SELECTED RELEVANT CASES

Supreme Court Cases

Zadvydas v. Davis and *Ashcroft v. Ma*, 533 U.S. 678 (2001)

Rule: Government detention violates the Due Process clause "unless the detention is ordered in a *criminal* proceeding with adequate procedural protections."

Exception: "certain special and narrow nonpunitive circumstances where a special justification, such as harm-threatening mental illness, outweighs" liberty interest

Demore v. Kim, 538 U.S. 510 (2003) (mandatory detention is constitutional where length of detention approximates average period of about 5 months)

Clark v. Martinez, 543 U.S. 371 (2005) (*Zadvydas* rule applies to inadmissible aliens as well)

Ninth Circuit Cases

Tijani v. Willis, 430 F.3d 1241 (9th Cir. 2005) (mandatory detention statute construed not to apply to 32-month detention; government must release unless it proves flight risk or danger to community)

Nadarajah v. Gonzales, 443 F.3d 1069 (9th Cir. 2006) (government must release detainee imprisoned for five years while ICE appealed grants of asylum and other relief)

Prieto-Romero v. Clark, – F.3d –, No. 07-35458 (9th Cir. July 25, 2008) (government may detain under 8 U.S.C. § 1226(a) for three years and counting because eventual removal is possible)

Casas-Castrillon v. Lockyer, – F.3d –, 07-56261 (9th Cir. July 25, 2008) (alien detained for 7 years is entitled to impartial administrative review for bond eligibility)

Published District Court *Tijani* Cases

Martinez v. Gonzales, 504 F. Supp. 2d 887 (C.D. Cal. 2007)
Judulang v. Chertoff, 535 F. Supp. 2d 1129, 1130, 1135 (S.D. Cal. 2008);
Mau v. Chertoff, 549 F. Supp. 2d 1247 (S.D. Cal. 2008)
Straube v. Chertoff, No. 07CV1751-JM (NLS), – F. Supp. 2d –, 2008 WL 2469999 (S.D. Cal. May 14, 2008)

Tijani IJ Hearings Ordered In the Southern District

Mustanich v. Gonzales, No. 07CV1100-WQH, 2007 WL 2819732 (S.D. Cal. Sept. 26, 2007)
Macalma v. Chertoff, No. 06CV2623, 2007 WL 1516744 (S.D. Cal. May 22, 2007)
Forero-Arias v. Chertoff, No. 07CV1374-WQH, 2008 WL 483627 (S.D. Cal. 2008)

Tijani IJ Hearings Ordered In Other Districts

Soeoth v. Gonzales, No. 06CV7451-TJH (MLG) (C.D. Cal. Jan. 5, 2007)
Diouf v. Gonzales, No. 06CV7452-TJH (FMO) (C.D. Cal. Jan. 5, 2007)
Martinez v. Gonzales, No. 06CV7609-TJH (AJW) (C.D. Cal. Jan. 8, 2007))
Rasheed v. Gonzales, No. 06CV7449-TJH (MAN) (C.D. Cal. Jan. 8, 2007).

Releases Ordered in *Tijani*-Type Cases

Macalma v. Chertoff, No. 06CV2623, 2007 WL 2819677 (S.D. Cal. Sept. 26, 2007)
Mau v. Chertoff, – F. Supp. 2d –, 2008 WL 2397426 (S.D. Cal. June 10, 2008) (ordering the government to release the petitioner under conditions of supervision)
Judulang v. Gonzalez, – F. Supp. 2d –, 2008 WL 2397427 (S.D. Cal. June 10, 2008) (same)

FEDERAL DEFENDERS OF SAN DIEGO, INC.

The Federal Community Defender Organization for the Southern District of California

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July 25, 2008

VIA FACSIMILE AND MAIL

Officer Dale Reed
POCR Officer
U.S. Immigration and Customs Enforcement
P.O. Box 438150
San Ysidro, CA 92143-8150

Re: [redacted]

Dear Officer Reed:

I represen[redacted] in matters relating to his continued detention in the custody of U.S. Immigration and Customs Enforcement. On **November 26, 2007**, an immigration judge ordered Mr. [redacted] removal to Sāmoa. Mr[redacted] was taken into the custody of federal immigration officials on **December 11, 2006**, and his Post Order Custody Review is scheduled to occur on or about **February 24, 2008.** He remains in ICE custody at the San Diego Detention Center (CCA).

For the reasons listed below, Mr.[redacted] respectfully requests that ICE release him from its detention facility after the completion of the ninety-day review period specified in federal regulations. See 8 C.F.R. § 241.4. Mr.[redacted] also respectfully requests release from ICE custody pursuant to the Supreme Court's decision in Zadvydas v. Davis, 533 U.S. 678 (2001), because ICE cannot effectuate his return toSāmoa in the reasonably foreseeable future.

A. Mr.[redacted]s General Background and Immigration Status.

Mr[redacted] was born in Western Sāmoa, on April 5, 1971. When he was one year old, he immigrated to the United States with his family. Mr[redacted] his parents, and his sister were admitted at Honolulu, HI with immigrant status, and Mr.[redacted] was immediately given legal permanent resident status. The family eventually settled in San Diego, where Mr.[redacted] has lived and attended school for many years.

Mr[redacted]ttended Morse and Lincoln High Schools into the eleventh grade, but did not graduate. After leaving school, Mr[redacted]as worked steadily. He worked for over four years and was an assistant manager at Winchell's Doughnuts in Lemon Grove. After that, he was a nurse's aide for six years. He was supervised in that position by[redacted], who can be reached at (619)[redacted] Since then, he has also held positions as a cashier at a gas station and a fast food outlet, for nine and five months respectively. He has had stable residences over the years, living with his sisters a[redacted] in San Diego for four years, and at[redacted]y in San Diego for eight years prior to that.

Mr. [redacted]s thirty-six years old, single, and has no children. However, he has strong family ties to the San Diego area, where his mother, sisters, and other close relatives live. There are a number of supportive relatives in San Diego who are willing to help Mr [redacted] transition to life out of custody, to assist with his health issues, and provide support to ensure his compliance with release. See Appendix attached hereto. For instance, Mr [redacted] has several offers of a place to stay on release. In addition, Mr. [redacted] has native-born sisters living in San Diego; his father is deceased. Therefore he has strong ties to the community.

His health is only fair, and he is taking antibiotics and medications to combat HIV. This is a major source of concern for his continued detention, where conditions will aggravate his health problems. On the other hand, Mr. [redacted] has supportive relatives in the community who are willing to help him deal with his condition. See Appendix. **Due to these medical problems, Mr. [redacted] cannot be considered a significant flight risk**, since he needs treatment and may need living assistance in the future. See 8 C.F.R. § 241.4(e)(6).

