Docket No: 08-CV-534-sr

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

ERROL BARRINGTON SCARLETT
Agency No. A35-899-292,

Petitioner,

v.

THE UNITED STATES DEPARTMENT OF HOMELAND SECURITY, BUREAU OF IMMIGRATION AND CUSTOMS ENFORCEMENT, BATAVIA FEDERAL DETENTION FACILITY, DIRECTOR, MARTIN HERRON, ET. AL.,

Respondents.

BRIEF FOR *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION AND NEW YORK CIVIL LIBERTIES UNION

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STATEMENT OF INTEREST

Amicus the American Civil Liberties Union Foundation (ACLU) has a longstanding interest in enforcing constitutional and statutory constraints on the federal government's power to subject non-citizens to administrative immigration detention. *Amicus* has been counsel of record or amicus in most of the leading cases in this area. *See, e.g.*, *Demore v. Kim*, 538 U.S. 510 (2003) (counsel of record); *Zadvydas v. Davis*, 533 U.S. 678 (2001) (amicus); *Clark v. Martinez*, 543 U.S. 371 (2005) (amicus); *Ly v. Hansen*, 351 F.3d 263 (6th Cir. 2003) (counsel of record); *Tijani v. Willis*, 430 F.3d 1241 (9th Cir. 2005) (counsel of record); *Nadarajah v. Gonzales*, 443 F.3d 1069 (9th Cir. 2006) (counsel of record); *Casas-Castrillon v. Dep't of Homeland Security*, 535 F.3d 942 (9th Cir. 2008) (amicus). *Amicus* currently represents detainees in several other cases that concern the legality of the government's immigration detention policies. *Amicus* the New York Civil Liberties Union (NYCLU) is the New York state affiliate of the ACLU.

INTRODUCTION

For over five years, Petitioner Errol Barrington Scarlett, a longtime lawful permanent resident, has been imprisoned by U.S. Immigration and Customs Enforcement (ICE) while he has challenged the Government's efforts to remove him to Jamaica, a country he left over 30 years ago. Mr. Scarlett has a meritorious challenge to removal that is currently pending at the U.S. Court of Appeals for the Second Circuit and has a substantial likelihood of prevailing on his application for cancellation of removal, a permanent form of immigration relief. Yet the Government maintains that the Immigration and Nationality Act (INA), 8 U.S.C. § 1226(c), requires his *mandatory* detention until such time as his removal proceedings are complete—a period of at least

months and more likely years—and that he is therefore entitled to *no* review of whether his continued detention is justified. *See* Gov't Opp. at 9

As set forth below, Mr. Scarlett's prolonged detention violates his rights under both the INA and the Due Process Clause. The Supreme Court has repeatedly held that immigration detention violates due process unless it is reasonably related to its purpose. Moreover, where detention is prolonged, due process requires a "sufficiently strong special justification" to outweigh the significant deprivation of liberty, as well as strong procedural protections to ensure that an individual's detention is actually serving those governmental purposes. *See Zadvydas v. Davis*, 533 U.S. at 678, 690-91 (2001).

Mr. Scarlett's detention fails in both regards. As a threshold matter, Petitioner has already been imprisoned more than five years, a period far beyond the "brief period of time" typically needed to complete such proceedings. *Demore v. Kim*, 538 U.S. 510, 513 (2003). Nevertheless, the Government maintains that he is subject to mandatory detention until such time as his removal proceedings are complete. *See* Gov't Opp. at 9. Moreover, although the Government is in large part responsible for the long duration of his removal proceedings and detention, the only reasons it has put forth for his continued imprisonment are that a conviction for drug possession nearly ten years ago renders him a danger; that his failure to appear at his criminal arraignments during this same period renders him a flight risk; and that the Government intends to seek a travel document to effectuate his removal should he ultimately lose his case. *See* Decision to Continue Detention, dated Aug. 28, 2008, Gov't Opp., Ex. A at 30-33. This is not the kind of "sufficiently strong justification" that the Supreme Court contemplated as warranting such a significant deprivation of liberty.

Nor has Mr. Scarlett received the strong procedural protections necessary to ensure that he is not erroneously deprived of his liberty. The Supreme Court has never upheld prolonged civil detention of this length in the absence of a meaningful hearing before an impartial adjudicator where the Government bears the burden of justifying continued imprisonment. Yet far from receiving such a hearing, the only process that Mr. Scarlett has received is a string of perfunctory administrative custody reviews before the very agency adjudicators who are responsible for his detention, where he bore the burden of demonstrating lack of danger and flight risk, had no opportunity to examine or rebut the Government's allegations, and had no appeal of the agency's decision. This kind of review falls far short of what due process requires. Moreover, because the Government asserts that Mr. Scarlett is currently subject to *mandatory* detention under 8 U.S.C. § 1226(c), *see* Gov't Opp. at 9, in the Government's view he is entitled to *no* further review of his custody at all until such time as his removal proceedings are concluded.

Mr. Scarlett's continued detention violates due process. This Court, however, need not—and should not—decide the serious constitutional questions presented by his case. Principles of statutory construction require that, where possible, courts should construe statutes so as to avoid serious constitutional problems. Indeed, the Supreme Court applied this canon in *Zadvydas,* construing the post-final-order immigration detention statute as authorizing detention only for the period of time "reasonably necessary to secure removal," 533 U.S. at 699, and designating six months as the presumptively reasonable period, even though the statute itself placed no limit on the length of detention. *Id.* at 701. Likewise here, the immigration statute is silent with respect to both the length of detention authorized and the procedures necessary to impose

such detention. In the absence of any evidence that Congress intended to authorize Petitioner's prolonged detention (and in particular his prolonged *mandatory* detention), this Court should construe the statute as authorizing detention only for the period of time reasonably necessary to conclude removal proceedings, and as authorizing prolonged detention only when accompanied by adequate procedural safeguards. Thus, on statutory grounds alone, this Court should order the Government either to release Mr. Scarlett immediately under reasonable conditions of supervision or to provide him with a constitutionally adequate custody hearing.

ARGUMENT

I. PETITIONER'S DETENTION VIOLATES HIS RIGHT TO DUE PROCESS UNDER THE FIFTH AMENDMENT.

A. Immigration Detention Violates Due Process Absent a Reasonable Relation to a Legitimate Government Purpose and Adequate Procedural Safeguards.

