APPENDIX

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JAVIER MARTINEZ, *Petitioner-Appellant*, v. LOWELL CLARK, Warden, Northwest Detention Center; NATHALIE ASHER, Tacoma Field Office Director, United States Immigration and Customs Enforcement; ALEJANDRO MAYORKAS, Secretary, Department of Homeland Security; MERRICK B. GARLAND, Attorney General, *Respondents-Appellees.*	No. 21-35023 D.C. No. 2:20-cv-00780-TSZ OPINION

Appeal from the United States District Court
for the Western District of Washington
Thomas S. Zilly, District Judge, Presiding

Argued and Submitted March 7, 2022
Seattle, Washington

Filed June 15, 2022

Before: Jacqueline H. Nguyen, Eric D. Miller, and Patrick J. Bumatay, Circuit Judges.

Opinion by Judge Bumatay

SUMMARY*

Immigration/Habeas/Detention

Affirming in part and vacating in part the district court's denial of Javier Martinez's habeas petition challenging his immigration detention, and remanding, the panel held that: 1) federal courts lack jurisdiction to review the discretionary determination of whether a particular noncitizen poses a danger to the community such that he is not entitled to bond; and 2) the district court correctly denied Martinez's claims that the Board of Immigration Appeals erred or violated due process in denying bond.

Martinez was detained under 8 U.S.C. § 1226(c), which provides for mandatory detention of noncitizens with certain criminal convictions throughout their removal proceedings. After Martinez filed a habeas petition, the district court ordered that he receive a bond hearing, reasoning that his prolonged mandatory detention violated due process. An IJ denied bond, and the BIA affirmed, concluding that the government sustained its burden to show that Martinez was a danger to the community by clear and convincing evidence. Martinez then brought the instant habeas petition, seeking release. The district court asserted jurisdiction over Martinez's claims, but denied habeas relief.

The panel held that the district court lacked jurisdiction to review the determination that Martinez posed a danger to the community, concluding that dangerousness is a discretionary determination covered by the judicial review

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

bar of 8 U.S.C. § 1226(e). That section bars federal courts from reviewing "discretionary judgment[s]" regarding the detention under § 1226. In concluding that the dangerousness determination is discretionary, the panel observed that the only guidance as to what it means to be a "danger to the community" is an agency-created multi-factorial analysis with no clear, uniform standard for what crosses the line into dangerousness. Thus, the panel explained it was left without standards sufficient to permit meaningful judicial review. Moreover, the panel explained that dangerousness is a fact-intensive inquiry that requires the equities be weighed, and like the other determinations this court has found to be discretionary (such as whether a crime is "violent or dangerous," or whether hardship is "exceptional and extremely unusual"), is a subjective question that depends on the identity and the value judgment of the person or entity examining the issue.

The panel further explained that the district court erred in relying on *Hernandez v. Sessions*, 872 F.3d 976 (9th Cir. 2017), to assert jurisdiction. The panel explained that *Hernandez*'s class action challenge to the "policy" and "process" over bond hearings is a far cry from Martinez's challenge to the individualized finding that he is "dangerous."

Martinez contended that the facts of his case are settled and, as in *Guerrero-Lasprilla v. Barr*, 140 S. Ct. 1062 (2020), courts can review the application of a legal standard to established facts as a "question of law" not covered by the bar of § 1226(e). The panel explained that the key point in *Guerrero-Lasprilla* is that courts are not precluded from reviewing the application of legal standards to settled facts, but here there is no legal standard that, if met, requires a certain outcome. The panel also rejected Martinez's attempt

to reframe the question as an evaluation of whether the undisputed facts satisfy the constitutionally compelled evidentiary standard for dangerousness, explaining that it would not allow Martinez to circumvent § 1226(e)'s jurisdictional bar by cloaking an abuse of discretion argument in constitutional garb. Thus, the panel vacated the district court's judgment as to dangerousness and remanded with instructions to dismiss.

As to Martinez's remaining claims, the panel concluded that the district court had jurisdiction to review them as constitutional claims or questions of law not covered by §1226(e), but agreed with the district court that they must be denied. First, Martinez contended that the BIA failed to apply the correct burden of proof and review all the evidence in the record in assessing dangerousness. The panel explained that there were no red flags to suggest that the BIA failed to consider all the evidence; rather, the BIA correctly noted the government's burden and reviewed the record, but concluded that, under the totality of the evidence, he was a danger to the community. Second, Martinez argued that the BIA had to consider alternatives to detention, such as conditional parole, before denying bond. The panel disagreed, explaining that the applicable precedent does not suggest that due process mandates that immigration courts consider release conditions or conditional parole before deciding that an alien is a danger to the community.

COUNSEL

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OPINION

BUMATAY, Circuit Judge:

Congress has determined that certain categories of aliens are subject to mandatory detention during their removal proceedings. *See* 8 U.S.C. § 1226(c). The most common reason for a noncitizen to be placed in mandatory detention is a criminal history. *See Nielsen v. Preap*, 139 S. Ct. 954, 960 (2019) (plurality opinion). So aliens with certain criminal convictions *must* remain in the government's custody without bond throughout their removal proceedings.

Despite this statutory provision, district courts throughout this circuit have ordered immigration courts to conduct bond hearings for noncitizens held for prolonged periods under § 1226(c). The district court directives flow not from statutory text, but from due process. According to one such court order, the "prolonged mandatory detention pending removal proceedings, without a bond hearing, will—at some point—violate the right to due process." *Martinez v. Clark*, No. 18-CV-01669-RAJ, 2019 WL 5962685, at *1 (W.D. Wash. Nov. 13, 2019) (simplified).

Whether due process requires a bond hearing for aliens detained under § 1226(c) is not before us today. And we take no position on that question.

What is before us today is the scope of federal court review of those bond determinations. In this case, the district court ordered that Javier Martinez—a twice-convicted drug trafficker detained under § 1226(c)—receive a bond hearing to determine whether he was a danger to the community or a flight risk. A hearing was held, and an immigration judge found that clear and convincing evidence showed that he was such a danger. The Board of Immigration Appeals ("BIA") affirmed, and Martinez remained detained.

Martinez then appealed to federal district court to overturn his detention. Martinez raised three claims: (1) clear and convincing evidence did not show he is a danger to the community; (2) the BIA applied the incorrect burden of proof at his hearing; and (3) the BIA failed to consider alternatives to detention, such as conditional parole. The district court asserted jurisdiction over all three claims and denied habeas relief. That decision was not entirely appropriate.

Congress has barred courts from reviewing "discretionary judgment[s]" regarding the detention and release of aliens in removal proceedings. 8 U.S.C. § 1226(e). Federal courts may only review related "constitutional claims or questions of law." *Singh v. Holder*, 638 F.3d 1196, 1202 (9th Cir. 2011). We hold that an immigration court's determination that a noncitizen is a danger to the community is a "discretionary judgment" not subject to review. We thus vacate the district court's judgment regarding Martinez's first claim and remand with instructions to dismiss for lack of jurisdiction.

The district court did, however, have jurisdiction to review Martinez's last two claims since they involve questions of law or constitutional questions. Because they were correctly denied, we affirm.

I.

Javier Martinez, a native of Costa Rica and citizen of Nicaragua, entered the United States in 1987 as a conditional resident. Three years later, he became a lawful permanent resident of the United States. In 2000, he was convicted of conspiring to distribute cocaine under 21 U.S.C. §§ 841, 846, and sentenced to 20 months in prison. The next year, after his release from prison, the Department of Homeland Security ("DHS") commenced removal proceedings against Martinez. An immigration judge later granted him withholding of removal.

Twelve years after his release from prison, in 2013, Martinez was once again arrested for trafficking cocaine under 21 U.S.C. §§ 841, 846. After his arrest, a federal magistrate judge released Martinez on his own recognizance. About five months later, Martinez pleaded guilty to the drug charge. He was released for the three months before sentencing. At the sentencing hearing, the district court noted that it was "impressed" with Martinez's ability to control himself and to "avoid the pitfalls" while he was "out on bond." The district court observed that it would not have released Martinez (as the magistrate judge did), but that Martinez did well with the opportunity. Martinez remained drug-free and complied with all the conditions of his release. Based on his efforts at rehabilitation, the district court sentenced Martinez to 60 months in prison. The district court also allowed Martinez to self-report to prison, and he did so a month later. While in prison, Martinez earned his GED, took vocational classes, and attended Bible studies.

He also participated in a drug-treatment program and received counseling for his drug addiction.

In early 2018, DHS reopened his removal proceedings based on his 2013 conviction. After his release from prison in April 2018, Martinez was taken directly into DHS custody and held without bond. After about six months, Martinez received a bond hearing, but the presiding immigration judge determined that he did not have jurisdiction to release Martinez because he was subject to mandatory detention under 8 U.S.C. § 1226(c).

In November 2018, Martinez then filed a federal habeas petition seeking immediate release or, in the alternative, an individualized bond hearing before an immigration judge. The district court ordered that Martinez receive a bond hearing. *Martinez*, 2019 WL 5962685, at *1. The district court reasoned that Martinez's prolonged mandatory detention under § 1226(c) violated due process. *Id.* To comply with due process, the district court ordered "the government to show by clear and convincing evidence that [Martinez] presents a flight risk or a danger to the community at the time of the bond hearing." *Id.*

In November 2019, an immigration judge held a bond hearing for Martinez and denied him bond. The immigration judge ruled that the government had met its burden of showing by clear and convincing evidence that Martinez was a danger to the community and a flight risk. In making the dangerousness determination, the immigration judge evaluated Martinez's mitigating evidence, such as his successful release on bond pre-incarceration, the district court's statements during sentencing, his efforts at rehabilitation, his family ties, and his strong community support. Still, the immigration judge found Martinez's two convictions for drug trafficking to be dispositive. The

immigration judge also determined that conditional parole was not appropriate for Martinez.

On appeal, the BIA ruled that Martinez was ineligible for release on bond based on the "totality of the evidence." The BIA agreed with the immigration judge that the government sustained its burden to show that Martinez was a danger to the community by clear and convincing evidence. In doing so, the BIA emphasized that it had "long acknowledged the dangers associated with the sale and distribution of drugs" and found that Martinez's repeated drug-trafficking convictions provided "strong evidence" that he was dangerous. The BIA also acknowledged Martinez's rehabilitation efforts, but it found that his good behavior for "the approximately 7 years he has been detained in either prison or DHS custody does not indicate that he will not revert to his old habits of drug use and trafficking upon his release." The BIA did not reach the immigration judge's alternative conclusion that Martinez posed a flight risk.

Martinez then brought the instant federal habeas petition under 28 U.S.C. § 2241, seeking release from DHS detention. As relevant here, Martinez asserted that the BIA erred by failing to consider releasing him on conditional parole and by concluding that the government met its burden to present clear and convincing evidence of his dangerousness.

As to the threshold issue of jurisdiction, a magistrate judge held that the federal court had jurisdiction over Martinez's claims. First, the magistrate judge ruled that Martinez's conditional parole claim was a question of law and did not challenge any discretionary determination. Next, the magistrate judge considered as a "colorable due process argument" Martinez's claim that the government failed to meet its evidentiary burden in denying bond.

After asserting jurisdiction, the magistrate judge recommended that the district court deny the habeas petition. On the conditional parole claim, the magistrate judge determined that the Ninth Circuit does not require immigration courts to consider conditions of release in assessing whether an alien could be released on bond. On the dangerousness claim, the magistrate judge applied de novo review and held that the government satisfied its burden of showing by clear and convincing evidence that Martinez was a danger to the community. The district court adopted the magistrate judge's report and recommendations.

Martinez now appeals. We have jurisdiction over the appeal under 28 U.S.C. § 1291 and § 2253(a). We review the denial of a habeas petition de novo, *Padilla-Ramirez v. Bible*, 882 F.3d 826, 828 (9th Cir. 2017), any underlying legal questions de novo, and factual questions for clear error, *Singh*, 638 F.3d at 1202–03.

II.

Before reaching the merits of this petition, we first reconsider the district court's view that it had jurisdiction to review all of Martinez's claims. "If a federal court lacked jurisdiction to decide an issue before it[,] we may exercise appellate jurisdiction to correct the error." *Shoner v. Carrier Corp.*, 30 F.4th 1144, 1150 (9th Cir. 2022) (simplified). We conduct that jurisdictional analysis on a claim-by-claim basis; jurisdiction over one claim does not automatically mean jurisdiction over all claims. *See DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006).

Martinez raises three questions for review in his habeas petition: (1) whether the BIA erred in determining that clear and convincing evidence showed that Martinez is a danger to the community; (2) whether the BIA applied the correct

burden of proof; and (3) whether the BIA violated due process by failing to consider alternatives to detention. We review each in turn, but first provide context as to the jurisdictional framework for reviewing bond determinations.

A.

Congress has made it clear that certain immigration determinations are unreviewable by federal courts. Congress, for example, has made a "choice to provide reduced procedural protection" for "adjustment of status" decisions by "sharply circumscrib[ing] judicial review" of those decisions. *Patel v. Garland*, 142 S. Ct. 1614, 1619, 1626 (2022) (referring to the jurisdictional bar under 8 U.S.C. § 1252(a)(2)(B)). We are generally bound by Congress's decision to strip our jurisdiction over a particular matter. *See Patchak v. Zinke*, 138 S. Ct. 897, 908 (2018) (plurality opinion) ("The constitutionality of jurisdiction-stripping statutes . . . is well established.").

In this case, we confront another jurisdictional wall: 8 U.S.C. § 1226(e). With that section, Congress barred federal courts from reviewing "discretionary judgment[s]" regarding the detention of noncitizens under § 1226. Section 1226(a) allows the government to arrest and detain an alien "pending a decision on whether the alien is to be removed from the United States." In general, § 1226(a) gives the government the "discretion either to detain the alien or to release him on bond or parole." *Nielsen*, 139 S. Ct. at 959. If an alien objects to the government's bond determination, the alien may appeal that decision to an immigration judge. *Hernandez v. Sessions*, 872 F.3d 976, 982 (9th Cir. 2017) (citing 8 C.F.R. §§ 236.1(d), 1003.19(c)). At that stage, the alien must establish "that he or she does not present a danger to persons or property, is not a threat to the national security, and does not pose a risk of flight." *Id.* (quoting *In re Guerra*,

24 I. & N. Dec. 37, 38 (BIA 2006)). If the alien satisfies the burden, the immigration judge may release the alien on bond or subject to other conditions of release. *Id.* at 983 (citing 8 C.F.R. §§ 236.1(d), 1003.19).

Section 1226(c), on the other hand, requires "mandatory detention" for certain categories of "criminal aliens." *Nielsen*, 139 S. Ct. at 960 (citing 8 U.S.C. § 1226(c)(1)(A)–(D)). A noncitizen like Martinez, who was convicted of two drug-trafficking offenses, qualifies for mandatory detention under § 1226(c). *See* 8 U.S.C. §§ 1226(c)(1)(A), 1182(a)(2). That person is then held in custody without a bond hearing. According to the Supreme Court, "Congress adopted this provision against a backdrop of wholesale failure by the INS to deal with increasing rates of criminal activity by aliens." *Demore v. Kim*, 538 U.S. 510, 518 (2003).

Section 1226 ends with a broad jurisdiction-stripping provision. It reads:

> The Attorney General's discretionary judgment regarding the application of [§ 1226] shall not be subject to review. No court may set aside any action or decision by the Attorney General under this section regarding the detention or release of any alien or the grant, revocation, or denial of bond or parole.

8 U.S.C. § 1226(e). Section 1226(e) means that an alien may not use the federal courts to "challeng[e] a 'discretionary judgment' by the Attorney General or a 'decision' that the Attorney General has made regarding his detention or release." *Jennings v. Rodriguez*, 138 S. Ct. 830, 841 (2018) (plurality opinion) (simplified). So importantly, federal

courts are barred from reviewing "discretionary decisions about the application of § 1226 to particular cases." *Nielsen*, 139 S. Ct. at 962 (simplified); *see also Singh*, 638 F.3d at 1202 (holding that a federal court may not second-guess the "executive's exercise of discretion" when it comes to the detention or release of noncitizens). And much like the jurisdictional bar in *Patel*, this provision "reflects Congress' choice to provide reduced procedural protection" for discretionary judgments regarding the detention of aliens. *See* 142 S. Ct. at 1626.

But while the provision sweeps broadly, it's also true that § 1226(e) does not limit habeas jurisdiction over "constitutional claims or questions of law." *Id.* That's because § 1226(e) does not strip federal courts of their "traditional habeas jurisdiction, bar constitutional challenge[s]," or preclude attacks to the "statutory framework" permitting detention without bail. *Id.* As for "questions of law," we may review the "application of a legal standard to undisputed or established facts." *Guerrero-Lasprilla v. Barr*, 140 S. Ct. 1062, 1068 (2020). Thus, challenges to the "discretionary process"—rather than to the "discretionary judgment[s]" themselves—are reviewable in federal court. *Singh*, 638 F.3d at 1202.

So federal courts are without jurisdiction to review a "discretionary judgment regarding" the decision to hold an alien in custody. 8 U.S.C. § 1226(e). In this context, "judgment" means "any authoritative decision." *Patel*, 142 S. Ct. at 1621 (citing Webster's Third New International Dictionary 1223 (1993) and 8 Oxford English Dictionary 294 (2d ed. 1989)). The use of "regarding" in the provision has "a broadening effect, ensuring that the scope of a provision covers not only its subject but also matters relating

to that subject." *Id.*, at 1622 (quoting *Lamar, Archer & Cofrin, LLP v. Appling*, 138 S. Ct. 1752, 1760 (2018)).

The touchstone of a "discretionary" determination is that it's "subjective." *Romero-Torres v. Ashcroft*, 327 F.3d 887, 891 (9th Cir. 2003). We have said it "is almost necessarily a subjective question that depends on the identity and the value judgment of the person or entity examining the issue." *Mendez-Castro v. Mukasey*, 552 F.3d 975, 980 (9th Cir. 2009) (simplified). The determination is "value-laden" and "reflect[s] the decision maker's beliefs in and assessment of worth and principle." *See Ramadan v. Gonzales*, 479 F.3d 646, 656 (9th Cir. 2007) (per curiam). A "prototypical" example is one that is "fact-intensive" and requires "equities [to] be weighed." *Torres-Valdivias v. Lynch*, 786 F.3d 1147, 1153 (9th Cir. 2015). In contrast, "determinations that *require* application of law to factual determinations are nondiscretionary." *Zerezghi v. U.S. Citizenship & Immigr. Servs.*, 955 F.3d 802, 808 (9th Cir. 2020) (emphasis added) (simplified); *see also id.* (holding that the government "*must* approve an I-130 visa petition if the facts stated in the application are true and the beneficiary is an immediate relative").

Under this rubric, we have held that several types of immigration determinations are "discretionary":

- Whether a crime is "violent or dangerous." *Torres-Valdivias*, 786 F.3d at 1152–53.

- Whether a crime is "particularly serious." *Arbid v. Holder*, 700 F.3d 379, 383 (9th Cir. 2012) (per curiam).

- Whether an "exceptional and extremely unusual hardship" has been met. *Mendez-Castro*, 552 F.3d at 980.

- Whether an "extreme hardship" has been met. *Prapavat v. INS*, 662 F.2d 561, 562 (9th Cir. 1981) (per curiam).

- Whether an alien has "good moral character." *Ramadan*, 479 F.3d at 656.

