UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

ERROL BARRINGTON SCARLETT A35-899-292, Petitioner, - against - The United States Department of Homeland Security, Bureau of Immigration and Customs Enforcement, Batavia Federal Detention Facility, Director MARTIN HERRION, et al., Respondents.	:	ELECTRONICALLY FILED 08-CV-534-Sr

PETITIONER'S RESPONSE TO RESPONDENTS' OBJECTIONS
TO THE REPORT AND RECOMMENDATION DATED MAY 12, 2009

Dated: New York, New York
June 19, 2009

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Petitioner Errol Barrington Scarlett ("Petitioner" or "Mr. Scarlett") respectfully submits the following response to Respondents' objections to the Report and Recommendation ("R&R") entered on May 12, 2009 by United States Magistrate Judge H. Kenneth Schroeder, Jr.

PRELIMINARY STATEMENT

The government fails to address the issues at the heart of this case: namely, whether the Immigration and Nationality Act, 8 U.S.C. § 1226(c), authorizes Petitioner's more than five years of prolonged mandatory detention without any hearing as to whether his detention is justified and, if so, whether such detention violates the Due Process Clause. *See* R&R at 11-15. Instead, the government dedicates most of its brief to an interpretation of the "when released" clause in the mandatory detention statute, 8 U.S.C. § 1226(c), that courts have widely rejected. *See* Gov't Objections at 5-21. (Docket Entry No. 22.) Moreover, while the government concedes that, under the Supreme Court's decision in *Demore v. Kim*, 538 U.S. 510 (2003), it may only "constitutionally detain deportable aliens for the *limited period* necessary for their removal proceedings," *see* Gov't Objections at 25 (quoting *Demore*, 538 U.S. at 526) (emphasis added), it still maintains Mr. Scarlett's over five year-long detention is lawful. In doing so, it wholly ignores the decisions of two circuit courts, relied on by the Magistrate Judge, that have read § 1226(c) not to authorize prolonged mandatory detention beyond this brief period of time in light of the serious constitutional problems that such detention would pose. *See* R&R at 11-13 (Docket Entry No. 15) (citing *Casas-Castrillon v. Dep't of Homeland Security*, 535 F.3d 942, 949-51 (9th Cir. 2008); *Tijani v. Willis*, 430 F.3d 1241, 1242 (9th Cir. 2005); *Ly v. Hansen*, 351 F.3d 263, 269-70 (6th Cir. 2003)).

Instead, the government defends the constitutionality of Mr. Scarlett's detention on the basis of its cursory and rubberstamp custody reviews that deemed him a flight risk and danger due to his past offenses, even though courts have recognized that due process requires an "evaluation of the individual's *current* threat to the community and his risk of flight" and forbids a presumption of dangerousness or flight risk based on the individual's past record alone. *Ngo v. INS*, 192 F.3d 390, 398-99 (3d Cir. 1999) (emphasis added); *see also D'Alessandro v. Mukasey*, No. 08-cv-914, 2009 WL 799958, at *23, 27 (W.D.N.Y. Mar. 25, 2009) (same). Moreover, because the government maintains that Mr. Scarlett is subject to *mandatory* detention for the remainder of his removal proceedings, *see* Gov't Objections at 25, it claims that he is entitled to *no* further review of his custody until such time as his removal proceedings are concluded.

Ultimately, this Court need not and should not reach the serious constitutional issues presented here. Rather, the Court should hold as a matter of statutory construction that because § 1226(c) cannot be read to authorize Petitioner's prolonged mandatory detention, § 1226(a) governs his imprisonment. As such, the Court should adopt the R&R and order the government to provide Mr. Scarlett with a bond hearing before an immigration judge, to which he is entitled by statute and regulation, *see* 8 C.F.R. § 1236.1(c)(10), where the government bears the burden of showing that his continued detention is justified.[1]

[1] Though the R&R refers to Petitioner's prolonged mandatory detention as "unconstitutional," the R&R is almost entirely based on caselaw construing § 1226(c) to not authorize prolonged mandatory detention on statutory grounds, because of the serious constitutional problems such detention would raise. *See* R&R at 11-13 (discussing cases), 12 n.2 (noting *Casas-Castrillon*'s holding that § 1226(a) and not § 1226(c) governs detention where mandatory detention is prolonged). To the extent that there is any ambiguity in this respect, Petitioner urges the Court to construe § 1226(c) to avoid

FACTS AND PROCEDURAL HISTORY

Personal and Family Background

Mr. Scarlett was born in Jamaica on November 3, 1955 and immigrated to the United States as a Lawful Permanent Resident ("LPR") on October 29, 1976, when he was twenty years old. Gov't Opp., Ex. A at 5. (Docket Entry No. 7.) He has resided in the United States now for over thirty years. He has extremely strong ties to this country, which he and his family consider to be their home. He is a father to four children, all of whom are U.S. citizens. *See* Br. of *Amici Curiae*, Ex. D at 72-84. (Docket Entry No. 13.) Prior to his criminal incarceration, Mr. Scarlett regularly saw his children, provided them with financial support, and lived with two of them. *Id*. Mr. Scarlett's entire immediate family, which includes five living brothers and sisters, all reside in the United States and are U.S. citizens. *Id*. at 86, 88. He is close to his family and, prior to his incarceration, used to see his relatives at least once a week; he also kept in close contact with his siblings by telephone. *Id*. at 89. Mr. Scarlett's parents are deceased, and he has no relatives living in Jamaica. He has not left the United States for the past nineteen years. *Id*. at 92-94.