This case involves prolonged detention in contravention of Mr. Scarlett's rights under the Due Process Clause of the Fifth Amendment. "Freedom from imprisonment—from Government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that Clause protects." *Zadvydas*, 533 U.S. at 690. Moreover, the Supreme Court has recognized that non-citizens—even those whom, unlike Mr. Scarlett, have exhausted all their challenges to removal and are simply waiting to be removed—have a liberty interest threatened by immigration detention. *Id.* at 690-91. For this reason, their detention violates due process unless it is reasonably related to its purpose. *Jackson v. Indiana*, 406 U.S. 715, 738 (1972); *Zadvydas*, 533 U.S. at 690.

Indeed, the Supreme Court has unequivocally held that detention requires a sufficiently strong special justification to outweigh such a significant deprivation of

liberty as well as "strong procedural protections." *Id.* at 690-91. Moreover, as detention becomes prolonged, the deprivation of liberty becomes greater, requiring an even stronger justification and more rigorous procedural protections. *See Kansas v. Hendricks*, 521 U.S. 346, 368 (1997) (upholding involuntary civil commitment for periods of one year at a time, subject to "strict procedural safeguards" including right to jury trial before state court and imposition of burden of proof beyond a reasonable doubt on Government); *see also Ngo v. INS*, 192 F.3d 390, 398 (3d Cir. 1999) (emphasizing that "[w]hen detention is prolonged, special care must be exercised . . . . The stakes are high and we emphasize that grudging and perfunctory review is not enough to satisfy the due process right to liberty . . . ."); *Fuller v. Gonzales*, No. 04-2039, 2005 WL 818614, at *5 (D. Conn. Apr. 08, 2005) (noting that "the sufficiency of [the Government's] justification decreases as the length of incarceration increases").

Notably, the petitioners in *Zadvydas* (as well as *Ngo*) had exhausted all administrative and judicial challenges to removal and had lost their right to reside in the United States. In contrast, Mr. Scarlett has a substantial challenge to removal, making his claim to due process protection even stronger. Moreover, non-citizens like Mr. Scarlett who have been admitted to the country—and indeed as lawful permanent residents—hold particularly strong due process rights, *see Zadvydas*, 533 U.S. at 693; *see also Landon v. Plasencia*, 459 U.S. 21, 32-33 (1982), and thus great care must be exercised with respect to their prolonged confinement.

B. Petitioner's Detention Has Become Unreasonably Prolonged Beyond the Time Necessary for the Completion of His Removal Proceedings.

Mr. Scarlett has been detained for over five years. This amount of time is clearly unreasonably prolonged for due process purposes. In *Zadvydas*, the Supreme Court held that due process concerns with respect to indefinite detention required it to construe the statutory provision regarding post-removal order detention as authorizing detention only for the "period reasonably necessary to secure removal," 533 U.S. at 699, period which it found to be presumptively six months. *Id.* at 701. Similarly, in *Demore*, the Supreme Court upheld mandatory, pre-removal order detention under 8 U.S.C. § 1226(c), but only for the "*brief* period necessary for [completing] removal proceedings." 538 U.S. at 513 (emphasis added). The *Demore* court stressed "[t]he very limited time of the detention at stake under § 1226(c)," and relied heavily on the Government's representations that such detention lasts "roughly a month and a half in the vast majority of cases in which it is invoked, and about four months in the minority of cases in which the alien chooses to appeal." *Id.* at 530. *See also Madrane v. Hogan*, 520 F. Supp. 2d 654, 664 (M.D. Pa. 2007) (noting that "[t]he emphasis in *Demore* on the anticipated limited duration of the detention period is unmistakable, and the Court explicitly anchored its holding by noting a brief period.") (internal citations omitted); *Fuller*, 2005 WL 818614, at *5 ("*Kim* held that it was permissible to detain aliens under section 236(c) for the *short* time necessary to complete removal proceedings).

Since *Demore*, the circuit courts considering the issue have acknowledged the serious constitutional concerns raised by prolonged, pre-final order detention. These courts have found detention periods far shorter than Mr. Scarlett's to be impermissible.

See Tijani v. Willis, 430 F.3d 1241, 1242 (9th Cir. 2005) (finding that petitioner's two years and eight months of detention while pursuing administrative and judicial review of his removal order raised serious constitutional problems and therefore construing the detention statute to require a bond hearing before an immigration judge where Government had the burden of justifying continued detention); *Ly v. Hansen*, 351 F.3d 263, 271-72 (6th Cir. 2003) (in light of serious constitutional problems posed by prolonged pre-final-order detention, construing 8 U.S.C. § 1226, as authorizing detention only for "a time reasonably required to complete removal proceedings in a timely manner," and finding one and a half years of detention "especially unreasonable" where no chance of actual removal existed); *Welch v. Ashcroft*, 293 F.3d 213, 224 (4th Cir. 2002) (holding "[f]ourteen months of incarceration . . . of a longtime resident alien with extensive community ties, with no chance of release and no speedy adjudication rights" to be impermissible under the due process clause). *Cf. Demore*, 538 U.S. at 532-33 (Kennedy, J. concurring) (noting that, at some point, prolonged detention is not reasonably related to removal); *Hussain v. Gonzales*, 510 F.3d 739, 742 (7th Cir. 2007) ("Inordinate delay before the [final order of removal] was entered might well justify relief" in light of serious due process concerns); *Tijani*, 430 F. 3d at 1249 (Tashima, J., concurring) (noting that the "sheer length" of petitioner's detention—two years and eight months—violates the Constitution). Other district courts within the Second Circuit have recently held the same. *See, e.g., Fuller*, 2005 WL 818614, at *6 (finding "detention already exceeding two years, with no prospect of a timely conclusion" to violate due process); *Hyppolite v. Enzer*, No. 07-00729, at * 2 (D. Conn. June 19, 2007), attached as Ex. A (finding "no-bond detention for more than fifteen months, combined with the

increased likelihood that [petitioner] will be granted cancellation of removal" to be unreasonable and construing mandatory detention statute not to authorize such detention).