We have also held that matters of governmental grace, such as adjustment of status and cancellation of removal relief are discretionary judgments not subject to review. *Bazua-Cota v. Gonzales*, 466 F.3d 747, 748–49 (9th Cir. 2006) (per curiam); *Romero-Torres*, 327 F.3d at 890; *accord Patel*, 142 S. Ct. at 1619.

With this background, we turn to Martinez's claims. We apply § 1226(e)'s jurisdictional framework here. Although the district court ordered that Martinez receive a bond hearing to comply with due process, the discretionary judgments made at the hearing "relat[e]" to mandatory detention under § 1226(c). *See Patel*, 142 S. Ct. at 1626. We start our analysis with Martinez's challenge to the dangerousness determination that kept him detained under that subsection.

B.

We hold that the determination of whether a particular noncitizen poses a danger to the community is a discretionary determination, which a federal court may not review. To begin, what does it mean to be a "danger to the community"? We are aware of no statutory or regulatory definition. Although we've approved of certain factors in

considering the question, *see Singh*, 638 F.3d at 1206 & n.5, neither our court nor any other circuit court appears to have defined dangerousness. In *Singh*, we said that an immigration judge should look to the factors set out in *Matter of Guerra*, 24 I. & N. Dec. 37, 40 (BIA 2006). *Id.*[1] That agency opinion explains that immigration judges have "broad discretion" in considering and weighing those factors. *Guerra*, 24 I. & N. Dec. at 40. And while we've advised that an alien's criminal history is the "most pertinent" factor, we have not said what combination of facts is "conclusive[]" to establish dangerousness. *Singh*, 638 F.3d at 1206. So the only guidance then is an agency-created multi-factorial analysis with no clear, uniform standard for what crosses the line into dangerousness. We thus are left without "standards sufficient to permit meaningful judicial review." *Husyev v. Mukasey*, 528 F.3d 1172, 1181 (9th Cir. 2008).

So like "dangerous crime," "particularly serious crime," "exceptional and extremely unusual hardship," "extreme hardship," and "good moral character," we hold that "danger to the community" fits comfortably within the category of discretionary determinations. Dangerousness is a "fact-intensive" inquiry that requires the "equities [to] be

[1] The nine factors are: "(1) whether the alien has a fixed address in the United States; (2) the alien's length of residence in the United States; (3) the alien's family ties in the United States, and whether they may entitle the alien to reside permanently in the United States in the future; (4) the alien's employment history; (5) the alien's record of appearance in court; (6) the alien's criminal record, including the extensiveness of criminal activity, the recency of such activity, and the seriousness of the offenses; (7) the alien's history of immigration violations; (8) any attempts by the alien to flee prosecution or otherwise escape from authorities; and (9) the alien's manner of entry to the United States." *Guerra*, 24 I. & N. Dec., at 40.

weighed." *Torres-Valdivias*, 786 F.3d at 1153. And like the rest of the lot, it is a "subjective question that depends on the identity and the value judgment of the person or entity examining the issue." *Mendez-Castro*, 552 F.3d at 980 (simplified). What one immigration judge may find indicative of a propensity for danger, another may see as progress toward redemption. This is exactly the type of discretionary judgment that § 1226(e) insulates from judicial review.

Take this case for example. Martinez is a twice-convicted drug trafficker, but has shown some promise by succeeding on pretrial release and making significant progress toward rehabilitation. Reasonable minds can differ on whether clear and convincing evidence establishes that he is a danger to the community. The decision comes down to the decisionmaker's "beliefs in and assessment of worth and principle." *Ramadan*, 479 F.3d at 656. As the dangerousness determination is subjective and value-laden, it is a discretionary judgment that federal courts are precluded from reviewing.

In contrast, the district court asserted jurisdiction over the claim as a constitutional question. In the district court's view, if Martinez was correct that the government failed to meet its evidentiary burden to prove dangerousness, then the BIA's bond determination was "constitutionally flawed." To support jurisdiction, the district court relied on *Hernandez*, 872 F.3d at 988. But that case does not support a finding of jurisdiction here. In *Hernandez*, we asserted jurisdiction over a class action brought by noncitizens challenging the government's "policy" of ignoring their financial circumstances or non-monetary alternative conditions of release in setting bond amounts. *Id.* at 983. We held that the plaintiffs' claims were cognizable on

habeas review because they were not attacking "the *amount* of their initial bonds," but rather claiming that the "discretionary process itself was constitutionally flawed." *Id.* at 988 (simplified). *Hernandez*'s challenge to the "policy" and "process" over bond hearings is a far cry from Martinez's challenge to the individualized finding that he is "dangerous." The district court thus erred in asserting jurisdiction over the dangerousness determination.

Martinez contends that the district court's assertion of jurisdiction was nonetheless proper because the facts of his case are settled and courts can always review the "application of a legal standard to undisputed or established facts," like in *Guerrero-Lasprilla.* He asks us to adopt a de novo standard to review whether clear and convincing evidence proves he is a danger to the community. But the key point in *Guerrero-Lasprilla* is that courts are not precluded from reviewing the application of *legal standards* to settled facts. 140 S. Ct. at 1068. Here, we have no "legal standard" that, if met, requires a certain outcome. *Cf. Zerezghi*, 955 F.3d at 808 (requiring the issuance of a I-130 visa if certain facts are present). We only have malleable guidance that steers the immigration judge's subjective assessment of the facts of a particular case. Federal courts thus lack jurisdiction to review the "application of such [a] standard to the facts of [this] case, be they disputed or otherwise." *Mendez-Castro*, 552 F.3d at 981.

Martinez also tries to reframe the question as an evaluation of whether the undisputed facts satisfy the constitutionally compelled clear-and-convincing *evidentiary* standard for dangerousness. But under any framing, this is an attempt to reweigh the evidence supporting a purely discretionary determination. Indeed, Martinez's argument boils down to the claim that due process forbids finding him

dangerous, even considering his two drug-trafficking convictions, because he received pretrial release, engaged in rehabilitation efforts, and had community support. Thus, he argues, it's impossible to find him dangerous by the constitutionally compelled clear-and-convincing-evidence standard. But due process does not command that evidence be weighed a certain way. Simply put, we will not allow Martinez to circumvent § 1226(e)'s jurisdictional bar by "cloaking an abuse of discretion argument in constitutional garb." *Torres-Aguilar v. INS*, 246 F.3d 1267, 1271 (9th Cir. 2001).

We thus hold that the district court lacked jurisdiction to review the BIA's determination that Martinez posed a danger to the community, even if it ultimately agreed with the BIA's conclusion. And because the district court lacked jurisdiction, we cannot evaluate the merits of Martinez's claim.

C.

After jettisoning Martinez's dangerousness claim, we are left to determine whether the district court had jurisdiction to review his two remaining claims: that the BIA erred by applying the wrong burden of proof and that due process required the BIA to consider alternatives to detention, such as conditional parole. Federal courts retain jurisdiction to review these claims because they are challenges to the legal standards or statutory framework used in bond determinations and are thus "constitutional claims or questions of law." *See Singh*, 638 F.3d at 1202; *id.* at 1202–03 (asserting jurisdiction over whether the immigration judge applied the correct burden of proof); *Mendez-Castro*, 552 F.3d at 979 (retaining jurisdiction over "whether an IJ failed to apply a controlling standard governing a discretionary determination"); *Jennings*, 138 S.

Ct. at 841 (recognizing jurisdiction over challenges to the "statutory framework").

III.

Turning now to the merits of Martinez's remaining claims, we agree with the district court that they must be denied.

A.

Martinez contends that the BIA failed to apply the correct burden of proof and review all the evidence in the record in evaluating whether the government proved his dangerousness with clear and convincing evidence. He also alleges the BIA impermissibly shifted the burden of proof to him. We disagree.

Generally, in the absence of any red flags, we take the BIA at its word. For example, "[w]hen nothing in the record or the BIA's decision indicates a failure to consider all the evidence," we will rely on the BIA's statement that it properly assessed the entire record. *Cole v. Holder*, 659 F.3d 762, 771 (9th Cir. 2011). We do not require the BIA to "discuss each piece of evidence submitted." *Id.* Similarly, we accept that the BIA "applied the correct legal standard" if the BIA "expressly cited and applied [the relevant caselaw] in rendering its decision." *See Mendez-Castro*, 552 F.3d at 980. But when there is an indication that something is amiss, like if the BIA "misstat[es] the record" or "fail[s] to mention highly probative or potentially dispositive evidence," we do not credit its use of a "catchall phrase" to the contrary. *Cole*, 659 F.3d at 771–72.

There are no such red flags here. At the outset of its decision, the BIA properly noted that the government bore

the burden to establish by clear and convincing evidence that Martinez is a danger to the community. It then reviewed the record, including Martinez's drug trafficking convictions, and concluded there was "strong evidence" of his dangerousness. It credited Martinez's significant rehabilitation efforts, such as keeping a clean record while on pretrial release and in prison. But it concluded, under "the totality of the evidence," that the serious nature of Martinez's convictions and his history of reoffending, even after several years of sobriety, rendered him a danger to the community. Contrary to Martinez's claim, the BIA explicitly noted the evidence of his release on his own recognizance and his self-report to prison during his 2013 criminal proceedings. Thus, we conclude that the BIA applied the correct burden of proof in this case.

B.

Martinez finally argues that the BIA had to consider alternatives to detention, such as conditional parole, before denying him bond. Martinez suggests that the BIA must import consideration of conditions of release from the criminal pretrial release context, such as GPS monitoring, drug testing, and counseling, to the immigration custody context. *See* 18 U.S.C. § 3142(c). In Martinez's view, failing to do so violates due process or constitutes legal error. We reject Martinez's argument.

Due process does not require immigration courts to consider conditional release when determining whether to continue to detain an alien under § 1226(c) as a danger to the community. In *Singh*, we addressed the due process requirements for bond hearings for aliens subject to prolonged detention. 638 F.3d at 1203–10. We held that due process requires immigration courts to make contemporaneous records of bond hearings, *id.* at 1200, and

most significantly, that the government prove dangerousness or risk of flight by clear and convincing evidence, *id.* at 1200, 1205. We then noted that these "greater procedural protections" are enough to safeguard an alien's due process rights and "justify [the] denial of bond." *Id.* at 1207.

Nowhere in *Singh* did we suggest that due process also mandates that immigration courts consider release conditions or conditional parole before deciding that an alien is a danger to the community. *Singh* offers the high-water mark of procedural protections required by due process, and we see no reason to extend those protections any further here.

Relying on *Hernandez*, Martinez argues that conditions of release must be considered to ensure that detention is reasonably related to the government's interest in protecting the public. That case is inapposite. In *Hernandez*, the plaintiff noncitizens complained that neither their financial circumstances nor alternative release conditions were considered before their bond decisions were made, even though they were determined not to be dangerous or flight risks. 872 F.3d at 984–85, 990–91. While the government had a legitimate interest in protecting the public and ensuring the appearance of noncitizens in immigration proceedings, we held that detaining an indigent alien without consideration of financial circumstances and alternative release conditions was "unlikely to result" in a bond determination "reasonably related to the government's legitimate interests." *Id.* at 991. The analysis is different here. Martinez was found to be a danger to the community and so his detention is clearly "reasonably related" to the government's interest in protecting the public. *See id.*

IV.

For these reasons, we vacate the district court's judgment regarding Martinez's challenge to the dangerousness determination and remand with instructions to dismiss; and we affirm the denial of the petition on all other claims.

AFFIRMED in part and VACATED and REMANDED in part with instructions to dismiss.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JAVIER MARTINEZ,

Petitioner,

v.

LOWELL CLARK, et al.,

Respondents.

C20-780 TSZ

ORDER

Having reviewed the Report and Recommendation of the Honorable Michelle L. Peterson, United States Magistrate Judge (docket no. 8), Petitioner Javier Martinez's objections thereto (docket no. 9), Respondents' response in opposition to those objections (docket no. 10), Petitioner's reply (docket no. 11), and the remaining record, the Court enters the following Order to address Petitioner's objections and to clarify why the doctrine of collateral estoppel does not apply in this case.

Background

Petitioner does not object to the statement of facts and procedural history as summarized in the Report and Recommendation. *See* Objections (docket no. 9 at 2). The Court does not recount that background information here.

Discussion

1. Standard of Review

This Court reviews de novo the challenged portions of the Report and Recommendation. *See Calderon-Rodriguez v. Wilcox*, 374 F. Supp. 3d 1024, 1026 (W.D. Wash. 2019).

2. Collateral Estoppel

Petitioner argues that the Board of Immigration Appeals ("BIA" or "agency") was collaterally estopped from finding that Petitioner was a "danger to the community" at the bond hearing before an immigration judge in 2019, based on the district courts' earlier rulings that Petitioner did not pose such a danger in 2013. Objections (docket no. 9 at 3). The BIA concluded that it was not bound by the courts' earlier rulings, reasoning that "[c]ollateral estoppel applies only when both the issues and the parties to the proceedings are the same" and that Petitioner's "criminal proceedings did not involve the same parties as his removal proceedings." BIA Decision, Ex. 3 to Reply (docket no. 6-3 at 4). The Magistrate Judge likewise concluded that collateral estoppel did not apply because the proceedings, which involved different due-process requirements and different circumstances, did not decide an "identical" issue. Report and Recommendation (docket no. 8 at 9–10).

Petitioner now argues that the Magistrate Judge "misunderstood" his argument, and he assigns "legal error" to the conclusion that the doctrine is inapplicable on the ground that the Magistrate Judge cited evidence relevant to his flight risk, as opposed to his dangerousness. Objections (docket no. 9 at 2, 4). Both arguments fail for the simple reason that Petitioner has not met his burden to show that collateral estoppel applies in

this case. *See Taylor v. Sturgell*, 553 U.S. 880, 907 (2008) (concluding that the party asserting preclusion carries the burden of establishing all necessary elements).

Petitioner is correct that collateral estoppel applies to the agency's own "determination[s] of certain issues of law or fact involving the same alien," *Oyeniran v. Holder*, 672 F.3d 800, 806 (9th Cir. 2012), and to issues that were "already litigated in Article III courts" in a "final judgment on the merits," *Paulo v. Holder*, 669 F.3d 911, 917 (9th Cir. 2011); but he fails to cite authority indicating that findings underlying a decision to release a criminal defendant before trial or at sentencing are necessary to decide a "final judgment on the merits." *See* Report and Recommendation (docket no. 8 at 9 & n.1); Reply (docket no. 11 at 1–2). Nor has Petitioner demonstrated that the issue decided by the district courts was "identical" to the one decided by the agency. As the Magistrate Judge explained, the government could more easily satisfy its burden to show Petitioner's dangerousness at the agency bond hearing because it was *not* required to show that "no conditions of release would mitigate any dangerousness," as required at the criminal proceedings. *See* Report and Recommendation (docket no. 8 at 9–10); *see* 18 U.S.C. § 3142. The BIA was not collaterally estopped from finding that Petitioner was a danger to the community.

3. Evidentiary or Due Process Challenge

Petitioner also contends that the BIA's and the Magistrate Judge's "conclusion that there is clear and convincing evidence of [his] danger to the community is not based on a fair reading of the record," purportedly violating his due process rights. Objections

(docket no. 9 at 8); *see Hernandez v. Sessions*, 872 F.3d 976, 983 n.8 (9th Cir. 2017).[1] Petitioner, however, fails to point to any evidence that was overlooked or mischaracterized. *See* Objections (docket no. 9 at 8); *see also Cole v. Holder*, 659 F.3d 762, 771–72 (9th Cir. 2011); *Singh*, 638 F.3d at 1206. Nor does Petitioner persuasively challenge the conclusion that his cited authority is factually distinguishable, based on the serious nature of his convictions. *See* Report and Recommendation (docket no. 8 at 13–16). The BIA did not err in concluding that Petitioner was a danger to the community.

Conclusion

For the foregoing reasons, the Court ORDERS:

(1) The Court ADOPTS the Report and Recommendation, docket no. 8;

(2) Petitioner's habeas petition, docket no. 1, is DENIED, and this action is DISMISSED with prejudice; and

(3) The Clerk is directed to enter judgment consistent with this Order and to send a copy of this Order to all counsel of record and to Judge Peterson.

IT IS SO ORDERED.

Dated this 14th day of December, 2020.

Thomas S Zilly

THOMAS S. ZILLY
United States District Judge

[1] In light of the Supreme Court's decision in *Jennings v. Rodriguez*, 138 S. Ct. 830, 846–48 (2018), the Ninth Circuit has since remanded the case to the district court, instructing it to reconsider the clear and convincing standard. *Rodriguez v. Marin*, 909 F.3d 252, 257 (9th Cir. 2018).

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JAVIER MARTINEZ,

Petitioner,

v.

LOWELL CLARK, et al.,

Respondents.

Case No. C20-780-TSZ-MLP

REPORT AND RECOMMENDATION

I. INTRODUCTION

Petitioner, who is currently in the custody of U.S. Immigration and Customs Enforcement ("ICE") at the Northwest ICE Processing Center ("NWIPC") in Tacoma, Washington, brings this 28 U.S.C. § 2241 habeas action through counsel to obtain release from detention. (Pet. (Dkt. # 1).) The Government has filed an opposition (Resp. (dkt. # 5)), and Petitioner has filed a reply (Reply (dkt. # 6)). Having considered the parties' submissions, the balance of the record, and the governing law, the Court recommends DENYING Petitioner's habeas petition and DISMISSING this action with prejudice.

II. BACKGROUND

A. Proceedings Leading to Petitioner's Detention

Petitioner, a native of Costa Rica and a citizen of Nicaragua, lawfully entered the United States in 1987 when he was seven years old and became a lawful permanent resident in 1990. (Resp., Ex. A (Dkt. # 5-1 at 1-3), Ex. B (Dkt. # 5-1 at 4-9); Pet. at ¶ 5.) Growing up, Petitioner suffered serious physical and emotional abuse at the hands of his mother, who was an alcoholic. (Pet. at ¶ 11.) When he was about 13 years old, his mother no longer wanted to care for him and allowed him to live with some older men who were dealing drugs. (*Id.*) Petitioner was used as a drug runner, and by the time he was 15 years old, he was addicted to alcohol and cocaine. (*Id.*)

In October 1999, when he was 19 years old, Petitioner was arrested and charged with Conspiracy to Distribute Cocaine in the Western District of Washington. (Pet. at ¶ 12; Resp., Ex. C (Dkt. # 5-1 at 10-16).) In August 2000, Petitioner was convicted and sentenced to 20 months in prison and five years of supervised release. (Resp., Ex. C.) After he was released in April 2001, the U.S. Department of Homeland Security ("DHS") commenced removal proceedings against him. (*Id.*, Ex. A; Pet. at ¶ 12.) In September 2002, an immigration judge ("IJ") granted his application for withholding of removal. (Resp., Ex. D (Dkt. # 5-1 at 17-18).)

From 2002 to 2009, Petitioner lived in Seattle, working to support his daughter and helping to support his partner and her son. (Pet. at ¶ 13.) During this time, Petitioner was able to stay away from alcohol and drugs. (*Id.*) Around 2009, however, Petitioner relapsed and began using drugs again. (*Id.* at ¶ 14.)