Prior to his criminal arrest, Mr. Scarlett had been working for UPS unloading trucks at a warehouse. *Id*. at 94. He previously worked at Dean Witter, U.S. Sugar, and Bullet Courier and was also self-employed for a period of time selling and repairing damaged automobiles. *Id*. at 97, 98, 100-01, 106, 107, 109-10.

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the constitutional problems discussed by the Magistrate Judge and adopt the R&R on statutory as well as constitutional grounds.

Criminal History

On March 17, 1999, Mr. Scarlett pled guilty to criminal possession of a controlled substance (cocaine) in the second degree in violation of New York Penal Law § 220.18-1. Gov't Opp., Ex. A at 20-23. He was sentenced to five years for this offense, served more almost three years in a New York state prison, and was released from criminal custody on May 28, 2002. *See id*. at 3. While in prison, Mr. Scarlett obtained his GED, Br. of *Amici Curiae*, Ex. D at 91, and after his release he went to work for his brother's real estate firm. *Id*. at 95. He did not engage in any further criminal acts. From June 2002 to October 2003, Mr. Scarlett also participated in a drug rehabilitation program. *Id*. at 97.

Commencement of Removal Proceedings and Detention

Nevertheless, on November 25, 2003—nearly a year and a half after his release from criminal custody—U.S. Immigration and Customs Enforcement (ICE) summoned Mr. Scarlett to the deportation unit at 26 Federal Plaza, New York, New York, so that he could be issued a charging document, or Notice to Appear ("NTA"). The NTA charged Mr. Scarlett with removability pursuant to 8 U.S.C. § 1227(a)(2)(B)(i) (controlled substance violation). On the basis of the NTA, Mr. Scarlett was immediately taken into custody. *See* Gov't Opp., Ex. A at 4-6, 1.

Even though Mr. Scarlett pled 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 Mr. Scarlett's removal proceedings were conducted pursuant to Fifth Circuit precedent, under which his simple possession offense was deemed an aggravated felony and therefore rendered him ineligible for cancellation of removal, despite Second Circuit precedent to the contrary. *Compare United States v. Hinojosa-Lopez*, 130 F.3d 691, 693-94 (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 his case for reconsideration under Second Circuit precedent. *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* Br. of *Amici Curiae*, Ex. B at 12-18.

No longer able to rely on Fifth Circuit precedent holding that simple possession constituted an aggravated felony, the government came up with a new theory of the case on remand. The government argued that Mr. Scarlett had been in possession of more than five grams of cocaine-base and thus fell within an exception in the Controlled Substances Act that classified this type of offense as an aggravated felony. *See* 21 U.S.C. § 844(a). However, Mr. Scarlett never pled guilty to possession of more than five grams of cocaine-base. Consequently, the government relied on forensic laboratory reports to claim he would have been convicted of a felony if prosecuted federally even though the reports were not part of his record of conviction. *See* Gov't Opp., Ex. A at 15. Nonetheless, the IJ adopted this reasoning and on January 18, 2006, found Mr. Scarlett removable based on an aggravated felony conviction and therefore ineligible for

cancellation of removal. The Board of Immigration Appeals ("BIA" or the "Board") affirmed the IJ's decision on May 9, 2006. *Id*. at 14.

Nearly three years later, on February 13, 2009, the U.S. Court of Appeals for the Second Circuit reversed the BIA's order, holding that the agency erred in considering evidence beyond Mr. Scarlett's record of conviction to conclude that his state conviction equated to a federal drug felony. *Scarlett v. U.S. Dep't of Homeland Security*, 311 Fed. Appx. 385, 388 (2d Cir. 2009). Mr. Scarlett's case is now on remand to the IJ for a merits hearing on his claim for cancellation relief, which he is seeking based on, *inter alia*, his long length of residence in this country, his favorable work record, evidence of his rehabilitation, his close ties to his family, and the relatively minor nature of his crime. *See* Br. of *Amici Curiae*, Ex. D at 72-84, 94-95, 97-98, 100-101, 106-107, 109-10; *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).

Detention and Custody Reviews

Mr. Scarlett has been incarcerated for immigration purposes for more than five and a half years—twenty months more than the time he spent in jail for his criminal conviction. Moreover, as set forth above, at least fifteen months of that time is attributable to the government's improper attempt to forum-shop for a jurisdiction where Mr. Scarlett's conviction for simple possession would be considered an aggravated felony.