Mr. [redacted] was legally admitted to the United States as an immigrant in 1972. He was granted legal permanent resident status that same year. He was ordered removed to Sāmoa in 2007. This is his first time in ICE custody. However, **ICE cannot obtain travel documents for Mr. [redacted]** as Sāmoa is not likely to provide travel permission in the reasonably foreseeable future.

B. Mr. [redacted] Will Not Flee If Released from ICE Custody. [8 C.F.R. § 241.4(e)(6)]

Mr. [redacted]s lengthy residence in the United States from age one indicates he has significant community ties and has adapted to life in this country. He has years of education and a continuous work history. He has lived all his adult life in San Diego, and all of his closest family members live here. These factors demonstrate that he **would not pose a significant flight risk** if released from ICE custody on appropriate conditions of supervision. See 8 C.F.R. § 241.4(e)(6).

Mr. [redacted] has never sought to avoid removal by absconding, never escaped from custody, failed to appear for immigration or criminal proceedings, or absented himself from any ordered placement. However, he has a parole violation in 2006 for failing to report. Otherwise, there is no indication that Mr. [redacted] would pose a risk of absconding to avoid removal. See 8 C.F.R. § 241.4(f)(7).

Mr. [redacted]'s long residence in San Diego and years of work history show he is perfectly able to adjust to life in the United States upon release. See 8 C.F.R. § 241.4(f)(8)(i). The presence of a number of supportive family members in the area also shows that flight beyond ICE control is not a factor in this case. See 8 C.F.R. § 241.4(f)(5). Also, as Mr. [redacted] will be subject to state parole conditions following release, he is even less likely to place himself beyond ICE supervision and risk return to prison.

He has a steady permanent residence at his mother's house at [redacted]t., San Diego (tel.: (619)[redacted]). [redacted] is a lawful permanent resident with no criminal record. She currently lives on SSI, so having her son living with her will contribute to her financial and health conditions as well. She is willing to act as guardian for Mr. [redacted] see that he complies with the conditions of release. Mr. [redacted] also has an offer to live with his cousin, [redacted], who lives at [redacted] St., San Diego (tel.: (619) [redacted]). She is a native-born citizen who works at Federal Express at the airport, with no criminal record, and is willing to be a guardian for Mr. [redacted]. Also, his aunt, [redacted] a nurse, who lives at [redacted] San Diego (tel.: (619) [redacted]) is willing to provide a place to stay. She is a naturalized citizen with no criminal record. Thus, Mr [redacted] has a network of supportive relatives available to assist his transition to life out of custody. See 8 C.F.R. § 241.4(f)(8)(i).

While an offer of employment is not a regulatory requirement for release under 8 C.F.R. § 241.4 (e) or (f), Mr. [redacted] has good prospects to find work. He has worked for a number of years in retail sales and has a six years' experience as a nurse's aide. Even though he has no specific offer of employment on release, he has experience which shows he will be able to find work on release. Because of this and his offers of a residence and family assistance, he will be stable and thus not a risk of flight. See 8 C.F.R. § 241.4(f)(5), (f)(8)(i).

C. Mr. [redacted] Will Not Pose a Danger to the Community If Released from the Custody of Federal Immigration Officials. [8 C.F.R. § 241.4(e)(2), (3), (4)]

Mr [redacted] is not a danger to himself or others and **is not likely to pose a threat to the community following release.** See 8 C.F.R. § 241.4(e)(4); (f)(8)(iv). The evidence shows Mr. [redacted] as no history of violence, is not presently a violent person, and is likely to remain nonviolent. See 8 C.F.R. § 241.4(e)(2) and (3); (f)(8)(ii).

Mr [redacted]'s criminal record exhibits **no instances of violent conduct.** His record consists of substance abuse offenses, possession and possession for sale, and associated theft offenses. His criminality revolves around his drug use, for which he obtained treatment while in prison in 2001 and 2002. He is willing to attend drug treatment as a condition of his supervision. While in prison and ICE custody, he has had **no disciplinary problems** and has worked consistently in various prison jobs, such as yard crew, clerk, porter, and coordinator. Thus his custody record exhibits evidence of rehabilitation. See 8 C.F.R. § 241.4(f)(1) & (4).

Given Mr [redacted]'s non-violent history and his good record during incarceration, it is clear Mr. [redacted] would not be a danger to the public upon release under appropriate conditions of supervision.

D. Mr. [redacted] Is Not Likely to Violate the Conditions of Release. [8 C.F.R. § 241.4(e)(5), (f)(8)(v)]

Mr. [redacted]'s record shows willingness to comply with the restrictions placed on him, and he is **unlikely to violate the conditions of release.**

Mr [redacted] has no escape or failure to appear, but he has a violation of parole for failing to report, as well as violations from drug use and a related receiving stolen property. See 8 C.F.R. § 241.4(f)(7). However, Mr [redacted] is willing to participate in a drug treatment condition on supervision, so that he can avoid negative social acts spiraling into misconduct. During his time in prison and in ICE custody, **Mr. [redacted] has had no disciplinary write-ups**. Therefore he is likely to comply on supervision. See 8 C.F.R. § 241.4(f)(1) and (8)(v).

His strong connections to the local community and the number of supportive family members among whom he will live make violation of supervision unlikely. See § 241.4(f)(5). Moreover, Mr [redacted] will be **on state parole supervision** until April 2008, doubling the effect of ICE supervision, and making violations of ICE supervision unlikely, since he would thereby risk additional prison time as well.

As he was admitted to the United States as an immigrant and granted LPR status, Mr. [redacted] has never violated the immigration laws. See 8 C.F.R. § 241.4(f)(6).

E. Mr. [redacted]'s Repatriation to Sāmoa Is Unlikely in the Reasonably Foreseeable Future. [8 C.F.R. § 241.4(e)(1)]

In Zadvydas, the Supreme Court prohibited an alien's continued confinement in immigration custody beyond a six-month period when there is no significant likelihood of the person's removal to his or her native country "in the reasonably foreseeable future." See Zadvydas, 533 U.S. at 701. There is no significant likelihood that the Samoan government will provide travel permission in a timely fashion. Meanwhile, Mr. [redacted]'s precarious health argues he should be released, so he can obtain proper care and attention from his family.

Mr. [redacted] has not received permission to return to Sāmoa, **nor is repatriation likely in the reasonably foreseeable future**. Oceania (which includes Sāmoa, but also Australia and New Zealand) is the second most likely region for deportees to remain detained without documents past the removal period. See Office of the Inspector General, Dep't of Homeland Security, ICE's Compliance with Detention Limits for Aliens with a Final Order of Removal from the United States 10 (Feb. 2007).