In February 2013, Petitioner was arrested and again charged with drug-related crimes in the Western District of Washington. (Pet. at ¶ 15; Resp., Ex. E (Dkt. # 5-1 at 19-25); *United States v. Martinez*, No. 13-50-RSL (W.D. Wash.).) The Honorable Mary Alice Theiler released

Petitioner pending trial. (Reply, Ex. 1 (Dkt. # 6-1) at 36-37.) Among the other conditions of his release, Petitioner was required to avoid using or possessing alcohol or any controlled substances, submit to drug and alcohol testing, obtain an alcohol/substance abuse evaluation and follow any treatment recommendations, and undergo a mental health evaluation and follow all treatment recommendations. (*Id.*)

On July 12, 2013, Petitioner pled guilty to Conspiracy to Distribute Cocaine. (Resp., Ex. E.) He was allowed to remain free while awaiting his sentencing hearing, which was scheduled for October 10, 2013. (Pet. at ¶ 16; *see also* Resp., Ex. E.) At the sentencing hearing and as a part of the stipulated terms of the plea agreement, the government recommended the 60-month mandatory minimum followed by four years of supervised release. (Reply, Ex. 1 at 42.) The Honorable Robert S. Lasnik adopted this recommendation, explaining:

> When I first picked up the file, I was seriously considering not going along with the plea agreement, and giving 70 months, and not allowing self-report, to put you into custody immediately today. Because, frankly, I don't see a lot of people who come back through the system at your young age of 32, you are going to be 33 on Sunday, who have had two trips through U.S. District Court, even spaced as far apart as yours are, both for serious drug offenses. We don't do chippy drug offenses in federal court.
>
> My thinking is, this is somebody who has had a chance already, did not take advantage of the five years of supervised release, did not take advantage of the opportunities that were presented to him, and was involved in a very serious drug trafficking organization. I was going to quiz [the prosecuting attorney] about why she was giving away the farm here.
>
> But I am very impressed with what you've done when Judge Theiler gave you this rare opportunity to prove that you could control yourself, you could be mature, you could avoid the pitfalls. One could look at that, her letting you out on bond, as setting you up for failure. . . . . Had you messed up in that timeframe you would be going away for longer than five years.
>
> So with that really strong effort to show post-offense presentencing rehabilitation, and the release status report from Probation/Pretrial that says you have been clean, you have been doing everything that you were supposed to do, and with the maturity that you have expressed here today, I will follow the joint recommendation.

(*Id.* at 48-49.) Judge Lasnik also noted that the government had opposed Petitioner's request for release pending trial, and that he "probably would have kept you in. I wouldn't have done what Judge Theiler did. She gave you a wonderful opportunity, but it was also a challenge, and you took advantage of it. That means a lot." (*Id.* at 51.) Judge Lasnik thus allowed Petitioner to self-report to prison, which he did on November 11, 2013. (Pet. at ¶¶ 17-19.)

While in prison, Petitioner obtained his G.E.D., took additional classes, and attended Bible studies. (*Id.* at ¶ 21.) Even though drugs were readily available, he remained sober, participated in the Residential Drug Abuse Program, and sought out counseling to control his drug addiction. (*Id.*)

B. Petitioner's Removal Proceedings

In January 2018, prior to Petitioner's release from prison, an IJ granted DHS's motion to reopen his removal proceedings to terminate the withholding of removal. (Resp., Ex. F (Dkt. # 5-1 at 26-27).) In March 2019, an IJ denied Petitioner's application for protection under the Convention Against Torture. (Pet. at ¶ 22.) In August 2019, the Board of Immigration Appeals ("BIA") dismissed his appeal. (*Id.*) Petitioner filed a petition for review with the Ninth Circuit. *Martinez v. Barr*, No. 19-72433 (9th Cir.). On October 2, 2020, the Ninth Circuit granted the government's unopposed motion to remand the matter to the BIA. (*Id.*, Dkt. # 32.)

C. Petitioner's Current Detention

On April 28, 2018, Petitioner completed his prison sentence, and ICE took him into custody. (Resp., Ex. B.) On November 19, 2018, Petitioner filed a habeas petition in this Court requesting release or a bond hearing. *Martinez v. Clark*, No. 18-1669-RAJ-MAT, Dkt. # 1 (W.D. Wash.). On November 13, 2019, the Honorable Richard A. Jones adopted Judge Theiler's recommendation that Petitioner's request for release be denied but that he be afforded a bond

hearing that complied with the requirements of *Singh v. Holder*, 638 F.3d 1196 (9th Cir. 2011). *See id.*, Dkt. ## 17 (R. & R.), 20 (Order Adopting R. & R.).

On November 26, 2019, Petitioner appeared for a bond hearing before an IJ. (*See* Resp., Ex. G (Dkt. # 5-1 at 28-35).) Petitioner, who was represented by counsel, submitted an evidence packet that included: numerous letters of support from family and community members, evidence that he had submitted a U-visa application to U.S. Citizenship and Immigration Services, the appearance bond issued by Judge Theiler, the transcript of his sentencing hearing with Judge Lasnik, and proof that he had completed substance abuse treatment while in prison, obtained his G.E.D., and participated in additional educational and vocational classes. (*See* Reply, Ex. 1.) DHS's evidence packet included Petitioner's immigration file and records from his criminal convictions. (*See* Resp., Ex. G at 3.) At the end of the hearing, the IJ denied bond, finding that DHS had met its burden of establishing by clear and convincing evidence that Petitioner is both a danger to the community and a flight risk. (*See id.* at 1.) The IJ also found that conditional parole was not appropriate in this case. (*Id.* at 6.)

The IJ's written bond memorandum summarized the status of Petitioner's removal proceedings, discussed Judge Jones's order requiring the bond hearing to comply with *Singh*, and set forth the relevant factors for the court to consider under *Matter of Guerra*, 24 I. & N. Dec. 37 (BIA 2006). (*See* Resp., Ex. G at 1-3.) The IJ discussed Petitioner's evidence, including his successful release pending his most recent criminal trial, Judge Lasnik's praise during the sentencing hearing, the fact that he self-reported to prison, his good behavior while in prison, his G.E.D., his successful completion of other rehabilitative and vocational classes, and his close family ties and strong community support. (*Id.* at 4.) The IJ thus concluded that Petitioner had "significant equities in the United States." (*Id.*) Nevertheless, the IJ found that Petitioner presents

a danger to the community due to his two drug-trafficking convictions and that this danger was not "sufficiently mitigated by his good behavior while he was awaiting sentence and while he was in federal prison." (*Id.* at 5.) The IJ also found that Petitioner presents a flight risk because his forms of relief from removal are extremely limited, which was not the case when the federal judges released him pending trial and sentencing. (*Id.* at 5-6.)

Petitioner appealed to the BIA. (Resp., Ex. H (Dkt. # 5-1 at 36-38).) The BIA agreed with the IJ that DHS had proved by clear and convincing evidence that Petitioner presents a danger to the community. (*Id.* at 1.) The BIA noted that it has "long acknowledged the dangers associated with the sale and distribution of drugs" and that Petitioner's "repeated drug trafficking offenses provide strong evidence that [he] is a danger to the community." (*Id.*) The BIA considered Petitioner's efforts to rehabilitate himself and the fact that seven years had elapsed since his last conviction but concluded that these were "insufficient to overcome the strong evidence of dangerousness," reasoning that the fact Petitioner has been well-behaved while in custody the past seven years "does not indicate that he will not revert to his old habits of drug use and trafficking upon his release, particularly given [his] claim that he maintained his sobriety for some period of time following his first conviction but ultimately started using and selling cocaine once again." (*Id.* at 2; *see also id.* ("Having considered the totality of the evidence in this case, we agree with the Immigration Judge that despite the respondent's rehabilitation efforts, the serious nature of his convictions and his history of reoffending, even after several years of claimed sobriety, renders the respondent a danger to the community.").) The BIA also rejected Petitioner's argument that it was collaterally estopped from reaching this conclusion because the federal judges released him pending trial and allowed him to self-report to prison. (*Id.*) Because

the BIA found Petitioner to be a danger to the community, it did not discuss the IJ's flight risk finding. (*Id.*)

III. DISCUSSION

Petitioner argues that he is entitled to immediate release because the BIA failed to comply with Judge Jones's order that he receive a *Singh* bond hearing and because his continued detention violates due process. Specifically, he contends that the BIA erred by: (1) failing to apply collateral estoppel to the federal judges' determination that he does not present a danger or flight risk, (2) failing to consider releasing him on conditional parole, and (3) concluding that the Government presented clear and convincing evidence of dangerousness. In addition to responding to these arguments, the Government contends the Court does not have jurisdiction. As discussed below, the Court finds that the bond hearing complied with *Singh* and that Petitioner's continued detention does not violate his due process rights.

A. Jurisdiction

The Government argues that the Court does not have jurisdiction to review the denial of bond because the immigration courts' exercise of discretion is not subject to judicial review under 8 U.S.C. § 1226(e). Section 1226(e) provides:

> The Attorney General's discretionary judgment regarding the application of this section shall not be subject to review. No court may set aside any action or decision by the Attorney General under this section regarding the detention or release of any [noncitizen] or the grant, revocation, or denial of bond or parole.

"Although § 1226(e) restrictions jurisdiction in the federal courts in some respects, it does not limit habeas jurisdiction over constitutional claims or questions of law," including the "application of law to undisputed facts, sometimes referred to as mixed questions of law and fact." *Singh*, 638 F.3d at 1202 (quoted sources omitted); *see also Hernandez v. Sessions*, 872

F.3d 976, 987 (9th Cir. 2017) (claims that the bond process was itself flawed are cognizable in federal court).

The Court concludes that § 1226(e) does not bar consideration of Petitioner's claims. "The availability of collateral estoppel presents a mixed question of law and fact[.]" *Eilrich v. Remas*, 839 F.2d 630, 632 (9th Cir. 1988). Petitioner's argument that the BIA was required to consider release on conditional parole presents a question of law and does not challenge any discretionary determination. Finally, Petitioner presents a colorable due process argument that DHS failed to meet its evidentiary burden, and therefore, the bond determination was constitutionally flawed. *See, e.g.*, *Hernandez*, 872 F.3d at 988; *Perez v. Wolf*, 445 F.Supp.3d 275, 284 (N.D. Cal. 2020) (finding jurisdiction over claim that the government failed to meet its evidentiary burden in immigration bond hearing); *Ramos v. Sessions*, 293 F.Supp.3d 1021, 1028 (N.D. Cal. 2018) (same); *cf. United States v. Hir*, 517 F.3d 1081, 1086 (9th Cir. 2008) (release determinations under the Bail Reform Act present mixed questions of law and fact).

B. Collateral Estoppel and Conditional Parole

Petitioner argues that the BIA erred by failing to apply collateral estoppel to the federal judges' determination that he did not present a flight risk or danger to the community after his arrest in 2013 and subsequent conviction. He also argues that the BIA erred by failing to consider releasing him on conditions of supervision. The Court is not persuaded by either argument.

Collateral estoppel applies to a question, issue, or fact when: "(1) the issue at stake was identical in both proceedings; (2) the issue was actually litigated and decided in the prior proceedings; (3) there was a full and fair opportunity to litigate the issue; and (4) the issue was necessary to decide the merits." *Oyeniran v. Holder*, 672 F.3d 800, 806 (9th Cir. 2012). As an

initial matter, the Court has been unable to identify any case applying collateral estoppel to a prior bail determination.[1] Perhaps this is because bail decisions are not necessary to decide the merits of criminal proceedings, an essential element of collateral estoppel. Regardless, as discussed below, the Court concludes that the issues presented to the federal and immigration judges were not identical.

"[D]etention of a criminal defendant pending trial pursuant to the [Bail Reform Act] and detention of a removable [noncitizen] pursuant to the [Immigration and Nationality Act] are separate functions that serve separate purposes and are performed by different authorities." *United States v. Diaz-Hernandez*, 943 F.3d 1196, 1199 (9th Cir. 2019) (quotation marks omitted, first and third alterations in *Diaz-Hernandez*). The Bail Reform Act requires a defendant to be released, subject to appropriate conditions, unless the government presents clear and convincing evidence that "no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community." *Hir*, 517 F.3d at 1086 (quoting 18 U.S.C. § 3142(e)); *see also United States v. Santos-Flores*, 794 F.3d 1088, 1090 (9th Cir. 2015) ("Only in rare cases should release be denied, and doubts regarding the propriety of release are to be resolved in favor of the defendant.").

In considering the due process protections required for prolonged-detention bond hearings, the Ninth Circuit in *Singh* did not adopt the Bail Reform Act's standards. Instead of requiring the government to present clear and convincing evidence that no conditions of release

[1] The cases Petitioner cites are distinguishable. *See, e.g.*, *Oyeniran*, 672 F.3d at 806 (applying collateral estoppel to preclude the BIA from "rehashing the historical facts and its findings of law" in previous removal proceedings); *Matter of Fedorenko*, 19 I. & N. Dec. 57, 65-67 (BIA 1984) (allowing BIA to rely on findings of fact and conclusions of law made by a federal court in denaturalization proceedings); *Matter of Rina*, 151 I. & N. Dec. 346, 346-47 (BIA 1975) (precluding noncitizen from relitigating the issue of illegal entry in his deportation proceedings because he was convicted of illegal entry in federal criminal proceedings).

would mitigate any dangerousness or flight risk, the Ninth Circuit held only "that the government must prove by clear and convincing evidence that [a noncitizen] is a flight risk or a danger to the community to justify denial of bond . . . ." *Singh*, 638 F.3d at 1203. The Ninth Circuit went on to discuss the standard of dangerousness that must be met to deny bond, directing the immigration courts to consider the factors set forth in *Guerra*, which include consideration of the noncitizen's "criminal record, including the extensiveness of criminal activity, the recency of such activity, and the seriousness of the offenses." *Id.* at 1206 (quoting *Guerra*, 24 I. & N. Dec. at 40). The Ninth Circuit also considered and rejected the petitioner's argument that the government should be required to show "special dangerousness" to deny bond. *Id.* at 1206-07. Throughout its discussion, the Ninth Circuit did not suggest that the immigration courts were required to consider conditions of release in assessing whether the government met its burden. More importantly the issue at stake in the criminal bail hearing and the immigration bond hearing were not identical. As pointed out by the IJ in her order, the circumstances changed between the time of Mr. Martinez's bail hearing and the hearing before her: "At this stage in Respondents' removal process, his forms of relief from removal are very limited." (Ex. G at 5.) Given the differences between the Bail Reform Act and *Singh*'s due process requirements and the difference circumstances between the two bond hearings, the Court concludes that collateral estoppel did not require the BIA to follow the federal judges by releasing Petitioner. In sum, the Court recommends denying Petitioner's collateral estoppel and conditional parole claims.

C. Clear and Convincing Evidence

Petitioner argues that the BIA erred as a matter of law in concluding that DHS presented clear and convincing evidence of dangerousness, and therefore, his continued detention violates due process. (*See* Pet. at ¶¶ 29, 31-32.) As discussed below, the Court does not agree.

1. Legal Standard

"The clear and convincing evidence standard is a high burden and must be demonstrated in fact." *Calderon-Rodriguez*, 374 F.Supp.3d at 1033 (quoting *Ramos*, 293 F.Supp.3d at 1030 (quotation and citation omitted)). To make this assessment, the IJ may consider any number of discretionary factors, including: (1) whether the detainee has a fixed address in the United States; (2) the detainee's length of residence in the United States; (3) the detainee's family ties in the United States, and whether they may entitle the detainee to reside permanently in the United States in the future; (4) the detainee's employment history; (5) the detainee's record of appearance in court; (6) the detainee's criminal record, including the extensiveness of criminal activity, the recency of such activity, and the seriousness of the offenses; (7) the detainee's history of immigration violations; (8) any attempts by the detainee to flee persecution or otherwise escape authorities; and (9) the detainee's manner of entry to the United States. *Guerra*, 20 I. & N. Dec. at 40; *see also Singh*, 638 F.3d at 1206.

In addition, "[a]lthough [a noncitizen's] criminal record is surely relevant to a bond assessment, . . . criminal history alone will not always be sufficient to justify denial of bond on the basis of dangerousness. Rather, the recency and severity of the offenses must be considered." *Singh*, 638 F.3d at 1206. "[B]ecause the IJ must consider 'the recency and severity of [any past] offenses,' evidence of criminal conduct grows less powerful as it becomes less current. Thus, the passage of time is undeniably relevant and the IJ must consider it." *Ramos*, 293 F.Supp.3d at 1034) (internal citation to *Singh* omitted); *Singh*, 638 F.3d at 1206 ("[A] conviction could have occurred years ago, and the [noncitizen] could well have led an entirely law-abiding life since then."). This does not mean, however, "that criminal conviction evidence inevitably loses its persuasive force" or that the government must present new evidence of dangerousness at each

bond hearing. *Id.* at 1033-34. "The IJ also must consider whether the detainee's circumstances have changed such that criminal conduct is now less likely." *Calderon-Rodriguez*, 374 F.Supp.3d at 1033 (citing *Singh*, 638 F.3d at 1205 ("[T]he BIA focused on Singh's prior convictions for petty theft, receiving stolen property and substance abuse. Under a clear and convincing evidence standard, the BIA might conclude that Singh's largely nonviolent prior bad acts do not demonstrate a propensity for future dangerousness, in view of evidence showing that his drug use, which was the impetus for his previous offenses, has ceased.")).

2. Standard of Review

The Ninth Circuit has not provided "clear guidance on precisely what standard of review a district court should apply in reviewing an IJ's application of the clear and convincing evidence standard of proof." *Ramos*, 293 F.Supp.3d at 1030 (citing *Singh*). This Court agrees with others that "a standard of review which asks only whether the IJ announced the correct legal standard is insufficient." *Ramos*, 293 F.Supp.3d at 1030 (citing *Nat'l Res. Def. Council, Inc. v. Pritzker*, 828 F.3d 1125, 1135 (9th Cir. 2016) ("An agency acts contrary to the law when it gives mere lip service or verbal commendation of a standard but then fails to abide the standard in its reasoning and decision."); *Cole v. Holder*, 659 F.3d 762, 771-72 (9th Cir. 2011) ("[W]here there is any indication that the BIA did not consider all of the evidence before it, a catchall phrase does not suffice, and the decision cannot stand. Such indications include misstating the record and failing to mention highly probative or potentially dispositive evidence.")); *see also Calderon-Rodriguez*, 374 F.Supp.3d at 1035 (reaching same conclusion).

In *Ramos*, the court took "its cue from the standard of review an appellate court applies when reviewing a lower court's application of the clear and convincing evidence standard." *Ramos*, 293 F.Supp.3d at 1030-31. Thus, the court reviewed the IJ's factual findings for clear

error and independently reviewed "the facts, findings, and record to determine, de novo, whether those facts clearly and convincingly demonstrate that [the petitioner] poses such a danger to the community that she must remain detained, including because no alternative to detention could protect the community." *Id.* at 1032-33; *see also Calderon-Rodriguez*, 374 F.Supp.3d at 1035. As discussed above, *Ramos*'s consideration of alternatives to detention goes beyond the requirements of *Singh*. Otherwise, however, the Court concurs that factual findings should be reviewed for clear error, which gives some deference to the immigration courts, but that the ultimate determination of whether those facts amount to clear and convincing evidence of flight risk and dangerousness should be reviewed de novo.

