UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

WARREN HILARION EUSTA JOSEPH, Plaintiff-Petitioner vs. OSCAR AVILA, in his official capacity as Director of Hudson County Correctional Facility; SCOTT WEBER, in his official capacity as Field Office Director for Detention & Removal, Newark District Office; JULIE L. MYERS, in her official capacity as Assistant Secretary of United States Immigration and Customs Enforcement; MICHAEL CHERTOFF, in his official capacity as the Secretary of the United States Department of Homeland Security; and ALBERTO GONZALES, in his official capacity as Attorney General of the United States. Defendants-Respondents.	Civil Action No. Hon. _____

MEMORANDUM OF LAW IN SUPPORT OF VERIFIED PETITION FOR WRIT OF HABEAS CORPUS PURSUANT TO 28 U.S.C. § 2241

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INTRODUCTION

1. This Memorandum of Law is submitted in support of the petition for writ of habeas corpus filed herewith.

2. Petitioner Warren Joseph has been imprisoned by immigration authorities for more than three years, while removal proceedings against him remain pending. A longtime lawful permanent resident of the United States and a decorated veteran who served in combat positions during Gulf War I, Mr. Joseph has lived in this country for close to twenty years. He faces removal based on a single nearly six-year-old conviction for which he was initially sentenced to probation alone. Although Mr. Joseph was subsequently imprisoned for six months for violating probation, he has now spent more than six times his criminal sentence incarcerated by immigration authorities, even though he poses no danger or flight risk that would warrant such prolonged detention. Moreover, during this time Mr. Joseph has never received any custody hearing, not to mention the kind of hearing that due process would require to justify a detention of such length.

3. Mr. Joseph's first habeas petition, filed on his own and without the assistance of counsel, was dismissed without prejudice by this Court in June 2006. At the time, Mr. Joseph was subject to a final administrative removal order which was stayed pending review by the Court of Appeals. Treating his habeas petition

as one for release under *Zadvydas v. Davis*, 533 U.S. 678 (2001), this Court found that he was not entitled to release because, once the stay was lifted, his removal to Trinidad was reasonably foreseeable. Less than four months later, however, the Third Circuit Court of Appeals vacated Mr. Joseph's removal order and remanded his case for further administrative proceedings. Pursuant to the Third Circuit's decision, Mr. Joseph is now eligible for both cancellation of removal and naturalization, claims on which he has a high likelihood of success. Nonetheless, and even though Mr. Joseph has offered to submit to reasonable conditions of supervision including electronic monitoring, the government refuses even to consider his release, arguing that his continued detention is mandatory under 8 U.S.C. § 1226(c).

4. The government's mandatory detention of Mr. Joseph, when he has strong challenges to removal and when his removal proceedings have already extended well beyond the "brief period of time" typically needed to complete such proceedings, *Demore v. Kim*, 538 U.S. 510, 513 (2003), violates both the Immigration and Nationality Act ("INA") and the Constitution. The Supreme Court has repeatedly held that immigration detention violates due process unless it is reasonably related to its purpose. Moreover, where detention is prolonged, due process requires a "sufficiently strong special justification" to outweigh the significant deprivation of liberty, as well as strong procedural protections. *See*

Zadvydas, 533 U.S. at 690-91. Mr. Joseph's continued and mandatory detention bears no such reasonable relationship to its purpose. Indeed, the sheer length of his detention – six times the period of his criminal sentence and seven times the average five month period recognized by the Supreme Court in *Demore*, 538 U.S. at 530 -- is patently unreasonable. The government has never alleged a "sufficiently strong special justification" for such prolonged detention, quite apart from providing Mr. Joseph with a hearing on the issue. In addition, Mr. Joseph's detention violates the bail clause of the Eighth Amendment which prohibits detention that is "excessive in light of the perceived evil" the government seeks to avoid.

5. This Court, however, need not – and should not – decide the serious constitutional questions presented by Petitioner's detention. Principles of statutory construction require that, where possible, courts should construe statutes so as to avoid serious constitutional problems. Applying these principles here, the pre-final-order removal statute, 8 U.S.C. § 1226, authorizes detention only for a reasonable period of time. Thus, no statute – neither § 1226(c), which the government asserts requires Petitioner's mandatory detention, nor § 1226(a), which provides for discretionary pre-final-order detention -- authorizes Petitioner's more than three year long detention, at least not in the absence of a hearing where the

government would bear the burden of demonstrating that such prolonged detention is warranted and hence reasonable.

6. Mr. Joseph requests that this Court issue the writ of habeas corpus and order his immediate release under reasonable conditions of supervision or, in the alternative, order a constitutionally adequate hearing where Respondents must prove that his continued detention is justified. Notably, just one month ago, another district court in this circuit ordered just such relief, when faced with a case very similar to the Petitioner's. *Madrane v. Hogan*, 2007 WL 404032, *4-5 (M.D. Pa. Feb. 1, 2007) (finding it "appropriate and necessary to hold a hearing" for immigration detainee held for three years in light of "extraordinarily lengthy deprivation of liberty").

7. Pursuant to 28 U.S.C. § 2243, and as set forth in an application filed herein, Mr. Joseph respectfully requests that the Court immediately order Respondents to show cause why the writ of habeas corpus should not be granted. Mr. Joseph also requests that the Court set a prompt hearing on this matter upon Respondents' return on the order to show cause.

FACTS AND PROCEDURAL HISTORY

Mr. Joseph's U.S. Military Service and Background

8. Petitioner Warren Hilarion Eusta Joseph is a longtime lawful permanent resident, and a decorated veteran of the first Gulf War, who has lived

in the United States for nearly twenty years. He has four U.S. citizen children, a U.S. citizen mother, and a U.S. citizen sister. He is a national and a citizen of Trinidad and Tobago.

9. A few months after coming to the U.S., when he was twenty-one years old, Mr. Joseph enlisted in the U.S. Army. He served in the United States Army and the Army Reserves from 1988 to 1996. During the first Persian Gulf War he served in combat positions and was injured in the course of duty. He received numerous awards and commendations recognizing his valiant service in that war, including recognition for returning to battle after being injured and successfully rescuing his fellow soldiers.

10. After his return from the Gulf in 1991, Mr. Joseph suffered from a variety of physical and mental symptoms often referred to as "Gulf War Syndrome," including symptoms of post-traumatic stress disorder. Like many other such veterans, he struggled with depression, alcoholism, and dependence on illegal drugs. He had recurring nightmares about killing people, and would wake up in a cold sweat. He became withdrawn and thought about suicide constantly. In 2003, he drank rust remover and had to be hospitalized.

11. Mr. Joseph continues to suffer from severe muscular problems, and at times cannot move his hands and legs. His exposure to artillery fire as a canon operator during the war has impaired his hearing in his right ear.

12. Mr. Joseph twice applied for naturalization —first in 1994, and again in 1995. He never received a decision on either application.

13. In October 2001, Mr. Joseph was convicted, following a plea of guilty, to transporting or receiving firearms while not licensed to do so, in violation of 18 U.S.C. § 922(a)(3). The conviction stemmed from Mr. Joseph's purchase in 1996 of handguns for individuals to whom he owed money. Mr. Joseph did not use the guns himself—he turned them over to his creditors in repayment of his debts. Mr. Joseph fully cooperated with the investigation by the Bureau of Alcohol, Tobacco, and Firearms, and his actions were not deemed sufficiently serious to warrant incarceration. Instead, he received a non-custodial sentence of four years probation. Two years later, however, Mr. Joseph violated his probation when he moved to his mother's house while suffering from partial paralysis and debilitating depression and failed to inform his probation officer in advance of his change of address. When his health improved, Mr. Joseph subsequently reported back to his probation officer. He also pled guilty to the probation violation for which he was sentenced to six months in prison.

Mr. Joseph's Three Year Long Detention During Removal Proceedings

14. It was while he was nearing the end of his six-month sentence that the Bureau of Immigration and Customs Enforcement ("ICE") commenced removal proceedings against Mr. Joseph based on his 2001 conviction. Shortly thereafter,

upon Mr. Joseph's completion of his criminal sentence on April 30, 2004, ICE agents took him into custody, first transferring him to the Monmouth County Correctional Institution and then to the Hudson County Correctional Facility. Mr. Joseph received a notice informing him that "the Immigration and Nationality Act prohibits your release from custody" and that he could not request review of this determination by an immigration judge. *See* Notice of Custody Determination, attached hereto as Ex. 1.[1] Mr. Joseph has remained incarcerated at the Hudson County Jail since that time.