At no point during his lengthy immigration detention has Mr. Scarlett received *any* hearing as to the justification for his continued imprisonment. Rather, he was denied

release on the basis of a string of rote and slapdash custody reviews on March 2005 and August 2006, 2007, and 2008. *See* Gov't Opp., Ex. A at 45, 44, 38, 30-31. His March 2005 review, for example, makes no finding of flight risk or danger and simply notes that ICE is in possession of a valid travel document and thus would be able to remove him in a timely manner should he lose his appeal. *Id*. at 45. His August 2006 review—although somewhat incoherent[2]—apparently deemed Mr. Scarlett a danger to the community based on the mere fact of his criminal history[3] and a flight risk based on his previous failure to appear at two criminal arraignments more than ten years earlier. *Id*. at 44. Mr. Scarlett's August 2007 review makes no finding of dangerousness, stating only that his failure to appear at his criminal arraignments possibly made him a flight risk. *Id*. at 38. It also states that a travel document is "ready and available once the 2nd Circuit issues a decision in your case"—an assertion that is contradicted by the reviewing officer's notes on the custody review worksheet that the travel document in Mr. Scarlett's file has expired. *See id*. at 42, 43. Finally, Mr. Scarlett's August 2008 review deems him a flight

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[2] The review states in relevant part:

> Your criminal history, your pending stay of removal filed with the 2nd Circuit (SDNY) including your failure to show up for court when required. Two bench warrants have previously been issued for your arrest in the past, indicating that you may be a flight risk. Furthermore, a travel document for your removal from the United States to your native county of Jamaica is ready and available once the 2nd Circuit issues a decision on your case.ooperate [sic] in obtaining a travel documention [sic], indicate that you would pose a threat to the community if released from ICE custody.

Gov't Opp., Ex. A at 44.

[3] Along with Mr. Scarlett's simple possession conviction, the August 2006 review appears to refer to a 1987 conviction for driving while intoxicated. *See* Gov't Opp., Ex. A at 44, 48.

risk and danger based on his criminal history alone and states ICE's intention to seek new travel documents if he loses his appeal. *Id*. at 30-31.

None of these custody reviews assess Mr. Scarlett's flight risk or dangerousness on a current basis. Nor do they make any mention of the progressively increasing length of Mr. Scarlett's detention, the particular circumstances of his crimes, evidence of Mr. Scarlett's rehabilitation (such as his participation in a drug treatment program), his work history, or the absence of any other criminal activity after his release from criminal custody. Nor do the custody reviews mention his close family ties or his long residence in the United States. Moreover, at no point did Mr. Scarlett receive an interview regarding his custody, as required by regulation. *See* 8 C.F.R. § 241.4(i)(3).

Mr. Scarlett filed the instant petition for habeas corpus before this Court on July 22, 2008. *See* Hab. Pet'n. (Docket Entry No. 1.) The Magistrate Judge recommended granting the writ of habeas corpus on May 12, 2009, *see* R&R at 15, and Petitioner and the government filed their respective objections to the R&R on June 5, 2009.

ARGUMENT[4]

I. THE GOVERNMENT ERRS IN ASSERTING THAT PETITIONER'S DETENTION IS AUTHORIZED UNDER § 1226(c).

A. The Magistrate Judge Correctly Found That 8 U.S.C. § 1226(c) Only Applies to Individuals Taken into ICE Custody at the Time of Their Release from Incarceration.

[4] As previously set forth, Petitioner objects to the Magistrate Judge's holding that the immediate custodian rule applies to the instant case and that therefore Martin Herrion, Assistant Field Office Director for the Buffalo Federal Detention Facility, is the only proper respondent in this action. *See* Pet'n's Objections at 3-4. However, regardless of whether the Magistrate properly applied the immediate custodian rule to his case, Petitioner, as the government concedes, has named his immediate custodian as a respondent here. *See* Gov't Opp. at 1 n.1.

As an initial matter, Respondents' assertion that this Court should extend *Chevron* deference to the interpretation of the phrase "when released" in 8 U.S.C. § 1226(c) set forth by the BIA in *Matter of Rojas*, 23 I&N Dec. 117, 125 (BIA 2001), is erroneous.[5] As the Magistrate Judge correctly found, the plain text of § 1226(c) unambiguously applies only to non-citizens taken into ICE custody *at the time* of their release from non-DHS custody and not to individuals like Mr. Scarlett who was taken into ICE custody nearly eighteen months after his release from criminal incarceration. *See* R&R at 6-8. Because *Rojas* contradicts Congress' unambiguously expressed intent, *Chevron*

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

> Detention of criminal aliens
> (1) Custody
> The Attorney General shall take into custody any alien who –
> (A) is inadmissible by reason of having committed any offense covered in section 1182(a)(2) of this title,
> (B) is deportable by reason of having committed any offense covered in section 1227(a)(2)(A)(ii), (A)(iii), (B), (C), or (D) of this title,
> (C) is deportable under section 1227(a)(2)(A)(i) of this title on the basis of an offense for which the alien has been sentence [sic] to a term of imprisonment of at least 1 year, or
> (D) is inadmissible under section 1182(a)(3)(B) of this title or deportable under section 1227(a)(4)(B) of this title,
> 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 release an alien described in paragraph (1) only if the Attorney General decides pursuant to section 3521 of Title 18 that release of the alien from custody is necessary to provide protection to a witness, a potential witness, a person cooperating with an investigation into major criminal activity, or an immediate family member or close associate of a witness, potential witness, or person cooperating with such an investigation, and the alien satisfies the Attorney General that the alien will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding . . . .

deference does not apply. *Chevron, U.S.A., Inc. v. Natural Resources Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984).