3. Sufficiency of Petitioner's Bond Hearing

Petitioner argues that the BIA erred as a matter of law when it affirmed the IJ's determination that he presents a current danger to the community. (Pet. at ¶ 31.) In support of this claim, he cites his successful release in 2013, his continued sobriety and participation in counseling when available, his completion of drug abuse and other educational programs, his G.E.D., and the fact that he has not committed any offense in over seven years. (*Id.*; *see also* Reply at 10-14.) While the Court finds Petitioner's rehabilitation efforts commendable, it concludes on de novo review that DHS presented clear and convincing evidence of current dangerousness. Petitioner was convicted of two serious drug trafficking offenses before his 33rd birthday, and although he maintained his sobriety for several years after his first conviction, he ultimately relapsed and began selling drugs again. Petitioner cites several cases where the courts found that the evidence did not meet the clear and convincing standard, but all of these cases involved more remote and/or less serious criminal activity. *See, e.g.*, *Judulang v. Chertoff*, 562 F.Supp.2d 1119, 1127 (S.D. Cal. 2008) (evidence of 20-year-old manslaughter conviction,

seven-year-old DUI conviction, and five-year-old burglary conviction was not sufficient, as a matter of law, to establish dangerousness); *Mau v. Chertoff*, 562 F.Supp.2d 1107, 1119 (S.D. Cal. 2008) (government did not establish dangerousness, as a matter of law, by pointing only to past DUI convictions that were four to six years old); *see also Ramos*, 293 F.Supp.3d at 1035 (two misdemeanor DUIs where sentencing judges declined to impose any custodial time were insufficient to satisfy clear and convincing evidence standard); *Calderon-Rodriguez*, 374 F.Supp.3d at 1036 (government did not meet clear and convincing evidence standard when the petitioner's two misdemeanor DUIs were over seven years old, and his one felony DUI/vehicular assault conviction, which did not result in any jail time, was over four years old). When compared with these cases, it is apparent that the severity and recency of Petitioner's criminal history satisfies the clear and convincing evidence standard, even when accounting for Petitioner's rehabilitation efforts.

Petitioner also argues that the BIA improperly placed the burden of proof on him to show that he will not reoffend. (Reply at 11-12.) A review of the BIA's decision as a whole, however, does not support this claim. The BIA found that DHS satisfied its burden of providing clear and convincing evidence of dangerousness based on Petitioner's 2000 and 2013 drug trafficking convictions: "The respondent's repeated drug trafficking offenses provide strong evidence that the respondent is a danger to the community." (Resp., Ex. H at 1.) The BIA then went on to discuss the evidence Petitioner had submitted in support of his request for bond, concluding that the fact Petitioner "has been well-behaved during the approximately 7 years he has been detained in either prison or DHS custody does not indicate that he will not revert to his old habits of drug use and trafficking upon his release, particularly given the respondent's claim that he maintained his sobriety for some period of time following his first conviction but ultimately started using

and selling cocaine once again." (*Id.* at 2.) The BIA also cited *Singh*'s requirement that it consider the seriousness of the offenses, their recency, and any evidence of rehabilitation. (*Id.*) It concluded: "Having considered the totality of the evidence in this case, we agree with the Immigration Judge that despite the respondent's rehabilitation efforts, the serious nature of his convictions and his history of reoffending, even after several years of claimed sobriety, renders the respondent a danger to the community." (*Id.*) Thus the BIA did not improperly place the burden on Petitioner and instead held the government to its burden of proof.

Finally, Petitioner cites *Obregon v. Sessions*, No. 17-1463, 2017 WL 1407889 (N.D. Cal. April 20, 2017), which noted that the Executive Office for Immigration Review does not have guidelines to direct IJs in applying the *Guerra* factors and concluded that IJs could look for guidance from cases applying the clear and convincing evidence standard under the Bail Reform Act and from the bail decision in the underlying criminal matter. *Id.* at *6. The court ultimately ordered a new bond hearing for the petitioner, who had three DUIs and four convictions for driving with a suspended license. *Id.* at *8. In doing so, the court expressed skepticism that the government would be able to meet its burden and indicated it was "extremely doubtful that any Magistrate Judge on this court would have remanded her to custody based on this record." *Id.*

The Court does not disagree that the immigration courts may look to criminal cases for guidance, but as discussed above, there are material differences between the Bail Reform Act and *Singh*. Furthermore, Petitioner's case is readily distinguishable from *Obregon* because Petitioner's criminal history is much more significant than in *Obregon*, and it is not "extremely doubtful" that no judge would have detained him pending trial. (*See* Reply, Ex. 1 at 48, 51 (Judge Lasnik's statements during the sentencing hearing that Judge Theiler had given Petitioner a "rare opportunity" and that he "probably would have kept you in").)

For these reasons, the Court recommends denying Petitioner's challenge to the BIA's conclusion that clear and convincing evidence supports his continued detention.

IV. CONCLUSION

The Court recommends that Petitioner's habeas petition be DENIED and that this action be DISMISSED with prejudice. A proposed order accompanies this Report and Recommendation.

Objections to this Report and Recommendation, if any, should be filed with the Clerk and served upon all parties to this suit within **fourteen (14) days** of the date on which this Report and Recommendation is signed. Failure to file objections within the specified time may affect your right to appeal. Objections should be noted for consideration on the District Judge's motions calendar for the third Friday after they are filed. Responses to objections may be filed within **fourteen (14)** days after service of objections. If no timely objections are filed, the matter will be ready for consideration by the District Judge on **11/20/2020.**

Dated this 6th day of November, 2020.

MICHELLE L. PETERSON
United States Magistrate Judge

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JAVIER MARTINEZ, *Petitioner-Appellant,* v. LOWELL CLARK, Warden, Northwest Detention Center; NATHALIE ASHER, Tacoma Field Office Director, United States Immigration and Customs Enforcement; ALEJANDRO MAYORKAS, Secretary, Department of Homeland Security; MERRICK B. GARLAND, Attorney General, *Respondents-Appellees.*	No. 21-35023 D.C. No. 2:20-cv-00780-TSZ ORDER

Filed May 30, 2023

Before: Jacqueline H. Nguyen, Eric D. Miller, and Patrick J. Bumatay, Circuit Judges.

Order;
Statement Respecting the Denial of Rehearing En Banc by Judge Berzon

SUMMARY*

Immigration/Habeas/Detention

The panel denied a petition for panel rehearing and denied on behalf of the court a petition for rehearing en banc in a case in which the panel held that federal courts lack jurisdiction to review the discretionary determination that a particular noncitizen in immigration detention poses a danger to the community and so is not entitled to release on bond.

Respecting the denial of rehearing en banc, Judge Berzon, joined by Chief Judge Murguia and Judges Wardlaw, W. Fletcher, Paez, Christen, Hurwitz, Koh, Sung, Mendoza, and Desai, disagreed with the Court's refusal to reconsider the panel opinion en banc.

Judge Berzon wrote that the panel's characterization of the dangerousness determination as discretionary conflicts with longstanding precedents from the criminal bail context holding that dangerousness determinations are mixed questions of law and fact, subject to independent review. Judge Berzon also wrote that the panel's ruling is at odds with Supreme Court guidance as to the sorts of determinations that constitute mixed questions rather than discretionary ones. Noting the critical importance of judicial review when liberty is at stake, Judge Berzon wrote that the panel's ruling grants the government unconstrained discretion to determine whether individuals in removal proceedings should be detained based on dangerousness, without judicial backstop.

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

ORDER

The panel has voted to deny the petition for panel rehearing. The full court was advised of the petition for rehearing en banc. A judge requested a vote on whether to rehear the matter en banc, and the matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc consideration. *See* Fed. R. App. P. 35(a).

The petition for panel rehearing and rehearing en banc is **DENIED**. An opinion respecting the denial of rehearing en banc, prepared by Judge Berzon, is filed concurrently with this order.

BERZON, Circuit Judge, with whom MURGUIA, Chief Judge, and WARDLAW, W. FLETCHER, PAEZ, CHRISTEN, HURWITZ, KOH, SUNG, MENDOZA, and DESAI, Circuit Judges, join, respecting the denial of rehearing en banc:

I respectfully disagree with this Court's refusal to reconsider the panel opinion en banc.

"Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action." *Foucha v. Louisiana,* 504 U.S. 71, 80 (1992). For that reason, the Supreme Court has required "strong procedural protections"—including judicial review—when upholding preventative detention based on dangerousness. *Zadvydas v. Davis*, 533 U.S. 678, 691–92 (2001). Yet the panel in this case held that federal courts lack jurisdiction to review the Board of Immigration Appeals' ("BIA") determination that a noncitizen poses a

danger to the community and so is not entitled to be released from immigration detention on bond. *See Martinez v. Clark*, 36 F.4th 1219, 1224 (9th Cir. 2022).

The panel concluded that a jurisdictional limitation in 8 U.S.C. § 1226(e), which applies to "the Attorney General's discretionary judgment regarding the application of this section," *id.*, precludes review of dangerousness. *Martinez*, 36 F.4th at 1224, 1228. The panel's characterization of the dangerousness determination as discretionary conflicts with longstanding precedents from the criminal bail context holding that dangerousness determinations are mixed questions of law and fact, subject to independent review. *See, e.g.*, *United States v. Howard*, 793 F.3d 1113, 1113 (9th Cir. 2015) (per curiam); *United States v. Motamedi*, 767 F.2d 1403, 1405–06 (9th Cir. 1985). And the panel's ruling is at odds with Supreme Court guidance as to the sorts of determinations that constitute mixed questions rather than discretionary ones. *See, e.g., Guerrero-Lasprilla v. Barr*, 140 S. Ct. 1062, 1069–70 (2020); *U.S. Bank Nat'l Ass'n v. Vill. at Lakeridge, LLC*, 138 S. Ct. 960, 967–68 (2018).

For these reasons, this Court should have reconsidered the panel opinion en banc.

I.

Under 8 U.S.C. § 1226, the government has authority to detain noncitizens present in the United States during the pendency of removal proceedings. For most noncitizens, the "default rule"—set forth in subsection (a) of 1226—is that the government has statutory authority to release them on bond. *See* 8 U.S.C. § 1226(a)(2); *Jennings v. Rodriguez*, 138 S. Ct. 830, 846 (2018). In such bond hearings, release turns on whether the noncitizen poses a danger to persons or property, a threat to national security, or a flight risk. *See*

Matter of Guerra, 24 I. & N. Dec. 37, 38 (BIA 2006) (citing *Matter of Adeniji*, 22 I. & N. Dec. 1102 (BIA 1999)); 8 C.F.R. § 1236.1(c)(8); *see also Singh v. Holder*, 638 F.3d 1196, 1206 (9th Cir. 2011).

Section 1226(c) departs from the default rule by specifying categories of noncitizens who, like Martinez, are subject to mandatory detention because of criminal offenses or terrorist activities. The government generally has no *statutory* authority to release noncitizens covered by section 1226(c). *See Jennings*, 138 S. Ct. at 846-47. But here, the district court held that because Martinez's mandatory detention was prolonged, "due process requires the government to show by clear and convincing evidence that the detainee presents a flight risk or a danger to the community." *Martinez v. Clark*, No. 18-CV-01669-RAJ, 2019 WL 5962685, at *1 (W.D. Wash. Nov. 13, 2019); *see also, e.g.*, *German Santos v. Warden Pike Cnty. Corr. Facility*, 965 F.3d 203, 210–11 (3d Cir. 2020) (holding that noncitizens subject to "unreasonably long" detention under section 1226(c) have a due process right to a bond hearing); *Reid v. Donelan*, 17 F.4th 1, 8 (1st Cir. 2021) (rejecting across-the-board rule that all section 1226(c) detainees have a constitutional right to a bond hearing once detained for longer than six months, but recognizing "the possibility that in most individual cases, detentions of six months (or of even less time) might necessitate some type of hearing to see if continued detention is reasonably necessary to serve the statute's purposes"). In Martinez's bond proceedings, the IJ and BIA denied him release, concluding based on his years-old drug convictions that—notwithstanding his subsequent good conduct—he is a danger to the community.

The panel in this case held that the district court lacked jurisdiction to review the dangerousness determination.

Martinez, 36 F.4th at 1228. In doing so, the panel invoked another subsection of 1226, subsection (e), which imposes limits on judicial review. Section 1226(e) provides:

> The Attorney General's discretionary judgment regarding the application of this section shall not be subject to review. No court may set aside any action or decision by the Attorney General under this section regarding the detention or release of any alien or the grant, revocation, or denial of bond or parole.

Section 1226(e) "applies only to 'discretionary' decisions about the 'application' of § 1226 to particular cases." *Nielsen v. Preap*, 139 S.Ct. 954, 962 (2019) (plurality opinion). It "does not limit habeas jurisdiction over constitutional claims or questions of law." *Singh*, 638 F.3d at 1202.

According to the panel, the dangerousness determination is unreviewable under section 1226(e) because the inquiry lacks any ascertainable legal standards, is "fact-intensive," "subjective[,] and value-laden," and is therefore "purely discretionary." *Martinez*, 36 F.4th at 1228–30 (internal quotations marks and citation omitted). This holding both mischaracterizes the nature of dangerousness determinations and misapplies the principles that govern which decisions involve discretionary questions as opposed to legal questions.

II.

The nature of the dangerousness determination here may seem like an esoteric jurisdictional question. But getting it right is of enormous practical importance to a great many individuals.

The panel assumed that a bond hearing required under the Due Process Clause for noncitizens detained under section 1226(c) is subject to the dangerousness standard applicable to statutory bond hearings for noncitizens detained under section 1226(a). *See Martinez*, 36 F.4th at 1226, 1228–29 (citing *Singh*, 638 F.3d at 1206, and *Guerra*, 24 I. & N. Dec. at 40). The panel's jurisdictional ruling thus precludes court review of dangerousness determinations for *all* noncitizens detained pending their removal proceedings under section 1226, not just noncitizens like Martinez who are subject under the statute to mandatory detention because of their criminal record.

Whether the government has unreviewable discretion to determine if a noncitizen should be detained as a danger to the community is a question of considerable constitutional significance. "Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that [the Due Process] Clause protects." *Zadvydas*, 533 U.S. at 690. Under the panel's ruling, the government could deem anyone dangerous and detain them for years while their removal case slowly works its way through the system; the constitutional protection of liberty would be eviscerated. But the Supreme Court has "upheld preventive detention based on dangerousness only when limited to specially dangerous individuals and subject to strong procedural protections." *Id*. at 691. Allowing noncitizens to be

detained for prolonged periods where "the sole procedural protections available . . . are found in administrative proceedings" would raise an "obvious" constitutional problem. *Id*. at 692. "[T]he Constitution may well preclude granting an administrative body the unreviewable authority to make determinations implicating fundamental rights." *Id*. (internal quotation marks and citation omitted).

Apart from the judicial review question, the panel's conclusion that dangerousness, and therefore release from immigration detention, "is a 'subjective question that depends on the identity and the value judgment of the person or entity examining the issue,'" *Martinez*, 36 F.4th at 1227 (citation omitted), is profoundly troubling from a constitutional perspective. In upholding the Bail Reform Act against a due process challenge, the Supreme Court emphasized that "[t]he judicial officer is not given unbridled discretion in making the detention determination." *United States v. Salerno*, 481 U.S. 739, 742, 751–52 (1987). The panel here, in contrast, concluded that essentially the same determination in the immigration context is wholly subjective at the agency level, as well as dependent on the identity and values of the decisionmaker—in other words, it is subject to "unbridled discretion." Were that true, there would almost surely be a due process violation. Conditioning release from detention entirely on the identity of the decisionmaker or the decisionmaker's personal tastes or feelings offends the central purpose of the Due Process Clause—protecting individuals from "arbitrary detention." *Rodriguez v. Marin*, 909 F.3d 252, 255, 257 (9th Cir. 2018) (citation omitted); *see also Foucha,* 504 U.S. at 80.

III.

We have recognized in the criminal bail context that the determination of dangerousness is governed by ascertainable standards, holding squarely that such a determination is a mixed question of law and fact subject to independent review. *See, e.g.*, *Howard*, 793 F.3d at 1113; *United States v. Hir*, 517 F.3d 1081, 1086–87 (9th Cir. 2008); *Motamedi*, 767 F.2d at 1405–06. The dangerousness determination in the immigration context is directly analogous. Yet the panel opinion does not mention the bail cases at all. That gap is telling. Had the panel acknowledged the bail precedents, it would have had to explain why the immigration bond determination regarding dangerousness lacks judicially cognizable legal standards and is therefore unreviewable, *Martinez*, 36 F.4th at 1228–29, when courts in the criminal bail context routinely review directly parallel determinations independently and have done so for decades.

1.

The Bail Reform Act provides for release of a criminal defendant pending trial "unless the judicial officer determines that such release will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community." 18 U.S.C. § 3142(b). We have long held that in considering a pre-trial release determination, the appellate court reviews "the district court's factual findings under a deferential, clearly erroneous standard," but

> the conclusion based on those factual findings presents a mixed question of fact and law. The inquiry transcends the facts presented and requires both the consideration

> of legal principles and the exercise of sound judgment about the values which underly those principles.

Motamedi, 767 F.2d at 1405, 1406; *United States v. Townsend*, 897 F.2d 989, 994 (9th Cir. 1990). "In light of the important constitutional dimensions involved" in applications for release from detention, the appellate court has "a nondelegable responsibility to make an independent determination of the merits of the application." *Motamedi*, 767 F.2d at 1405 (citation omitted). In particular, with respect to "the danger that [the detainee] poses to the community," the court's factual findings are reviewed for clear error, but "[t]he conclusions based on such factual findings . . . present a mixed question of fact and law." *Howard*, 793 F.3d at 1113; *see also Hir*, 517 F.3d at 1086.

The majority of circuits likewise independently review bail release determinations while deferring to the district court's findings of subsidiary facts. *See, e.g.*, *United States v. Portes*, 786 F.2d 758, 763 (7th Cir. 1985) (holding that determining whether a defendant "pose[s] a danger to the community . . . is a judgmental function [as to which] we . . . must engage in an 'independent review' of the case."); *United States v. Delker*, 757 F.2d 1390, 1399, 1400–01 (3d Cir. 1985) (independently reviewing dangerousness determination and stating that independent review is "appropriate in light of the nature of the question to be determined" because "[a] crucial liberty interest is at stake"); *United States v. Patriarca*, 948 F.2d 789, 791 (1st Cir. 1991) (independently reviewing denial of release based on dangerousness); *United States v. Stone*, 608 F.3d 939, 945 (6th Cir. 2010) (reviewing denial of release based on dangerousness after explaining that "[w]e review the district

court's factual findings for clear error, but we consider mixed questions of law and fact—including the ultimate question whether detention is warranted—de novo"); *United States v. Cisneros*, 328 F.3d 610, 613, 618–19 (10th Cir. 2003) (similar); *United States v. Quartermaine*, 913 F.2d 910, 915 (11th Cir. 1990) (similar); *United States v. Sazenski*, 806 F.2d 846, 847 (8th Cir. 1986) (similar).[1]

2.

The determination of whether a person will "endanger the safety of any other person or the community" in the bail context, 18 U.S.C. § 3142(b), is directly analogous to the dangerousness determination in the immigration context. The Supreme Court has long analogized immigration detention to criminal detention and immigration bond to criminal bail. *See, e.g.*, *Wong Wing v. United States,* 163 U.S. 228, 233, 235 (1896); *Zadvydas*, 533 U.S. at 690–92 (citing *Salerno*, 481 U.S. at 747, 750–52). The substantive standards for dangerousness in the two contexts are essentially the same, and the pertinent factual and equitable considerations are as well. In both settings, the decisionmaker considers whether the historical facts give rise to an inference that the applicant for release poses a danger to the community. *See*, *e.g., Motamedi,* 767 F.2d at 1407; *Singh*, 638 F.3d at 1206. Comparing the case law in both contexts demonstrates that the panel was wrong to

[1] A few circuits characterize dangerousness for bail purposes as a finding of fact subject to clear error review. *See United States v. Manafort*, 897 F.3d 340, 346 n.2 (D.C. Cir. 2018); *United States v. English*, 629 F.3d 311, 319 (2d Cir. 2011); *United States v. Clark*, 865 F.2d 1433, 1437 (4th Cir. 1989) (en banc). The Fifth Circuit applies a deferential standard of review similar to abuse-of-discretion. *See United States v. Moreno*, 857 F.3d 723, 725–26 (5th Cir. 2017).

conclude that there are no applicable "standards sufficient to permit meaningful judicial review" of the dangerousness determination for purposes of an immigration bond hearing. *See Martinez*, 36 F.4th at 1229 (citation omitted).