Moreover, the General Accounting Office, in a 2004 audit of ICE removal procedures, noted that a common reason for countries' reluctance to accept deportees arises from lack of assurances that deportees will be able to support themselves, due to their lack of contacts and resources in the destination country. See U.S. Gen. Accounting Office, Immigration Enforcement: Better Data and Controls Are Needed to Assure Consistency with the Supreme Court Decision on Long-Term Alien Detention 21 (May 2004). Thus, countries with overtaxed economies are unlikely to accept deportees who will be further potential burdens on society. In that context, it is significant that Sāmoa, since the 1990s, has suffered several economic reversals, including devastating tropical storms, near bankruptcy of the national airline, and a blight destroying the country's principal agricultural product, producing a 50% drop in the GDP. See U.S. Dep't of State, Background Notes: Samoa, http://www.state.gov/r/pa/ei/bgn/1842.htm (Oct. 2007). The CIA describes the economy as "traditionally . . . dependent on development

aid, family remittances from overseas, agriculture, and fishing." U.S. Central Intelligence Agency, World Factbook–Samoa, https://www.cia.gov/library/publications /the-world-factbook/geos/ws.html (updated Feb. 7, 2008). The legal minimum daily wage in Sāmoa is the equivalent of 72¢. See U.S. Dep't of State, Samoa: Country Reports on Human Rights–2006, http://www.state.gov/g/drl/rls/hrrpt/2006/78789.htm (Mar. 6, 2007). Mr. [redacted] left Sāmoa when he was one year old, so his ties to that country are exceedingly tenuous thirty-five years later. Moreover, Mr. [redacted]'s health condition and lack of close relatives remaining in Sāmoa make it appear even more likely that he will have difficulty adjusting to the removal and maintaining himself without assistance. All this mitigates against a positive response to ICE's repatriation requests.

For the above reasons, Mr. [redacted] should be released from custody because he is neither a danger to the community nor a risk of flight. Furthermore, ICE cannot effectuate his removal to Sāmoa in the reasonably foreseeable future. Therefore, no justification remains for detaining him.

Thank you for your time and consideration. Please do not hesitate to contact me if you have any questions or concerns about this correspondence.

Sincerely,

JAMES FIFE
Attorney
Federal Defenders of San Diego, Inc.

FEDERAL
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OF
SAN DIEGO,
INC.

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for the Southern
District of California

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May 14, 2008

U.S. Immigration and Customs Enforcement
Headquarters Custody Determination Unit
801 I Street, NW, Suite 800
Washington, DC 20536

Re: [redacted]

Dear HQCDU:

I am writing to you regarding the detention of the above-mentioned detainee at the agency's detention facility in the San Diego District of U.S. Immigration and Customs Enforcement (hereinafter "ICE"). Mr [redacted] entered ICE custody on **November 26, 2007**. An immigration judge ordered Mr. [redacted] removed from the United States to Cuba on **December 11, 2007**. ~~His removal order is final.~~

This letter should be considered Mr [redacted]'s **written request for a HQCDU review** per 8 C.F.R. § 241.13(d)(1) & (3). As his attorney, I formally request service on me, as well as Mr. [redacted] of all notices, decisions, and other filings regarding this review under 8 C.F.R. §§ 103.5a(a)(2)(iii) & 292.5(a). A G-28 Notice of Entry of Appearance is already on file with ICE.

Mr. [redacted] 90-day Post Order Custody review was to be held on or about February 24, 2008. To date, he has received no notice of a decision. Under the regulations, he is to have a headquarters custody review by the end of six months following the final order of removal. See 8 C.F.R. § 241.13(b)(2)(ii). He therefore requests the HQCDU make a determination of his claim for release pursuant to 8 C.F.R. § 241.13.

Mr. [redacted]'s detention by ICE commenced the 180-day reasonable period for effecting removal set forth in the Supreme Court's opinion in Zadvydas v. Davis, 533 U.S. 678 (2001). See also 8 U.S.C. § 1231(a)(1)(B)(i). However, Mr [redacted] remains in detention, despite the fact that no government has issued travel documents to effectuate his removal from the United States. Given the months of no response, it is **manifest that ICE will not be able to remove Mr. [redacted] to Western Sāmoa in the reasonably foreseeable future**. Under Zadvydas, he must be released at once.

Several factors indicate that Mr. [redacted]'s removal to Sāmoa is not significantly likely in the reasonably foreseeable future. First, the Samoan government has not issued travel documents to Mr. FOMAI, despite all of ICE's efforts over the last five months, and there is no indication that ICE will succeed in the reasonably foreseeable future. Oceania (which includes Sāmoa, but also Australia and New Zealand) is the second most likely region for deportees to remain detained without documents past the removal period. See Office of the Inspector General, Dep't of Homeland Security, ICE's Compliance with Detention Limits for Aliens with a Final Order of Removal from the

United States (Feb. 2007).

Moreover, the General Accounting Office, in a 2004 audit of ICE removal procedures, noted that a common reason for countries' reluctance to accept deportees arises from lack of assurances that deportees will be able to support themselves, due to their lack of contacts and resources in the destination country. See U.S. Gen. Accounting Office, Immigration Enforcement: Better Data and Controls Are Needed to Assure Consistency with the Supreme Court Decision on Long-Term Alien Detention 21 (May 2004). Thus, countries with overtaxed economies are unlikely to accept deportees who will be further potential burdens on society.

In that context, it is significant that Sāmoa, since the 1990s, has suffered several economic reversals, including devastating tropical storms, near bankruptcy of the national airline, and a blight destroying the country's principal agricultural product, producing a 50% drop in the GDP. See U.S. Dep't of State, Background Notes: Samoa, http://www.state.gov/r/pa/ei/bgn/1842.htm (Oct. 2007). The CIA describes the economy as "traditionally . . . dependent on development aid, family remittances from overseas, agriculture, and fishing." U.S. Central Intelligence Agency, World Factbook–Samoa, https://www.cia.gov/library/publications/the-world-factbook/geos/ws.html (updated Feb. 7, 2008). The legal minimum daily wage in Sāmoa is the equivalent of 72¢. See U.S. Dep't of State, Samoa: Country Reports on Human Rights–2006, http://www.state.gov/g/drl/rls/hrrpt/2006/78789.htm (Mar. 6, 2007). Mr. Fomai left Sāmoa when he was one year old, so his ties to that country are exceedingly tenuous thirty-five years later. Moreover, Mr. [redacted]'s health condition and lack of close relatives remaining in Sāmoa make it appear even more likely that he will have difficulty adjusting to the removal and maintaining himself without assistance. All this mitigates against a positive response to ICE's repatriation requests.