15. On July 12, 2004, an immigration judge ordered Mr. Joseph removed based on his firearms conviction. Because the immigration judge found that this conviction was an aggravated felony, Mr. Joseph was ineligible for naturalization and other relief from removal that would otherwise have been available to him as a longtime lawful permanent resident. Mr. Joseph appealed the immigration judge's decision to the Board of Immigration Appeals ("BIA"), which affirmed the decision on December 10, 2004, without an opinion.

16. Following the BIA's decision, Mr. Joseph filed a Petition for Review before the Third Circuit Court of Appeals challenging the finding that his firearms

[1] Presumably the authority for Mr. Joseph's detention was 8 U.S.C. § 1226(c), a statute which requires mandatory detention of certain non-citizens charged with removal on criminal grounds, and which the government asserts is the basis for his current mandatory detention. *See* Section III., *infra* for text and discussion of § 1226(c).

conviction constituted an aggravated felony. Mr. Joseph also requested a stay of removal pending resolution of the Petition for Review, which the Third Circuit granted on March 4, 2005.[2]

17. Five months later, at which point Mr. Joseph had been imprisoned fifteen and a half months without any individualized determination that he posed a danger or flight risk, ICE issued a "Decision to Continue Detention." *See* Decision to Continue Detention, Aug. 15, 2005, attached hereto as Ex. 2. Based solely on a paper review of his file, the decision stated that Mr. Joseph would not be released because his "removal from the United States appears imminent." It noted that, due to the Third Circuit's stay of removal, ICE was "precluded from enforcing" Mr. Joseph's removal at this time. It further stated that his custody status would be reviewed again "90 days after the stay of removal is lifted, or one year from the date of this decision." *Id.* The custody review decision offered no further explanation for the decision to continue detention, made no mention of how long Mr. Joseph had been detained at that time, and offered no suggestions as to what steps he might take to effect a different outcome in any future decisions. *See id.*

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[2] Mr. Joseph also filed a petition for a writ of habeas corpus in the U.S. District Court of New Jersey raising similar claims. Pursuant to the REAL ID Act, that petition was transferred to the Third Circuit and consolidated with his petition for review. *See Joseph v. Attorney General of the U.S.*, 465 F.3d 123, 125 (3rd Cir. 2006).

18. Shortly thereafter, Mr. Joseph – on his own and without the assistance of counsel -- filed a petition for a writ of habeas corpus in this court, challenging his prolonged detention on due process grounds. *See Joseph v. Dep't of Homeland Security*, No 2:05-CV-05233-JLL, Doc. # 1 (D.N.J. Nov. 2, 2005) (Petition for Writ of Habeas Corpus). In a decision issued on June 12, 2006, while the Third Circuit's stay of removal was still in place, this court dismissed the petition "without prejudice to Petitioner bringing a new petition" in the future. *Joseph v. Dep't of Homeland Security*, 2006 WL 1644875, *5 (D.N.J. June 12, 2006). The Court found that Mr. Joseph did not qualify for release under *Zadvydas v. Davis*, because, absent the stay of removal, his removal to Trinidad was "reasonably foreseeable." *Id.* at * 3. While recognizing that Mr. Joseph was protected by the Fifth Amendment's Due Process clause, the Court found that his continued detention was "not constitutionally impermissible at this juncture" because he had been afforded an individualized custody review in August 2005 and another custody review was "imminent." *Id.* at *4-5. The Court further noted that Mr. Joseph would have an opportunity to reassert his claims "if the BICE does not provide adequate due process in the future." *Id.* at *5.

19. Two months later, ICE issued Mr. Joseph a second "Decision to Continue Detention" that was again based solely on a review of his file. *See* Decision to Continue Detention, August 21, 2006, attached as hereto as Ex. 3. The

decision stated that because of the Third Circuit stay of removal, "ICE has not had an unencumbered period of 90 days to affect your removal," and that therefore Mr. Joseph "did not appear to meet the threshold for custody review as set forth in 8 CFR 241.4(g)(1)(i)." *Id.* The decision further added that "[n]onetheless, your history of firearms convictions [sic] and probation violations suggests that you would pose a risk of flight as well as a danger to the community if released from ICE custody." *Id.*[3] Like the previous custody review decision issued more than a year before, the August 2006 custody review decision offered no further explanation for the decision to continue detention, made no mention of how long Mr. Joseph had been detained (more than twenty-seven months at the time), and offered no suggestions as to what steps he might take to effect a different outcome in any future decisions. *Id.*

20. Less than two months later, on October 2, 2006, the Third Circuit granted Mr. Joseph's Petition for Review, agreeing with his argument that his firearms conviction is not an aggravated felony, and remanding his case to the BIA for further proceedings. *Joseph v. Attorney General of U.S.*, 465 F.3d 123, 129 (3rd Cir. 2006). As a result of the Court's decision, Mr. Joseph is now eligible for both naturalization under 8 U.S.C. § 1440 and cancellation of removal under 8 U.S.C. § 1229b(a).

[3] The decision erroneously states that Mr. Joseph has multiple firearms convictions when he has only one.

21. In the aftermath of the Third Circuit's ruling, counsel for Mr. Joseph contacted counsel for the government to request that he be released under reasonable conditions of supervision, including electronic monitoring if necessary. Government counsel responded that Mr. Joseph would continue to be detained as he was subject to mandatory detention under INA § 236(c), 8 U.S.C. § 1226(c).

22. Mr. Joseph thereafter renewed his request for release before the Immigration Court in Newark, New Jersey. Pursuant to 8 C.F.R. § 1003.19(h)(2)(ii), Mr. Joseph argued that he was entitled to a bond hearing because he is not "properly included" in the mandatory detention categories designated under 8 U.S.C. § 1226(c). This motion was denied by the immigration judge on March 22, 2007. *See* Bond Decision of Immigration Judge, March 22, 2007, attached hereto as Ex. 4.[4]

23. A hearing on Mr. Joseph's claim for cancellation of removal is currently scheduled to begin on June 4, 2007. Mr. Joseph's application for naturalization on grounds of his being a military veteran is also pending. There is no time frame for the completion of his removal proceedings or a decision on his

[4] Specifically, Mr. Joseph argued that he was not subject to § 1226(c) because he was not taken into ICE custody "when released" for his firearms offense (as required by the plain language of the statute), and that because he was likely to prevail on his claims for relief from deportability, he was not "deportable" within the meaning of § 1226(c). The immigration judge denied these claims, citing BIA precedent. *See* Ex. 4; *see also* Sections III. A. and B, *infra.*

naturalization application. Meanwhile, Mr. Joseph remains imprisoned at the Hudson County Correctional Facility in New Jersey.

ARGUMENT

I. MR. JOSEPH'S CONTINUED DETENTION, WITHOUT EVEN A HEARING TO DETERMINE WHETHER SUCH PROLONGED DETENTION IS JUSTIFIED, VIOLATES HIS RIGHT TO DUE PROCESS UNDER THE FIFTH AMENDMENT.

A. Prolonged Immigration Detention Violates Due Process Unless It is Reasonably Related to the Government's Purpose And Accompanied By Strong Procedural Protections.

24. As this Court recognized in dismissing Mr. Joseph's first habeas petition, "as a lawful permanent resident of the United States, Mr. Joseph is entitled to the protections of the Due Process Clause under the Fifth Amendment." *Joseph v. Dep't of Homeland Security*, 2006 WL 1644875, *3 (D.N.J. June 12, 2006). Moreover, "[f]reedom from imprisonment--from government custody, detention, or other forms of physical restraint--lies at the heart of the liberty that Clause protects." *Id.* (quoting *Zadvydas v. Davis*, 533 U.S. at 290). Thus, Mr. Joseph's continued immigration detention implicates a core liberty interest that is protected by the Due Process Clause. *Zadvydas*, 533 U.S. at 693 (noting that even non-citizens who have been ordered removed have a liberty interest that is implicated by immigration detention).

25. In *Zadvydas* and again in *Demore,* the Supreme Court made clear that immigration detention violates due process unless it is reasonably related to its purpose. *Zadvydas*, 533 U.S. at 690 (citing *Jackson v. Indiana*, 406 U.S. 715, 738 (1972)); *Demore v. Kim*, 538 U.S. at 513 (upholding brief period of mandatory detention because it was necessary to purpose). Moreover, when detention becomes prolonged, due process requires a "sufficiently strong special justification" to outweigh the significant deprivation of liberty, as well as strong procedural protections. *Zadvydas*, 533 U.S. at 690-91.