"The decision whether to admit a defendant to bail . . . must often turn on a judge's prediction of the defendant's future conduct." *Jurek v. Texas*, 428 U.S. 262, 275 (1976). To assess whether it is safe to release an individual for bail purposes, a district court takes into account multiple factors, including "the nature and circumstances of the offense charged," the "history and characteristics of the person," including "past conduct" and "criminal history," and "the nature and seriousness of the danger" posed by the individual. 18 U.S.C. § 3142(g). The district court typically looks to objective sources concerning the individual's history of violence: "prior convictions, police reports, and other investigatory documents" which "are, as a matter of course, used to show past histories of violence." *Motamedi,* 767 F.2d at 1407.

There is no question that there are legal standards applicable to such review. The Supreme Court has specifically so recognized, rejecting the notion that a requirement that a decisionmaker assess the likelihood that an individual "would constitute a continuing threat to society" relies on a standard that is "so vague as to be meaningless." *Jurek*, 428 U.S. at 272, 274. "[T]here is nothing inherently unattainable about a prediction of future criminal conduct." *Salerno*, 481 U.S. at 751 (quoting *Schall v. Martin*, 467 U.S. 253, 278 (1984)).

Dangerousness determinations in the immigration context are no less subject to meaningful legal standards sufficient to permit judicial review. Consistent with the

precedents from the bail context, we have explained that to determine dangerousness in section 1226(a) bond hearings, immigration judges must consider a person's "criminal record, including the extensiveness of criminal activity, the recency of such activity, and the seriousness of the offenses." *Singh*, 638 F.3d at 1206 (quoting *Guerra*, 24 I. & N. Dec. at 40). *Singh* further explained that "criminal history alone will not always be sufficient to justify denial of bond on the basis of dangerousness," because "the recency and severity of the offenses must [also] be considered." *Id.* In other words, just as in the bail context, the court considers objective evidence concerning the immigration detainee's past conduct and criminal history to make a prediction about likely future conduct. *See Motamedi,* 767 F.2d at 1407. As in bail cases, the essential question is whether the evidence "demonstrate[s] a propensity for future dangerousness." *Singh*, 638 F.3d at 1205.

The BIA's analysis in *Guerra* reinforces that, as in the bail context, sufficient legal standards *do* exist to permit meaningful review here. *Guerra* explained that other past conduct short of a criminal conviction is relevant to determining dangerousness:

> [A]lthough we recognize that the respondent has not been convicted of the offenses charged in the criminal complaint, we find that unfavorable evidence of his conduct, including evidence of criminal activity, is pertinent to the Immigration Judge's analysis regarding . . . danger to the community.

24 I. & N. Dec. at 41. Thus, IJs "are not limited to considering *only* criminal convictions in assessing whether

an alien is a danger to the community. Any evidence in the record that is probative and specific can be considered." *Id.* at 40–41. Applying these standards to the evidence in *Guerra*, the BIA affirmed the IJ's determination. *Id*. at 41. In other words, the BIA itself reviewed the IJ's dangerousness decision by applying legal standards to the objective facts. There is no reason why the same legal standards are sufficiently enunciated for BIA review of IJ decisions but not for court review of BIA decisions.

Nor is the BIA's own characterization of the bond determination as discretionary pertinent. *Guerra* reasoned that that provision "gives the Attorney General the authority to grant bond if he concludes, in the exercise of discretion, that the alien's release on bond is warranted." 24 I. & N. Dec. at 39. But the agency's own characterization of the nature of the decision – as opposed to its description of the substance of the standard – is not controlling for purposes of deciding a federal court's jurisdiction. Otherwise "the Executive would have a free hand to shelter its own decisions from abuse-of-discretion appellate court review simply by issuing a regulation declaring those decisions 'discretionary.'" *Kucana v. Holder*, 558 U.S. 233, 252 (2010).

IV.

As the panel acknowledged, the jurisdictional prohibition in section "1226(e) does not limit habeas jurisdiction over 'constitutional claims or questions of law.'" *Martinez*, 36 F.4th at 1227; *see also Singh*, 638 F.3d at 1202. In concluding that "danger to the community" is a purely discretionary determination and so not a question of law, the panel reasoned that the determination requires a "fact-intensive," "multi-factorial analysis with no clear, uniform

standard for what crosses the line into dangerousness." *Martinez*, 36 F.4th at 1228–29. This test for identifying an unreviewable discretionary judgment is fundamentally flawed. Nearly every consideration the panel identified to support the conclusion that the dangerousness determination is discretionary is also applicable to legal questions involving the application of law to fact, as the Supreme Court and our court have recognized.

Recent Supreme Court precedent reflects that many legal questions involving the application of law to fact, often called "mixed questions," are fact-intensive, subject to a "broad . . . standard," and require balancing multiple facts or considerations. *See U.S. Bank Nat'l Ass'n*, 138 S. Ct. at 967–68; *see also Guerrero-Lasprilla*, 140 S. Ct. at 1069. The Court has also recognized that the application of law to fact entails consideration of competing values. *See Miller v. Fenton*, 474 U.S. 104, 115–16 (1985). So, contrary to the analysis of the panel in this case, the characteristics relied upon by the panel cannot serve as litmus tests for discretionary decisions.

U.S. Bank National Ass'n and *Guerrero-Lasprilla* refute the panel's conclusion that an inquiry must be discretionary if it is fact-intensive. As *Guerrero-Lasprilla* recognized, some mixed questions of law and fact "immerse[] courts in case-specific factual issues." 140 S. Ct. at 1069 (citation omitted). The mixed question in *U.S. Bank National Ass'n* was "fact-intensive" and required "[p]recious little" legal work. 138 S. Ct. at 968. Some mixed questions may "compel[] [courts] to marshal and weigh evidence, make credibility judgments, and otherwise address . . . 'multifarious, fleeting, special, narrow facts that utterly resist generalization.'" *Id.* at 967 (quoting *Pierce v. Underwood*, 487 U.S. 552, 561-562 (1988)). And mixed

questions in the constitutional context may "primarily involve[] plunging into a factual record." *Id.* at 967 n.4.

Also, mixed questions of law and fact can entail balancing multiple facts or weighing competing concerns. *U.S Bank National Ass'n* explained that a mixed question may require a court to "weigh evidence" and "balance [the facts] one against another." 138 S. Ct. at 967–68. *Guerrero-Lasprilla* held that the fundamentally equitable question whether an individual acted with due diligence for purposes of equitable tolling is a question of law involving a mixed question of law and fact. *See* 140 S. Ct. at 1068.

Mixed questions of law and fact may also entail consideration of underlying values. For example, *Miller* held that "the ultimate issue of 'voluntariness'" of a confession, for purposes of determining whether it was obtained in violation of due process, "is a legal question requiring independent federal determination," 474 U.S. at 110, even though the voluntariness inquiry "subsum[es] . . . a 'complex of values,'" *id.* at 116 (citation omitted). *See also*, *e.g. United States v. McConney*, 728 F.2d 1195, 1202, 1204–05 (9th Cir. 1984) (en banc) (recognizing that the application of law to undisputed fact can require the court "to exercise judgment about the values that animate legal principles" and "balance competing legal interests").

Nor does the absence of a legal standard that mandates a "certain" outcome, *Martinez*, 36 F.4th at 1229, render an issue discretionary. It is commonplace for legal standards to "be given concrete meaning through a process of case-by-case adjudication." *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 448 (1987). Some mixed questions "require courts to expound on the law, particularly by amplifying or

elaborating on a broad legal standard." *U.S. Bank Nat'l Ass'n*, 138 S. Ct. at 967.

Legal inquiries involving the weighing of multiple factors, without a standard that *mandates* a particular result, are legion. Take, for example, the familiar question whether a police officer's use of force was excessive under the Fourth Amendment—a question that is determined under the multi-part balancing test of *Graham v. Connor*, 490 U.S. 386, 396–97 (1989). *See, e.g.*, *Glenn v. Washington Cnty.*, 673 F.3d 864, 871 (9th Cir. 2011). There is no legal standard in excessive force cases that mandates a particular outcome in all instances. But the Supreme Court has held that once the facts have been established, whether the totality of the circumstances "warrant[s] deadly force . . . is a [] question of law." *Scott v. Harris*, 550 U.S. 372, 381 n.8 (2007) (citation omitted); *see also, e.g.*, *United States v. Phelps*, 955 F.2d 1258, 1265–66 (9th Cir. 1992) (explaining that the process due under the three-part balancing test of *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), is a "question of law"); *Moser v. Las Vegas Metro. Police Dep't*, 984 F.3d 900, 905 (9th Cir. 2021) (explaining that the multi-part First Amendment "*Pickering* balancing test presents a question of law"); *Alpha Indus., Inc. v. Alpha Steel Tube & Shapes, Inc.*, 616 F.2d 440, 443-44 (9th Cir. 1980) (explaining that under the multi-factor *AMF Inc. v. Sleekcraft Boats*, 599 F.2d 341 (9th Cir. 1979), test for trademark confusion, the "determination of likelihood of confusion based on th[e] factors is a legal conclusion"). The bottom line is that multi-factor standards that require weighing competing interests are commonly understood to constitute legal standards, not to constitute subjective, purely discretionary, unreviewable decisionmaking.

* * * *

Judicial review is of critical importance when liberty is at stake. *See Zadvydas*, 533 U.S. at 692; *Motamedi*, 767 F.2d at 1405. And that's precisely what's on the line here: the dangerousness determination at issue can often make the difference between years in detention awaiting a final removal decision and liberty during that period. The "prediction of future criminal conduct is an essential element in many of the decisions rendered throughout our" system of justice, and so it is a "task performed countless times each day throughout the American system of criminal justice." *Jurek*, 428 U.S. at 275-76. In our Circuit as well as others, that determination is subject to independent judicial review for criminal bail purposes. *See supra*, Part III.1. Yet the panel's decision concludes that for immigration detainees, there are no cognizable legal standards that would permit judicial review of the analogous determination in bond cases. In so doing, the panel grants the government unconstrained discretion to determine whether individuals in civil removal proceedings should be detained based on dangerousness, without judicial backstop.

I seriously disagree with this Court's decision to deny rehearing en banc. Should the issue arise again once the case law on the implications of *U.S. Bank National Ass'n* and *Guerrero-Lasprilla* is better developed, I hope the issue will be revisited.

U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Name: MARTINEZ, JAVIER

A 040-200-753

Date of this notice: 5/14/2020

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

Donna Carr

Donna Carr
Chief Clerk

Enclosure

Panel Members:
Gemoets, Marcos

Userteam: Docket

File: A040-200-753 – Tacoma, WA

Date: MAY 14 2020

In re: Javier MARTINEZ

IN BOND PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Robert Pauw, Esquire

APPLICATION: Redetermination of custody status

The respondent, a native of Costa Rica and citizen of Nicaragua, appeals the Immigration Judge's November 26, 2019, decision denying his request for a change in custody status. A bond memorandum dated January 10, 2020, sets forth the basis for the Immigration Judge's decision. The Department of Homeland Security ("DHS") has not responded to the appeal. The appeal will be dismissed.

We review the findings of fact, including the determination of credibility, made by the Immigration Judge under the "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i). We review all other issues, including issues of law, discretion, or judgment, under a de novo standard. 8 C.F.R. § 1003.1(d)(3)(ii).

The Immigration Judge held a bond hearing in this case pursuant to an October 30, 2019, order from the U.S. District Court for the Western District of Washington (Exh. B-4). The District Court ordered that the respondent be provided a bond hearing where the DHS bears the burden to establish by clear and convincing evidence that the respondent is a danger to the community or a flight risk (Exh. B-4 at 3; Exh. B-3 at 24, 26). At the November 26, 2019, bond hearing, the Immigration Judge concluded that the DHS had satisfied its burden of proving by clear and convincing evidence that the respondent is a danger to the community and a flight risk. The Immigration Judge denied the respondent's request for bond.

We agree with the Immigration Judge that the DHS satisfied its burden of proving by clear and convincing evidence that the respondent is a danger to the community (IJ at 4-5). The DHS submitted evidence indicating that the respondent was convicted in 2000 and 2013 of conspiracy to distribute cocaine (Exh. B-1 at 35, 67). As the Immigration Judge noted, we have long acknowledged the dangers associated with the sale and distribution of drugs (IJ at 5). *Matter of Guerra*, 24 I&N Dec. 37, 41 (BIA 2006); *see Matter of Y-L-, A-G-, & R-S-R-*, 23 I&N Dec. 270, 275 (A.G. 2002) (holding that drug trafficking is inherently a particularly serious crime because of its harmful effect on society and the crime and violence that often accompany it); *Matter of Melo*, 21 I&N Dec. 883, 886 (BIA 1997) ("The scourge on society of illegal drug trafficking and the associated criminal activity it generates is at this point beyond dispute."). The respondent's repeated drug trafficking offenses provide strong evidence that the respondent is a danger to the community.

In support of his request for bond, the respondent has submitted evidence that he has made efforts to rehabilitate himself since his 2013 conviction. Notably, the respondent attended counseling and remained sober while his criminal proceedings were pending, obtained his G.E.D. while in prison, and completed several educational programs in prison, including drug abuse programs (Exh. B-2 at 35, 45, 52-56). While these efforts, as well as the 7 years that have elapsed since the respondent's last conviction, provide some evidence of rehabilitation, they are insufficient to overcome the strong evidence of dangerousness. That the respondent has been well-behaved during the approximately 7 years he has been detained in either prison or DHS custody does not indicate that he will not revert to his old habits of drug use and trafficking upon his release, particularly given the respondent's claim that he maintained his sobriety for some period of time following his first conviction but ultimately started using and selling cocaine once again (Exh. B-2 at 35).

Contrary to the respondent's argument on appeal, the Court of Appeals for the Ninth Circuit has not held that a prior criminal history alone is never sufficient to support a dangerousness finding (Respondent's Br. at 10-11). Rather, the Ninth Circuit noted that the mere existence of a criminal history is not necessarily sufficient to support a finding that the respondent is a danger to the community; the seriousness of the offenses, their recency, and any evidence of rehabilitation must be taken into account. *See Singh v. Holder*, 638 F.3d 1196, 1206 (9th Cir. 2011). Having considered the totality of the evidence in this case, we agree with the Immigration Judge that despite the respondent's rehabilitation efforts, the serious nature of his convictions and his history of reoffending, even after several years of claimed sobriety, renders the respondent a danger to the community (IJ at 4-5).

The respondent argues that we are collaterally estopped from concluding that he is a danger to the community because the District Court judge in his 2013 criminal proceedings released him on his own recognizance while his case was pending and allowed him to self-report for his 60 month sentence (Exh. B-2 at 32-34, 46; Respondent's Br. at 2-3). Collateral estoppel applies only when both the issues and the parties to the proceedings are the same. *See Matter of Fedorenko*, 19 I&N Dec. 57, 61 (BIA 1984); *see also Clark v. Bear Stearns & Co., Inc.*, 966 F.2d 1318, 1320 (9th Cir. 1992) ("Collateral estoppel, or issue preclusion, bars the relitigation of issues actually adjudicated in previous litigation between the same parties."). As the respondent's criminal proceedings did not involve the same parties as his removal proceedings, collateral estoppel is inapplicable.

Because the DHS has satisfied its burden of proving by clear and convincing evidence that the respondent is a danger to the community, he is ineligible for release on bond. *See Matter of Urena*, 25 I&N Dec. 140, 141 (BIA 2009). We need not address the respondent's arguments that he does not pose a flight risk. Accordingly, the following order will be entered.

ORDER: The respondent's bond appeal is dismissed.

FOR THE BOARD

EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
NORTHWEST DETENTION CENTER
IMMIGRATION COURT
TACOMA, WASHINGTON

In the Matter of:	
Javier Martinez,	File Number A040 200 753
Respondent	In Bond Proceedings

Application: Bond Re-determination

On Behalf of the Respondent
Robert Pauw, Esq.
1000 Second Ave., Suite 1600
Seattle, Washington 98104

On Behalf of DHS
Thomas P. Molloy, Esq.
Assistant Chief Counsel
Department of Homeland Security
Immigration and Customs Enforcement
1623 East J Street, Suite 2
Tacoma, Washington 98421

Memorandum of the Immigration Judge

On November 26, 2019, the court held a bond hearing and denied Respondent's request for bond, finding that the Department of Homeland Security (DHS) had met its burden of establishing by clear and convincing evidence that Respondent is both a danger to the community and a flight risk. Respondent was represented by counsel at this hearing. Respondent has been in DHS custody since April 26, 2018. Bond Exh. B-1 at 31.

Respondent is a 39-year-old native of Costa Rica and a citizen of Nicaragua. Bond Exh. B-1 at 1, 31. Respondent was previously in removal proceedings in 2002. *Id.* at 8. He was ordered removed and granted withholding of removal under INA § 241(b)(3). *Id.* After Respondent's federal conviction for drug trafficking in 2013, DHS moved to reopen Respondent's prior removal

proceedings and terminate Respondent's prior grant of withholding of removal. *Id.* On January 10, 2018, the immigration court reopened Respondent's removal proceedings. *Id.* On March 8, 2019, the immigration judge denied all of Respondent's applications for relief from removal and ordered Respondent removed to Nicaragua (and Costa Rica, in the alternative). *Id.* at 30. On August 27, 2019, the Board of Immigration Appeals dismissed Respondent's appeal of that removal order. *Id.* at 3. Respondent has subsequently filed a petition for review with the Ninth Circuit Court of Appeals and has also received an automatic stay of removal. Respondent's petition for review remains pending.

On October 30, 2019, in a separate habeas action brought in the District Court for the Western District of Washington, the District Court ordered that Respondent receive a bond hearing before an immigration judge and that the burden be placed on DHS to establish that Respondent is a danger to the community or a flight risk. Case No. 18-CV-01669-RAJ (WAWD)(October 30, 2019)(Order Implementing Report and Recommendation). The procedural protections established by *Singh v. Holder*, 638 F.3d 1196, 1208 (9th Cir. 2011) were also provided to Respondent.

The Board of Immigration Appeals stated there is no limitation on the discretionary factors that an Immigration Judge may consider when ruling on custody and bond issues. *See Matter of Guerra*, 24 I&N Dec. 37, 40 (BIA 2006). An immigration judge may consider various factors when setting bond such as: the respondent's immigration history, criminal record, family ties in the United States, employment history, and length of time in the United States. *Id.* at 39; *see also Matter of Andrade*, 19 I&N Dec. 488, 489-90 (BIA 1987) (listing factors, including whether the alien has potential relief from removal, for consideration in a bond hearing). The Court should also consider Respondent's ability to pay a bond. *Hernandez v. Sessions*, 872 F.3d 976, 1000 (9th Cir.