No special circumstances justify Mr. [redacted]'s continued detention beyond the 180-day statutory removal period. See § 241.14(f)-(k) (authorizing continued detention "on account of special circumstances" only upon substantiation through specific hearing procedure before IJ). On the other hand, Mr. [redacted] suffers from significant health problems requiring living assistance and regular medical care. While he can obtain such assistance from friends and relative living here, he has no such support network in Sāmoa, and he would likely become a public charge and a burden to society. This is not only bad for Mr. [redacted] personally, but provides an additional reason for Western Sāmoa's manifest reluctance to issue travel permission for his return.

Moreover, ICE cannot deny Mr. [redacted]'s willingness to assist in his repatriation and to cooperate in any manner required of him. See 8 C.F.R. §§ 241.4(g)(1)(C)(ii), 241.4(g)(5), 241.12(d)(2) (requiring a deportable alien to assist in obtaining travel documents to facilitate his removal from the United States). Mr. [redacted] has completed any and all applications as requested by ICE officers, the United States government, and foreign governments. There is **no indication that Mr. [redacted] has been uncooperative** in efforts to obtain a travel document. The lack of progress in obtaining permission to remove Mr. [redacted] has nothing to do with his failure to cooperate, but it has everything to do with the Samoan government's intransigence toward repatriation.

Mr. [redacted] cannot be removed to Western Sāmoa in the reasonably foreseeable future. ICE must abide by the Supreme Court's decision in Zadvydas, which requires Mr. [redacted]'s immediate release from detention. If you have any questions or concerns regarding this matter, please do not hesitate to contact my office.

Sincerely,

JAMES FIFE
Attorney
Federal Defenders of San Diego, Inc.

cc:
Officer Dale Reed
Custody Determination Officer
U.S. Immigration and Customs Enforcement
P.O. Box 438150
San Ysidro, CA 92143-8150

[redacted][1]
A[redacted]
San Diego Detention Center (CCA)
P.O. Box 439049
San Ysidro, CA 92143

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

[redacted], Petitioner, v. MICHAEL CHERTOFF, SECRETARY OF THE DEPARTMENT OF HOMELAND SECURITY, MICHAEL MUKASEY, ATTORNEY GENERAL, ROBIN BAKER, DIRECTOR OF SAN DIEGO FIELD OFFICE, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, JOHN GARZON, OFFICER-IN-CHARGE, Respondents.	Civil Action No. **PETITION FOR WRIT OF HABEAS CORPUS** [28 U.S.C. § 2241]

I.

INTRODUCTION

The Petitioner, [redacted], respectfully petitions this Court for a writ of habeas corpus to remedy his unlawful detention.

---

[1]The petitioner is filing this petition for a writ of habeas corpus with the assistance of James Fife and the Federal Defenders of San Diego, Inc., who drafted the instant petition. That same counsel also assisted the petitioner in preparing and submitting his request for the appointment of counsel. Robin Baker is the director of the San Diego field office of U.S. Immigration and Customs Enforcement. He administers federal immigration laws on behalf of the Secretary of Homeland Security in the federal judicial district for the Southern District of California. In Mr. Baker's capacity as the director of the local office of U.S. Immigration and Customs Enforcement, he has immediate control and custody over the petitioner. Mr. Garzon is officer in charge of the detention facility holding the petitioner.

Petitioner is in the custody of the Secretary of the Department of Homeland Security and the Attorney General of the United States and their employees (hereinafter "Respondents"). He is detained under Respondents' behest and supervision at the immigration detention facility in San Ysidro, California, under the control of the officer in charge.

II.

JURISDICTION AND VENUE

This Court has jurisdiction under 28 U.S.C. §§ 1331, 2241(c)(1) and (3), and U.S. Const. art. I., § 9, cl. 2, because the Petitioner is being unlawfully detained as a result of U.S. Immigration and Customs Enforcement's misunderstanding of the provisions of 8 U.S.C. § 1231(a)(6). See Zadvydas v. Davis, 533 U.S. 678, 686-90 (2001). Moreover, his detention violates the Constitution, the laws, and the treaties of the United States. See Magana-Pizano v. INS, 200 F.3d 603, 610 (9th Cir. 2000); Goncalves v. Reno, 144 F.3d 110, 123 (1st Cir. 1998). Reno v. American-Arab Anti-Discrimination Committee, 525 U.S. 471, 482-83 (1999), makes clear that the Petitioner's habeas petition is not barred by 8 U.S.C. § 1252(g).

Venue is proper in this district because the Petitioner is detained here. See 28 U.S.C. § 2241, et. seq., and 28 U.S.C. § 1391(e).

III.

BACKGROUND

The Petitioner is a Western Samoan national. He has been ordered removed by the Respondents under 8 U.S.C. § 1227 for conviction of criminal offenses. However, Respondents have been unsuccessful for **over seven months** in obtaining travel documents. Since Petitioner cannot be removed to his destination country or any other alternate country, he is being held by the Respondents based upon a misconstrual of their statutory authority to detain indefinitely non-removable aliens under 8 U.S.C. § 1231(a)(6) and in violation of the Supreme Court's holding in Zadvydas.

The Petitioner was born in Western Samoa on April 5, 1971. He was lawfully admitted to the United States when he was one year old and granted immediate lawful permanent resident status. He has lived in the United States since that time. He was subsequently convicted of drug offenses and most recently, in 2004, for vehicle theft. He was taken into immigration custody following his release from prison on December 11, 2006, **over 18 months ago**. He was ordered removed to Western Samoa on November 26, 2007. He waived appeal, and so his removal order was final as of that date. See 8 C.F.R. § 1241.1(b).

Petitioner has been in the continuous custody of U.S. Immigration and Customs Enforcement ("ICE") since December 2006. ICE was scheduled to conduct a Post-Order Custody ("90-day") review on or about **February 24, 2008**, for which Petitioner submitted a written argument with supporting materials. See Appendix A attached hereto (copies of 90-day review submission). However, to date, he has not received any official decision. According to regulations, he should have had a headquarters custody review at 180 days, or about **May 24, 2008.** That custody review has also not taken place, since Petitioner has received no notice, acknowledgment of his submission, nor a final decision. See Appendix B attached hereto (180-day review submission). In the meantime, ICE has been unable to obtain permission for Petitioner's repatriation to Samoa for nearly **seven months** following the final order of removal, and so is unlikely to in the reasonably foreseeable future. His current detention exceeds the period deemed presumptively reasonable for removal by the Supreme Court in Zadvydas; however, Petitioner remains in custody. Under Zadvydas and progeny, he must be released on appropriate conditions of supervision.