Notably, the Board itself has agreed that the "when released" clause in § 1226(c) requires the Attorney General "to take custody of aliens *immediately* upon their release from criminal confinement." *See Rojas*, 23 I&N Dec. at 122 (emphasis added). Nonetheless it found that noncitizens who were *not* taken into immigration custody immediately upon their release were still subject to mandatory detention. According to the Board, the "when released" clause does not describe which aliens are subject to mandatory detention, but rather describes when the Attorney General's duty to take them into custody is triggered. *See Rojas*, 23 I&N Dec. at 121, 122 (stating that "when released" clause is not part "of the description of an alien who is subject to detention" but rather refers only "to the statutory command that the 'Attorney General shall take into custody'" certain categories of noncitizens).

As recognized in a dissenting opinion signed by seven Board members, this distinction makes no sense. *See Rojas*, 23 I&N Dec. at 134 (Rosenberg, Board Member, dissenting) ("[T]he majority fails to provide any reason why characterizing the language as a directive makes it any less a description, particularly when that description is communicated as part of a mandate to the Attorney General."). Indeed, the majority of district courts have found the Board's reading inconsistent with the plain language of the statute, namely that § 1226(c) applies only to those non-citizens taken into ICE custody at the time of their release from non-DHS custody. *See Waffi v. Loiselle*, 527 F. Supp. 2d 480, 487-88 (E.D. Va. 2007) (holding that § 1226(c) applies only where ICE "immediately" takes custody upon release from incarceration); *Quezada-Bucio v. Ridge*,

317 F. Supp. 2d 1221, 1228-30 (W.D. Wash. 2004) (same); *Bromfield v. Clark*, No. 06-757, 2007 WL 527511, at *4-5 (W.D. Wash. Feb. 14, 2007) (same); *Pastor-Camarena v. Smith*, 977 F. Supp. 1415, 1417-18 (W.D. Wash. 1997) (same, with respect to similar language in prior mandatory detention statute); *Zabadi v. Chertoff*, No. 05-03335, 2005 WL 3157377, at *4-5 (N.D. Cal. Nov. 22, 2005) (holding that § 1226(c) applies only where ICE assumes custody within a "reasonable period of time" after release); *Oscar v. Gillen*, 595 F. Supp. 2d 166, 169 (D. Mass. 2009) (Board's interpretation "perverts the plain language of the statute").

The government's attempt to insert ambiguity into the statute where there is none is unavailing. Contrary to the government, the mere fact that some courts have found the statute ambiguous does not render it so. *See Reno v. Koray*, 515 U.S. 50, 64-65 (1995) ("A statute is not ambiguous . . . merely because there is a division of judicial authority over its proper construction.") (internal citations and quotations omitted). This is particularly so where the very issue in dispute is whether § 1226(c) is ambiguous or not. *See* Gov't Objections at 7, 14-15; *compare Quezada-Bucio*, 317 F. Supp. 2d at 1228-30 (W.D. Wash. 2004) (holding "when released" clause to be unambiguous) *with Serrano v. Estrada*, No. 3-01-CV-1916, 2002 WL 485699, at *3 (N.D. Tex. Mar. 6, 2002) (holding "when released" clause to be ambiguous).

The government also asserts incorrectly that reading the statute only to apply to non-citizens whom ICE immediately takes into custody "would strip sections 1226(c)(1)(A) and (D) of any independent significance" because certain inadmissible non-citizens subject to those sections "would not necessarily be subject to criminal or other non-DHS custody . . . . and therefore have not been released." *See* Gov't

Objections at 16-17. But the Board itself has rejected this reading of the statute. *See Matter of Adeniji*, 22 I&N Dec. 1102, 1109-12 (BIA 1999) (holding that release from some form of non-DHS custody after the effective date of the statute is necessary to trigger § 1226(c)); *Matter of West*, 22 I&N Dec. 1405, 1408-10 (BIA 2000) (same).[6]

B. Section 1226(c) Does Not Authorize Petitioner's Prolonged Mandatory Detention, Because It Only Authorizes Detention For the Brief Period Necessary to Conclude Removal Proceedings.