2017). If the court determines that the respondent is not a danger to the community, the court should then assess the respondent's potential risk of flight. *Id.*

In this case, the Department of Homeland Security (DHS) filed an evidence package containing the Record of Inadmissible/Deportable Alien, Form I-213, criminal conviction records, the immigration judge's order of removal, and the Board of Immigration Appeals decision dismissing Respondent's appeal. Bond Exh. B-1. These reports indicate that Respondent has two separate drug trafficking convictions in federal court. *Id.* at 35. On August 18, 2000, Respondent was convicted in federal court for conspiracy to distribute cocaine and he was sentenced to serve 20 months in prison. *Id.* On October 10, 2013, Respondent was again convicted in federal court for conspiracy to distribute cocaine. *Id.* His sentence for the second drug trafficking conviction was 60 months in prison. *Id.* at 67. After serving his sentence for his second drug trafficking conviction, Respondent was taken into DHS custody. *Id.* at 31.

At his bond hearing, Respondent's counsel proffered that Respondent first entered the United States in 1987 as a lawful permanent resident and he has never been removed. Respondent has one United States citizen daughter in Seattle, Washington. Respondent had several family members, friends, and members of community present at his bond hearing to support him. Respondent claims that he was the victim of severe child abuse when he was a child and he has applied for a U-visa in June 2019. That application is pending before DHS. Respondent claims he was abandoned by his parents at age 11 and that he was raised by a family that was involved in drug trafficking. According to Respondent, the family used Respondent as a drug runner and they got him addicted to cocaine at age 11 or 12. He requires treatment for this addiction. When Respondent was arrested for his 2013 drug trafficking case in 2013, he was released by a federal magistrate on a personal recognizance bond. *See* Bond Exh. B-2 at 34. For 9 or 10 months while

ha awaited trial, he made all of his court appearances and had no violations of his release order. He also had no positive drug tests and complied with his drug treatment program. Respondent appeared at his sentencing hearing and he and was sentenced to 60 months in prison, which was the mandatory minimum sentence in his case. The district court judge in his drug trafficking case allowed Respondent to self-report to federal prison to serve his sentence and Respondent did, in fact, self-report. While in prison, Respondent was well-behaved and he obtained his GED. Respondent also completed a number of rehabilitative and vocational classes.

Respondent filed an evidence package in support of his request for bond. Bond Exh. B-2. This evidence included (1) letters of support from friends and family; (2) Respondent's daughter's birth records; (3) a receipt notice for Respondent's U-visa; (4) a copy of Respondent's personal recognizance appearance bond from federal court; (5) Respondent's letter to the federal judge in his drug trafficking case; (6) a transcript of Respondent's sentencing hearing in federal court; (7) records of Respondent's treatment and class completions in federal prison; and (8) Respondent's high school equivalency diploma. *Id.*

Respondent has significant equities in the United States. He has close family ties, a work and educational history, a lengthy period of residence in the United States, and strong community support. Respondent also has a drug addiction and requires ongoing treatment. He has made efforts to rehabilitate himself while in prison since 2013. He has also applied for a U-visa. Respondent was praised by the district court judge at his sentencing hearing in 2013 because Respondent behaved himself and appeared for his hearings while he was awaiting the resolution of his criminal drug trafficking trial. Respondent also self-reported to serve his 60-month prison sentence. Nevertheless, Respondent has twice been convicted of drug-trafficking in the United States and has been sentenced to serve a total of 80 months in prison since 2000. Respondent

conspired to distribute cocaine in the community where he lived. This court is well aware of the dangers associated with dangerous and addictive drugs such as cocaine. Likewise, the Board of Immigration Appeals has long recognized the dangers associated with the sale and distribution of drugs. *See Matter of Melo*, 21 I&N Dec. 883, 886 (BIA 1997) (noting that the scourge on society of illegal drug trafficking and the associated criminal activity it generates is, at this point, beyond dispute); *see also*, *Mahini v. I.N.S.*, 779 F.2d 1419, 1421 (9th Cir. 1986) ("the Board has continually found convictions for drug possession and trafficking to be particularly serious, and the offenders a danger to the community"). Like the federal district court judge, this court also finds it significant that Respondent was twice convicted of federal drug trafficking crimes prior to his 33rd birthday. *See* Bond Exh. B-2 at 44 ("I don't see a lot of people who come back through the system at your age of 32 … who have had two trips through U.S. District Court, even spaced as far apart as yours are, both for serious drug offenses. We don't do chippy drug offenses in federal court."). The court does not find that Respondent's danger to the community as a repeat drug-trafficker is sufficiently mitigated by his good behavior while he was awaiting sentence and while he was in federal prison.

At this stage of Respondent's removal process, his forms of relief from removal are extremely limited. He has made his case to the immigration judge and the Board of immigration appeals and they have determined that he should be removed from the United States. His chances of success at the Circuit Court are speculative at this point. This is also true of his U-visa application. The court recognizes that Respondent appeared in court in his criminal case and also self-reported for sentencing. Nevertheless, Respondent faces different, and perhaps more significant, circumstances in his future now that DHS is working to remove him permanently from the United States. This is especially true now that he has an administratively final order of

removal. Respondent has very little incentive to return to court or to present himself for removal from the United States if his petition for review and U-visa application are unsuccessful. In this court's view, Respondent is an extremely poor bail risk.

For the forgoing reasons, the court finds that DHS has met its burden to show by clear and convincing evidence that Respondent is a danger to the community and a flight risk. The court therefore denies Respondent's request for bond and the court finds that conditional parole is not appropriate in this case.

ORDER

The Respondent's motion for a custody re-determination is denied. The Respondent shall be held without bond.

Dated: 1/10/2020

John C. Odell
Immigration Judge

HONORABLE RICHARD A. JONES

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JAVIER MARTINEZ

Petitioner,

v.

LOWELL CLARK, *et al*.,

Respondents.

Case No. 18-cv-01669-RAJ

ORDER ADOPTING REPORT AND RECOMMENDATION

I. INTRODUCTION

Before the Court is Respondents' Objections to the May 23, 2019 Report and Recommendation of the Honorable Mary Alice Theiler and his Motion to Appoint Counsel. Dkt. # 18. For the reasons below, and having considered Respondents' objections, the Court **ADOPTS** the Report and Recommendation.

II. DISCUSSION

Petitioner, who is currently detained at the Northwest Detention Center in Tacoma, Washington, bring a 28 U.S.C. § 2241 immigration habeas action through counsel. He contends that his prolonged mandatory detention without a bond hearing violates the Fifth and Eighth Amendments. Dkt. # 1. He seeks immediate release or, in the alternative, a bond hearing before an immigration judge. *Id.* Petitioner also filed a motion for a temporary restraining order seeking immediate release pending resolution of the lawsuit or, in the alternative, expedited review of this action. Dkt. # 4. The Government moved

to dismiss and opposed petitioner's motion for preliminary injunction. Dkt. # 7. Magistrate Judge Theiler recommended that Petitioner's habeas petition and the Government's motion to dismiss both be granted in part and denied in part. Dkt. # 17. Specifically, Magistrate Judge Theiler found that Government should be ordered to provide petitioner with an appropriate bond hearing because his current prolonged detention violates the Due Process Clause, but his other claims and requests for relief should be denied. *Id.* The Court also recommends that petitioner's motion for a preliminary injunction be denied as moot. *Id.*

The Government makes three arguments in its opposition to the Report and Recommendation. Dkt. # 18. The Government argues that: (1) the statute, 8 U.S.C. §1226(c), does not provide for a bond hearing; (2) assuming that due process requires a bond hearing after prolonged detention, only one factor should be considered in determining whether detention has become prolonged, *i.e.*, whether the Government has unreasonably delayed the removal proceedings; (3) if detention becomes unreasonably prolonged and a bond hearing is required, the Government should not have the burden of proving by clear and convincing evidence justification for further detention. *Id.*

Having considered the Government's objections, the Court **ADOPTS** the Report and Recommendation. First, despite the statutory language of 8 U.S.C. §1226(c), the Ninth Circuit offers "grave doubts that any statute that allows for arbitrary prolonged detention without any process is constitutional . . . ." *Rodriguez v. Marin ("Rodriguez IV")*, 909 F.3d 252, 256 (9th Cir. 2018). And as Magistrate Theiler observed, essentially all district courts that have considered the issue agree that prolonged mandatory detention pending removal proceedings, without a bond hearing, "will—at some point—violate the right to due process." Dkt. # 17 at 13 (quoting *Sajous v. Decker*, No. 18-2447, 2018 WL 2357266, at *8 (S.D.N.Y. May 23, 2018)). Second, the multi-factored test adopted by Magistrate Judge Theiler has been relied upon by many courts to determine whether a § 1226(c) detention has become unreasonable. Third, the Government's contention that it should not have the burden of proving by clear and convincing evidence justification for further

detention is without merit. Ninth Circuit jurisprudence holds that to detain a noncitizen for a prolonged period of time while removal proceedings are pending, due process requires the government to show by clear and convincing evidence that the detainee presents a flight risk or a danger to the community at the time of the bond hearing. *Singh v. Holder*, 638 F.3d 1196, 1208 (9th Cir. 2011); *Calderon-Rodriguez v. Wilcox*, 374 F.Supp.3d 1024, 1032-33 (9th Cir. 2019).

III. CONCLUSION

For the reasons above, and having considered Respondents' objections, the Court **ADOPTS** the May 23, 2019 Report and Recommendation of the Honorable Mary Alice Theiler.

DATED this 30th day of October, 2019.

The Honorable Richard A. Jones
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JAVIER MARTINEZ,

Petitioner,

v.

LOWELL CLARK, et al.,

Respondents.

Case No. C18-1669-RAJ-MAT

REPORT AND RECOMMENDATION

I. INTRODUCTION

Petitioner, who is currently detained at the Northwest Detention Center in Tacoma, Washington, bring this 28 U.S.C. § 2241 immigration habeas action through counsel. He contends that his prolonged mandatory detention without a bond hearing violates the Fifth and Eighth Amendments. (Dkt. 1 at 7.) He seeks immediate release or, in the alternative, a bond hearing before an immigration judge. (*Id.*) Petitioner also filed a motion for a temporary restraining order seeking immediate release pending resolution of the lawsuit or, in the alternative, expedited review of this action. (Dkt. 4.) The Court found that petitioner's motion for a temporary restraining order did not meet the immediate and irreparable injury standard of Federal Rule of Civil Procedure 65(b), and therefore construed the motion as one for preliminary

injunction. (Dkt. 5 at 2.) The Court ordered the Government to respond to the motion for preliminary injunction at the same time it responded to the habeas petition. (*See id.*)

The Government has moved to dismiss and opposed petitioner's motion for preliminary injunction. (Dkt. 7.) The Government argues that petitioner's continued detention does not violate Due Process or the Eighth Amendment and that he cannot meet the standards for preliminary injunctive relief. (*See id.*) After the Government's motion was fully briefed, the Court ordered supplemental briefing. (Dkt. 11.) The parties have submitted their supplemental briefs and the matter is now ripe for review.

Having considered the parties' submissions, the balance of the record, and the governing law, the Court recommends that both petitioner's habeas petition and the Government's motion to dismiss be granted in part and denied in part. Specifically, the Government should be ordered to provide petitioner with an appropriate bond hearing because his current prolonged detention violates the Due Process Clause, but his other claims and requests for relief should be denied. The Court also recommends that petitioner's motion for a preliminary injunction be denied as moot.

II. BACKGROUND

Petitioner is a native of Costa Rica and a citizen of Nicaragua who initially entered the United States in September 1987 as a conditional resident. (Dkt. 8-1 at 2.) Petitioner became a Lawful Permanent Resident in May 1990. (Dkt. 8-2 at 2.) In August 2000, petitioner pleaded guilty to an aggravated felony, and the court sentenced him to 20 months in prison and five years of supervised release. (Dkt. 8-3.)

In April 2001, the Department of Homeland Security ("DHS") commenced removal proceedings based on his felony conviction. (*See* Dkt. 8-1.) On September 11, 2002, the IJ

granted petitioner's application for withholding of removal but did not enter an order of removal.[1] (Dkt. 8-8.)

In August 2013, petitioner again pleaded guilty to an aggravated felony and the court sentenced him to 60 months in prison and four years of supervised release. (Dkts. 8-10, 8-11.) While his criminal case was pending, he was released on his personal recognizance until he was required to surrender to serve his sentence at the Federal Detention Center in Victorville, California. (Dkt. 1 at ¶¶ 17-22.) In January 2018, prior to petitioner's release from prison, the IJ granted DHS's motion to reopen his removal proceedings. (Dkt. 8-12.)

On April 26, 2018, the Bureau of Prisons released petitioner into DHS custody. (Dkt. 8-13.) DHS served petitioner with a Notice to Appear for removal proceedings based on his 2013 conviction. (Dkt. 8-14.) DHS determined to hold petitioner without bond. (Dkt. 8-15.) At a bond hearing on October 30, 2018, approximately six months after entering DHS custody, the IJ found that he did not have jurisdiction to grant petitioner a bond because petitioner was subject to mandatory detention under 8 U.S.C. § 1226(c). (Dkt. 8-16.) Petitioner did not appeal this decision.

Petitioner initiated this action on November 19, 2018, alleging violations of his Fifth and Eighth Amendment rights and seeking immediate release or, alternatively, a bond hearing before an IJ. (Dkt. 1.) As noted above, petitioner also filed a motion for a temporary restraining order seeking his immediate release from custody pending resolution of his habeas petition. (Dkt. 4.) The Court found that he failed to meet the standard for an ex parte temporary restraining order and construed his motion as one for preliminary injunction. (Dkt. 5 at 3.) The Court set the

[1] In *Matter of I-S- & C-S-*, 24 I. & N. Dec. 432 (BIA 2008), the Board of Immigration Appeals ("BIA") clarified that entry of an order of removal must precede or be included in the withholding decision. Prior to this decision, it was not uncommon for IJs to enter withholding orders without removal orders.

motion for preliminary injunction for consideration on the same schedule as the habeas petition and ordered the Government to file a habeas return. (*Id.*) The Government timely filed a motion to dismiss (Dkt. 7), and after the motion was fully briefed (Dkts. 9, 10), the Court ordered supplemental briefing regarding the appropriate legal standard for petitioner's due process claim (Dkt. 11; *see also* Dkts. 13-15).

On March 8, 2019, before briefing in this action was completed, an IJ denied petitioner's applications for relief from removal and ordered him removed to Nicaragua or, alternatively, Costa Rica. (Dkt. 14-1 at 4-26.) Petitioner timely appealed this decision to the BIA, and his appeal remains pending. (*See id.* at 32-36.)

III. DISCUSSION

The instant habeas petition challenges the constitutionality of petitioner's mandatory detention under the Fifth Amendment's Due Process Clause and the Eighth Amendment's Excessive Bail Clause. The Court begins by explaining the statutory framework for immigration detention and federal courts' interpretation of those statutes, and then turns to the merits of petitioner's Fifth Amendment claim. Finally, the Court addresses the Eighth Amendment claim. As discussed below, the Court concludes that petitioner's continued mandatory detention violates the Fifth Amendment and that he is entitled to a bond hearing; he is not, however, entitled to release or relief under the Eighth Amendment.[2]

A. Statutory framework for immigration detention

Three statutes govern immigration detention. *See* 8 U.S.C. §§ 1225, 1226, 1231. Although only one applies to petitioner, § 1226(c), the Court briefly discusses each to provide context for the discussion below regarding petitioner's due process rights.

[2] The Government also argued that this action should be dismissed for failure to exhaust administrative remedies (Dkt. 7 at 8-9) but later withdrew this argument (Dkt. 10 at 5 n.2.)

Section 1225 applies to "applicants for admission"—noncitizens who "arrive[] in the United States," or are "present" in the United States but have "not been admitted." 8 U.S.C. § 1225(a)(1).[3] There are two categories of applicants for admission, those who fall under § 1225(b)(1) and those who fall under § 1225(b)(2). Section 1225(b)(1) applies to, among others, noncitizens initially determined to be inadmissible because of fraud, misrepresentation, or lack of valid documentation. *See Jennings v. Rodriguez*, 138 S. Ct. 803, 837 (2018) (citing § 1225(b)(1)(A)(i)). Section 1225(b)(2) is broader and "serves as a catchall provision that applies to [essentially] all applications for admission not covered by § 1226(b)(1) . . . ." *Id.* Normally, noncitizens covered by § 1225(b)(1) are subject to an expedited removal process that does not include a hearing before an IJ or review of the removal order. 8 U.S.C. § 1225(b)(1)(A)(i). If, however, a § 1225(b)(1) noncitizen "indicates either an intention to apply for asylum . . . or a fear of persecution," the inspecting immigration officer must refer the noncitizen for an interview with an asylum officer. 8 U.S.C. § 1225(b)(1)(A)(ii); 8 C.F.R. § 208.30(d). If the asylum officer determines that the noncitizen has a credible fear of persecution, the noncitizen "shall be detained for further consideration of the application for asylum." 8 U.S.C. § 1225(b)(1)(B)(ii). Under the statute, the only opportunity for a noncitizen to be released pending a decision on the asylum application is temporary parole "for urgent humanitarian reasons or significant public benefit." 8 U.S.C. § 1182(d)(5)(A); *see also* 8 C.F.R. §§ 212.5(b), 235.3. The statute does not impose "any limit on the length of detention" pending a decision on the asylum application and does not authorize bond hearings or release on bond. *Jennings*, 138 S. Ct. at 842-45. By contrast, noncitizens detained under § 1225(b)(2) are detained for removal proceedings if an

[3] Applicants for admission are also referred to as "arriving" noncitizens. 8 C.F.R. § 1001.1 ("Arriving [noncitizen] means an applicant for admission coming or attempting to come into the United States at a port-of-entry, or [a noncitizen] seeking transit through the United States at a port-of-entry[.]").

immigration officer "determines that [they are] not clearly and beyond a doubt entitled to be admitted" to the United States. 8 U.S.C. § 1225(b)(2)(A). The statute mandates detention until removal proceedings are completed. *Jennings*, 138 S. Ct. at 842, 845.

Section 1226 provides the framework for the arrest, detention, and release of noncitizens who are in removal proceedings. Section 1226(a) grants DHS the discretionary authority to determine whether a noncitizen should be detained, released on bond, or released on conditional parole pending the completion of removal proceedings, unless the noncitizen falls within one of the categories of criminals described in § 1226(c), for whom detention is mandatory until removal proceedings have concluded.[4] 8 U.S.C. § 1226; *Jennings*, 138 S. Ct. at 846-48. The parties do not dispute that petitioner is detained pursuant to § 1226(c).

When a noncitizen is arrested and taken into immigration custody pursuant to § 1226(a), ICE makes an initial custody determination, including the setting of bond. *See* 8 C.F.R. § 236.1(c)(8). After the initial custody determination, the detainee may request a bond redetermination by an IJ.[5] 8 C.F.R. § 236.1(d)(1). Once an IJ has made an initial bond redetermination, a detainee's request for a subsequent bond redetermination must be made in writing and must show that the detainee's circumstances have changed materially since the prior bond redetermination. 8 C.F.R. § 1003.19(e).

Section 1231 governs the detention and release of noncitizens who have been ordered removed. During the "removal period," which typically lasts 90 days, detention is mandatory. 8

[4] Although the relevant statutory sections refer to the Attorney General, the Homeland Security Act of 2002, Pub. L. No. 107-296 § 471, 116 Stat. 2135 (2002), transferred most immigration law enforcement functions from the Department of Justice ("DOJ") to DHS, while the DOJ's Executive Office for Immigration Review retained its role in administering immigration courts and the BIA. *See Hernandez v. Ashcroft*, 345 F.3d 824, 828 n.2 (9th Cir. 2003).