IV.

ARGUMENT

THIS COURT MUST RELEASE THE PETITIONER FROM THE CUSTODY OF THE RESPONDENTS UNDER APPROPRIATE CONDITIONS OF SUPERVISION.

Federal law requires the Attorney General to remove a deportable alien from the United States within a ninety-day period after an immigration judge's order of removal becomes administratively final. See 8 U.S.C.

§ 1231(a)(1); see also Ma v. Ashcroft, 257 F.3d 1095, 1104 (9th Cir. 2002). During the ninety-day removal period, the alien must be detained in custody. See 8 U.S.C. § 1231(a)(2).

If the Attorney General cannot remove the alien within the statutory removal period, the Attorney General can release the person in question under appropriate conditions of supervision, including regular appearances before an immigration officer, travel restrictions, and medical or psychiatric examinations, among other requirements. See Ma, 257 F.3d at 1104; see also 8 U.S.C. § 1231(a)(3) (listing the conditions of supervision for deportable or removable aliens released from immigration custody at the expiration of the ninety-day removal period). The Attorney General may detain a deportable or inadmissible alien beyond the ninety-day removal period, however, when he determines that the person in question would "be a risk to the community or unlikely to comply with the order of removal" if released from immigration custody. 8 U.S.C. § 1231(a)(6).

However, in Zadvydas, 533 U.S. at 689, the Supreme Court held that 8 U.S.C. § 1231(a)(6) only authorizes a period of detention that is reasonably necessary to bring about an alien's removal from the United States, and "does not permit indefinite detention." If a deportable alien has not been released from immigration custody within a six-month period after the issuance of a final order of removal, "the habeas court must ask whether the detention in question exceeds a period reasonably necessary to secure removal." Id. at 699; see also Ma, 257 F.3d at 1102 n.5 (declaring that in Zadvydas, "the Supreme Court read the statute to permit a 'presumptively reasonable' detention period of *six months* after a final order of removal–that is, *three months* after the statutory removal period has ended"). When a deportable alien "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." Zadvydas, 533 U.S. at 701 (emphasis added). Federal officials **must** release a deportable alien from custody under appropriate conditions of supervision when no "significant likelihood of removal [exists] in the reasonably foreseeable future." Id.; see also Clark v. Martinez, 543 U.S. 371, 379 (2005) (Zadvydas principles apply to inadmissible aliens); Ma,

257 F.3d at 1100 (concluding that federal law does not permit the Attorney General to hold someone "for more than a reasonable period" beyond the ninety-day statutory removal window, and mandates release of the alien under 8 U.S.C. § 1231(a)(3), when the alien "has already entered the United States and there is no reasonable likelihood that a foreign government will accept the alien's return in the reasonably foreseeable future").

The Zadvydas court erected a "presumptively reasonable" six-month detention period during which the federal government should attempt to accomplish all reasonably foreseeable removals pursuant to 8 U.S.C. § 1231. Zadvydas, 533 U.S. at 701; see also Martinez, 543 U.S. at 386; Ma, 257 F.3d at 1102 n.5. However, more broadly, Zadvydas held that a detainee cannot be held beyond a period "reasonably necessary" to accomplish his or her removal from the United States. Zadvydas, 533 U.S. at 699. When that removal is no longer foreseeable, the authority to detain is lost: "Consequently, interpreting the statute to avoid a serious constitutional threat, we conclude that, once removal is no longer reasonably foreseeable, continued detention is no longer authorized by statute. See 1 E. Coke, Institutes *70b ('*Cessante ratione legis cessat ipse lex*') (the rationale of a legal rule no longer being applicable, the rule itself no longer applies)." Id.

The Petitioner has been detained in the custody of Respondents since December 2006, over **eighteen months**, and was ordered deported over **seven months ago**, in November 2007. Petitioner's detention is now beyond the reasonable detention period established in Zadvydas, and there is "good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future." Zadvydas, 533 U.S. at 701. That is because, first, the consistently negative result of ICE's efforts to date. Second, a common reason for countries' reluctance to accept deportees is insufficient assurances that deportees will be able to support themselves, due to their lack of contacts and resources in the destination country. See U.S. Gen. Accounting Office, Immigration Enforcement: Better Data and Controls Are Needed to Assure Consistency with the Supreme Court Decision on Long-Term Alien Detention 21 (May 2004). Thus, countries with overtaxed

economies are unlikely to accept deportees, who will be further potential burdens on society. In that context, it is significant that Sāmoa, since the 1990s, has suffered several economic reversals, including devastating tropical storms, near bankruptcy of the national airline, and a blight destroying the country's principal agricultural product, producing a 50% drop in the GDP. See U.S. Dep't of State, Background Notes: Samoa, http://www.state.gov/r/pa/ei/bgn/1842.htm (Oct. 2007). The CIA describes the economy as "traditionally . . . dependent on development aid, family remittances from overseas, agriculture, and fishing." U.S. Central Intelligence Agency, World Factbook–Samoa, https://www.cia.gov/library/publications /the-world-factbook/geos/ws.html (updated Feb. 7, 2008). The legal minimum daily wage in Sāmoa is the equivalent of 72¢. See U.S. Dep't of State, Samoa: Country Reports on Human Rights–2006, http://www.state.gov/g/drl/rls/hrrpt/2006/78789.htm (Mar. 6, 2007). Petitioner left Sāmoa when he was one year old, so his ties to that country are exceedingly tenuous thirty-five years later. Moreover, Petitioner has been diagnosed with a **serious and degenerative health condition**.[2] The lack of close relatives remaining in Sāmoa makes it appear even more likely he would have difficulty adjusting to the removal and maintaining himself without government assistance. All this mitigates against a positive response to ICE's repatriation requests. Accordingly, release is mandated.

There is no likelihood that Petitioner's destination country or any reasonable alternative destination, will grant repatriation in the reasonably foreseeable future. See Zadvydas, 533 U.S. at 700; see also Ma, 257 F.3d at 1112 (holding that section 1231 mandates the release of deportable aliens "at the end of the presumptively reasonable detention period" when "there is no repatriation agreement and no demonstration of a reasonable likelihood that one will be entered into in the near future"). Therefore, the Petitioner must be released under the conditions set out in §1231(a)(3). See Zadvydas, 533 U.S. at 700-01.

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[2] In order to preserve his privacy rights, Petitioner is willing, on request of the Court, to submit under seal a declaration and documentation concerning the details of his current medical condition.

V.

