The Hon. Ricardo S. Martinez
Chief United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

Daniel Ramirez Medina,

Petitioner,

v.

U.S. DEPARTMENT OF HOMELAND SECURITY; JOHN KELLY, Secretary of Homeland Security; NATHALIE ASHER, Director of the Seattle Field Office of U.S. Immigration and Customs Enforcement,

Respondents.

Case No. 2:17-cv-00218-RSM-JPD

**RESPONDENTS' RESPONSE TO PETITIONER'S OBJECTION TO R&R**

NOTED FOR MARCH 16, 2017



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Respondents respond to Petitioner's Objections to the Magistrate Judge's Report and Recommendation ("R&R"). Petitioner seeks his immediate release from custody based on his allegation that his arrest and questioning by Immigration and Customs Enforcement ("ICE") was unlawful. However, Petitioner also contends that he is not challenging the commencement of removal proceedings or the decision to terminate Deferred Action for Childhood Arrivals ("DACA") for him. Particularly in light of this contention, he has failed to show any entitlement to immediate release while his removal proceedings are pending. Such extraordinary relief is particularly unwarranted given that it is undisputed that he has cancelled a bond hearing that could have provided for his release. For five principal reasons, this Court should adopt the R&R's recommendation that Petitioner not be released immediately:

**1. No emergency justifies immediate release because Petitioner's counsel cancelled the February 23 bond hearing that would have determined whether Petitioner should be released pending resolution of removal proceedings.**

Petitioner's counsel cancelled the hearing that the Magistrate Judge ordered for the purpose of determining whether Petitioner should be released pending his removal proceedings. *See* Dkt. 64 (Report and Recommendation ("R&R") at 37 ("There is no real dispute that Petitioner has not exhausted available administrative remedies regarding his request for release; in fact, he cancelled the expedited bond hearing ordered by the Court")). Petitioner now seeks immediate release based, in large part, on the very claims that should have been addressed at the February 23 bond hearing. *See* Dkt. 66 at 6-7 (arguing that he is not a flight risk or a risk to public safety).[1] Litigants should not be allowed to manufacture an "emergency" in this manner. *Cf. Clapper v. Amnesty Intern. USA.*, 133 S.Ct. 1138 at 1151-52 (2013) (explaining in the context of standing that the alleged injury cannot be self-inflicted).

It has long been established in the context of immigration proceedings that from the moment a petitioner is able to pursue administrative remedies, "their detention was not so lawless as to allow a judge to free them under the habeas corpus statute." *Arias v. Rogers*, 676 F.2d 1139, 1143 (7th Cir. 1982). Petitioner prefers to seek release from federal district judge

[1] There is another hearing (a master calendar hearing) currently scheduled before an immigration judge ("IJ") on March 22.


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rather than from an immigration judge. But this preference is not a valid basis for seeking emergency relief, especially when the Magistrate Judge already addressed the "issue of immediate release . . . by directing an expedited bond hearing before an IJ." *See* Dkt. 64 at 37.[2] Congress created the immigration court system, in part, so that immigration matters would not be litigated before federal district court judges who have significant demands on their time (including criminal proceedings governed by the Speedy Trial Act). *Cf. Prieto-Romero v. Clark*, 534 F.3d 1053, 1065-69 (9th Cir. 2008) (explaining that bond hearings before an IJ are an opportunity to contest the necessity of detention before a neutral decision-maker). There is no basis for allowing Petitioner to bypass this system by seeking release in district court on an emergency basis.

**2. Immediate release is not warranted because Petitioner is not entitled to release from custody, even if he prevails on all of his constitutional claims.**

Subsequent to filing the Amended Petition, Petitioner clarified that he is not challenging the removal proceedings and is not seeking reinstatement of DACA. Transcript of Oral Argument dated March 8, 2017 ("Transcript") at 52:4-7.[3] Rather, he is challenging only his arrest and related actions that occurred prior to the commencement of removal proceedings. *See* Dkt. 64 at 29 ("Petitioner's claims 'arose' from actions several ICE officers took *before* the Government decided to initiate removal proceedings against him.") (emphasis original); *id*. at 15 ("The gravamen of the petition is that ICE officers should not have detained Petitioner in the first place . . . ."); *see also* Transcript at 40:1-9.