[5] The Honorable Marsha J. Pechman recently issued an order granting bond hearings for certain asylum seekers detained under § 1226(a), finding evidence that the government regularly delayed providing these detainees with their requested hearings. *See Padilla v. U.S. Imm. & Customs Enforcement*, No. 18-928, 2019 WL 1506754 (W.D. Wash. Apr. 5, 2019).

U.S.C. § 1231(a)(2). The removal period is triggered by the latest of the following: (1) the date the order of removal becomes administratively final; (2) if the removal order is judicially reviewed and if a court orders a stay of the removal, the date of the court's final order; or (3) if the noncitizen is detained or confined (except under an immigration process), the date the noncitizen is released from detention or confinement. 8 U.S.C. § 1231(a)(1)(B). If ICE is unable to remove the noncitizen during the removal period, DHS may continue to detain certain noncitizens specified in the statute or release them under an order of supervision. 8 U.S.C. § 1231(a)(6). Section 1231(a)(6), however, does not authorize indefinite detention. *Zadvydas v. Davis*, 533 U.S. 678, 701 (2001). In addition, the Ninth Circuit has held that noncitizens subject to prolonged detention under § 1231(a)(6) are entitled to a bond hearing. *Diouf v. Napolitano* ("*Diouf II*"), 634 F.3d 1081, 1082 (9th Cir. 2011).

To summarize, §§ 1225(b) and 1226(c) mandate detention without a bond hearing until removal proceedings have concluded, even if the detention becomes prolonged. *Jennings*, 138 S. Ct. at 842, 847. Section 1226(a) permits prolonged detention while removal proceedings are pending but gives noncitizens the opportunity to request a bond hearing. Section 1231(a) requires detention during the removal period but authorizes DHS to release certain noncitizens after the removal period; noncitizens detained for a prolonged period under § 1231(a)(6) are entitled to a bond hearing in the Ninth Circuit and cannot be held indefinitely.

B. Overview of caselaw interpreting the immigration detention statutes

This case raises the question of whether and if so, when, due process requires a bond hearing for noncitizens subject to mandatory detention under § 1226(c).[6] Neither the Supreme

[6] The undersigned recently considered the same issues for a noncitizen detained under § 1225(b)(1). The Report and Recommendation in that case remains pending. *Banda v. Nielsen*, No. C18-1841-JLR, Dkt. 14 (W.D. Wash. Apr. 10, 2019).

Court nor any Court of Appeals has answered the question, and district courts around the country have taken different approaches. This is the first case in which this District has considered the issue. The Court summarizes the relevant caselaw below.

1. *Supreme and Circuit Court authority*

"[I]n a series of decisions since 2001, the Supreme Court and [Ninth Circuit] have grappled in piece-meal fashion with whether the various immigration detention statutes may authorize indefinite or prolonged detention of detainees and, if so, may do so without providing a bond hearing." *Rodriguez v. Robbins* ("*Rodriguez III*"), 804 F.3d 1060, 1067 (9th Cir. 2015), *rev'd sub nom Jennings v. Rodriguez*, 138 S. Ct. 830 (2018). First, in *Zadvydas*, the Supreme Court addressed § 1231(a)(6), which authorizes detention beyond the 90-day removal period for noncitizens who are subject to final orders of removal. 533 U.S. at 678. The petitioners claimed that they were being held indefinitely because the government could not execute their removal orders. The Supreme Court reasoned:

> A statute permitting indefinite detention of [a noncitizen] would raise a serious constitutional problem. The Fifth Amendment's Due Process Clause forbids the Government to "depriv[e]" any "person . . . of . . . liberty . . . without due process of law." Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that Clause protects. *See Foucha v. Louisiana*, 504 U.S. 71, 80 (1992). And this Court has said that government detention violates that Clause unless the detention is ordered in a criminal proceeding with adequate procedural protections, *see United States v. Salerno*, 481 U.S. 739, 746 (1987), or, in certain special and "narrow" nonpunitive "circumstances," *Foucha*, *supra*, at 80, where a special justification, such as harm-threatening mental illness, outweighs the "individual's constitutionally protected interest in avoiding physical restraint." *Kansas v. Hendricks*, 521 U.S. 346, 356 (1997).

Id. at 690. To avoid "serious constitutional concerns," the Court applied the canon of constitutional avoidance and held that § 1231(a)(6) does not authorize indefinite detention without a bond hearing and instead contains "an implicit 'reasonable time' limitation." *Id.* at

683, 699. The Court noted that it had reason to believe "Congress previously doubted the constitutionality of detention for more than six months," and thus "for the sake of uniform administration of the federal courts," recognized a presumptively reasonable six-month period of post-removal order detention. *Id.* at 701. After six months, once a noncitizen "provides good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future, the Government must respond with evidence sufficient to rebut that showing." *Id.* The Court noted, however, that the six-month presumption did not establish a bright-line rule for release; rather, a noncitizen "may be held in confinement until it has been determined that there is no significant likelihood of removal in the reasonably foreseeable future." *Id.*

Next, in *Demore v. Kim*, 538 U.S. 510 (2003), the Supreme Court considered a due process challenge to § 1226(c), which mandates detention during removal proceedings for noncitizens convicted of certain crimes. The Court explained that Congress drafted § 1226(c) to respond to the high rates of crime and flight by removable noncitizens and held that "the Government may constitutionally detain deportable [noncitizens] during the limited period necessary for their removal proceedings." *Id.* at 518-21, 526. In so holding, the Court stressed the "brief" nature of the mandatory detention under § 1226(c), which has "a definite termination point" that, in the vast majority of cases, resulted in detention of less than about five months. *Id.* at 529-30. Justice Kennedy's concurring opinion, which created the majority, reasoned that under the Due Process Clause, a noncitizen could be entitled to "an individualized determination as to his risk of flight and dangerousness if the continued detention became unreasonable or unjustified." *Id.* at 532.

Since *Zadvydas* and *Demore*, the Ninth Circuit has recognized that prolonged immigration detention without adequate procedural protections would raise "serious

constitutional concerns." *Casas-Castrillon v. Dep't of Homeland Sec.*, 535 F.3d 942, 950 (9th Cir. 2008) (addressing detention under § 1226(a)); *Diouf II*, 634 F.3d at 1086 (addressing detention under § 1231(a)(6)); *see also Rodriguez v. Robbins* ("*Rodriguez II*"), 715 F.3d 1127, 1137, 1144 (9th Cir. 2013) (prolonged detention under §§ 1225(b) and 1226(c) without a bond hearing would be "constitutionally doubtful"); *Tijani v. Willis*, 430 F.3d 1241, 1242 (9th Cir. 2005) (holding that constitutionality of 32-month detention under § 1226(c) was "doubtful"). To avoid these concerns, the Ninth Circuit applied the canon of constitutional avoidance to §§ 1225(b), 1226(a), 1226(c), and 1231(b)(6), and held that the statutes implicitly limit mandatory detention to six months, at which time the government must justify continued detention by presenting clear and convincing evidence of dangerousness or flight risk at an individualized bond hearing. *See Rodriguez III*, 804 F.3d at 1078-1085 (addressing §§ 1225(b), 1226(a), and 1226(c)); *Diouf II*, 634 F.3d at 1092 (addressing § 1231(b)(6)); *Singh v. Holder*, 638 F.3d 1196, 1023, 1026, 1028 (9th Cir. 2011) (clarifying procedural requirements for prolonged detention bond hearings). With respect to §§ 1225(b), 1226(a), and 1226(c), the Ninth Circuit further held that bond hearings were required every six months and that at the hearings, the IJ must consider restrictions short of detention. *Rodriguez III*, 804 F.3d at 1087-89.

The other circuit courts that addressed prolonged mandatory detention under § 1226(c) also "recognized that the Due Process Clause imposed some form of 'reasonableness' limitation upon the duration of detention that can be considered justifiable under that statute," and each circuit "read an implicit reasonableness requirement into the statute itself, generally based on the doctrine of constitutional avoidance." *Reid v. Donelan*, 819 F.3d 486, 494 (1st Cir. 2016), *vacated in light of Jennings*, 2018 WL 40000993 (1st Cir. May 11, 2018) (citing *Lora v. Shanahan*, 804 F.3d 601, 606 (2d Cir. 2015), *vacated*, 138 S. Ct. 1260 (2018); *Rodriguez II*, 715

F.3d at 1138; *Diop v. ICE/Homeland Sec.*, 656 F.3d 221, 222-23 (3d Cir. 2011), *abrogated by Jennings*, 138 S. Ct. 830; *Ly v. Hansen*, 351 F.3d 263, 269-70 (6th Cir. 2003)[7]); *see also Sopo v. U.S. Att'y Gen.*, 825 F.3d 1199 (11th Cir. 2016), *vacated*, 890 F.3d 952 (11th Cir. 2018) ("[A]s a matter of constitutional avoidance, we readily join other circuits in holding that § 1226(c) 'implicitly authorizes detention for a reasonable amount of time . . . .'" (quoting *Diop*, 656 F.3d at 231)). These circuits, however, divided on how to determine whether a bond hearing was required. The Second Circuit joined the Ninth Circuit in establishing a bright-line rule requiring a bond hearing after six months detention. *Lora*, 804 F.3d at 616. The other circuits adopted a "case-by-case" approach that turned on the facts of each case. *Sopo*, 825 F.3d at 1214-15 (summarizing holdings of the First, Third, and Sixth Circuits before adopting the case-by-case approach for the Eleventh Circuit). This approach was driven by the "core principle" that "the reasonableness of any given detention pursuant to § 1226(c) is a function of whether it is necessary to fulfill the purpose of the statute." *Id.* at 1217 (quoting *Diop*, 656 F.3d at 234, and citing *Zadvydas* and *Demore*). To make this determination, the courts identified a non-exhaustive list of factors to serve as "guideposts" for lower courts conducting a reasonableness review. *E.g.*, *id.* at 1218 (quoting *Reid*, 819 F.3d at 501). For example, the Eleventh Circuit identified the amount of time the noncitizen had been in detention without a bond hearing, why the removal proceedings had become protracted, whether it will be possible to remove the noncitizen if there is a final order of removal, whether the noncitizen's immigration detention exceeded the time the noncitizen spent in prison for the crime that rendered him removable, and

[7] It appears that *Jennings* abrogated *Ly*'s reliance on the canon of constitutional avoidance to construe § 1226(c); however, courts citing *Ly* post-*Jennings* have not so recognized. *See, e.g.*, *Sajous v. Decker*, No. 18-2447, 2018 WL 2357266, at *9 (S.D.N.Y. May 23, 2018).

whether the immigration detention facility was meaningfully different from a criminal penal institution. *Id.* at 1217-18.

In *Jennings*, the Supreme Court reversed *Rodriguez III*, holding that the Ninth Circuit erroneously applied the canon of constitutional avoidance and that the plain text of §§ 1225(b), 1226(a), and 1226(c) unambiguously authorizes detention pending resolution of removal proceedings and does not plausibly suggest a 6-month limitation or periodic bond hearings. *Jennings*, 138, S. Ct. at 842, 846-47. Rather than considering the parties' constitutional due process arguments, the Court remanded to the Ninth Circuit for further proceedings. *Id.* at 851-52. The Ninth Circuit, in turn, remanded to the district court to determine "the minimum requirements of due process" for noncitizens detained under each statute. *Rodriguez v. Marin* ("*Rodriguez IV*"), 909 F.3d 252, 255 (9th Cir. 2018) (quoting *Morrissey v. Brewer*, 408 U.S. 471, 488-89 (1972)). In doing so, the Ninth Circuit expressed "grave doubts that any statute that allows for arbitrary prolonged detention without any process is constitutional or that those who founded our democracy precisely to protect against the government's arbitrary deprivation of liberty would have thought so." *Id.* at 256.

2. *Post*-Jennings *authority*

In the wake of *Jennings*, district courts have grappled with how to address due process challenges to prolonged mandatory detention under § 1226(c). The Ninth Circuit's guidance thus far is limited to "grave doubts that any statute that allows for arbitrary prolonged detention without any process is constitutional . . . ." *Rodriguez IV*, 909 F.3d at 256. Likewise, the Third Circuit has stated in dicta, "*Jennings* did not call into question our constitutional holding in *Diop* that detention under § 1226(c) may violate due process if unreasonably long." *Borbot v. Warden Hudson Cnty. Corr. Facility*, 906 F.3d 274, 278 (3d Cir. 2018). Indeed, essentially all district

courts that have considered the issue agree that prolonged mandatory detention pending removal proceedings, without a bond hearing, "will—at some point—violate the right to due process." *Sajous v. Decker*, No. 18-2447, 2018 WL 2357266, at *8 (S.D.N.Y. May 23, 2018) (stating general perspective shared by District Courts in New York); *see, e.g.*, *Bolus A.D. v. Sec. of Homeland Security*, --- F. Supp. 3d ----, 2019 WL 1895059, at *2 (D. Minn. Apr. 29, 2019); *Vargas v. Beth*, --- F. Supp. 3d ----, 2019 WL 1320330, at *8 (E.D. Wis. Mar. 22, 2019) (collecting cases).

To analyze whether due process requires a bond hearing in a particular case, most courts analyze certain case-specific factors derived from *Zadvydas*, *Demore*, and the First, Third, Sixth, and Eleventh Circuits' pre-*Jennings* decisions regarding the reasonableness of prolonged detention under § 1226(c), discussed above. Some courts focus only on the reason for the delay, denying habeas relief where the government has not unreasonably delayed and the removal proceedings are proceeding through the regular course of litigation. *E.g.*, *Crooks v. Lowe*, No. 18-047, 2018 WL 6649945, at *2 (M.D. Penn. Dec. 19, 2018) (denying relief for noncitizen detained 18 months because "his case has proceeded through the removal process at a reasonable pace and there is no indication in the record that the government has improperly or unreasonably delayed the proceedings"); *Fernandez v. Lowe*, No. 17-2301, 2018 WL 3584697, at *4 (M.D. Penn. July 26, 2018) (denying relief after fifteen month detention based on same reasoning as in *Crooks*).

Other courts consider two factors: the length and the reason for the delay. In this line of cases, courts generally find that "detention for a year, or just over a year, [is] insufficient," but detention for fifteen months or longer may entitle the petitioner to habeas relief. *De Oliveira Viegas v. Green*, --- F. Supp. 3d ----, 2019 WL 1423781, at *4 (D.N.J. Mar. 29, 2019) (collecting

cases and granting bond hearing where petitioner had been detained 15 months). With respect to the reason for the delay, one court considered the petitioner's contribution to the delay, whether there was evidence the government acted unreasonably or in bad faith, and the relative speed at which the removal proceedings were moving through the immigration courts, *Dryden v. Green*, 321 F. Supp. 3d 496, 502-03 (D.N.J. 2018) (denying habeas relief where petitioner had been detained 13 months, petitioner was responsible for the delay, there was no bad faith or unreasonable action on the part of the government, and the immigration courts adjudicated his removal proceedings relatively quickly), but most courts that rely on only two factors focus on whether the *petitioner* acted in bad faith or engaged in "delay tactics," not the government, *see, e.g.*, *De Oliveira Viegas*, 2019 WL 1423781, at *5 (granting habeas relief where noncitizen had been detained for 15 months and discounting the fact that the noncitizen had sought continuances because there was no indication that he acted in bad faith); *Liban A.D. v. Rodriguez*, No. 18-6023, 2019 WL 1411062, at *3 (D.N.J. Mar. 28, 2019) (granting habeas relief where detention lasted 18 months and noncitizen did not engage in "delay tactics"); *Carlos A. v. Green*, No. 18-13356, 2019 WL 325543, at *4 (D.N.J. Jan. 25, 2019) (granting habeas relief where detention lasted nearly 19 months and although the noncitizen was responsible for approximately six months of delay, the remaining delay was "attributable to his having diligently pursued his appellate rights"); *Charles A. v. Green*, No. 18-1158, 2018 WL 3360765, at *5 (D.N.J. July 10, 2018) (denying relief where noncitizen had been detained for one year and engaged in "delay tactics").

A majority of district courts, however, analyze a number of factors to determine whether a noncitizen's mandatory detention under 1226(c) violates due process. Those factors include (1) the total length of detention to date; (2) the likely duration of future detention; (3) whether

the detention will exceed the time the petitioner spent in prison for the crime that made him removable; (4) the nature of the crimes the petitioner committed; (5) the conditions of detention; (6) delays in the removal proceedings caused by the petitioner; (7) delays in the removal proceedings caused by the government; and (8) the likelihood that the removal proceedings will result in a final order of removal. *See, e.g.*, *Cabral v. Decker*, 331 F. Supp. 3d 255, 261 (S.D.N.Y. 2018) (collecting cases from the Southern District of New York); *Vargas*, 2019 WL 1320330, at *8; *Bolus A.D.*, 2019 WL 1895059, at *2 (considering most of these factors); *Liban M.J. v. Sec. of Dep't of Homeland Sec.*, --- F. Supp. 3d ----, 2019 WL 1238834, at *3 (D. Minn. Mar. 18, 2019) (same); *Misquitta v. Warden Pine Prairie ICE Processing Center*, 353 F. Supp. 3d 518, 526 (W.D. La. Nov. 16, 2018) (same); *Baez-Sanchez v. Kolitwenzew*, 360 F. Supp. 3d 808, 815-16 (C.D. Ill. 2018) (considering several factors); *Gonzalez v. Bonnar*, No. 18-5321, 2019 WL 330906, at *4 - *5 (N.D. Cal. Jan. 25, 2019).

C. Petitioner's prolonged detention is unreasonable

Having considered the above authority, the Court joins the vast majority of other district courts to conclude that unreasonably prolonged detention under § 1226(c) without a bond hearing violates due process. This conclusion aligns with the Ninth Circuit's recent pronouncement in *Rodriguez IV* that it has "grave doubts that any statute that allows for arbitrary prolonged detention without any process is constitutional," 909 F.3d at 255, as well as Justice Kenney's concurring opinion in *Demore*, 538 U.S. at 532 (Kennedy, J., concurring) ("[S]ince the Due Process Clause prohibits arbitrary deprivations of liberty, a lawful permanent resident [detained under § 1226(c)] could be entitled to an individualized determination as to his risk of flight and dangerousness if the continued detention became unreasonable or unjustified.").

The question, then, is how the Court should determine whether a noncitizen's prolonged mandatory detention has become unreasonable. Petitioner asks the Court to adopt a bright-line rule that detention becomes unreasonably prolonged at six months. (Dkt. 9 at 2 (citing *Rodriguez v. Nielsen*, 2019 U.S. Dist. LEXIS 4228, at *18 (N.D. Cal. Jan. 7, 2019) ("In the absence of controlling appellate authority, this Court concludes that the analytical framework set forth in *Tijani*, *Casas*, and *Diouf* supports Rodriguez's argument that detention becomes prolonged after six months and entitles him to a bond hearing."); Dkt. 14 at 1-5 (citing, *inter alia*, *Zadvydas*).) The Court declines to adopt such a rule as it is inconsistent with *Demore*, 538 U.S. 531 (upholding constitutionality of § 1226(c) where petitioner had been detained for six months), and the fact-dependent nature of the constitutional question before the Court, namely whether petitioner's prolonged detention has become unreasonable, *see Diop*, 656 F.3d at 234 ("Reasonableness, by its very nature, is a fact-dependent inquiry requiring an assessment of all the circumstances of any given case."); *Sopo*, 825 F.3d 1215-17 (explaining why case-by-case approach is better-aligned with reasonableness test than bright-line rule); *Reid*, 819 F.3d at 495-98 (same). It is also inconsistent with the many district court opinions discussed above that have adopted a fact-dependent analysis rather than a bright-line rule.