More importantly, the government entirely fails to address the cases cited in both the R&R and Brief of *Amici Curiae* holding that if § 1226(c) authorized prolonged mandatory detention beyond the brief period necessary to complete removal proceedings contemplated in *Demore*, it would be unconstitutional. *See* R&R at 11-13; Br. of *Amici Curiae* at 22-24. The government then ignores both the principle of constitutional avoidance—which requires a court to construe a statute to avoid serious constitutional

[6] Even if § 1226(c) were deemed ambiguous, the Court should not defer to the Board's interpretation because it is not a permissible construction of the statute. *Chevron*, 467 U.S. at 843-44. Detention violates due process unless it is reasonably related to its purpose. *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001). Under the canon of constitutional avoidance, this Court should therefore reject the Board's construction in light of the due process concerns raised by subjecting individuals to *mandatory* detention many months or even years after their release from non-DHS custody. While such individuals may be detained upon a finding of danger or flight risk, it is not reasonable to subject such individuals to mandatory detention rather than to provide them with a bond hearing where such a determination can be made. These due process concerns are made especially clear by the instant case, where Petitioner spent nearly eighteen months after serving his sentence at large without incident while undertaking the difficult process of reentering society and rehabilitating himself, only to be subjected to mandatory detention upon the government's initiation of removal proceedings against him. *Cf. Quezada-Bucio*, 317 F. Supp. 2d at 1231. In addition, the longstanding rule of lenity in the immigration context requires that "any lingering ambiguities in deportation statutes [be construed] in favor of the alien." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 447 (1987). Thus, to the extent § 1226(c) is deemed ambiguous, the Board should construe it not to apply to individuals, such as Mr. Scarlett, who are not taken into ICE custody at their time of their release.

problems—as well as the decisions of the two circuit courts that have specifically addressed this issue with respect to § 1226(c) and construed the statute accordingly.

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, as the government itself concedes, the Supreme Court described the statute as authorizing mandatory detention only "during the *brief period* necessary for [non-citizens'] removal proceedings." *Demore*, 538 U.S. at 513 (emphasis added); *cf.* Gov't Objections at 25 (the government may only "constitutionally detain deportable aliens for the *limited period* necessary for their removal proceedings") (quoting *Demore*, 538 U.S. at 526) (emphasis added); *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 v. Gonzales*, No. 04-2039, 2005 WL 818614, at *5 (D. Conn. Apr. 8, 2005) ("*Kim* held that it was permissible to detain aliens under section 236(c) for the *short time* necessary to complete removal proceedings) (emphasis in original). The *Demore* Court emphasized in particular that removal proceedings run "roughly a month and a half in the vast majority of cases in which it is invoked, and about five months in the minority of cases in which the alien chooses to appeal." 538 U.S. at 530. Thus, even if § 1226(c) were properly applied to Mr. Scarlett at the beginning of his detention, it certainly does not authorize his prolonged mandatory detention now, more than five and a half years later.

The existence of distinct statutory provisions that expressly authorize the prolonged detention of terrorists—statutes which the government does not even acknowledge or attempt to distinguish—further demonstrates that Congress did not intend for a non-specific detention statute such as § 1226 to serve this purpose. Notably, the Supreme Court specifically referenced these special 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 v. Martinez*, 543 U.S. 371, 379 n.4, 386 n. 8 (2005). Unlike § 1226, these special statutes clearly address the question of how long a non-citizen subject to their provisions may be detained: "pending the outcome 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).

Furthermore, as recognized by the Magistrate Judge, if § 1226(c) did authorize Mr. Scarlett's prolonged mandatory detention, it would raise serious constitutional problems. *See* R&R 11-15. Yet the government ignores these problems and does not even acknowledge the circuit court decisions that have applied the canon of constitutional avoidance to construe § 1226(c) accordingly. *See Ly*, 351 F.3d at 269-70; *Tijani*, 430 F.3d at 1242; *Casas-Castrillon*, 535 F. 3d at 950-51; *cf. Hussain v. Mukasey*, 510 F.3d 739, 743 (7th Cir. 2007) ("Inordinate delay before the [final order of removal] was entered might well justify relief."); *Madrane*, 520 F. Supp. 2d at 667 (holding that prolonged mandatory detention violates due process); *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) (emphasis in original).

In *Casas-Castrillon*, the Ninth Circuit specifically applied avoidance principles to the prolonged detention of a lawful permanent resident, like Petitioner, who had won a remand for agency reconsideration. 535 F. 3d at 950-51. In particular, the court found that the continued detention of petitioner without "an individualized determination of the necessity of detention before a neutral decision maker, such as an immigration judge . . . would raise serious constitutional concerns." *Id*. at 950. However, the Ninth Circuit avoided this constitutional question by reading § 1226(c) not to authorize such prolonged detention without access to a bond hearing. Rather, the court found that such non-citizens are subject to *discretionary* detention under § 1226(a) and that prolonged detention under § 1226(a) "is permissible only where the Attorney General finds such detention individually necessary by providing the alien with an adequate opportunity to contest the necessity of his detention." *Id*. at 951.

Accordingly, under the rule of constitutional avoidance, 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). Under § 1226(a) and its implementing regulation, Petitioner is entitled to a bond hearing where the government bears the burden of justifying his continued detention. *See* Br. of *Amici Curiae* at 25-27.