26. In *Demore v. Kim*, the Supreme Court upheld mandatory detention under 8 U.S.C. § 1226(c) but only for the "brief period necessary for [completing] removal proceedings" – a period which the Court noted lasted "roughly a month and a half in the vast majority of cases in which [the statute] is invoked, and about five months in the minority of cases in which the alien chooses to appeal." 538 U.S. at 530. Moreover, *Demore* involved a lawful permanent resident who had no challenge to deportability. *Id.* at 523, n. 6.[5] Thus, *Demore* left open the question

[5] The petitioner in *Demore* conceded deportability and had only a claim for withholding of removal. A grant of withholding of removal does not cancel a finding of deportability or the removal order that follows because such grant is "country specific, barring deportation only to a single place." *Matter of Lam*, 18 I&N Dec. 15, 18 (BIA 1981); *see also* 8 C.F.R. § 208.16(f) ("Nothing . . . shall prevent the Service from removing an alien to a third country other than the country to which removal has been withheld or deferred"). In contrast, when a lawful permanent resident is granted cancellation of removal, he retains his lawful permanent resident status and is not deportable to any country.

of the constitutionality of mandatory detention in two types of situations: First, where an individual is mandatorily detained beyond the "brief period of time" necessary to conclude removal proceedings, *see, e.g., id.* at 532 (Kennedy, J concurring) (noting that where continued detention becomes unreasonable or unjustified, the non-citizen could be entitled to an individualized determination as to whether he poses a danger or flight risk), and second, where an individual has a challenge to removal that could lead to a finding that he is not in fact deportable. *See, e.g., Gonzalez v. O'Connell*, 355 F.3d 1010, 1019-20 (7th Cir. 2004) (noting that *Demore* did not resolve the constitutionality of whether mandatory detention under § 1226(c) is consistent with due process when a detainee makes a colorable claim that he is not in fact deportable). Mr. Joseph's detention presents both situations. Accordingly, *Demore* is not controlling in his case.

B. Mr. Joseph's Prolonged Detention Is Not Reasonably Related To Its Purpose.

27. The purpose of detention pending removal proceedings is two-fold—first and foremost, to assure a non-citizen's appearance at removal proceedings (and at removal if ultimately ordered); and secondarily to protect the public from any danger the individual might pose if released during this time. *See Demore*, 538 U.S. at 513, 528. Mr. Joseph's continued detention bears no "reasonable relation" to either of these purposes. *See Jackson v. Indiana*, 406 U.S. at 738; *Zadvydas*, 533 U.S. at 690.

28. First, Mr. Joseph does not present a flight risk. He has highly meritorious claims to cancellation of removal and naturalization which would entitle him to remain lawfully in the United States. He therefore has every incentive to appear at removal proceedings. Moreover, he has extensive ties in the United States – including his U.S. citizen sister and mother (with whom he intends to reside) – and he has agreed to submit to reasonable conditions of supervision, including electronic monitoring if necessary.

29. Second, Mr. Joseph is not a danger to the community. He has a single conviction for a nonviolent offense that dates back to events that occurred more than ten years ago while he was suffering from acute post-war depression, and for which he was sentenced to probation alone. Although he subsequently pled guilty to violating his probation, he received only a six month sentence for this violation. In contrast, ICE has now imprisoned him for more than six times that amount – a period of about 37 months – with no immediate end in sight.

30. Indeed, the sheer length of Mr. Joseph's detention renders it unreasonable. Prolonged detention requires a "sufficiently strong special justification" in order to outweigh the significant deprivation of liberty. *See Zadvydas*, 533 U.S. at 690-91. The government has put forth no such justification for Mr. Joseph's prolonged and continuing detention. "There exists a point at which the length of detention becomes so egregious that it can no longer be said to

be 'reasonably related' to an alien's removal." *Tijani v. Willis*, 430 F.3d 1241, 1249 (Tashima, J., concurring) (citing *Demore*, 538 U.S. at 532 (Kennedy, J., concurring)).

31. When, as here, a lawful permanent resident has been detained for more than three years outside of any kind of criminal process, and that detention is not the result of frivolous appeals, the detention becomes punitive; it is no longer reasonably related to the goal of effecting removal. *See, e.g., Madrane v. Hogan*, No 1:05-CV-2228, Doc. # 49, slip op. at 22 (M.D. Pa. Mar. 26, 2007) (granting writ of habeas corpus on the grounds that "Petitioner's extended detention in ICE custody for more than three years while ICE has pursued its efforts to remove Petitioner has resulted . . . in a violation of Petitioner's right to due process and is therefore unconstitutional"); *Fuller v. Gonzales*, 2005 WL 818614 (D. Conn. Apr. 8, 2005) (holding that petitioner's two year long detention under 8 U.S.C. § 1226(c) was "inordinately long," "not justified by those government interests," and violated due process).

C. Mr. Joseph Has Not Received the Kind of Custody Hearing That Prolonged Detention Requires.

32. Nor has Mr. Joseph's prolonged detention been accompanied by the kind of procedural protections that such a significant deprivation of liberty requires. When civil detention becomes prolonged, the deprivation of liberty at issue becomes greater, and correspondingly requires both a greater justification and

more rigorous procedures. *See Zadvydas*, 533 U.S. at 691. Thus, the burden of justifying such a deprivation should be placed on the government. *See, e.g., Kansas v. Hendricks*, 521 U.S. 346, 368 (1997) (upholding involuntary civil commitment for periods of one year at a time, subject to "strict procedural safeguards" including right to jury trial before state court and burden of proof beyond a reasonable doubt); *Cooper v. Oklahoma*, 517 U.S. 348, 363 (1996) ("due process places a heightened burden of proof on the State in civil proceedings in which the individual interests at stake . . . are both particularly important and more substantial than mere loss of money") (internal quotations omitted). *See also Tijani*, 430 F.3d at 1244-45 (Tashima, J. concurring) (noting that when a fundamental right such as the right to individual liberty is at stake, Supreme Court precedent rejects laws that place on the individual the burden of protecting that right) (citing *inter alia*, *Addington v. Texas*, 441 U.S. 418 (1979)).

33. Indeed, even with respect to non-citizens who are apprehended at the border, and who therefore are entitled to lesser due process protection than lawful permanent residents such as Mr. Joseph, the Third Circuit Court of Appeals has emphasized that "[w]hen detention is prolonged, special care must be exercised so that the confinement does not continue beyond the time when the original justifications for custody are no longer tenable." *Ngo. v. INS,* 192 F.3d 390, 398 (3rd Cir. 1999). Given the greater due process rights of non-citizens like Mr.

Joseph who have been admitted to the country as lawful permanent residents, *see, e.g., Landon v. Plasencia*, 459 U.S. 21, 32-33 (1982), even greater care must be exercised with respect to their prolonged confinement.

34. In *Ngo*, the Third Circuit emphasized that "grudging and perfunctory review is not enough to satisfy the due process right to liberty, even for aliens" and that "[d]ue process is not satisfied . . . by rubberstamp denials." 192 F.3d at 398. Yet, during his three years of imprisonment by immigration authorities this is the only review Mr. Joseph has received -- two file custody reviews which merely rubberstamped his continuing detention. Mr. Joseph has never had a personal interview, let alone the kind of hearing that is constitutionally required to justify detention of such length, i.e., one where, at a minimum, the burden is on the government to demonstrate that detention is warranted.

35. Mr. Joseph's most recent custody review decision was issued in August 2006, nearly a year ago. No interview of Mr. Joseph was conducted in connection with this review even though regulations appear to require such an interview. *See* 8 C.F.R. § 241.4 (i)(3) (requiring interview when a non-citizen is not recommended for release after a Headquarters record review). *See also Oyedeji v. Ashcroft*, 332 F. Supp. 2d 747, 754 (M.D. Pa. 2004) (ordering release of non-citizen detained four years where petitioner was not given a personal interview, "a rudimentary element of due process" which is also "contemplate[d]"

by the regulations); *Alafyouny v. Chertoff*, 2006 WL 1581959, *23 (N.D. Tex. May 19, 2006) (finding denial of due process when non-lawful permanent resident was detained for two years without even a personal interview). Indeed, in dismissing Mr. Joseph's first habeas petition, this Court noted the "right to an annual personal interview" as among the procedural protections afforded by the regulations. *See Joseph*, 2006 WL 1644875, at *6.