REQUESTED RELIEF

Petitioner requests that this Court order the respondents to release him from custody under the conditions of supervision set forth in 8 U.S.C. §1231(a)(3).

VI.

VERIFICATION

I, [redacted], hereby verify under penalty of perjury that the facts contained in the instant Petition are true and correct.

Respectfully submitted,

Dated:_____

_____

[redacted]

Petitioner

[redacted]
San Diego Detention Center (CCA)
P.O. Box 439049
San Ysidro, CA 92143

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

[redacted]	Civil Action No.
Petitioner,	
v.	**PETITION FOR WRIT OF HABEAS CORPUS**
MICHAEL CHERTOFF, SECRETARY OF THE DEPARTMENT OF HOMELAND SECURITY, PETER KEISLER, ACTING ATTORNEY GENERAL, ROBIN BAKER, DIRECTOR OF SAN DIEGO FIELD OFFICE, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, JOHN A. GARZON, OFFICER-IN-CHARGE,	**[28 U.S.C. § 2241]**
Respondents.	

[1]The petitioner is filing this petition for a writ of habeas corpus with the assistance of James Fife and the Federal Defenders of San Diego, Inc., who drafted the instant petition. That same counsel also assisted the petitioner in preparing and submitting his request for the appointment of counsel. Robin Baker is the director of the San Diego field office of U.S. Immigration and Customs Enforcement. He administers federal immigration laws on behalf of the Secretary of Homeland Security in the federal judicial district for the Southern District of California. In Mr. Baker's capacity as the director of the local office of U.S. Immigration and Customs Enforcement, he has immediate control and custody over the petitioner. John Garzon is the ICE officer in charge of the detention facility holding the petitioner.

I.

INTRODUCTION

The petitioner, [redacted], respectfully petitions this Court for a writ of habeas corpus to remedy his unlawful detention.

Petitioner is in the custody of the Secretary of the Department of Homeland Security and the Attorney General of the United States and their employees (hereinafter "respondents"). He is detained at the respondents' detention facility in San Ysidro, California, under the control of the officer in charge.

II.

JURISDICTION AND VENUE

This Court has jurisdiction under 28 U.S.C. §§ 1331, 2241(c)(1) and (3), and U.S. Const. art. I., § 9, cl. 2, because the petitioner is being unlawfully detained as a result of U.S. Immigration and Customs Enforcement's misapplication of the detention provisions of 8 U.S.C. §§ 1226 & 1231. Federal district courts have jurisdiction to entertain habeas corpus petitions under 28 U.S.C. § 2241 to address the lawfulness of detentions of non-citizens by ICE. See Zadvydas v. Davis, 533 U.S. 678, 686-90 (2001); Demore v. Kim, 538 U.S. 510, 516-17 (2003); Clark v. Martinez, 543 U.S. 371, 379 (2005); Nadarajah v. Gonzales, 443 F.3d 1069, 1075-76 (9th Cir. 2006). Moreover, his detention violates the Constitution, the laws, and the treaties of the United States, raising a federal question under 28 U.S.C. § 1331. See Magana-Pizano v. INS, 200 F.3d 603, 610 (9th Cir. 2000); Goncalves v. Reno, 144 F.3d 110, 123 (1st Cir. 1998). Reno v. American-Arab Anti-Discrimination Committee, 525 U.S. 471, 482-83 (1999), makes clear that the petitioner's habeas petition is not barred by 8 U.S.C. § 1252(g).

Venue is proper in this district because the petitioner is detained here. See 28 U.S.C. § 2241, et. seq., & 28 U.S.C. § 1391(e).

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III.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Petitioner's Background

The petitioner is a native and citizen of Fiji. He fled to the United States in March 2001, when he was twenty-one years old, following abuse and torture at the hands of the Fijian police. He was lawfully admitted on a tourist visa, but continued to reside in the United States beyond the termination of his visa.

After his admission to the United States, petitioner was convicted of driving under the influence and was sentenced to the low term of 16 months' imprisonment.

Removal Proceedings and Initiation of Current Detention by Respondents

After completion of the term of imprisonment prescribed by law, petitioner was transferred to custody of the respondents on October 5, 2004, which is the beginning of his present period of detention. On December 15, 2004, a removal hearing was held. The government proceeded solely on a charge of overstaying his visa. The immigration judge found petitioner removable and denied petitioner's applications for asylum based on his fear of physical harm and torture from Fijian officials if returned to his country.

Status of Petitioner's Legal Challenges to Removal

Petitioner timely appealed the decision of the immigration judge to the Board of Immigration Appeals. Petitioner argued that the immigration judge had erred in denying asylum. Petitioner argued he should have been granted asylum and Convention Against Torture relief. The BIA affirmed on April 28, 2005.

Petitioner then filed a timely petition for review *pro se* with the Ninth Circuit Court of Appeals on May 12, 2005, in Case No. 05-72765. The same day, petitioner moved for a stay of deportation pending appeal; the government filed a notice of non-opposition to the stay on July 8, 2005. Following two extensions of time, petitioner's opening brief was filed late on November 17, 2005, but was accepted by the Court. Respondents were ordered to file their brief by January 26, 2006.

On January 20, 2006, the Government sought a two-week extension of time to file its brief. Petitioner filed an opposition to the extension on February 7, 2006. The response brief was filed on February 9, 2006.

After a 14-day extension, petitioner filed his reply brief on March 9, 2006. No action has since taken place on the case.

Prior Challenges to Detention

Because petitioner was not found deportable on account of a criminal conviction, he is not subject to the mandatory detention requirements of 8 U.S.C. § 1226(c). Nonetheless, ICE has denied petitioner release on supervision during custody reviews required by regulations, most recently on December 8, 2006. Nor has petitioner received any bond hearing before an immigration judge. Petitioner has filed no previous request for relief from detention with this or another court.

IV.

LEGAL ARGUMENT

THIS COURT MUST RELEASE THE PETITIONER FROM THE CUSTODY OF THE RESPONDENTS UNDER APPROPRIATE CONDITIONS OF SUPERVISION.

In the instant action, petitioner seeks release from the custody of respondents on the basis of two recent Ninth Circuit decisions, Tijani v. Willis, 430 F.3d 1241 (9th Cir. 2005), and Nadarajah v. Gonzales, 443 F.3d 1069 (9th Cir. 2006). These cases follow the Supreme Court's principles on indefinite detention laid down in Zadvydas v. Davis, 533 U.S. 678, 689 (2001), and apply them to detainees subjected to prolonged detention and whose orders of removal are on review. These cases hold that it is "constitutionally doubtful" that the detention statutes permit lengthy periods of custody pending the outcome of legal challenges. Under the authority of Tijani and Nadarajah, petitioner is entitled to release on order of supervision pending resolution of his appeals.