II. THE GOVERNMENT ERRS IN ASSERTING THAT PETITIONER'S PROLONGED MANDATORY DETENTION IS CONSTITUTIONAL.

The Magistrate Judge correctly found that Petitioner's prolonged mandatory detention violates due process. Rather than addressing this argument in any meaningful way, the government cursorily defends the constitutionality of Petitioner's lengthy imprisonment on essentially two grounds: (1) Petitioner is to be held responsible for the

length of his detention because he obtained a stay of removal pending judicial review and (2) Petitioner's administrative custody reviews satisfied due process and adequately justified his detention. *See* Gov't Objections at 23-26. Neither of these arguments has merit.[7]

A. Petitioner's Stay of Removal Does Not Immunize His Detention From Due Process Constraints

First, the mere fact that a litigant has obtained a stay of removal while pursuing judicial review does not authorize the government to subject him to prolonged detention without meaningful procedures. This is particularly so where, as here, Petitioner pursued a meritorious appeal of his removal order, which was ultimately granted by the Second Circuit. *See Scarlett*, 311 Fed. Appx. at 388. 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.

351 F.3d at 273. *See also* R&R at 12-13; *D'Alessandro v. Mukasey*, No. 08-cv-914, 2009 WL 799958, at *12 (W.D.N.Y. Mar. 25, 2009) ("[t]he price for securing a stay of removal should not be continuing incarceration") (quotation omitted); *Oyedeji v. Ashcroft*, 332 F. Supp. 2d 747, 753 (M.D. Pa. 2004) (petitioner "should not be effectively punished for pursuing applicable legal remedies."); *Tijani*, 430 F.3d at 1242.

[7] The government also adverts to Petitioner's requests for extensions before the Second Circuit. *See* Gov't Objections at 21. Petitioner's undersigned *pro bono* counsel obtained only a two and a half month extension to file Petitioner's opening brief and a week long extension to file its reply brief. *See* Docket at 7-9, *Scarlett v. Dep't Homeland Security*, No. 06-2701 (2d Cir. 2009). This amount of time only accounts for a small portion of Petitioner's more than five and a half years of detention. Moreover, Petitioner's requests for these extensions were entirely legitimate, given counsel's need to familiarize themselves with his complex case.

Moreover, the Magistrate Judge correctly recognized that the length of Mr. Scarlett's proceedings is largely attributable to the government's attempt at forum-shopping by transferring Mr. Scarlett to Louisiana and initiating his proceedings in the Fifth Circuit. *See* R&R at 3-4, 15. Yet the government simply asserts that there is no record basis for this finding, even though the government itself agreed to a remand of Mr. Scarlett's case for reconsideration under Second Circuit precedent in apparent recognition of the unfairness of his transfer. *See* Order, *Scarlett v. Ashcroft*, No. 04-3664 (E.D.N.Y. Feb. 28, 2005), Gov't Opp., Ex. A at 53-54. Similarly, the government asserts that the "record evidence does not support a conclusion that Scarlett's administrative proceedings have moved at a particularly slow pace." *See* Gov't Objections at 26-27. But this is patently incorrect. As the government itself acknowledges, it took more than fourteen months for the IJ and the BIA to rule on Mr. Scarlett's case following its remand in February 2005—nearly a year for the IJ and nearly five months for the BIA—a period of time that far exceeds the month-and-a-half to five months contemplated by *Demore*. *See id*. at 27 n.7; *see also Demore*, 538 U.S. at 530-31.

The government asserts that the Magistrate "disregarded applicable Second Circuit precedent" upholding detentions of similar length and longer. Gov't Objections at 22. But the two cases that the government relies on—*Doherty v. Thornburgh*, 943 F.2d 204 (2d Cir. 1991) and *Dor v. District Director, INS*, 891 F.2d 997 (2d Cir. 1989)—are entirely distinguishable. The petitioner in *Doherty* had extended his detention by alternately agreeing to and resisting his deportation over the course of his proceedings. Moreover, Doherty *had received a bond hearing*, the very relief Mr. Scarlett seeks here.

943 F.2d at 206, 211-12.[8] Similarly, in *Dor*, only the petitioner's "delaying tactics"—specifically, his frivolous administrative appeals and collateral attacks on the denial of his application for adjustment—had prevented the agency from effectuating his deportation. *Id*. at 1002-03. Both these cases stand for the proposition that an individual raising a frivolous challenge in order to delay removal may be held responsible for the lengthy nature of his imprisonment. In contrast, Mr. Scarlett obtained a stay of removal to pursue a meritorious appeal of his removal order—an appeal that was ultimately granted by the Second Circuit. Moreover, unlike the petitioner in *Doherty*, Mr. Scarlett has never received a bond hearing during his lengthy detention. In this respect, his case is "poles apart" from the cases above. *See D'Alessandro*, 2009 WL 799958, at *13 n.7.