The excessive length of Mr. Scarlett's detention— almost two years more than the time he served for his crime and is more than twelve times the average five month period recognized by the Supreme Court in *Demore*, 538 U.S. at 530—is patently unreasonable. This is particularly true in light of the fact that fifteen months of his detention are directly attributable to the Government's improper attempt to forum-shop for a jurisdiction where his conviction for simple possession would be considered an aggravated felony.[1]

The unreasonableness of Mr. Scarlett's detention is further demonstrated not only by the length of detention he has already endured, but also by the indeterminate, potentially lengthy, future detention he faces. *See, e.g., Ly*, 351 F.3d at 271-72; *Tijani*, 430 F.3d at 1242. Alhough briefing and argument on his petition for review was completed as of January 2008, *see* Docket, Scarlett v. U.S. Dep't of Homeland Security, No. 06-2701 (2d Cir. Mar. 3, 2008), Gov't Opp, Ex. A at 67, there is no set time frame in

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[1] Even though Mr. Scarlett plead guilty to a New York state criminal possession offense and was taken into ICE custody in New York City, *see* Form I-200 Warrant for Arrest of Alien, dated Nov. 25, 2003, Gov't Opp., Ex. A at 1; Form I-213 Record of Deportable/Inadmissible Alien, dated Nov. 25, 2003, Gov't Opp., Ex. A at 2, the Government transferred him to a detention facility in Oakdale, Louisiana and initiated removal proceedings against him there. *See* Form I-261 Additional Charge of Inadmissibility/Deportability, dated Jan. 7, 2004, Gov't Opp., Ex. A at 8. This meant that his removal proceedings were conducted pursuant to Fifth Circuit precedent rendering him ineligible for cancellation as an aggravated felon, whereas Second Circuit precedent would have been in his favor. *Compare United States v. Hinojosa-Lopez*, 130 F.3d 691 (5th Cir. 1997) (state-law felony is an aggravated felony) *with Aguirre v. INS*, 79 F.3d 315, 316-18 (2d Cir. 1996) (state-law felony is not an aggravated felony). In apparent recognition of the unfairness of this result—and after Mr. Scarlett filed a habeas petition challenging the removal order on this ground—the Government subsequently agreed to remand of his case for reconsideration under *Aguirre*. *See* Order, Scarlett v. Ashcroft, No. 04-3664 (E.D.N.Y. Feb. 28, 2005), Gov't Opp., Ex. A at 53-54. *See also* Pet.'s Op. Br. at 12-18, Scarlett v. U.S. Dep't of Homeland Security, No. 06-2701 (2d. Cir. 2007), attached as Ex. B.

which the court must decide his case. Moreover, if Mr. Scarlett prevails on his appeal—which is likely, *see infra*—his case will be remanded back to the immigration judge (IJ) for adjudication of his cancellation claim, which itself could take a significant amount of time. *See, e.g., Ly*, 351 F.3d at 265 (noting that the petitioner's case was pending before the IJ for more than 18 months, most of this time waiting for a merits hearing and a decision); *Madrane*, 520 F. Supp. 2d at 667 (expressing concern that "the administrative and appellate process that has yet to be exhausted may be considerably time-consuming"); *Fuller*, 2005 WL 818614, at *6 (noting that "there no indication that [petitioner's] section 236(c) detention is anywhere near over" where BIA had only recently ordered briefing in her case on remand from Court of Appeals and further remand to the IJ was likely). In addition, even if Mr. Scarlett wins a grant of cancellation before the IJ, the Government can appeal this decision to the BIA, during which time Mr. Scarlett will continue to be subjected to mandatory detention. *See In re Joseph*, 22 I&N Dec. 660, 665 (BIA 1999) (holding that mandatory detention statute continued to apply to individual who prevails before the immigration court, but whose case the Government was appealing to the BIA). Likewise, if Mr. Scarlett were to lose again before the BIA, he would almost certainly seek further review from the Court of Appeals. Thus there is no way to predict how long it will take before his removal challenge will finally be resolved. Such resolution could take months or even years, during which time Petitioner will be needlessly forced to endure further detention.

Finally, Mr. Scarlett's over five year-long detention is particularly unreasonable because he has a substantial challenge to removal, as evidenced by the Second Circuit's stay of his removal. *See Mohammed v. Reno*, 309 F.3d 95, 100 (2d Cir. 2002) (explaining

a petitioner requesting a stay of removal must demonstrate, *inter alia*, a "likelihood of success on the merits" of his appeal). In *Demore*, the Supreme Court upheld mandatory detention for a person who had conceded deportability—the "rough equivalent" to a final order of removal. 538 U.S. at 577 (Breyer, J., concurring in part and dissenting in part). However, "[a] wholly different case arises when a detainee who has a good-faith challenge to his deportability is mandatorily detained[.]" *Gonzalez v. O'Connell*, 355 F.3d 1010, 1020 (7th Cir. 2004); *see also Tijani*, 430 F.3d at 1247 (Tashima, J. concurring) (in light of serious constitutional problems, § 1226(c) should be construed as applying only to those non-citizens who cannot raise a substantial argument against removability); *Hyppolite*, No. 07-00729, at * 2 (holding that § 1226(c) must be construed as limited to detention for a reasonable time period, including the likelihood of petitioner prevailing on his claim for relief); *cf. Krolak v. Achim*, No. 04-C-6071, at *1 (N.D. Ill. Dec. 1, 2004), attached as Ex. C (holding that application of § 1226(c) to non-citizen with good faith claim to relief violates due process). A non-citizen's "constitutional claims to bail in these circumstances are strong." *Demore*, 538 U.S. at 577 (Breyer, J., concurring in part and dissenting in part).[2]

[2] Mr. Scarlett has more than a good faith challenge to deportability. As established by the Supreme Court in *Lopez v. Gonzales*, 549 U.S. 47 (2006), Mr. Scarlett's state conviction for simple possession does not constitute an aggravated felony. Moreover, under Second Circuit precedent, the IJ and BIA clearly erred in finding that he was convicted of possession of more than five grams of cocaine-base and in relying on lab reports outside the conviction record to do so. *See* Ex. B at 18-37. Thus, unlike the petitioner in *Demore,* Mr. Scarlett is eligible for cancellation of removal, a permanent form of immigration relief. Moreover, he has a strong claim for cancellation due to his long length of residence in this country, his favorable work record, evidence of his rehabilitation, his close ties to his family—including five U.S. citizen children, whom he saw regularly and supported financially prior to his incarceration, and five U.S. citizen siblings—and the relatively minor nature of his crime. *See* Transcript of IJ Hearing, dated Dec. 15, 2005, attached as Ex. D at 72-84, 94-95, 97-98, 100-101, 106-107, 109-

C. The Government Has Not Provided a Sufficiently Strong Justification to Outweigh the Significant Deprivation of Liberty Associated with Petitioner's Detention.

