibited where there is "no significant likelihood of [his or her] removal in the reasonably foreseeable future"—is the "sole constraint on detention that the Due Process Clause requires." Slip Op. 26-27. As the Third Circuit explained, "[w]hile *Zadvydas* limited the *substantive* scope of § 1231(a)(6), it did not explicitly preclude courts from construing § 1231(a)(6) to include additional *procedural* protections"—such as a bond hearing—"should those protections

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[3] As the Court explained:

> This is because "statutory language given a limiting construction in one context must be interpreted consistently in other contexts, 'even though other of the statute's applications, standing alone, would not support the same limitation.'" *Spector v. Norwegian Cruise Line Ltd.*, 545 U.S. 119, 140 (2005) (quoting Clark v. Martinez, 543 U.S. 371, 380 (2005).

Slip Op. 34.

be necessary to avoid detention that could raise different constitutional concerns," such as prolonged detention without a hearing. *Id*. at 27-28 (emphasis in original).

Third, the Third Circuit followed the Ninth Circuit to hold that the "Government must meet its burden in such bond hearings by clear and convincing evidence." Slip Op. at 33, n12, citing *Singh v. Holder*, 638 F.3d 1196, 1203-04 (9th Cir. 2011) ("Because it is improper to ask the [alien] to 'share equally with society the risk of error when the possible injury to the individual'— deprivation of liberty—is so significant, a clear and convincing evidence standard of proof provides the appropriate level of procedural protection.").

What types of cases does *Guerrero-Sanchez* apply to?

Guerrero-Sanchez applies to prolonged detention pursuant to Section 1231(a)(6). A detainee held under that statute is clearly entitled to a bond hearing if he or she has been detained for six months or more. Thus, *Guerrero-Sanchez* clearly requires a bond hearing for the following classes of detained immigrants if they have been detained for at least six months:

- Individuals detained pursuant to reinstated orders of removal, including those in withholding-only proceedings.

- Individuals petitioning for direct review of a removal order and for whom no stay of removal has been issued.

- Individuals who have a final order of removal and remain detained pending administrative adjudication of a motion to reopen, whether before the IJ or BIA, and regardless of whether they have obtained a stay of removal.

- Individuals petitioning for review of a denied motion to reopen, regardless of whether they have obtained a stay of removal.

- Other individuals with final orders of removal who have no pending challenges to removal and no stay of removal.

What are the implications of *Guerrero-Sanchez* for bond hearings required by *Diop v. ICE/Homeland Security*, 656 F.3d 221 (3d Cir. 2011)?

In *Diop*, the Third Circuit construed 8 U.S.C. § 1226(c), which imposes mandatory detention pending removal proceedings, to contain an implicit "reasonable" time limit. Thus, where mandatory detention became unreasonable, the statute required a bond hearing where the government bore the burden of justifying the individual's continued imprisonment. 656 F.3d at 231. *Diop*'s statutory holding was abrogated by the Supreme Court in *Jennings v. Rodriguez*, 138 S. Ct. 830, 847 (2018) (holding that Section 1226(c) authorizes mandatory detention without a bond hearing until the conclusion of removal proceedings).

However, *Jennings* did *not* eliminate bond hearings for individuals subject to prolonged mandatory detention altogether. Rather, *Diop* also held, as a constitutional matter, that "when detention becomes unreasonable, the Due Process Clause demands a hearing, at which the Government bears the burden of proving that continued detention is necessary to fulfill the purposes of the detention statute." *Diop*, 656 F.3d at 233. Critically, *Guerrero-Sanchez* reaffirmed *Diop*'s independent constitutional holding. *See* Slip Op. 28-29 & n.11. Although the Court declined to address specifically whether *Diop*'s constitutional holding survives *Jennings*, *see id*. at 30 n.11, it reaffirmed that the Court in *Diop* had "already recognized" that due process requires a bond hearing in cases where mandatory detention has become unreasonably prolonged. *Id*. at 28.

What should I do to obtain a bond hearing for my client under *Guerrero-Sanchez*?

Because *Guerrero-Sanchez* interpreted the statute to provide for a bright-line, six-month rule, IJs *should* provide bond hearings for all qualifying detainees in the Third Circuit without further litigation. However, in the Ninth Circuit, the Executive Office of Immigration Review did not acquiesce to a similar ruling in *Diouf*. *See, e.g.*, *Aleman Gonzales v. Sessions*, 3:18-cv-01869-JSC (N.D. Cal. June 5, 2018) (order granting preliminary injunction and class certification) (case seeking implementation of *Diouf* hearings at six months).

Therefore, practitioners are advised to take the following steps:

- First, at six months of detention, file a motion with the IJ seeking a bond hearing under *Guerrero-Sanchez*. A sample motion for a bond hearing is attached to this advisory.

- Second, if the IJ declines to hold a hearing, file a petition for writ of habeas corpus with an order to show cause or a temporary restraining order.

- Finally, if IJ's are not complying with the rule, please inform the ACLU at ProlongedDetention@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 REDETERMINATION HEARING UNDER *GUERRERO-SANCHEZ V. WARDEN, YORK COUNTY PRISON*

Pursuant to *Guerrero-Sanchez v. Warden, York County Prison*, Nos. 16-4134 & 17-1390, 2018 WL 4608970 (3d Cir. 2018), Respondent [**INSERT NAME**] requests an immediate bond hearing where the government bears the burden of showing by clear and convincing evidence that [**he/she/they**] is a flight risk or danger to the community.

The grounds for this motion are as follows:

1. In *Guerrero-Sanchez v. Warden*, the Third Circuit held that the Immigration and Nationality Act, 8 U.S.C. § 1231(a)(6), generally requires a bond hearing at six months of detention. *See* 2018 WL 4608970, at *13 (holding that "an alien detained under § 1231(a)(6) is generally entitled to a bond hearing after six months (*i.e.*, 180 days) of custody."). Moreover, at that hearing, the "Government must meet its burden . . . by clear and convincing evidence" of showing that the individual is a flight risk or danger to the community to justify his or her continued imprisonment. *Id*. at *12 n.12. Critically, the bond hearing requirement "necessarily applies to *all* aliens detained under § 1231(a)(6),

not just those, like [the petitioner in *Guerrero-Sanchez*], who have reinstated removal orders under § 1231(a)(5) and are pursuing withholding-only relief." *Id*. at *12.

2. Respondent is entitled to a bond hearing under *Guerrero-Sanchez*. [**Explain the procedural posture of the case and why the individual qualifies for a bond hearing under *Guerrero-Sanchez*. For example:**]

- Respondent has been detained pursuant to a final order of removal since **DATE**—or for **XX** months.
- Respondent has been detained pursuant to a reinstated order of removal since **DATE**—or for **XX** months—pending withholding-only proceedings.
- Respondent has been detained pursuant to a final order of removal since **DATE**—or for **XX** months—pending review of a denied motion to reopen by the U.S. Court of Appeals for the Third Circuit.
- Respondent has been detained pursuant to a final order of removal since **DATE**—or for **XX** months—pending review of a motion to reopen that is currently pending before [**the IJ or BIA**].
- Respondent has been detained pursuant to a final order of removal since **DATE**—or for **XX** months—pending review of that order by the U.S. Court of Appeals for the Third Circuit, without a judicial stay of removal.

CONCLUSION

For the foregoing reasons, this Court should grant Respondent's request for an immediate custody redetermination where the government bears the burden of showing that [**his/her/their**] continued detention is necessary.

Respectfully submitted,

Date: _____ _____