36. Moreover, instead of providing a coherent justification for Mr. Joseph's continued detention, the August 2006 custody review decision is only a few paragraphs long and perfunctorily states that because the Third Circuit issued a stay of removal, and "ICE has not had an unencumbered period of 90 days to affect your removal," Mr. Joseph "did not appear to meet the threshold for custody review as set forth in 8 CFR 241.4(g)(1)(i)." *See* Ex. 3. Almost as an afterthought, the decision adds that Mr. Joseph's "history of firearms convictions [sic] and probation violations suggests that [he] would pose a risk of flight as well as a danger to the community if released from ICE custody." *Id.* This statement is not only wholly unsupported, it is also factually inaccurate. Mr. Joseph has only one firearms conviction.

37. Nor does the decision note that this single conviction occurred more than six years ago, and stemmed from conduct several years earlier during a time that Mr. Joseph was suffering from severe post-war depression and post-traumatic

stress. As the Third Circuit made amply clear in *Ngo*, an assessment of flight risk and danger that is based on a past conviction, especially one that occurred a long time ago, does not comport with due process. Rather, due process requires "an evaluation of the individual's *current threat* to the community and his risk of flight" and detention cannot be justified on the basis of "temporally distant offenses." 192 F.3d at 398 (emphasis added). *See also Lawson v. Gerlinski*, 332 F. Supp. 2d 735, 745-46 (M.D. Pa. 2004) (finding "perfunctory" INS District Director findings of flight risk and danger which were based solely on the basis of petitioner's prior conviction, and concluding that the government "had not advanced an adequate basis for the continuing detention" of petitioner); *Oyediji v. Ashcroft*, 332 F. Supp. 2d at 754 (noting that petitioner was "denied release solely on a reading of his files," with no "inquiry into the circumstances surrounding his [past] criminal convictions").

38. A previous decision to continue Mr. Joseph's detention, issued in August 2005, was similarly inadequate. Based solely on a paper review of his file, the decision stated that Mr. Joseph would not be released because his "removal from the United States appears imminent." *See* Decision to Continue Detention, Aug. 15, 2005, attached hereto as Ex. 3. The decision made no mention of whether or not Mr. Joseph presented a danger or a flight risk. It noted that, due to the stay of removal, ICE was "precluded from enforcing" his removal at this time,

and that his custody status would be reviewed again "90 days after the stay of removal is lifted, or one year from the date of this decision." *Id.*

39. In its June 2006 decision dismissing Mr. Joseph's pro se habeas petition, this Court found that "at this juncture" he was "not entitled to any greater custody reviews than that which the BICE had already provided." *Joseph*, 2006 WL 1644875, at *4. However, the Court noted that another custody review was "imminent" and that Mr. Joseph would have an opportunity to reassert his claims "if the BICE does not provide adequate due process in the future." *Id.* at *4-5.

40. Regardless of whether this Court's earlier conclusion was justified, Mr. Joseph's present detention most certainly violates due process. Subsequent to this Court's dismissal of Mr. Joseph's first habeas petition, the Third Circuit ruled that Mr. Joseph is not an "aggravated felon," vacating his removal order and remanding to the BIA for consideration of his claims for cancellation of removal and naturalization, both of which are substantial. *See Joseph v. Attorney General of the United States*, 465 F.3d at 129. In addition, since this Court's decision, Mr. Joseph has remained in detention for close to an additional year, during which he has been served with yet another meaningless custody review decision that does not comport with due process.

41. For all of the foregoing reasons – because there is no "sufficiently strong" justification for Mr. Joseph's three-year detention, and because he has

never received a hearing to determine if his detention is justified -- Mr. Joseph's continued detention violates due process. He is therefore entitled to release under reasonable conditions of supervision, or at a minimum, to an immediate hearing where the government bears the burden of justifying his continued detention. *See, e.g., Madrane v. Hogan*, No 1:05-CV-2228, Doc. # 49, slip op. at 22 (M.D. Pa, Mar. 26, 2007) (declining to "adopt Respondent's inflexible position that Petitioner may be detained for as many years as it may take to obtain a final order regarding his removal simply on the basis of the language of § 236(c)" and ordering the government, to provide justification for the petitioner's continued detention at a hearing before the court); *cf. Tijani v. Willis*, 430 F.3d at 1242 (ordering such a hearing, but before an immigration judge and on statutory (constitutional avoidance) grounds rather than due process).

II. MR. JOSEPH'S CONTINUED DETENTION VIOLATES THE EXCESSIVE BAIL CLAUSE OF THE EIGHTH AMENDMENT.

42. Mr. Joseph's continued detention, when he poses no significant danger or flight risk, also violates the Eighth Amendment, which provides in relevant part that "excessive bail shall not be required." U.S. Const. Amend. VIII. In *Demore v. Kim*, the Supreme Court did not address whether, in an individual

case such as here, mandatory detention could violate the Eighth Amendment right to be free of excessive bond.[6]

43. While the bail clause does not provide an absolute right to bail, it prohibits detention that is "excessive in light of the perceived evil" the government seeks to avoid. *United States v. Salerno,* 481 U.S. 739, 754 (1987) (quotations omitted). In *Salerno*, the Supreme Court rejected an Eighth Amendment facial challenge to the Bail Reform Act's authorization of pretrial detention without bond for certain arrestees charged with "a specific category of extremely serious offenses." *Id.* at 750. The Court explained:

> [T]o determine whether the Government's response is excessive, we must compare that response against the interest that the government seeks to protect by means of that response. Thus, when the government has admitted that its only interest is in preventing flight, bail must be set by a court at a sum designed to ensure that goal, and no more. *Stack v. Boyle*, [342 U.S. 1 (1951)]. We believe that when Congress has mandated detention on the basis of a compelling interest other than prevention of flight, as it has here, the Eighth Amendment does not require release on bail.

481 U.S. at 755-756.

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[6] The "excessive bail" clause applies in removal proceedings. *See Carlson v. Landon*, 342 U.S. 524, 544-46 (1952) (applying excessive bail analysis to detention pending removal proceedings while noting that the case did not involve "unusual delay in deportation hearings"); *see also Browning-Ferris Industries v. Kelco Disposal*, 492 U.S. 257, 263 n.3 (1989) ("Bail . . . is implicated . . . when there is a direct government restraint on personal liberty, be it in a criminal case or in a civil deportation proceeding. The potential for governmental abuse which the Bail Clause guards against is present in both instances").

44. The Bail Reform Act provision upheld by the *Salerno* Court provided that only a narrow category of arrestees charged with particularly serious offenses could be subject to pretrial detention on account of danger, *see id.* at 747, 750, 755, and moreover, that such detention could be imposed only after an adversary hearing where the government bore the burden of proving by "clear and convincing evidence" that the arrestee "pose[d] a threat . . . which no conditions of release [could] dispel." *Id.* at 750, 755. In contrast, Mr. Joseph – who was convicted of a single non-violent firearms offense for which he was sentenced to probation, and a probation violation for which he served six months – is being subjected to mandatory detention in the absence of any similarly compelling interest. Moreover, Mr. Joseph has never received any hearing at all, let alone an adversary hearing subject to procedural protections comparable to those provided under the Bail Reform Act.

45. Further contributing to the "excessiveness" of Mr. Joseph's detention is the issue of its length. Under the Bail Reform Act, the length of mandatory pre-trial detention is limited by the "speedy trial" requirement. *Id.* at 747. In comparison, Mr. Joseph has already spent three years in immigration detention, and final resolution of his case could extend months or even years. To mandate his continued detention during this time, without even a hearing to determine if he actually poses any danger or flight risk, is clearly "excessive." *Id.* at 754. Indeed,

even if Mr. Joseph were found after a hearing to pose a flight risk, the Bail Clause entitles him to bond "at a sum designed to ensure that goal, and no more." *Id.* at 754 (quoting *Stack v. Boyle*, 342 U.S. 1 (1951)).

III. THIS COURT SHOULD NOT DECIDE THE CONSTITUTIONAL ISSUES RAISED BY MR. JOSEPH'S PROLONGED AND MANDATORY DETENTION BECAUSE HIS DETENTION IS NOT AUTHORIZED BY STATUTE.

46. Mr. Joseph's prolonged and mandatory detention raises serious constitutional problems that were not resolved by the Supreme Court's decision in *Demore*. Although these problems are set forth above (*see* Sections I, II, *supra)* supra), this Court need not – and should not -- decide these issues because Mr. Joseph's detention is not authorized by statute. Indeed, this Court has an obligation to construe the immigration statutes to avoid the kinds of serious constitutional problems raised here, as long as an alternative construction is possible. *Crowell v. Benson,* 285 U.S. 22, 62 (1932).