Furthermore, and especially in light of the excessive length of his detention, the Government has not provided sufficiently strong reasons to justify Mr. Scarlett's ongoing imprisonment. The primary purpose of immigration detention is to ensure a non-citizen's appearance at removal proceedings, and at removal if ultimately ordered. *Zadvydas*, 533 U.S. at 697 (discussing purpose of post-final-order detention); *Demore*, 538 U.S. at 513, 528 (discussing purpose of pre-final-order detention). Protecting the community from danger is also a legitimate—but secondary—government purpose. *Zadvydas*, 533 U.S. at 697. The Government, however, has not demonstrated that Petitioner's over five years of detention is justified on either of these grounds.

Indeed, the Government currently asserts that it need put forth *no* justification for Mr. Scarlett's detention since he is purportedly subject to mandatory detention under 8 U.S.C. § 1226(c). *See* Gov't Opp. at 9. Moreover, to the extent that the Government ever sought to justify Mr. Scarlett's detention on the grounds of danger or flight risk, its summary custody review decisions were based solely on his past criminal history, his failure to appear at criminal arraignments more than ten years ago, and the fact that his removal order has been stayed. *See* Decisions to Continue Custody, Gov't Opp., Ex. A at 45, 44, 38, 30-31. As set forth below, none of these reasons suffice to justify Mr. Scarlett's prolonged detention.

10; *see also In re C-V-T-*, 22 I&N Dec. 7, 11 (BIA 1998) (listing family ties, family hardship, long residence in the United States, evidence of rehabilitation, and employment history as factors indicating cancellation of removal may be warranted).

First, the Government's assertion as to flight risk entirely fails to address either Petitioner's meritorious challenge to removal or his close family ties to the United States, both of which make him less likely to be a flight risk if released. *See* Ex. D, at 72-84 (noting that Mr. Scarlett has five U.S. citizen children, whom he saw regularly and supported financially prior to his incarceration, as well as five U.S. citizen siblings). Indeed, the post-final-order custody review regulations, which the Government claims to have followed in Mr. Scarlett's case, specifically identify "ties to the United States such as the number of close relatives residing here lawfully," as "favorable factors" that the Government must consider in deciding whether to continue to detain or release him. *See* 8 C.F.R. § 241.4(f)(5); *see also id.* § 241.4(h)(3) (providing that review "will include" enumerated factors). Nevertheless, the Government has yet to even address these factors, much less refute them. *See Madrane*, 520 F. Supp. at 669-70 (ordering petitioner's release where Government failed to refute evidence of petitioner's family ties and low flight risk).

In addition, the Government's assertions rest solely on Mr. Scarlett's past failure, more than ten years ago, to appear for criminal arraignments. Thus, they do not make the *contemporary* assessment of flight risk that due process requires. *See Ngo*, 192 F.3d at 399 (due process "requires an opportunity for an evaluation of the individual's *current* . . . risk of flight") (emphasis added); *see also Zadvydas*, 533 U.S. at 721 (Kennedy, J., dissenting) ("Whether a due process right is denied . . . turns . . . on whether there are adequate procedures to review their cases, allowing persons once subject to detention to show that . . . they *no longer* present special risks or danger if put at large.") (emphasis added).

The Government's rote assertions that Mr. Scarlett presents a danger are similarly unfounded. As with flight risk, the Government's assertions rest solely on Mr. Scarlett's single drug conviction from nearly ten years ago[3] and do not make the current assessment of dangerousness that due process requires. *See Ngo,* 192 F.3d at 398 ("presenting danger to the community at one point by committing [a] crime does not place [non-citizens] forever beyond redemption," and "the process due even to excludable aliens requires an opportunity for an evaluation of the individual's *current* threat to the community") (emphasis added); *see also id.* at 398-399 ("To presume dangerousness to the community and risk of flight based solely on [petitioner's] past record does not satisfy due process."). Moreover, the custody reviews utterly fail to discuss the "nature and severity" of his simple possession conviction and the lack of any evidence of recidivism, in contravention of agency regulations, *see* 8 C.F.R. § 241.4(f)(2), nor do they even mention the evidence of his rehabilitation after his release from criminal custody, including his employment record and his participation in a drug treatment program. *Id.* § 241.4(f)(4). *See also* Ex. D, at 94-95, 97-98, 100-101, 106-107, 109-10 (describing Mr. Scarlett's work history and rehabilitation).

Finally, the Government's asserted justification for Mr. Scarlett' continued detention fails even to consider whether other conditions of release, such as electronic monitoring, would be sufficient to satisfy the Government's interests without requiring such a significant deprivation of Mr. Scarlett's liberty. *Cf. Ngo,* 192 F.3d at 398

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[3] Mr. Scarlett's August 2006 custody review also lists a 1987 New York State conviction for driving while intoxicated. *See* Decision to Continue Detention, dated Aug. 23, 2006, Gov't Opp., Ex. A at 44. None of the other custody reviews, including his most recent review in August 2008, mention this offense. *See* Decisions to Continue Custody, Gov't Opp., Ex. A at 45, 38, 30-31.

(criticizing Government for failing to make any effort to determine if the petitioner's conduct "could be discouraged by requiring appropriate surety").

D. Petitioner Has Been Denied the Procedural Protections Due Process Requires To Justify Prolonged Detention.

1. Due Process Requires the Government to Justify Prolonged Detention at a Constitutionally Adequate Hearing

As set forth above, the Supreme Court has recognized that where detention is prolonged, due process requires "strong procedural protections." *See Zadvydas*, 533 U.S. at 690-91; *see also Ngo*, 162 F.3d at 398. It is well-established that "[t]he fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). Supreme Court precedent and persuasive authority from other circuits on the procedures that must accompany prolonged civil detention show that the Government's administrative custody reviews fall far short of what due process demands.