The other cases the government cites—which were nearly all litigated *pro se* and thus decided without the benefit of full briefing—are also largely inapposite. *See* Gov't Objections at 22. Most focus on whether a detainee's removal is reasonably foreseeable within the meaning of *Zadvydas v. Davis*, 533 U.S. 678 (2001), and whether continued detention is therefore authorized under 8 U.S.C. § 1231.[9] In contrast, Mr. Scarlett is not

[8] In addition, the petitioner presented an "exceptionally poor bail risk" and possibly a threat to national security. *Doherty*, 943 F.2d at 211.

[9] *See Kassama v. Dep't of Homeland Security*, 553 F. Supp. 2d 301, 307 (W.D.N.Y. 2008) (*pro se*) (holding that petitioner had not met his burden of demonstrating that his removal was not reasonably forseeable given that government was still making efforts to remove him); *Arthur v. Gonzales*, No. 07-cv-6158, 2008 WL 4934065, at *14-16 (W.D.N.Y. Nov. 14, 2008) (*pro se*) (dismissing petitioner's claim for release under *Zadvydas* as premature where petitioner had a stay of removal and also holding petitioner had not established that the government would be unable to effectuate his removal in the reasonably foreseeable future); *Greenland v. INS/ICE*, 599 F. Supp. 2d 365 (W.D.N.Y. 2009) (*pro se*) (holding that petitioner had not demonstrated that his removal was not reasonably forseeable where a stay of removal alone prevented the government's effectuation of his removal); *see also Singh v. Holmes*, No. 02-cv-529, 2004 WL 2280366, at *5 (W.D.N.Y. Oct. 8, 2004) (holding that petitioner was not entitled to release under *Zadvydas* where he had made "no attempt" to show that his

challenging post-final-order detention under § 1231, but rather pre-final order mandatory detention under § 1226(c). Moreover, he is not arguing that he is entitled to release from detention, only that he is entitled to a bond hearing—i.e., that due process does not permit prolonged mandatory detention beyond the "brief period" contemplated in *Demore*, and that § 1226(c) must be construed to require such a hearing. *See Demore*, 538 U.S. at 513; *see also Casas-Castrillon*, 535 F.3d at 948.

B. Petitioner's Administrative Custody Reviews Did Not Satisfy Due Process.

The government's second defense of Mr. Scarlett's detention, based on the adequacy of his custody reviews, similarly lacks merit. *See* Gov't Objections at 23-26. The government does not address any of the cases cited in the Brief of *Amici Curiae* or the R&R regarding the deficiencies of the custody review process. *See* Br. of *Amici Curiae* at 14-17; R&R at 12. Instead, it asserts that mere existence of the custody reviews satisfies due process. *See* Gov't Objections at 24. Yet as previously set forth, the custody review process nowhere approaches the procedures that the Supreme Court has emphasized in the civil detention context. *See* Br. of *Amici Curiae* at 14-15.[10]

Mr. Scarlett's custody reviews were non-adversarial in nature and assigned him the burden of establishing lack of flight risk and dangerousness rather than placing the

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removal was not reasonably foreseeable). To the extent that *Singh* additionally suggested that non-citizens with stays of removal are entitled to *no* review over their custody, *Singh*, 2004 WL 2280366, at *4-5, it is clearly wrong for the reasons discussed *supra*. Notably, of the cases cited by the government, the only one to uphold mandatory detention under § 1226(c) is *Arthur*. However, that case did not raise the statutory and due process claims presented here, but only the petitioner's claim that he did not properly fall within the mandatory detention statute because he had not been convicted of an aggravated felony – an argument which the court rejected. *See Arthur*, 2008 WL 4934065, at *10-11.

[10] Should the Court find any material facts to be in dispute regarding the adequacy of the government's custody reviews, Petitioner respectfully requests limited discovery on the custody review process.

burden on the government of justifying his continued detention. They did not provide the "constitutionally adequate fact finding before a neutral decisionmaker" that is required in the detention context. *Hamdi v. Rumsfeld*, 542 U.S. 507, 537 (2004). *See also* Br. of *Amici Curiae*. at 16-17; *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).[11] Indeed, Mr. Scarlett never even received the periodic interviews regarding his custody that are required by regulation. *See* 8 C.F.R. § 241.4(i)(3); *see also Oyedeji*, 332 F. Supp. 2d at 754 ("custody decisions based solely on a file review, without any opportunity to be heard in person, [are] inadequate").

The government's custody reviews are especially lacking given that, as an admitted LPR who has no final order of removal, Mr. Scarlett is entitled to significant due process protections. The Supreme Court has recognized that non-citizens—even those, unlike Mr. Scarlett, who have exhausted all their challenges to removal and are simply waiting to be removed—have a liberty interest threatened by immigration detention. *Zadvydas*, 533 U.S. at 690-91. Moreover, in a pre-*Zadvydas* case involving the indefinite detention of "excludable" aliens who had been ordered removed, the Third