Two federal statutes authorize civil detention of aliens prior to final removal orders. Aliens may be detained or released at the discretion of the Attorney General under 8 U.S.C. § 1226(a). However, aliens who

are subject to removal due to certain types of criminal convictions, such as aggravated felonies or crimes of moral turpitude, are detained under so-called mandatory detention provisions in 8 U.S.C. § 1226(c). Once an order of removal is final, however, continued detention is governed by 8 U.S.C. § 1231 and regulations.

If detainees with final orders are not removed within the 90-day statutory period, the Attorney General can release them under appropriate conditions of supervision, including regular appearances before an immigration officer and travel restrictions, among other requirements. See Ma v. Ashcroft, 257 F.3d 1095, 1104 (9th Cir. 2002); see also 8 U.S.C. § 1231(a)(3) (listing the conditions of supervision for deportable or removable aliens released from immigration custody at the expiration of the ninety-day removal period). The Attorney General may detain a deportable or inadmissible alien beyond the removal period only when he determines that the individual would "be a risk to the community or unlikely to comply with the order of removal" if released from immigration custody. 8 U.S.C. § 1231(a)(6).

In Zadvydas, however, the Supreme Court held that due process constraints on this civil detention authority permit only a period of custody that is reasonably necessary to bring about an alien's removal from the United States, and "does not permit indefinite detention." 533 U.S. at 689. Thus, federal officials **must** release a deportable alien from custody under appropriate conditions of supervision when no "significant likelihood of removal [exists] in the reasonably foreseeable future." Id.; see also Martinez, 543 U.S. at 386-87 (Zadvydas principles applicable equally to class of inadmissible aliens).

In Zadvydas, Kim, and Martinez, the Supreme Court repeatedly recognized that unreasonable, indefinite, civil detention raises serious due process problems. It construed the immigration detention statutes consistently with the Fifth Amendment as permitting detention only during a period reasonably necessary to accomplish removal. See Zadvydas, 533 U.S. at 690; Kim, 538 U.S. at 513; Martinez, 543 U.S. at 386; see also Ly v. Hansen, 351 F.3d 263, 268 (6th Cir. 2003) (immigration detention should last only "for a time reasonably required to complete removal proceedings in a timely manner"). In short, a detention which may

be reasonably related to a government purpose at the outset may no longer comply with due process requirements once it becomes unreasonably prolonged. See Zadvydas, 533 U.S. at 699 ("Consequently, interpreting the statute to avoid a serious constitutional threat, we conclude that, once removal is no longer reasonably foreseeable, continued detention is no longer authorized by statute. See 1 E. Coke, Institutes *70b ('*Cessante ratione legis cessat ipse lex*') (the rationale of a legal rule no longer being applicable, that rule itself no longer applies)."); Kim, 538 U.S. at 532 (Kennedy, J., concurring) ("If the Government cannot satisfy this minimal, threshold burden [of removability], then the permissibility of continued detention pending deportation proceedings turns solely upon the alien's ability to satisfy the ordinary bond procedures–namely, whether if released the alien would pose a risk of flight or a danger to the community."); Martinez, 543 U.S. at 385 ("In Zadvydas, it was the statute's text read in light of its purpose, not some implicit statutory command to avoid approaching constitutional limits, which produced the rule that the Secretary may detain aliens only for the period reasonably necessary to bring about their removal.").

The Ninth Circuit in Tijani and Nadarajah has applied the reasoning of these Supreme Court cases to the circumstances of detainees whose orders of removal are still subject to active legal challenges, that is, those detained under 8 U.S.C. § 1226 instead of § 1231. Consistent with the trend seen in Martinez to bring all classes of indefinitely detained aliens under the due process protections recognized in Zadvydas, Tijani and Nadarajah provide relief to detainees in petitioner's circumstances who are exposed to prolonged civil detention while their appeals are processed.

In Tijani, the Court of Appeals reviewed a § 2241 habeas petition by a deportee who had been held in custody for 32 months awaiting the outcome of his appeals. Tijani held it was "constitutionally doubtful that Congress may authorize imprisonment of this duration for lawfully admitted resident aliens who are subject to removal." 430 F.3d at 1242. Distinguishing Demore v. Kim, because Tijani did not concede he was deportable, the Court ordered his release, unless he was provided with a bail hearing and found unsuitable for

release under the usual factors of risk of flight or danger to the community. See id.; see Kim, 538 U.S. at 522-23. Moreover, Kim was grounded on the Supreme Court's assumption that the period of detention would be "brief," only that "necessary for his removal proceedings," which the Supreme Court estimated as roughly six weeks in duration on average, or five months if further review is sought. See id.; see Kim, 538 U.S. at 522-23, 530. As Tijani's detention while awaiting outcome of his appeals far exceeded these estimates of the constitutionally permitted "brief period" of detention, he was entitled to release under the Zadvydas principles. See id. Thus, Tijani was entitled to release on habeas corpus unless the government proved at a hearing before an immigration judge that the petitioner was a flight risk or danger to the community. See id.[2]

In his concurring opinion, Judge Tashima expanded on the decision in order to provide guidance to the district courts. Judge Tashima saw the heart of the case to be a problematic administrative decision, In re Joseph, 22 I. & N. Dec. 799 (BIA 1999), which erroneously treated 8 U.S.C. § 1226(c) as permitting indefinite detention. See id. at 1243-44 (Tashima, J., concurring). Rather, Zadvydas made it clear that "[w]hen such a fundamental right [as personal liberty] is at stake, the Supreme Court has insisted on heightened procedural protections to guard against the erroneous deprivation of that right." Id. at 1244. The natural limitation on authority to detain, in Judge Tashima's view, is "[o]nly those immigrants who could not raise a 'substantial' argument against their removability should be subject to mandatory detention." Id. at 1247. Such a standard "strikes the best balance between the alien's liberty interest and the government's interest in regulating immigration." Id. Because Tijani had a potentially meritorious claim that his conviction was not a categorical crime of moral turpitude, he made a showing of a "substantial argument" which would warrant release on appeal. See id. at 1247-48.

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[2]However, in so proving, it is important that the assessment be based on the *current* circumstances relating to the detainee and not simply on past criminal convictions. See Lawson v. Gerlinski, 332 F. Supp.2d 735, 745 (M.D. Pa. 2004) (" 'To presume dangerousness to the community and risk of flight based solely on [an alien's] past record does not satisfy due process.' ") (quoting Ngo v. INS, 192 F.3d 390, 398-99 (3d Cir. 1999)).