In the civil detention context, the Supreme Court has repeatedly emphasized the importance of a range of procedures for due process, including the provision of an adversary hearing, the existence of a neutral decision-maker, and the allocation of the burden of proof on the Government to justify continued detention. *See, e.g.*, *Zadvydas*, 533 U.S. at 692 (criticizing the regulations governing prolonged immigration detention for placing the burden of proof on the non-citizen); *Tijani*, 430 F.3d at 1242, 1244-45 (Tashima, J. concurring) (noting that when the right to individual liberty is at stake, Supreme Court precedent rejects laws that place on the individual the burden of protecting that right); *Foucha v. Louisiana*, 504 U.S. 71, 81 (1992) (striking civil commitment statute because individual was denied an "adversary hearing at which the

State must prove by clear and convincing evidence that he is demonstrably dangerous to the community''); *United States v. Salerno*, 481 U.S. 739, 750 (1987) (upholding pre-trial detention under Bail Reform Act where Act provided for "a full-blown adversary hearing, the Government must convince a neutral decision-maker by clear and convincing evidence that no conditions of release can reasonably assure the safety of the community or any person"); *Addington v. Texas*, 441 U.S. 418, 432-33 (1979) (holding that state must justify civil commitment by clear and convincing evidence of mental illness and dangerousness and rejecting preponderance standard); *Hendricks*, 521 U.S. at 353 (noting that state statute providing for civil detention of "sexually violent predators" required prosecutor to prove beyond a reasonable doubt whether detention was justified during a trial at which the individual had the right to counsel and right to present evidence and cross-examine witnesses); *id.* at 366, 368 (emphasizing procedural protections in upholding constitutionality of commitment statute). *See also Casas-Castrillon v. Dep't of Homeland Sec.*, 535 F.3d 942, 950 (9th Cir. 2008) (noting that prolonged detention in the absence of an "individualized determination of the necessity of detention before a neutral decision maker" would raise serious constitutional concerns).[4]

[4] Moreover, even with respect to "excludable" noncitizens, the Third Circuit in *Ngo* recognized the need for "rigorous," and "individualized" review of prolonged immigration detention. 192 F.3d at 392. Although in that case the Court declined to find the administrative custody review proces facially invalid, excludable aliens "traditionally have been afforded less constitutional protection than deportable aliens" such as the Petitioner here. *Patel v. Zemski*, 275 F.3d 299, 310 (2001), *overruled on other grounds*, *Demore v. Kim*, 538 U.S. 510 (2003). Moreover, *Ngo* predated *Zadvydas,* in which the Supreme Court specifically noted the inadequacy of an administrative custody review process similar to the one at issue here. *Zadvydas,* 533 U.S. at 692.

2. Petitioner Has Been Denied a Constitutionally Adequate Hearing.

Clearly, the custody reviews that Petitioner received do not even approach the constitutional minimums established by Supreme Court precedent. As illustrated above, *see* Section I.C, *supra,* the custody reviews Mr. Scarlett received were non-adversarial and did not provide him with the meaningful individualized hearing that due process requires. These decisions were no more than a few paragraphs long and relied solely on Petitioner's long-past criminal history and failure to appear and the fact that a travel document would be available should he ultimately lose his case. *See* Decisions to Continue Custody, Gov't Opp., Ex. A at 45, 44, 38, 30-31. Indeed, the Government's determination that Mr. Scarlett presents a danger and flight risk, based solely on his criminal history and past failure to appear, ensures that he will remain imprisoned for the entire duration of his removal proceedings and appellate review, thereby rendering the custody review process meaningless. In this respect, Petitioner has received nothing more than a "rubberstamp denial[]." *Ngo*, 192 F.3d at 399.

Mr. Scarlett also has not received a hearing before an *impartial* adjudicator. His custody review decision was issued by the Field Office Director, who is an ICE employee, and as such has an institutional interest in detaining and removing non-citizens like Mr. Scarlett. *See St. John v. McElroy*, 917 F. Supp. 243, 251 (S.D.N.Y. 1996) (noting "political and community pressure" on the "INS, an executive agency," to continue to detain non-citizens who cannot vote). Accordingly, the Field Office Director's release determinations cannot provide the kind of impartiality that is the essence of due process. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 538 (2004) (recognizing "the general rule" "[t]hat even purportedly fair adjudicators are disqualified by their

interest in the controversy to be decided.") (internal citations omitted); *Concrete Pipe & Products of Cal., Inc v. Construction Laborers Pension Trust for Southern Cal.*, 508 U.S. 602, 617-18 (1993) ("Before one may be deprived of a protected interest, whether in a criminal or civil setting, one is entitled as a matter of due process of law to an adjudicator who is not in a situation . . . which might lead him not to hold the balance nice, clear and true"); *see also Armentero v. INS*, 412 F.3d 1088, 1088 (9th Cir. 2005) (Ferguson, J., specially concurring) ("Administrative agents cannot be vested with the authority to render decisions concerning the length of detention. Such decision-making power rests in the hands of a judicial officer.").

Finally, the custody reviews improperly placed the burden on Petitioner to show that he was not a danger or flight risk, in violation of Supreme Court precedent requiring that such burden be borne by the Government. *See* Section I.D.1, *supra*.

II. NO STATUTE AUTHORIZES PETITIONER'S PROLONGED DETENTION WITHOUT A CONSTITUTIONALLY ADEQUATE HEARING.

As set forth above, Petitioner's prolonged detention without a special, strong justification and adequate procedural safeguards violates due process. This Court need not, however, decide those issues because traditional rules of statutory construction, including the canon of constitutional avoidance, compel the conclusion that no detention statute permits Petitioner's prolonged detention, at least in the absence of a constitutionally adequate bond hearing.