47. The Supreme Court has consistently applied this canon of statutory construction to immigration statutes. In *Zadvydas v. Davis*, the Court held that the immigration statute governing post-final order detention, 8 U.S.C. § 1231(a)(6), "read in light of the Constitution's demands, limits an alien's post-removal-period detention to a period reasonably necessary to bring about that alien's removal from

the United States," presumptively six months. 533 U.S. at 689, 701. In *Clark v. Martinez*, the Court construed the same statute to similarly limit the length of time that the government may detain individuals who had been deemed inadmissible. 543 U.S. 371 (2005). There, Justice Scalia explained that the canon of statutory construction "is a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts." *Id.* at 381.

48. The government claims that Mr. Joseph's continued mandatory detention is authorized under 8 U.S.C. § 1226(c), which requires pre-final-order mandatory detention for certain categories of non-citizens. *See* Bond Decision of Immigration Judge, March 22, 2007, attached hereto as Ex. 4.[7] But, as set forth below, neither § 1226(c) nor § 1226(a) -- which authorizes *discretionary* pre-final-

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[7] 8 U.S.C. 1226(c) provides, in relevant part, that:

> (1) "[t]he Attorney General shall take into custody any alien who
>
> (A) . . . .
>
> (B) is deportable by reason of having committed any offense covered in section 1227(a)(2)(A)(ii), (A)(iii), (B), (C), or (D) of this title,
>
> (C) . . . .
>
> (D) . . . .
>
> when the alien is released, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense."

ICE has charged Mr. Joseph as being deportable under 8 U.S.C. § 1227(a)(2)(C) for violation of a firearm law.

order detention for those individuals not subject to § 1226(c) -- authorize Mr. Joseph's continued detention, at least not in the absence of a constitutionally adequate hearing where the government would bear the burden of showing that such prolonged detention, now exceeding three years, is justified.

A. Mr. Joseph's Detention Is Not Authorized by 8 U.S.C. § 1226(c).

1. Mr. Joseph Is Not Properly Subject to Mandatory Detention under 8 U.S.C. § 1226(c) because he was not taken into immigration custody "when released" for his offense.

49. As a threshold matter, and as a matter of plain language, Mr. Joseph is not subject to mandatory detention under 8 U.S.C. § 1226(c) because he was not taken into immigration custody "when released" for his firearms conviction in October 2001, but rather two and a half years later when he was released from jail for his probation violation. Section 1226(c) states in relevant part that the Attorney General "shall take into custody an alien who is deportable by reason of having committed any offense covered [inter alia] in section [237(a)(2)(C)] . . . .*when the alien is released* . . . ." 8 U.S.C. § 1226(c) (emphasis added). The plain language of this provision limits mandatory detention to those non-citizens who are taken into immigration custody "*when*" they are released from incarceration for the crime that makes them deportable, not several years later.

50. In *Matter of Rojas*, 23 I&N Dec. 117, 119-120, 127 (BIA 2001), the BIA rejected this interpretation, holding that the timing of a person's release from

a criminal offense is not relevant as long as it occurred after October 9, 1998, the date § 1226(c) took effect.[8] A number of federal courts, however, have rightly held to the contrary. *See Quezado Bucio v. Ridge*, 317 F. Supp. 2d 1221, 1231 (W.D. Wash. 2004) ("[I]f Congress had intended for mandatory detention to apply to aliens at any time after they were released, it easily could have used the language 'after the alien is released,' or 'regardless of when the alien is released,' or other words to that effect. Instead, Congress chose the word 'when,' which connotes a much different meaning."); *Pastor v. Camarena v. Smith*, 977 F. Supp. 1415, 1417-18 (W.D. Wash. 1997) (holding, with respect to similar language in prior mandatory detention statute that "[t]he plain meaning . . . is that it applies immediately after release from incarceration, not to aliens released many years earlier"); *Zabadi v. Chertoff,* No. 3:05-cv-03335-WHA, Doc. #37 (N.D. Cal., Nov. 22, 2005) (Order granting writ of habeas corpus) (holding that petitioner who was taken into immigration custody two years after being released from incarceration for his criminal offense, did not fall within the "when released" requirement and was therefore not subject to mandatory detention).

51. Moreover, Mr. Joseph has an even stronger argument that he does not satisfy § 1226(c)'s "when released" requirement because he was never incarcerated

[8] *See Matter of Adeniji*, 22 I. & N. Dec. 1102, 1111 (BIA 1999) (holding that, based on effective date language in the statute, § 1226(c) only applies to those individuals who were released from criminal custody after October 8, 1998, the date the provision took effect).

for his firearms offense, but merely sentenced to probation. The word "release" presupposes some form of physical custody. Thus, § 1226(c) applies only to individuals who are incarcerated for a criminal offense that triggers mandatory detention, and who are then taken into ICE custody "when released" from such incarceration. Because Mr. Joseph was never incarcerated for his offense, he was never "released" within the meaning of § 1226(c) and is not subject to mandatory detention under the statute.

52. In rejecting this argument, the immigration judge relied on *Matter of West*, in which the BIA held that § 1226(c)'s "when released" requirement is triggered even if no sentence of imprisonment is imposed for the underlying offense, because "release from physical custody following arrest" is itself sufficient to satisfy the "when released" requirement. *See* Bond Decision of Immigration Judge, March 22, 2007, attached hereto as Ex. 4 (quoting *Matter of West,* 22 I& N Dec. 1405, 1409-10 (BIA 2000)). Thus, the immigration judge reasoned that Mr. Joseph, having been "arrested" for his firearms offense and subsequently "released" on bond, was properly subject to § 1226(c). *Id.* But this interpretation of § 1226(c)'s "when released" language cannot be squared with the language that immediately follows: "when the alien is released, *without regard to whether the alien is released on parole, supervised release, or probation. . . .*" 8 U.S.C. 1226(c)(1)(emphasis added). One is not "released on parole, supervised

release or probation" after an arrest, but rather after serving a term of imprisonment for a conviction. Thus, § 1226(c) does not apply to individuals like Mr. Joseph who were never incarcerated for the offense that now purportedly subjects them to mandatory detention.[9]

2. This Court must construe 8 U.S.C. § 1226(c) as not applying to individuals like Mr. Joseph who have substantial challenges to deportability.

53. If this Court finds that Mr. Joseph satisfies the "when released" requirement of § 1226(c), it must nonetheless construe § 1226(c) as not authorizing his continued detention. As noted above, *Demore v. Kim* left open the question of whether mandatory detention under § 1226(c) is consistent with due process when applied to an individual like the Mr. Joseph who has a substantial challenge to deportability that could lead to a finding that he is not in fact deportable. *See* Section I.A., *supra* (citing *Gonzalez v. O'Connell*, 355 F.3d at 1019-20). Basic principles of statutory construction require that courts construe a statute whenever possible to "first ascertain whether a construction of the statute is fairly possible by

[9] Nor is Petitioner subject to mandatory detention on the grounds that he was taken into immigration custody immediately upon release from incarceration relating to his probation violation. Under the plain language of § 1226(c), a non-citizen is subject to mandatory detention "when released" from incarceration for "the same offense" that renders him deportable. 8 U.S.C. 1226(c)(1). *See also Cavazos v. Moore*, No. 7:03-cv-00347, Doc # 58 at 6 (S.D. Tex. Jan. 7, 2005) (Order Granting Plaintiffs' Motion to Intervene). Here, it is Mr. Joseph's firearms conviction, and not his subsequent probation violation, that renders him deportable.

which the [constitutional] question may be avoided." *Crowell v. Benson*, 285 U.S. at 62. In light of the serious constitutional problems that would arise if § 1226(c) required mandatory detention of individuals like Mr. Joseph who have substantial challenges to deportability -- and in the absence of any indication that Congress intended this result -- this Court must construe § 1226(c) as not authorizing mandatory detention in such circumstances.

54. Such a construction is wholly consistent with the plain language of § 1226(c). The specific sub-provision under which Mr. Joseph is detained provides, in relevant part, that the Attorney General "shall take into custody any alien who . . . *is deportable* by reason of having committed" any of the designated offenses. 8 U.S.C. § 1226(c)(1)(B) (emphasis added). However, nowhere does the statute define the meaning of the term "is deportable." *Demore*, 538 U.S. at 578-79 (Breyer, J. concurring in part and dissenting in part). Thus, "the relevant statutes literally say nothing about an individual [like Mr. Joseph] who, armed with a strong argument against deportability, might, or might not fall within their terms." *Id.* Nor do the implementing regulations. While these regulations provide a non-citizen with the opportunity to establish that he is "not properly included" in the statute's reach, they say nothing about the showing the non-citizen must make in this regard. *See* 8 C.F.R. § 1003.19 (2005).