[11] Numerous district courts have deemed an impartial adjudicator such as an immigration judge to be necessary in the immigration detention context, where the liberty interests and risk of government error are especially high. *See, e.g., Del Toro-Chacon v. Chertoff*, 431 F. Supp. 2d 1135, 1142 (W.D. Wash. 2006); *Duong v. INS*, 118 F. Supp. 2d 1059, 1067 (S.D. Cal. 2000); *Phan v. Reno*, 56 F. Supp. 2d 1149, 1157 (W.D. Wash. 1999); *Cabreja-Rojas v. Reno*, 999 F. Supp. 493, 497-98 (S.D.N.Y. 1998); *Ekekhor v. Aljets*, 979 F. Supp. 640, 644 (N.D. Ill. 1997); *Rivera v. Demore*, No. C 99-3042, 1999 WL 521177, at *7 (N.D. Cal. Jul 13, 1999); *Chamblin v. INS*, Civil No. 98-97-JD, 1999 WL 803970, at *12 n.5 (D.N.H. June 8, 1999); *Thomas v. McElroy*, No. 96 Civ. 5065, 1996 WL 487953, at *3-4 (S.D.N.Y. Aug. 27, 1996); *Cruz-Taveras v. McElroy*, No. 96 CIV. 5068, 1996 WL 455012, at *7 (S.D.N.Y. Aug. 13, 1996) (Mukasey, J.).

Circuit held that "special care must be exercised so that the confinement does not continue beyond the time when the original justifications for custody are no longer tenable . . . ." and that "grudging and perfunctory review is not enough to satisfy the due process right to liberty." *Ngo v. INS*, 192 F.3d 390, 398 (3d Cir. 1999). As an admitted LPR with no final order of removal, Mr. Scarlett is entitled to even higher due process protections. *See* Br. of *Amici Curiae* at 5.

The inadequacy of the custody review process is amply demonstrated by the government's utter failure to justify Mr. Scarlett's detention here. The government apparently maintains that *any* determination of flight risk or danger suffices to justify prolonged imprisonment. *See* Gov't Objections at 25. However, for constitutional purposes, the issue is not whether the government has offered *any* justification for detention, but rather whether it has provided a *sufficient* justification that outweighs detention's significant deprivation of liberty. *See Zadvydas*, 533 U.S. at 690-91. Moreover, as detention grows in length, non-citizens' heightened liberty interests against continued imprisonment require a greater showing of danger and flight risk and additional procedural review. *See* R&R at 14; *Fuller*, 2005 WL 818614, at *5; *see also* Br. of *Amici Curiae* at 4-5, 11-13; *Demore*, 538 U.S. at 532 (Kennedy, J. concurring).[12]

The government's assertions with respect to Mr. Scarlett's alleged flight risk rest solely on his past failure, more than ten years ago, to appear for criminal arraignments. *See* Gov't Objections at 24; *see also* Decisions to Continue Custody, Gov't Opp., Ex. A at 45, 44, 38, 30-31. Thus, they do not make the *contemporary* assessment of flight risk

[12] In this respect, the government errs in charging that the Magistrate Judge incorrectly "focus[es] almost exclusively" on the length of Petitioner's detention "without due regard for the considered justifications for his detention." *See* Gov't Objections at 26.

that due process requires. *See Ngo*, 192 F.3d at 398 (due process "requires an opportunity for an evaluation of the individual's *current* . . . risk of flight") (emphasis added); *see also D'Alessandro*, 2009 WL 799958, at *22 (same); *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).

Moreover, 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* Br. of *Amici Curiae*, Ex. D, at 72-84 (noting that Mr. Scarlett has four 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); *cf. D'Alessandro*, 2009 WL 799958, at *18. Nevertheless, the government has yet to even address these factors, much less refute them. *See Madrane*, 520 F. Supp. 2d at 669-70 (ordering petitioner's release where government failed to refute evidence of petitioner's family ties and low flight risk).

The government's rote assertions that Mr. Scarlett presents a danger, *see* Gov't Objections at 24-25, are similarly unfounded. As with flight risk, the government's

assertions rest on Mr. Scarlett's single drug conviction from nearly ten years ago[13] 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 . . . based solely on [petitioner's] past record does not satisfy due process."); *D'Alessandro*, 2009 WL 799958, at *23 (same); *cf*. 8 C.F.R. § 241.4(e)(2) (requiring assessment of whether individual "*presently* a non-violent person") (emphasis added). 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 See* Br. of *Amici Curiae*, Ex. D, at 94-95, 97-98, 100-01, 106-107, 109-10 (describing Mr. Scarlett's work history and rehabilitation). Such "rubberstamp" review, *Ngo*, 192 F.3d at 398, cannot justify Petitioner's detention here.

[13] 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.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Court adopt Magistrate Judge Schroeder's Report and Recommendation and grant Petitioner's petition for writ of habeas corpus.

Dated: New York, New York
June 19, 2009

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 19, 2009, I electronically filed the accompanying Petitioner's Response to Respondents' Objections to the Report and Recommendation Dated May 12, 2009, with the Clerk of the District Court using its CM/ECF system, which would then electronically notify the following CM/ECF participant on this case:

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I hereby further certify that I caused to be served on this date true and correct copies of the accompanying Petitioner's Response to Respondents' Objections to the Report and Recommendation Dated May 12, 2009 by electronic mail on the following counsel for *amici curiae*:

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