8 U.S.C. § 1226 governs detention of non-citizens "pending a decision" as to removal. In general such detention is discretionary. *See* 8 U.S.C. § 1226(a) ("an alien *may be* . . . detained pending a decision on whether the alien is to be removed")

(emphasis added). Under certain circumstances, however, detention is mandatory. *See* 8 U.S.C. § 1226(c) (stating that the Attorney General "*shall take into custody*" certain noncitizens who are inadmissible or deportable on criminal or terrorism-related grounds, "*when the alien is released*" and prohibiting their release from immigration custody except for limited law enforcement purposes) (emphasis added) [5]

The Government maintains that Petitioner is subject to mandatory detention under § 1226(c). *See* Gov't Opp. at 9. However, as set forth below, Petitioner is *not* subject to mandatory detention under § 1226(c) both because he was not taken into immigration custody "when released" from criminal incarceration, *see* Section II.A, *infra*, but even more importantly because the canon of constitutional avoidance requires this Court to construe 1226(c) as not authorizing prolonged mandatory detention, especially of persons like the Petitioner who have substantial challenges to deportability. *See* Section II.B, *infra*, Thus, Petitioner's detention is governed by § 1226(a) rather than 1226(c). Moreover, the rule of constitutional avoidance similarly requires that § 1226(a), although

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[5] 8 U.S.C. 1226(c) states in relevant part:

> (c) Detention of Criminal Aliens
>
> (1) Custody
>
> The Attorney General shall take into custody any alien who –
>
> . . .
>
> (B) is deportable by reason of having committed any offense covered in section 237(a)(2)(A)(ii), (A) (iii), (B), (C), or (D),
>
> . . .
>
> when the alien is released, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense
>
> (2) Release
>
> The Attorney General may released an alien described in paragraph (1) only if the Attorney General decides pursuant to Section 3521 of title 18, United States Code, that release of the alien is necessary to provide protection to a witness . . . .

silent as to the length of detention authorized, should also be construed as authorizing detention only for the period of time reasonably necessary to conclude removal proceedings, and as requiring a constitutionally adequate custody hearing whenever detention becomes prolonged. *See* Section II.C, *infra*. Because Mr. Scarlett's more than five year detention exceeds the time reasonably necessary to conclude removal proceedings, the statute does not authorize his continued detention and this Court should order his immediate release under reasonable conditions of supervision. However, even if this Court does not conclude that the length of Mr. Scarlett's detention exceeds the period authorized by 1226(a), the statute requires that he be provided with an immediate bond hearing where the Government bears the burden of demonstrating that his prolonged detention is justified.

A. Mr. Scarlett's Detention Is Governed By § 1226(a), Not § 1226(c), Because He Was Not Taken Into Immigration Custody "When Released" For His Offense.

As a threshold matter, Mr. Scarlett is not subject to mandatory detention under § 1226(c) because he was not taken into immigration custody "when released" from criminal incarceration, but instead nearly a year and a half later.[6] Section 1226(c) states in relevant part that the Attorney General "shall take into custody an alien who is . . . deportable by reason of having committed any offense covered [*inter alia*] in section [237(a)(2)(B)(i)] . . . .*when the alien is released* . . . ." 8 U.S.C. § 1226(c) (emphasis added). As numerous courts have held, the plain language of this provision limits

[6] Mr. Scarlett was released from criminal incarceration for a drug conviction offense in May 2002. He was not taken into immigration custody, however, until approximately 17 months later, on November 25, 2003 when he was called into the New York City ICE office to be served with his Notice to Appear. *See* Form I-200 Warrant for Arrest of Alien, dated Nov. 25, 2003, Gov't Opp. Ex. A at 1; Form I-862 Notice to Appear, dated Nov. 25, 2003, Gov't Opp. Ex. A at 4-6.

mandatory detention to those non-citizens who are taken into immigration custody "*when*" they are released from incarceration for the crime that makes them deportable, not several years later. *See Quezado Bucio v. Ridge*, 317 F. Supp. 2d 1221, 1231 (W.D. Wash. 2004) ("[I]f Congress had intended for mandatory detention to apply to aliens at any time after they were released, it easily could have used the language 'after the alien is released,' or 'regardless of when the alien is released,' or other words to that effect. Instead, Congress chose the word 'when,' which connotes a much different meaning."); *Pastor v. Camarena v. Smith*, 977 F. Supp. 1415, 1417-18 (W.D. Wash. 1997) (holding, with respect to similar language in prior mandatory detention statute that "[t]he plain meaning . . . is that it applies immediately after release from incarceration, not to aliens released many years earlier"); *Waffi v. Loiselle*, 527 F. Supp. 2d 480, 488 (E.D. Va. 2007) ("the Court finds that the mandatory detention statute . . . does not apply to an alien such as petitioner, who has been taken into immigration custody well over a month after his release from state custody"); *Zabadi v. Chertoff,* No. 05-03335, 2005 WL 3157377, at *1 (N.D. Cal., Nov. 22, 2005) (order granting writ of habeas corpus) (holding that petitioner who was taken into immigration custody two years after being released from incarceration for his criminal offense, did not fall within the "when released" requirement and was therefore not subject to mandatory detention).[7] Consequently, § 1226(a), and not § 1226(c), governs Mr. Scarlett's detention.

[7] *But see Matter of Rojas*, 23 I&N Dec. 117, 119-120, 127 (BIA 2001) (holding that the timing of a person's release from criminal custody is irrelevant as long as it occurred after § 1226(c)'s effective date).

B. Mr. Scarlett's Detention Is Governed By § 1226(a) Because, Under the Rule of Constitutional Avoidance, § 1226(c) Does Not Apply to Individuals with Substantial Claims Against Removability Nor to Prolonged Detention.

Section 1226(c) also cannot be read to govern Mr. Scarlett's detention under the rule of constitutional avoidance. The rule of constitutional avoidance dictates reading a statute as not authorizing unconstitutional action unless no other construction is even "fairly possible." *Zadvydas*, 533 U.S. at 689; *see also Crowell v. Benson*, 285 U.S. 22, 62 (1932). This canon "is a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts." *Clark v. Martinez*, 543 U.S. 371, 381 (2005).

The Supreme Court has consistently applied the canon of constitutional avoidance to immigration statutes. In *Zadvydas*, the Court held that the general detention statute governing post-final order detention, 8 U.S.C. § 1231(a)(6), is insufficiently clear to authorize prolonged and indefinite detention. *Zadvydas*, 533 U.S. at 697 ("if Congress had meant to authorize long-term detention of unremovable aliens, it certainly could have spoken in clearer terms"); *see also id.* at 689, 699. In *Clark*, the Court adopted the same rule of construction to read a similar time limitation into the statute with respect to detention of inadmissible aliens. 543 U.S. at 386-87.