55. In *Matter of Joseph*, 22 I & N Dec. 799 (BIA 1999), the BIA addressed what showing a non-citizen must make in order to demonstrate that he is "not properly included" within § 1226(c)'s reach. The Board held that a non-citizen who wished to avoid the reach of § 1226(c) was required to show that ICE was "substantially unlikely to establish, at the merits hearing, the charges that subject the alien to mandatory detention." *Matter of Joseph*, 22 I & N Dec. at 800. Contrary to Supreme Court precedent which requires the government to "bear a lion's share of the burden" "where a fundamental right, such as individual liberty, is at stake," the *Matter of Joseph* standard "not only places the burden on the [non-citizen] to prove that he should not be physically detained, it makes that burden all but insurmountable." *See Tijani*, 430 F. 3d 1245-46 (Tashima, J., concurring). That standard therefore presents serious constitutional due process problems.

56. Indeed, relying upon the *Matter of Joseph* standard, the immigration judge rejected Mr. Joseph's argument that he is not "deportable" within the meaning of § 1226(c). *See* Ex. 4. Mr. Joseph argued that he is not "deportable" within the meaning of § 1226(c) because he has substantial claims to cancellation of removal under 8 U.S.C. § 1229b(a) as well as to naturalization under 8 U.S.C. § 1440. Thus, notwithstanding an initial finding that his firearms offense renders him "deportable," were Mr. Joseph to succeed on either of these claims, he would not be deportable, Indeed, Mr. Joseph has a strong chance of prevailing on both of

these claims. His nearly twenty years of lawful permanent residence, distinguished military service during the first Gulf War, and close family ties make Mr. Joseph a strong candidate for cancellation of removal, especially when balanced against his one conviction for a nonviolent offense committed more than ten years ago. *See, e.g., Matter of C-V-T-,* 22 I & N Dec. 7, 11 (BIA 1998) (setting forth balancing test governing cancellation of removal and relevant factors to be weighed).[10] Mr. Joseph also has a strong claim that he is entitled to naturalization as a military veteran. *See* 8 U.S.C. § 1440.[11] Nonetheless, the immigration judge denied Mr. Joseph a bond hearing on the grounds that he didn't satisfy the *Matter of Joseph* standard. *See* Ex. 4 (stating that the only relevant enquiry was whether the

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[10] Cancellation of removal under § 1229(b) is available to longtime lawful permanent residents such as Mr. Joseph if, after balancing "the adverse factors" against the "social and humane considerations presented," an immigration judge determines that "relief appears in the best interest of this country" *See Matter of C-V-T-,* 22 I & N Dec. at 11. A counterpart to the § 212(c) waiver of deportation that was frequently granted to longtime lawful permanent residents under pre-IIRIRA law, *see INS v. St. Cyr*, 533 U.S. 289, 296 n.5 (noting that 212(c) waiver was granted in about 50% of cases), the effect of a grant of cancellation is the same: cancellation of deportability and retention of lawful permanent resident status. Factors relevant to this determination include, *inter alia*, service in the country's armed forces, family ties within the United States, residence of long duration in this country, hardship to the non-citizen and his family in the event of deportation, the non-citizen's character, and the "nature, recency, and seriousness" of his or her criminal record. *Matter of C-V-T-,* 22 I & N Dec. at 11

[11] The fact that Mr. Joseph is in removal proceedings does not preclude him from pursuing an application for naturalization for military veterans under 8 U.S.C. § 1440. *See* 8 U.S.C. § 1429 (exempting individuals applying for naturalization as military veterans under § 1440 from prohibition on naturalizing during pendency of removal proceedings).

government was substantially unlikely to prevail on a charge of removability, and that "the quality of Mr. Joseph's case for relief from removal is irrelevant" to that inquiry).

57. By requiring the mandatory detention of individuals like Mr. Joseph who have substantial claims to relief from removal, the *Matter of Joseph* standard presents serious problems under the Due Process clause of the Fifth Amendment. As noted above, the principal purpose of detention under 8 U.S.C. § 1226(c) is to assure a non-citizen's appearance at removal proceedings and at removal, if ultimately ordered. But an individual with substantial challenges to deportability is unlikely to be ultimately ordered removed, and thus the government has less of an interest in detaining him. Relatedly, individuals who have substantial challenges to deportability have an "incentive to press their legal claims," at removal proceedings and are therefore unlikely to "abandon those claims and flee." *Tijani v. Willis*, 430 F.3d at 1247 (Tashima, J., concurring). Finally, their proceedings – and consequently their detention -- are likely to last far longer than proceedings for individuals who have no challenges to removal. *See id.* at 1246 n. 3 ("By subjecting immigrants who . . . raise difficult questions of law in their removal proceedings to detention while those proceedings are being conducted, the *Joseph* standard forces those immigrants to endure . . . . detention that lasts for a prolonged period of months or years").

58. This Court can and should avoid those constitutional problems by construing "is deportable" within the meaning of § 1226(c) as not applying to individuals who have substantial claims to relief from removal which, if successful, would render them not "deportable." This construction allows the government leeway to detain those non-citizens who, lacking any incentive to appear are most likely to flee, while assuring that those non-citizens who raise a "substantial argument against their removability" will at least have a bond hearing to determine if their detention is necessary. *Tijani v. Willis*, 430 F.3d at 1247 (Tashima, J., concurring). In so doing, this construction strikes the best balance between an alien's liberty interest and the government's interest in regulating immigration. *Id.* (citing *Demore*, 538 U.S. at 578 (Breyer, J., concurring in part and dissenting in part)).

3. This Court must construe 8 U.S.C. § 1226(c) as not authorizing mandatory detention beyond the brief period of time contemplated in *Demore.*

59. As previously noted, *Demore* left open the question of whether prolonged mandatory detention would violate the Due Process clause of the Fifth Amendment. Indeed, the Supreme Court placed great emphasis on the fact that mandatory detention under § 1226(c) lasts "roughly a month and a half in the vast majority of cases in which [the statute] is invoked, and about five months in the minority of cases in which the alien chooses to appeal." *Demore*, 538 U.S. at 531;

see also id. at 513 (referring to the "brief period of time necessary" to complete removal proceedings). Principles of constitutional avoidance thus require this Court to avoid the serious constitutional problem that would arise if § 1226(c) were construed to authorize prolonged mandatory detention, and instead to construe the statute as authorizing mandatory detention only for the "brief period of time necessary" to conclude removal proceedings. *Demore,* 538 U.S. at 513.

60. The language of § 1226(c) is consistent with such a reading. Like the statute in *Zadvydas* – which was silent with regard to the length of post-final-order detention authorized, but which the Supreme Court construed as authorizing detention only for the period of time reasonably necessary to effectuate removal -- § 1226(c) is silent with regard to the length of mandatory detention it authorizes. Thus, in the absence of any language indicating that Congress intended to authorize prolonged mandatory detention, this Court should follow the approach that the Supreme Court took in *Zadvydas,* and construe the statue as authorizing detention only for a limited period of time reasonably necessary to conclude removal proceedings.

61. In *Ly v. Hansen*, the Sixth Circuit Court of Appeals followed this approach, avoiding the constitutional problem associated with prolonged § 1226(c) detention by construing the statute to permit detention only "for a time reasonably required to complete removal proceedings in a timely manner." 351 F.3d 263, 268

(6th Cir. 2004). Similarly, in *Tijani v. Willis*, "in order to avoid deciding the constitutional issue," the Ninth Circuit "interpret[ed] the authority conferred by § 1226(c) as only applying to expedited removal," not to the petitioner's two years and eight month detention which was hardly "expeditious." 430 F.3d at 1242.

62. Unlike *Zadvydas,* neither *Ly* nor *Tijani* adopted any specific period as the presumptively reasonable time limit for the detention authorized under § 1226(c). Rather, in *Ly,* the Sixth Circuit deferred the "reasonableness" determination to a habeas court, to be decided on a case by case basis. 351 F. 3d at 272-73. *But see Ly*, 351 F.3d at 275 (Haynes, J., concurring in part and dissenting in part) (arguing, based on *Demore*, for a presumptive 47-day period of detention under § 1226(c) for individuals who did not appeal, and a 120 day limit for those who did appeal). Similarly, in *Tijani,* the Ninth Circuit did not decide what length of detention would be "expeditious" and hence authorized by § 1226(c). Instead, having found that petitioner's two years and eight month detention was not "expeditious," the Court directed the district court to grant the writ of habeas corpus unless the government proved at a hearing before an immigration judge that the petitioner presented a sufficiently serious risk of flight or danger to the community to justify his on-going detention. *Tijani*, 430 F.3d at 1242.