Judge Tashima observed the perverse, penalizing effect of detention for those who have the best reasons to stay and fight: "By subjecting immigrants who, like Tijani, raise difficult questions of law in their removal proceedings to detention while those proceedings are conducted, the Joseph standard forces those immigrants to endure precisely what Tijani has endured: detention that lasts for a prolonged period of months or years." Id. at 1246 n.3. Judge Tashima concluded that liberty is one of the most fundamental rights protected by the Constitution, and the Supreme Court has indicated time and again that the individual should not carry the burden of protecting this fundamental right. See id. at 1245-46. Moreover, he put into question the continued viability of Joseph, which was decided prior to the Supreme Court's holding in Zadvydas. See id. at 1246; see also Miller v. Gammie, 335 F.3d 889, 900 (9th Cir. 2003) (en banc) (lower courts are not bound by prior precedent that has been seriously undermined by intervening Supreme Court authority).

In Nadarajah, the Ninth Circuit considered an indefinite detainee held under suspicion of terrorist affiliation. Nadarajah challenged his detention and was pursuing a claim for asylum, but the government relied on the silence of the asylum detention statute to detain Nadarajah while this litigation proceeded. See 443 F.3d at 1076-78. However, the Court held that the asylum detention statute was equally subject to the strictures of Zadvydas. See id. at 1082. Moreover, the Court held the principles of Fed. R. App. Proc. 23(b), allowing release on bail pending appeal, apply to such immigration detentions. Id. at 1083. The usual standards operate in such cases: (1) probability of success on merits and irreparable harm; or (2) serious legal question and a balance of the hardships. Id. Moreover, the showing of probable success correspondingly lessens as the length of detention increases. Id. at 1083-84. In Nadarajah, the Court found the 52 months of detention were a great hardship that accordingly reduced the required showing of likelihood of success. Id.

Petitioner's case is factually similar to Tijani and Nadarajah, and therefore he too is entitled to consideration for release. Like Tijani, petitioner can raise his argument for release through the vehicle of a § 2241 petition, and he also can point to substantial arguments regarding his deportation proceeding. His

petition for review in the Ninth Circuit argues that the immigration judge at the removal hearing erred in holding petitioner was ineligible for relief in the form of asylum and withholding under the Convention Against Torture. Petitioner presented evidence of his official maltreatment by Fijian officials and his abiding fear that if he were returned there, the persecution would re-commence. Petitioner was mistakenly detained and interrogated for involvement with the rebel movement in the recent coup in Fiji. The physical abuse and torture by police, including burning with hot iron, was so severe that petitioner fled his country to come to the United States. Petitioner also now fears that he is target for harm by the rebels, since he was interrogated and released by the police. He argues that a DUI is not a particularly serious crime warranting denial of CAT relief. His claims would counts as a "substantial question" under the Tashima analysis in Tijani. Moreover, as Judge Tashima observed, the detainee need not show certainty of outcome to gain release, just that "a closer look is surely required." Tijani, 430 F.3d at 1248 (Tashima, J., concurring).

Also, as in Nadarajah, petitioner here can demonstrate a basis for release under the factors in Fed. R. App. P. 23(b). He raises substantive legal and factual questions. His continued loss of personal liberty in itself constitutes irreparable harm. As for the balance of hardships, whereas the Court in Nadarajah found that 52 months' detention was a very burdensome hardship which correspondingly lessened the required showing of likely success on appeal, and the 32 months of detention in Tijani was deemed excessive, petitioner here has been in respondents' custody for over **36 months**. His burden of probable success, too, must be significantly lessened. Moreover, because petitioner was ordered removed solely on the basis of overstaying his visa, he is not even subject to the mandatory detention provisions of 8 U.S.C. § 1226(c), unlike Nadarajah, whom ICE suspected of affiliation, at least, with a terrorist organization, and so potentially subject to mandatory detention. See 443 F.3d at 1073-74; 8 U.S.C. §§ 1226(c)(1)(D), 1227(a)(4)(B), & 1182(a)(3)(F).

Balancing the factors identified in case law for release of detainees while legal challenges are pending, petitioner is entitled to release at least as much as the petitioners in Tijani and Nadarajah. In addition to the

severe harm flowing generally from a continued deprivation of personal liberty, his ability to pursue his meritorious appeal and cooperate with counsel is seriously impaired by continued detention.

As Chief Judge Vanaskie observed in Lawson, 332 F. Supp. 2d at 745:

> The price for securing a stay of removal should not be prolonged incarceration. "Freedom from imprisonment–from government custody, detention, or other forms of physical restraint–lies at the heart of the liberty that [the Fifth Amendment's Due Process] Clause protects." Zadvydas, 533 U.S. at 690. "[G]overnment detention violates that Clause unless the detention is ordered in a *criminal* proceeding with adequate procedural protections, or, in certain special and 'narrow' non-punitive 'circumstances,' where a special justification, such as harm-threatening mental illness, outweighs the 'individual's constitutionally protected interest in avoiding physical restraint.' " Id. The fact that the alien has procured a stay of removal does not undermine the due process bedrock principle that there must be a "special justification" outweighing the alien's constitutionally-protected interest in liberty, as well as "adequate procedural protections" to continue incarceration while the alien litigates his claims.

Consonant with these principles, this Court and other district courts have granted petitioners relief in cases which have raised identical claims under Tijani and Nadarajah, recognizing that indefinite detention pending substantive legal challenges violates due process. See Malcalma v. Chertoff, No. 06CV2623-WQH (AJB), 2007 WL 1516744 (S.D. Cal. Sept. 26, 2007); Martinez v. Gonzales, ___ F. Supp.2d ___. 2007 WL 2402737 (C.D. Cal. Aug. 17, 2007); Martinez-Herrera v. Crawford, No. CV07-0267-PHX-NVW-DKD, 2007 WL 2023469 (D.Ariz. June 20, 2007); Ali v. Crawford, No. CV06-01149-PHX-EHC; (D.Ariz. June 8, 2007); Soeoth v. Gonzales, No. 06CV7451-TJH (MLG) (C.D. Cal. Jan. 5, 2007). Copies of orders granting relief in these cases are attached hereto in the Appendix.

V.

REQUESTED RELIEF

The petitioner requests that this Court order the respondents to release him from custody under the conditions of supervision set forth in 8 U.S.C. §1231(a)(3). Alternatively, the Court should order a release hearing to evaluate petitioner's eligibility for supervision under appropriate conditions.

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VI.

VERIFICATION

I, [redacted], hereby verify that the facts contained in the instant petition are true and correct

Respectfully submitted,

Dated: _____

_____

[redacted]

Petitioner