Under the avoidance canon, § 1226(a), and not § 1226(c), governs Petitioner's detention for at least two reasons. First, § 1226(c) cannot be read to apply to individuals like Petitioner who have substantial challenges to removal. As set forth above, § 1226(c) applies only to individuals who are, *inter alia*, "deportable" based on designated criminal grounds. § 1226(c)(A), (B); *see also Matter of Joseph*, 22 I&N Dec. 799, 800 (BIA

1999). However, the meaning of "deportable" is ambiguous. Because the statute nowhere defines the meaning of the term "is deportable," "the relevant statutes literally say nothing about an individual [like Mr. Scarlett] who, armed with a strong argument against deportability, might, or might not fall within their terms." *Demore*, 538 U.S. at 578-79 (Breyer, J. concurring in part and dissenting in part). Moreover, serious constitutional problems arise where mandatory detention is applied to individuals with a substantial claim against removability. *See* Section I.B, *supra*; *see also O'Connell*, 355 F.3d at 1020; *Tijani*, 430 F.3d at 1247 (Tashima, J. concurring); *Demore*, 538 U.S. at 578-79 (Breyer, dissenting). This Court therefore can and should avoid these constitutional problems by construing "is deportable" within the meaning of § 1226(c) as not applying to individuals who have substantial claims to relief from removal which, if successful, would render them not deportable as charged. Because Mr. Scarlett has a strong claim that he is eligible for cancellation of removal—in which case he will not be "deportable" as charged—he is not "deportable" within the meaning of the statute.

Second, even if this Court were to find that § 1226(c) applies to individuals like Mr. Scarlett who have substantial challenges to removal, § 1226(c) cannot be construed to authorize *prolonged* mandatory detention of the kind Petitioner has been subjected to. As an initial matter, nothing in the plain language of § 1226(c) states that it authorizes prolonged mandatory detention, nor is there any other evidence that Congress intended to authorize prolonged mandatory detention. To the contrary, in upholding the constitutionality of § 1226(c), the Supreme Court specifically described the statute as authorizing mandatory detention only "during the brief period necessary for their removal proceedings," *Demore*, 538 U.S. at 513—a period typically "lasts roughly a month and a

half in the vast majority of cases . . . and about five months in the minority of cases in which the alien chooses to appeal [to the Board of Immigration Appeals]." *Id.* at 530; *see also Madrane*, 520 F. Supp. 2d at 664; *Fuller*, 2005 WL 818614, at *5.

Thus, even if § 1226(c) was properly applied to Mr. Scarlett at the beginning of his detention, it certainly does not authorize his prolonged detention now. Indeed, as the Ninth Circuit has specifically held, when individuals such as Mr. Scarlett succeed in winning remands of their cases for new administrative removal proceedings, their detention is governed by § 1226(a) rather than § 1226(c) because they have already been detained in excess of "the brief period" of time reasonably necessary to conclude removal proceedings. *See Casas-Castrillon*, 535 F.3d at 948 ("An alien whose case is being adjudicated before the agency for a second time—*after* having fought his case in [the Court of Appeals] and won, a process which often takes more than a year—has not received expeditious process.").

Furthermore, as previously set forth, if § 1226(c) *did* authorize prolonged mandatory detention—particularly of individuals such as the Petitioner who are pursuing meritorious challenges to removal—it would violate due process. *See* Section I, *supra; Casas-Castrillon*, 535 F.3d at 950. The rule of constitutional avoidance requires this Court to construe § 1226 so as to avoid this problem, unless no other construction of the statute is even "fairly possible." *Zadvydas*, 533 U.S. at 689. Applying that rule here, this Court must find that § 1226(c) does not authorize prolonged mandatory detention. Rather, once mandatory detention exceeds the brief period of time contemplated by *Demore,* the only authority for continuing such detention is § 1226(a).

Notably, the two circuit courts that have directly addressed the issue—the Sixth

Circuit in *Ly v. Hansen,* and the Ninth circuit in *Tijani v. Willis,* and most recently in *Casas-Castrillon*—have reached a similar conclusion. *See Ly*, 351 F.3d at 269-70 (holding that § 1226 only authorizes detention for period of time reasonably necessary to conclude removal proceedings); *Tijani*, 430 F.3d at 1242; *Casas-Castrillon*, 535 F.3d at 950 (finding "no evidence that Congress intended to authorize the long-term detention of aliens such as Casas without providing them access to a bond hearing before an immigration judge" and holding that § 1226(c) provides no authority for mandatory detention of individuals whose removal orders have been stayed pending judicial review, or whose cases are thereafter remanded for new administrative proceedings). Courts in the Second Circuit have reached similar holdings as well. *See Hyppolite*, No. 07-00729, at *2 (§ 1226(c) "must be construed as limited to detention for a reasonable period of time"); *see also Fuller*, 2005 WL 818614, at *5-6 (holding prolonged detention under § 1226(c) to be unconstitutional). For these reasons, § 1226(a), rather than § 1226(c), governs Petitioner's detention.[8]

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[8] The Government incorrectly asserts that "because Scarlett's removal has been stayed at his own request, he should not be heard to complain about his continued detention." Gov't Opp. at 11. As the Sixth Circuit explained in *Ly*:

> [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. Further, 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 273. *See also Oyedeji v. Ashcroft*, 332 F.Supp.2d 747, 753 (M.D. Pa. 2004) ("The price for securing a stay of removal should not be continuing incarceration . . . . [Petitioner] should not be effectively punished for pursuing applicable legal remedies."); *Tijani*, 430 F.3d at 1242.

The cases that the Government cites to the contrary are entirely distinguishable. Nearly all these cases held that because the petitioner's removal had been stayed pending

C. This Court Must Construe 8 U.S.C. § 1226(a) and the Applicable Regulations as not Authorizing Petitioner's Prolonged Detention Without a Constitutionally Adequate Bond Hearing.