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[2] Petitioner contends that once this case starts down the "path" of removal proceedings before an IJ it may never end up returning to district court. *See* Dkt. 66 at 6 n.4. However, the Magistrate Judge already explained how the matter could return to district court; following an IJ's bond determination "the aggrieved party may ask the Court to waive the general requirement that a bond determination be appealed to the Board of Immigration Appeals and consider appropriate objections to the bond determination." *See* Dkt. 39 at 2. That the R&R concludes that exhaustion in the form of a bond hearing is not required does not change this analysis.

[3] When asked by the Magistrate Judge what habeas remedy Petitioner is seeking "as it relates to loss or termination of DACA," Petitioner's counsel responded that he was "not seeking any." Transcript at 51:11-15. When the Magistrate Judge followed-up to clarify whether he was seeking reinstatement of DACA, he responded that he was "not seeking anything that has to do with the removal proceedings themselves." Transcript at 52:4-7; *see also, id*. at 40:1-9, 40:25 through 41:14, 43:9-18, 46:2-7.


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As Respondents previously explained, Dkt. 58 at 10-11, a petitioner is not entitled to release from custody on a habeas petition even if the arrest and other actions that preceded the commencement of removal proceedings are unlawful. *See U.S. ex. rel. Bilokumsky v. Tod*, 263 U.S. 149, 158 (1923) (citations omitted); *see also Arias*, 676 F.2d at 1142-43 (explaining in the context of immigration detention that "[i]t is of course possible that the detention might be legal although the arrest was not").[4] This is because a petition for a writ of habeas corpus "is not like an action to recover damages for an unlawful arrest," and it does not enable a petitioner to seek release from custody on the grounds there were "defects in the original arrest or commitment." *Bilokumsky*, 263 U.S. at 158 (citations omitted); *Guzman-Flores v. U.S. Immigration & Naturalization Serv*., 496 F.2d 1245, 1248 (7th Cir. 1974) (explaining "that the illegality of an arrest does not destroy a later valid proceeding, [and that this principle] has long been recognized by the Supreme Court and is still a valid rule of law"). Similarly, courts have long recognized that once deportation (now removal) proceedings were commenced, they "must be allowed to proceed without the intervention of proceedings in the district court challenging the arrest." *Min-Shey Hung v. United States*, 617 F.2d 201 (10th Cir. 1980). This makes sense because the purpose of a writ of habeas corpus is to test the legality of the current detention, not the prior arrest. *Arias*, 676 F.2d at 1142.[5]

Here, there is legal authority for the present detention – 8 U.S.C. § 1226(a), which authorizes the detention of aliens "pending a decision on whether the alien is to be removed."[6]

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[4] When asked whether he was aware of "any immigration cases that grant habeas relief in the form of release pending removal proceedings for Fourth Amendment claims," Petitioner's counsel answered, "No." Transcript at 56:7-10.

[5] Respondents are not asking the Court to cast the writ of habeas corpus to the "museum and history books . . ." Dkt. 64 at 45. Instead, they are merely pointing out that historically the writ never provided for release on the basis of an unlawful arrest provided that subsequent custody is lawful.

[6] The Supreme Court has explained that Congress, since 1789, has authorized the arrest of deportable aliens by order of an executive official. *See Abel v. United States*, 362 U.S. 217, 232-34 (1960) (providing the historic development of administrative arrest and detention without a judicial warrant). Petitioner contends that Respondents have provided no explanation as to why he remains in custody. *See* Dkt. 66 at 5. But the Respondents provided an explanation in their initial filing explaining that Immigration and Customs Enforcement ("ICE") issued a valid Notice to Appear ("NTA") and that Petitioner is being detained under 8 U.S.C. § 1226(a) pending resolution of his removal proceedings. *See* Dkt. 32; *see also* Dkt. 64 at 35-6 (discussing this authority). Petitioner concedes he is not challenging the decision to issue the NTA and


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Thus, even if Petitioner succeeds in establishing that his initial arrest was unlawful, he is still not entitled to immediate release from custody. *Id.* at 1143. As a result, there is no basis for ordering his release at this time.