63. Subsequent to *Tijani,* however, the Ninth Circuit adopted six months as the "presumptively reasonable" period of detention authorized under general

detention statutes such as § 1226. *Nadarajah v. Gonzales*, 443 F.3d 1069, 1079-80 (9th Cir. 2005) (holding that "the period of detention authorized under the general detention statutes must be construed as being brief and reasonable," presumptively six months).[12] In choosing six months the Court relied not only on *Zadvydas,* but also on *Demore. Id.* at 1080-1081 ("*Demore* endorses the general proposition of 'brief' detentions, with a specific holding of a six-month period as presumptively reasonable.")

64. Under any of the readings of § 1226(c) set forth above, Mr. Joseph's continued mandatory detention is not statutorily authorized. Mr. Joseph has been detained for more than three years, far in excess of the brief period of time reasonably required to complete removal proceedings and hardly a period of time that could be deemed "expeditious." Moreover, there is no time frame for an ultimate determination on Mr. Joseph's challenge to removal.

B. No other statute authorizes Mr. Joseph's continued detention, absent a constitutionally adequate hearing where the government would bear the burden of showing that such prolonged detention is justified.

65. Because Mr. Joseph's mandatory detention is not authorized under § 1226(c), it is necessary to address whether such detention is authorized by 8

[12] By "general detention statutes," the Ninth Circuit was referring to 8 U.S.C. §§ 1225, 1226, and 1231, as distinct from those statutes where Congress specifically authorized prolonged detention in excess of six months on national security grounds, 8 U.S.C. § 1226a and 8 U.S.C. §§ 1531-1537. *See id.* at 1078.

U.S.C. § 1226(a), the companion pre-final order detention provision that authorizes discretionary detention of those non-citizens who are not subject to mandatory detention under § 1226(c).[13]

66. By its plain language, § 1226(a) does not authorize Mr. Joseph's mandatory detention. *See* 8 U.S.C. § 1226(a) ("an alien *may* be . . . detained pending a decision on whether the alien is to be removed from the United States. Except as provided in [8 U.S.C. § 1226(c)] and pending such decision, the Attorney General . . . *may release* the alien") (emphasis added). However, that statute is silent with regard to both the procedures that are necessary to detain a citizen and the length of detention authorized. Implementing regulations provide that non-citizens arrested and detained under § 1226(a) can only be released if they establish lack of danger and flight risk -- placing the burden on them rather than

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[13] 8 U.S.C. § 1226(a) provides:

> On a warrant issued by the Attorney General, an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States. Except as provided in subsection (c) of this section and pending such decision, the Attorney General--
> (1) may continue to detain the arrested alien; and
> (2) may release the alien on--
> (A) bond of at least $1,500 with security approved by, and containing conditions prescribed by, the Attorney General; or
> (B) conditional parole; but
> (3) may not provide the alien with work authorization (including an "employment authorized" endorsement or other appropriate work permit), unless the alien is lawfully admitted for permanent residence or otherwise would (without regard to removal proceedings) be provided such authorization.

the government. *See* 8 C.F.R. § 1236.1(c)(8) (authorizing discretionary release under § 1226(a) "provided that the alien must demonstrate to the satisfaction of the officer that such release would not pose a danger to property or persons, and that the alien is likely to appear for any future proceeding"). Thereafter, most non-citizens, but not all, can seek review of their custody determination in a hearing before an immigration judge, 8 C.F.R. § 1003.19, where they are required to meet the same burden. *See Matter of Adeniji*, 22 I & N Dec. 1102, 1113 (BIA 1999).

67. These regulations raise serious constitutional problems under the due process clause, particularly to the extent that § 1226(a) authorizes prolonged pre-final-order detention. As previously noted, where detention becomes prolonged, the deprivation of liberty becomes greater, and correspondingly requires both a greater justification and more rigorous procedures. *See* Sections I.A and I.C., *supra* (citing, inter alia, *Zadvydas*, 533 U.S. at 690-91; *Ngo*, 192 F.3d at 398). In particular, due process requires that when the government deprives an individual of a significant liberty interest, the burden of justifying such a deprivation should be placed on the government. *See* Section I.C., *supra* (citing *Kansas v. Hendricks,* 521 U.S. at 368, *Cooper*, 517 U.S. at 363, and *Tijani*, 430 F.3d at 1244-45 (Tashima, J. concurring)).

68. Thus, although 8 U.S.C. § 1226(a) provides no express time limit on pre-final order detention, to avoid the constitutional concerns posed by prolonged

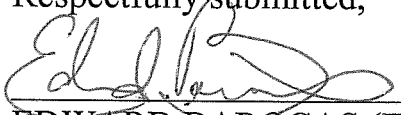
detention, absent a sufficiently strong justification and strong procedural protections, this Court must read the statute as authorizing detention only for a reasonable period of time. In determining what is "reasonable," this Court has two options: (1) to read a time a limit into the length of detention authorized by § 1226(a), i.e., the "brief period of time necessary" to complete removal proceedings as contemplated by *Demore*, 538 U.S. at 513. *Cf. Zadvydas*, 533 U.S. at 701 (similarly reading a time limit into the post-final order detention statute); or (2) to read § 1226(a) to require a hearing whenever detention exceeds such a "brief" period, where the government bears the burden of showing that such prolonged detention is justified. *Cf.* Tijani, 430 F.2d 1242 (ordering such a hearing when proceedings are not "expeditious"). Under the first approach, Mr. Joseph is entitled to immediate release because his three-year detention far exceeds the brief period necessary to complete removal proceedings. Under the second, he is entitled to an immediate hearing where -- like the hearings ordered in *Tijani* and more recently in *Madrane* -- the government bears the burden of demonstrating that his continued detention is justified.

CONCLUSION

For the foregoing reasons, Petitioner Warren Joseph respectfully requests that the Court grant the writ of habeas corpus and order his immediate release from custody under reasonable conditions of supervision, or in the alternative, order an immediate hearing where the government bears the burden of proving that Mr. Joseph's continued indefinite detention is justified.

Dated: May 22, 2007

Respectfully submitted,



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*Application for admission pro hac vice forthcoming

Attorneys for Petitioner

EXHIBIT 1

U.S. Department of Justice
Immigration and Naturalization Service

Notice of Custody Determination

Warren Hilarion Eusta JOSEPH AKA: JOSEPH, HILARION WARREN; JOSEPH, HILARION

C/O FCI - FORT DIX
PO BOX 38
FORT DIX, NJ 08640

Case No: CHJ0403000063
File No: A041 090 468
Date: 3-22-04

Pursuant to the authority contained in section 236 of the Immigration and Nationality Act and part 236 of title 8, Code of Federal Regulations, I have determined that pending a final determination by the immigration judge in your case, and in the event you are ordered removed from the United States, until you are taken into custody for removal, you shall be:

☒ detained in the custody of this Service.
☐ released under bond in the amount of $_____.
☐ released on your own recognizance.

☐ You may request a review of this determination by an immigration judge.
☒ You may not request a review of this determination by an immigration judge because the Immigration and Nationality Act prohibits your release from custody.

LEONARD SIENO
(Signature of authorized officer)

RESIDENT AGENT IN CHARGE
(Title of authorized officer)

Marlton, New Jersey
(INS office location)

☐ I do ☐ do not request a redetermination of this custody decision by an immigration judge.
☒ I acknowledge receipt of this notification.

(Signature of respondent)

4-30-04
(Date)

RESULT OF CUSTODY REDETERMINATION

On _____, custody status/conditions for release were reconsidered by:

☐ Immigration Judge ☐ District Director ☐ Board of Immigration Appeals

The results of the redetermination/reconsideration are:
☐ No change - Original determination upheld.
☐ Detain in custody of this Service.
☐ Bond amount reset to _____
☐ Release-Order of Recognizance
☐ Release-Personal Recognizance
☐ Other: _____

_____
(Signature of officer)

Form I-286 (Rev. 4-1-97)N

EXHIBIT 2

Office of Detention and Removal Operations
Newark District Detention and Removal
U.S. Department of Homeland Security
Hemisphere Center
570 Route 1&9 South
Newark, NJ 07114

U.S. Immigration and Customs Enforcement

Warren JOSEPH (A41 090 468)
C/O Hudson County Jail
35 Hackensack Avenue
South Kearny, NJ 07302

Decision to Continue Detention

This is to inform you that your custody status has been reviewed and it has been determined that you will not be released from the custody of U.S. Immigration and Customs Enforcement (ICE) at this time. This decision has been made based on a review of your file and/or your personal interview and in consideration of any information you submitted to the reviewing officials.