Moreover, *Zadvydas* did not establish a constitutional presumption that detention longer than six months is unconstitutional. Rather, the Supreme Court established that at six months, a § 1231(a)(6) detainee could be released if he or she came forward with "good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future," at which time the government would be required to rebut that showing. *Zadvydas*, 533 U.S. at 701. Thus, at six months, the burden is on the detainee—not the government—to establish a basis for release. *Id.* (emphasizing that a noncitizen "may be held in confinement until it has been

determined that there is no significant likelihood of removal in the reasonably foreseeable future"). Because petitioner's removal proceedings are ongoing, there is no basis on which to conclude that there is no significant likelihood of removal in the reasonably foreseeable future. *See Prieto-Romero v. Clark*, 534 F.3d 1053, 1062-65 (9th Cir. 2008) (holding that petitioner's detention was not indefinite because although there was uncertainty regarding when his removal proceedings would conclude, he remained capable of being removed if it was ultimately determined that he should be removed).

The Government argues the Court should hold that regardless of the length of detention without a bond hearing, detention remains constitutional so long as there is no unreasonable delay by the Government.[8] (Dkt. 13 at 4.) The Government cites *Demore* for the proposition that mandatory detention is constitutional where it continues to serve the government's interests in ensuring a noncitizen's presence at the time of removal and reducing the danger to the community and flight risk criminal noncitizens present. (*Id.* at 3.) According to the Government, these purposes are served by mandatory detention under § 1226(c) unless the Government unreasonably delays pursuing and completing removal proceedings. (*Id.* at 4 (citing Justice Kennedy's concurrence in *Demore*).) The Government also argues that the Court's test should acknowledge that § 1226(c) requires detention for the entirety of the removal proceedings, *see Jennings*, 138 S. Ct. at 847, and presumes such detention to be constitutional,

[8] The Government's motion to dismiss analyzed the constitutionality of petitioner's continued detention under the test outlined in *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976) (whether due process mandates additional safeguards requires analysis of (1) the private interests, (2) the governmental interests, and (3) the probable value of additional procedural safeguards). (Dkt. 7 at 7.) Given that this test is not the focus of post-*Jennings* district court decisions addressing the constitutionality of prolonged detention under § 1226(c), *see supra*, the Court declined to adopt it absent additional briefing from the parties regarding the appropriate legal standard to apply to petitioner's due process claim. (Dkt. 11 at 3.) The Government's supplemental briefing abandoned the three-part *Mathews* test but continued to advocate for the principle set forth in *Mathews* that "[d]ue process is flexible and calls for such procedural protections as the particular situation demands." (*See* Dkts. 13, 15.)

see SeaRiver Mar. Fin. Holdings, Inc. v. Mineta, 309 F.3d 662, 669 (9th Cir. 2002) ("Statutes are presumed constitutional.") (citing *Heller v. Doe*, 509 U.S. 312, 320 (1993)). (Dkt. 13 at 3.)

The Government asks the Court to adopt the approach of only a minority of district courts. Out of approximately 50 district court cases that have addressed the issue presented here, the Court has found only seven that put a premium on whether the Government unreasonably delayed the proceedings. *E.g.*, *Misquitta*, 353 F. Supp. 3d at 526-27 (adopting multi-factor test but explaining that factors must be tied back to whether detention has become unreasonable, unjustified, or arbitrary in light of the purpose of § 1226(c), which the court found unlikely absent evidence of government wrongdoing in connection with the removal proceedings); *Crooks*, 2018 WL 6649945, at *2 (denying relief for noncitizen detained 18 months because "his case has proceeded through the removal process at a reasonable pace and there is no indication in the record that the government has improperly or unreasonably delayed the proceedings"); *Fernandez*, 2018 WL 3584697, at *4 (denying relief after fifteen month detention based on same reasoning as in *Crooks*).

The Court declines to adopt this approach. First, most district courts have adopted tests that do not turn on whether the Government acted unreasonably. *See supra*. Second, the Government's argument "fails to address that the Supreme Court limited its *Demore* holding to a brief period of detention under § 1226(c)." *Liban M.J.*, 2019 WL 1238834, at *2 (rejecting argument similar to the Government's argument here); *Muse v. Sessions*, No. 18-054, 2018 WL 4466052, at *3 (D. Minn. Sept. 18, 2018) (same); *Gonzalez*, 2019 WL 330906, at *4 - *5 (rejecting similar argument and concluding that "the starting point of the analysis is the length of detention"). "In contrast to the situation at the time *Demore* was decided, case processing times today are considerably longer." *Gonzalez*, 2019 WL 330906, at *4. Thus, most district courts

have not interpreted Justice Kennedy's concurrence as limiting unconstitutional detention to situations where the government unreasonably delays the proceedings. And third, allowing a § 1226(c) detainee an individualized bond hearing does not impede the Government's valid interests in protecting the community and ensuring that removable noncitizens appear for their removal proceedings and at the time of removal; bond hearings simply ensure that the detention is justified on an individual basis. *See Baez-Sanchez*, 360 F. Supp. 3d at 816. Indeed, IJs have the authority to continue a noncitizen's detention if his or her particular circumstances warrant it.

Instead of adopting either parties' proposed test, the Court adopts the multi-factor analysis that many other courts have relied upon to determine whether § 1226(c) detention has become unreasonable. To reiterate, those factors are (1) the total length of detention to date; (2) the likely duration of future detention; (3) whether the detention will exceed the time the petitioner spent in prison for the crime that made him removable; (4) the nature of the crimes the petitioner committed; (5) the conditions of detention; (6) delays in the removal proceedings caused by the petitioner; (7) delays in the removal proceedings caused by the government; and (8) the likelihood that the removal proceedings will result in a final order of removal. *See Cabral*, 331 F. Supp. 3d at 261; *Bolus A.D.*, 2019 WL 1895059, at *2. The Court discusses each factor below.

First, the Court considers the most important factor—the length of detention. *E.g.*, *Sajous*, 2018 WL 2357266, at *10 (citing *Zadvydas*, *Sopo*, and *Diop*). The longer detention continues beyond the "brief" period authorized in *Demore*, the harder it is to justify. *See Liban M.J.*, 2019 WL 1238834, at *3 ("Although there is no bright-line rule for what constitutes a reasonable length of detention, Petitioner's [12-month] detention has lasted beyond the 'brief' period assumed in *Demore*."); *Sajous*, 2018 WL 2357266, at *10 ("[D]etention that has lasted

longer than six months is more likely to be 'unreasonable', and thus contrary to due process, than detention of less than six months."); *De Oliveira Viegas*, 2019 WL 1423781, at *4 (courts in the District of New Jersey generally deny habeas relief where the petitioner has been detained for a year or just over a year, but granting relief where petitioner was detained 15 months). Petitioner has been detained since April 26, 2018, nearly 13 months. "Other courts have required bond hearings for detentions of similar and much shorter lengths." *Liban M.J.*, 2019 WL 1238834, at *3. The length of petitioner's detention favors granting him a bond hearing.

Second, the Court considers how long the detention is likely to continue absent judicial intervention; in other words, the anticipated duration of all removal proceedings including administrative and judicial appeals. *Bolus A.D.*, 2019 WL 1895059, at *2. Petitioner only recently filed his appeal of the IJ's removal order with the BIA, which may take six months or longer to reach a decision. (*See* Dkt. 14-1 at 37 ¶ 3.) If the BIA affirms, petitioner will have the opportunity to seek review in the Ninth Circuit. This process takes approximately 12-20 months from the notice of appeal date. *See* U.S. Court of Appeals for the Ninth Circuit, Frequently Asked Questions, www.ca9.uscourts.gov/content/faq.php (last visited 5/15/19). This factor favors granting petitioner a bond hearing.

Third and fourth, the Court reviews the length of detention compared to petitioner's criminal sentence and the nature of his crimes. *Cabral*, 331 F. Supp. 3d at 262. Petitioner was sentenced to 60 months in prison for drug related felonies and has been detained for only approximately 13 months. He also committed the drug related felonies in 2000 and was sentenced to 20 months in prison. Although petitioner committed serious crimes and the length his most recent sentence was significantly longer than his current detention, the Court concludes that it would not be futile to grant him a bond hearing, particularly given that he was released on

personal recognizance pending trial and sentencing, appeared in court as required and surrendered for his sentence, and did not commit further crimes or otherwise endanger the public while he was released. Nevertheless, these factors favor the Government.

Fifth, the Court considers the conditions of the detention facility where the petitioner is detained. *Bolus A.D.*, 2019 WL 1895059, at *2. "The more that the conditions under which the [noncitizen] is being held resemble penal confinement, the stronger his argument that he is entitled to a bond hearing." *Jamal A. v. Whitaker*, 358 F. Supp. 3d 853, 860 (D. Minn. 2019) (quoting *Muse*, 2018 WL 4466052, at *5). Neither party has submitted evidence regarding the conditions of petitioner's confinement at the Northwest Detention Center, and therefore the Court concludes that this factor is neutral.

As to the sixth and seventh factors, the Court considers the nature and extent of any delays in the removal proceedings caused by petitioner and the government, respectively. *Liban M.J.*, 2019 WL 1238834, at *4; *Sajous*, 2018 WL2357266, at *10 - *11. "Petitioner is entitled to raise legitimate defenses to removal . . . and such challenges to his removal cannot undermine his claim that detention has become unreasonable." *Liban M.J.*, 2019 WL 1238834, at *4 (citing *Hernandez v. Decker*, No. 18-5026, 2018 WL 3579108, at *9 (S.D.N.Y. July 25, 2018) ("[T]he mere fact that a noncitizen opposes his removal is insufficient to defeat a finding of unreasonably prolonged detention, especially where the Government fails to distinguish between bona fide and frivolous arguments in opposition.")). Courts, however, should be "sensitive to the possibility that dilatory tactics by the removable [noncitizen] may serve not only to put off the final day of deportation, but also to compel a determination that the [noncitizen] must be released because of the length of his incarceration." *Ly*, 351 F.3d at 272; *see also Sopo*, 825 F.3d at 1218 ("Evidence that the [noncitizen] acted in bad faith or sought to deliberately slow the proceedings in hopes of

obtaining release cuts against the [noncitizen]."). With respect to the government, "If immigration officials have caused delay, it weighs in favor of finding continued detention unreasonable. . . . Continued detention will also appear more unreasonable when the delay in the proceedings was caused by the immigration court or other non-ICE government officials." *Sajous*, 2018 WL 2357266, at *11 (citing *Demore* and *Reid*)).

Petitioner was taken into DHS custody on April 26, 2018, and his first master calendar hearing before an IJ did not occur until July 24, 2018. (Dkt. 16 at ¶ 3.) The hearing was adjourned to August 27, 2018 to allow petitioner time to prepare. (*Id.*) At the August 27, 2018 hearing, petitioner filed a motion to terminate. (*Id.* at ¶ 4.) The hearing was adjourned to September 26, 2018 to allow petitioner time to prepare and file an application for relief from removal. (*Id.*) Prior to the September 26, 2018 hearing, the IJ denied petitioner's motion to terminate. (*Id.* at ¶ 5.) At the September 26, 2018 hearing, petitioner filed applications for relief from removal, and the hearing was adjourned to November 27, 2018 for a merits hearing on petitioner's applications. (*Id.* at ¶ 6.) The November 27, 2018 hearing was adjourned to December 7, 2018 due to leave of the IJ. (*Id.* at ¶ 8.) The IJ conducted merits hearings on December 7, 2018, January 25, 2019, and March 8, 2019. (*Id.* at ¶¶ 9-11.) On March 8, 2019, the IJ issued her written decision denying petitioner's applications for relief and ordered him removed. (*Id.* at ¶ 11.) On March 29, 2019, petitioner sent his appeal to the BIA for filing. (Dkt. 14-1 at 36.)

Based on this record, there is no indication that petitioner engaged in deliberate delay tactics. He requested two reasonable continuances so he could prepare and file a motion to terminate and applications for relief from removal. The Court thus concludes that the sixth factor favors petitioner.

DHS, likewise, did not engage in deliberate delay tactics. Most of the delay—from April 26, 2018 to July 24, 2018, and November 27, 2018 to March 8, 2019—appears to have stemmed from the immigration court's crowded docket. Although not the result of intentional action on behalf of government officials, this delay is attributable to the Government. *See Sajous*, 2018 WL 2357266, at *11 (citing *Ly* for the proposition that "the operative question should be whether the [noncitizen] has been the cause of the delayed immigration proceeding and, where the fault is attributable to some entity other than the [noncitizen], the factor will weigh in favor of concluding that continued detention without a bond hearing is unreasonable"); *Durkay v. Decker*, No. 18-2898, 2018 WL 5292130, at *4 (S.D.N.Y. Oct. 25, 2018) (weighing delay caused by immigration court in favor of the petitioner). Accordingly, the seventh factor also favors petitioner.

Finally, the Court considers "the likelihood that the removal proceedings will result in a final order of removal." *Liban M.J.*, 2019 WL 1238834, at *4. In other words, the Court considers whether the noncitizen has asserted any defenses to removal. *Sajous*, 2018 WL 2357266, at *11. Where a noncitizen has not asserted any grounds for relief from removal, presumably the noncitizen will be removed from the United States, and continued detention will at least marginally serve the purpose of detention, namely assuring the noncitizen is removed as ordered. *Id.* (citing *Demore*). But where a noncitizen has asserted a good faith challenge to removal, "the categorical nature of the detention will become increasingly unreasonable." *Id.* (quoting *Reid*, 819 F.3d at 400-500). Petitioner here filed applications for relief from removal that the IJ denied. (Dkt. 14-1 at 4-26.) Petitioner has appealed that determination, and the Court does not have sufficient information to determine whether the appeal is nonfrivolous or whether

petitioner ultimately will prevail. Accordingly, the Court concludes that this factor does not weigh in favor of either party.

In sum, four of the eight factors weigh in favor of granting petitioner a bond hearing, two weigh in favor of the Government, and two are neutral. The Court thus concludes that petitioner's continued mandatory detention under § 1226(c) has become unreasonable and in violation of due process.

D. Remedy

As a remedy, petitioner asks the Court to order his immediate release or, in the alternative, direct that he receive an individualized bond hearing. There is no authority supporting petitioner's claim that he is entitled to an order of release. Rather, the proper remedy is a bond hearing where the government must "show by clear and convincing evidence that the detainee presents a flight risk or a danger to the community at the time of the bond hearing." *Calderon-Rodriguez v. Wilcox*, --- F. Supp. 3d ----, 2019 WL 486409 (W.D. Wash. Feb. 7, 2019) (citing *Singh v. Holder*, 638 F.3d 1196, 1208 (9th Cir. 2011)); *see also Cortez v. Sessions*, 318 F. Supp. 3d 1134, 1146-47 (N.D. Cal. 2018) (holding that *Singh*'s standards continue to apply to prolonged detention bond hearings post-*Jennings*); *Guerrero-Sanchez v. Warden York Cnty. Prison*, 905 F.3d 208, 224 n.12 (3d Cir. 2018) (adopting *Singh*'s clear and convincing evidence standard post-*Jennings*); *Darko v. Sessions*, 342 F. Supp. 3d 429, 435-36 (S.D.N.Y. 2018) (same). The bond hearing also must comply with *Singh*'s other procedural requirements. *See Singh*, 638 F.3d at 1206-08.

E. Petitioner is not entitled to relief under the Eighth Amendment

Petitioner claims that his continued detention without a bond hearing violates the Eighth Amendment's Excessive Bail Clause. (Dkt. 1 at 7.) He argues that he is not a danger to the

community, citing the fact that he was released on personal recognizance pending trial and after sentencing, and therefore the only governmental interest in detaining him is preventing flight, which is insufficient to hold him at no bond. (Dkt. 9 at 6-7.) The Government contends that petitioner fails to state a claim because no bail has been set in this matter and thus petitioner has no basis upon which to argue that bail is excessive. (Dkt. 7 at 8 (citing *Madrigal v. Nielsen*, No. 18-843, 2018 WL 4732469, at *11 - *12 (W.D. Wash. Aug. 31, 2018), *R & R adopted*, 2018 WL 4700552 (W.D. Wash. Oct. 1, 2018)).) As discussed below, the Court concludes that petitioner's Eighth Amendment claim fails, but not for the reason asserted by the Government.

The Eighth Amendment states, "Excessive bail shall not be required . . . ." U.S. Const. Amend. VIII. The Excessive Bail Clause does not "accord a right to bail in all cases, but merely [provides] that bail shall not be excessive in those cases where it is proper to grant bail." *Carlson v. Landon*, 342 U.S. 524, 545 (1952); *see also Leader v. Blackman*, 744 F. Supp. 500, 509 (S.D.N.Y. 1990) ("It is well settled that bail may be denied under many circumstances, including deportation cases, without violating any constitutional rights."). "[W]hen Congress has mandated detention on the basis of a compelling interest other than prevention of flight, . . . the Eighth Amendment does not require release on bail." *United States v. Salerno*, 481 U.S. 739, 752 (1987).

With respect to § 1226(c), Congress mandated the detention of noncitizens who have committed certain crimes to prevent such noncitizens from "absconding or *engaging in criminal activity* before a final decision can be made" in their removal proceedings. *Jennings*, 138 S. Ct. at 836 (emphasis added); *see also Demore*, 538 U.S. at 518, 527-28 (explaining that mandatory detention under § 1226(c) serves the purposes of preventing both flight and additional criminal activity by the noncitizens who fall within its scope). Although petitioner claims that he does not

present a danger to the community, he has committed serious crimes that qualify him for detention under § 1226(c). Because § 1226(c) mandates detention for reasons other than prevention of flight, petitioner's detention does not violate the Excessive Bail Clause. *See Salerno*, 481 U.S. at 752; *Marogi v. Jenifer*, 126 F. Supp. 2d 1056, 1062 (E.D. Mich. 2000) (rejecting Excessive Bail Clause challenge by a noncitizen detained under § 1226(c)); *Avramenkov v. I.N.S.*, 99 F. Supp. 2d 210, 218 (D. Conn. 2000) (same); *Alexis v. Sessions*, No. 18-1923, 2018 WL 5921017, at *9 (S.D. Tex. Nov. 13, 2018) (same).

IV. CONCLUSION

The Court RECOMMENDS:

(1) Petitioner's habeas petition (Dkt. 1) be GRANTED in part and DENIED in part. The petition should be GRANTED as to petitioner's due process claim and request for a bond hearing and DENIED in all other respects.

(2) The Government's motion to dismiss (Dkt. 7) should be GRANTED in part and DENIED in part. The motion should be DENIED as to petitioner's due process claim and request for a bond hearing and GRANTED in all other respects.

(3) The Government should be ORDERED to provide petitioner with an individualized bond hearing that complies with the requirements set forth in *Singh v. Holder*, 638 F.3d 1196 (9th Cir. 2011), within 30 days of the order on this Report and Recommendation.

(4) Petitioner's motion for a preliminary injunction (Dkt. 4) should be DENIED as moot.

A proposed order that details these recommendations accompanies this Report and Recommendation.

Objections to this Report and Recommendation, if any, should be filed with the Clerk and served upon all parties to this suit within **fourteen (14) days** of the date on which this Report and Recommendation is signed. Failure to file objections within the specified time may affect your right to appeal. Objections should be noted for consideration on the District Judge's motions calendar for the third Friday after they are filed. Responses to objections may be filed within **fourteen (14)** days after service of objections. If no timely objections are filed, the matter will be ready for consideration by the District Judge on **June 7, 2019**.

Dated this 23rd day of May, 2019.

Mary Alice Theiler
United States Magistrate Judge