Just as the rule of constitutional avoidance requires this Court to construe § 1226(c) as not authorizing prolonged *mandatory* detention, *see* Section II.B., *supra*, it also requires this Court to construe § 1226(a) and the applicable regulations as not authorizing prolonged *discretionary* detention which exceeds the period reasonably necessary to conclude removal proceedings, at least absent a constitutionally adequate hearing to determine if such detention is justified. Like § 1226(c), § 1226(a) is also silent with respect to the length of detention authorized. Because unreasonably prolonged detention raises serious constitutional problems, and because there is no evidence that Congress intended to authorize such constitutionally problematic detention, this Court must read § 1226(a) as only authorizing detention for a "reasonable period of time." *Cf. Zadvydas*, 533 U.S. at 701 (similarly reading a "reasonable period of time" into § 1231(a)(6) to avoid the serious constitutional problem that would be posed if it authorized unlimited detention).

In determining what is "reasonable," this Court must first read a time limit into the length of detention authorized by § 1226(a). *See Demore,* 538 U.S. at 513; *Ly*, 351

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judicial review, the petitioner had not established that the Government would be unable to effectuate his removal in the reasonably foreseeable future. *See* Gov't Opp. at 12-14 (citing cases). However, the question of whether removal is reasonably foreseeable is distinct from the issue of whether prolonged detention under § 1226 has, as in Mr. Scarlett's case, come to exceed the brief period necessary to conclude removal proceedings. *See Demore*, 538 U.S. at 513; *see also Casas-Castrillon*, 535 F.3d at 948. Moreover, the petitioner in *Doherty v. Thornburgh*, 943 F.2d 204 (2d Cir. 1991), had (1) received a bond hearing; (2) presented an "exceptionally poor bail risk" and possibly a threat to national security; and (3) extended his detention by alternately agreeing to and resisting his deportation over the course of his proceedings. *Id.* at 206, 211-12. None of these justifications for continued detention apply to Mr. Scarlett here.

F.3d at 269-70 (construing § 1226 as authorizing detention only for the period of time reasonably necessary to conclude removal proceedings); *cf. Zadvydas*, 533 U.S. at 701 (construing § 1231(a)(6) as authorizing detention only for "the period of time reasonably necessary to effectuate removal"); *see also Nadarajah v. Gonzales*, 443 F.3d 1069, 1079 (9th Cir. 2006) (holding that where Congress intended to authorize prolonged and indefinite detention, *i.e.*, in cases involving specific types of national security risks, it did so clearly and that "general detention statutes" authorize detention only for "brief and reasonable" time periods).[9] On proper reading of the statute then, Petitioner is entitled to immediate release under reasonable conditions of supervision because his over five year-long detention far exceeds the brief period necessary to complete removal proceedings.

Second, even if this Court were to find that Petitioner's five-year long detention does not exceed the period of time reasonably necessary to conclude removal proceedings, this Court must still construe § 1226(a) to require a constitutionally adequate hearing whenever detention is prolonged. *Cf. Tijani v. Willis*, 430 F.3d at 1242 (finding that mandatory detention does not apply when proceedings are not "expeditious," and ordering the petitioner's release unless the Government established at a hearing before an IJ that his prolonged detention was justified); *Casas-Castrillon*, 535

[9] The existence of distinct statutory provisions that do expressly authorize prolonged detention of terrorists further demonstrates that Congress did not intend for the general detention statutes such as § 1226 and § 1231 to serve this purpose. Notably, the Supreme Court specifically referenced these provisions in concluding that statutes that do not expressly authorize prolonged and indefinite detention should not be read to do so. *See Zadvydas*, 533 U.S. at 697; *Clark*, 543 U.S. at 379 n.4, 386. Unlike § 1226 and § 1231, these special statutes clearly address the question of how long a non-citizen subject to their provisions may be detained: "until the completion of any appeal" in the case of the Alien Terrorist Removal provisions, 8 U.S.C. § 1537(b)(1), and "until the alien is removed from the United States," in the case of the Patriot Act, 8 U.S.C. § 1226A(a)(2).

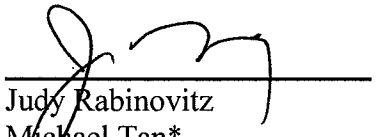
F.3d at 950 (construing § 1226(a) as requiring such a hearing). Petitioner is thus entitled to a constitutionally adequate hearing before a neutral decision-maker where—like the hearings ordered by the Ninth Circuit in *Tijani* and *Casas*—the Government bears the burden of demonstrating that his continued detention is justified.

Notably, the regulations promulgated to implement § 1226(a) specifically provide for IJ review of ICE's custody determinations, *see* 8 C.F.R. § 236.1(c)(10), and allow for IJ custody re-determination hearings where, as here, the non-citizen's circumstances have "changed materially" since the agency's custody determination or IJ bond hearing. 8 C.F.R. § 1003.19(e). Thus, these regulations should likewise be construed to provide for a constitutionally adequate custody hearing for Petitioner here. Indeed, in the absence of such a finding, the regulations would violate the statute.

CONCLUSION

For the foregoing reasons, this Court should order Petitioner's immediate release under reasonable conditions of supervision or, in the alternative, order that he immediately be provided a constitutionally adequate hearing where the Government bears the burden of demonstrating that his continued detention is justified.

Respectfully Submitted,



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DATED: January 28, 2009

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CERTIFICATE OF SERVICE

I, Konny Huh, declare as follows:

I am employed in the City, County and State of New York, in the office of one of plaintiff's counsel at whose direction the following service was made. I am over the age of eighteen years and am not a party to the within action. My business address is the American Civil Liberties Union Foundation, Immigrants' Rights Project, 125 Broad Street, 18th Floor, New York 10004.

On the 28th day of January, 2009, I sent a copy of the foregoing Brief of *Amici Curiae* in Support of Petition for Habeas Corpus by Federal Express, next business day delivery, addressed to the following:

Gail Y. Mitchell U.S. Attorney's Office Federal Centre 138 Delaware Avenue Buffalo, NY 14202 *Counsel for Respondent*	Errol Barrington Scarlett A# 35899-292 Buffalo Federal Detention Center 4250 Federal Drive Batavia, NY 14020 *Petitioner*

I declare under penalty of perjury under the laws of the State of New York that the above is true and correct.

Dated: January 28, 2009

Konny Huh