You are not being released because your removal from the United States appears imminent. A review of your case indicates that you were ordered removed by the Board of Immigration Appeals on 12/10/2004. A request for a travel document has been submitted to the Consulate General of Trinidad. It is anticipated that the Consulate will issue this document upon receipt of your travel itinerary.

On 03/04/2005, the United States Court of Appeals for the Third Circuit, granted you a stay of removal, pending their decision on your petition for review. ICE is therefore, precluded from enforcing your removal at this time. To date, ICE has not had an unencumbered period of 90 days in which to affect your removal.

You are to remain in ICE custody pending your removal from the United States. You are advised that you must demonstrate that you are making reasonable efforts to comply with the order of removal, and that you are cooperating with efforts to remove you by taking whatever lawful actions ICE requests to affect your removal. You are also advised that any willful failure or refusal on your part to make timely application in good faith for travel or other documents necessary for your departure, or any conspiracy or actions to prevent your removal or obstruct the issuance of a travel document, may subject you to criminal prosecution under 8 USC Section 1253(a).

Based on the above, you are to remain in ICE custody pending your removal from the United States. This office will again review your custody status, 90 days after the stay of removal has been lifted or one year from the date of this decision.

Acting Field Office Director — 8/15/05

Signature and Title of Deciding Official — *Date*

EXHIBIT 3

Office of Detention and Removal Operations
Field Office Newark
U.S. Department of Homeland Security
The Hemisphere Center
570 US Routes 1 & 9 South, Suite 512
Newark, NJ 07114

U.S. Immigration and Customs Enforcement

Warren JOSEPH (A41 090 468) 15210f A30
Hudson County Jail
Kearny, NJ 07032

Decision to Continue Detention

This is to inform you that your custody status has been reviewed and it has been determined that you will not be released from the custody of U.S. Immigration and Customs Enforcement (ICE) at this time. This decision has been made based on a review of your file and/or your personal interview and in consideration of any information you submitted to the reviewing officials.

A review of your case indicates that you were ordered removed by the Board of Immigration Appeals on 12/10/2004. You filed a Petition for Review with the US Court of Appeals for the Third Circuit, and this petition is pending with this Court at this time. On 09/09/2005, a travel document was issued by the Consulate General of Trinidad and Tobago and this document remains on file. It is anticipated that the Consulate will renew this document upon receipt of your travel itinerary.

On 03/04/2005, the United States Court of Appeals for the Third Circuit granted you a stay of removal pending its decision on your petition for review. ICE is, therefore, precluded from enforcing your removal at this time. To date, ICE has not had an unencumbered period of 90 days in which to affect your removal. Therefore, you do not appear to meet the threshold for custody review as set forth in 8 CFR 241.4(g)(1)(i). Nonetheless, your history of firearms convictions and probation violations suggests that you would pose a risk of flight as well as a danger to the community if released from ICE custody.

You are advised that you must demonstrate that you are making reasonable efforts to comply with the order of removal, and that you are cooperating with efforts to remove you by taking whatever lawful actions ICE requests to affect your removal. You are also advised that any willful failure or refusal on your part to make timely application in good faith for travel or other documents necessary for your departure, or any conspiracy or actions to prevent your removal or obstruct the issuance of a travel document, may subject you to criminal prosecution under 8 USC Section 1253(a).

Based on the above, you are to remain in ICE custody pending your removal from the United States. If you have not been released from custody or removed from the United States, this office will again review your custody status, 90 days after the stay of removal has been lifted or one year from the date of this decision.

Field Office Director
Signature and Title of Deciding Official

8/21/06
Date

EXHIBIT 4

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
NEWARK, NEW JERSEY

File No.: A 41-090-468

In the Matter of:

Warren Hilarion Eusta JOSEPH,
Respondent

In Bond Proceedings

ORDER ON REQUEST FOR BOND REDETERMINATION

ON BEHALF OF THE RESPONDENT
Claudia Slovinsky, Esq.
396 Broadway, Suite 601
New York, New York 10013

ON BEHALF OF ICE
Alan Wolfe, Esq.
Assistant Chief Counsel
970 Broad Street, Room 1104B
Newark, New Jersey 07102

BOND MEMORANDUM

Warren Hilarion Eusta Joseph ("Respondent"), a native and citizen of Trinidad and Tobago, was admitted to the United States as an immigrant at or near New York, New York on or about September 28, 1987. On or about October 10, 2001, Respondent was convicted in United States District Court for the Eastern District of New York for the offense of unlawful dealing in firearms without a dealer license in violation of 18 U.S.C. §§ 922(a)(3) and 924(a)(1)(D).

On March 22, 2004, the Department of Homeland Security ("DHS") served Respondent with a notice to appear ("NTA") charging that he is removable pursuant to INA §§ 237(a)(2)(C)[1] and (a)(2)(A)(iii).[2] Immigration Judge ("IJ") Daniel Meisner (now retired) found that Respondent was removable from the United States as an aggravated felon. The Board of Immigration Appeals ("BIA" or "the Board") affirmed the IJ's decision, but the Third Circuit reversed the decision and remanded it to the court.

The Respondent now requests a bond redetermination based on its contention that

[1] "Any alien who at any time after admission is convicted under any law of purchasing, selling, offering for sale, exchanging, using, owning, possessing, or carrying, or of attempting or conspiring to purchase, sell, offer for sale, exchange, use, own, possess, or carry, any weapon, part, or accessory which is a firearm or destructive device (as defined in section 921(a) of title 18, United States Code) in violation of any law is deportable." INA § 237(a)(2)(C) (2006).

[2] "Any alien who is convicted of an aggravated felony at any time after admission is deportable." INA § 237(a)(2)(A)(iii) (2006).

Respondent is not subject to mandatory detention based on the Board's decision in Matter of Joseph, 22 I. & N. Dec. 660 (BIA 1999). The court finds that Respondent is subject to mandatory detention and is therefore ineligible for a bond redetermination.

As an initial matter, Respondent is subject to mandatory detention as an alien removable by reason of having committed any offense covered in section 237(a)(2)(C). Respondent argues that because he was not sentenced to a period of incarceration, but rather to probation, for his conviction under the section, he is not subject to mandatory detention. The court rejects this theory. Criminal arrest constitutes "custody" for the purposes of § 236(c). See Matter of West, 22 I. & N. Dec. 1405, 1409-1410 (BIA 2000). Respondent's counsel admits that on May 3, 2000, he was arrested and released on $10,000 bond in conjunction with his firearms conviction. He was therefore released from custody after the expiration of the Transition Period Custody Rules (October 8, 1998) and is subject to mandatory detention. See id.; see also Matter of Adenjij, 22 I. & N. Dec. 1102 (BIA 1999).

Respondent's counsel further argues, however, that because Respondent has an "excellent case" for cancellation of removal under INA § 240A and the government is unlikely to prevail in its opposition to that application, the court is obligated under the Board's decision in Matter of Joseph, supra, to release him from custody. Respondent fundamentally misreads Matter of Joseph. The Board held in the case that a lawful permanent resident is not "properly included" in the mandatory detention category where the IJ determines that "it is substantially unlikely that the Immigration and Naturalization Service [now DHS] will prevail *on a charge of removability* specified in section 236(c)(1) of the Act." Matter of Joseph, 22 I. & N. Dec. 799 (BIA 1999). Here, the court finds that the evidence in the record suggests just the opposite: DHS is substantially likely to prevail on the charge of removability. The quality of Respondent's case for relief from removal is irrelevant to that inquiry. Substantial evidence exists to suggest that the remaining charge of removability, which subjects Respondent to mandatory detention under INA § 236(c)(1), can be sustained; that Respondent may be eligible for cancellation of removal (to wit, relief from the *effect* of his conviction) does not affect the sustainability of the charge itself. Matter of Joseph, therefore, does not apply to these circumstances.

The court finds that the record contains substantial evidence to suggest that the remaining charge contained in the NTA can be sustained. Because Respondent was released from custody in connection with that charge on May 3, 2000, he is subject to mandatory detention pursuant to INA § 236(c).

March 22, 2007
Date

Alberto J. Riefkohl
Immigration Judge