This does not mean that ICE's custody determinations are not subject to review. As the Magistrate Judge explained, 8 U.S.C. § 1226 provides for a bond redetermination before an IJ and a subsequent administrative appeal to the Board of Immigration Appeals ("BIA"). *See* Dkt. 64 at 35-36 (discussing the statutory framework for detention pending removal proceedings). In addition, under the proper circumstances, a petitioner can raise a constitutional challenge to the adequacy of the bond hearing or the length of his detention. *See V. Singh v. Holder*, 638 F.3d 1196, 1200 (9th Cir. 2011), *Casas-Castrillion v. Dep't of Homeland Sec*., 535 F.3d 942, 944-45 (9th Cir. 2008). But these cases involve constitutional challenges to the detention itself, not challenges to the actions that led to the detention, such as the decision to arrest and question an individual. Of course, an unlawful arrest can have important consequences. In the context of a petition for review, the Ninth Circuit found that a Fourth Amendment violation can result in the suppression of evidence which could require the termination of the removal proceeding. *See, e.g., Lopez-Rodriguez v. Mukasey*, 536 F.3d 1012, 1017, 1019 (9th Cir. 2008) (holding entry into residence did not satisfy the Fourth Amendment and required dismissal of removal proceedings); *Orhorhaghe v. I.N.S.*, 38 F.3d 488, 492, 492, 505 (9th Cir. 1994) (holding that officer violated the Fourth Amendment). In addition, an unlawful arrest, under certain circumstances, if found to be separate from removal proceedings, may give rise to a claim for money damages. *See Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971). An unlawful arrest, however, does not mandate that the petitioner be released in habeas. *See Arias*, 676 F.2d at 1143.

**3. "Conditional release" is not permitted in the present context.**

Even if Petitioner were properly challenging his current detention, rather than prior actions by ICE, his conditional release would still not be proper. The Ninth Circuit, in the

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commence removal proceedings. Moreover, although Petitioner challenges the ICE officer's decision to question him about his immigration status, 8 U.S.C. § 1357(a)(1) authorizes officers "to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States."


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context of immigration detention, rejected the argument that it was proper to release an individual in habeas "based on a prediction" as to what the court "is likely to conclude" when it decides the merits of the petitioner's claim. *V. Singh*, 638 F.3d at 1212 (explaining that such a system would be "odd" and "would severely undermine the streamlined system Congress sought to establish by enacting the REAL ID Act");[7] *cf. Chin Wah v. Colwell*, 187 F. 592, 594-95 (9th Cir. 1911) (finding that under the law in existence at the time, federal district courts could not grant release on bail in immigration proceedings).

In the criminal context, the Ninth Circuit has not yet decided whether a district court has the authority to "conditionally release" a habeas petitioner on bail pending a decision on the merits of the petition. Dkt. 64 at 40 (citing *United States v. McCandless*, 841 F.3d 819, 822 (9th Cir. 2016), *petition for cert. filed* (Feb. 16, 2016) (No. 16-8054)). However, as Respondents have repeatedly noted, Dkt. 32 at 8, Dkt. 52 at 9 n.7, there is a significant difference between 28 U.S.C. § 2241 (civil habeas) and § 2254 (criminal habeas). In a Section 2254 proceeding, the petitioner is challenging an underlying criminal conviction and not merely his or her detention.[8] In contrast, the relief sought (or at least properly sought) in a Section 2241 proceeding is only

[7] The procedural posture of *V. Singh* is different from the present case because, there, the petitioner had already filed a petition for review in the Ninth Circuit, so the question was whether the district court in habeas should review the merits of the pending petition for review. *See* 638 F.3d at 1212. The reasoning of *V. Singh* applies with even greater force, here, because Petitioner claims he is not challenging an order of removal (or even the proceedings themselves) but merely challenging his initial arrest. Thus, a prediction on whether he will prevail does not even have any bearing on whether he is now properly detained.

[8] In his Opposition brief, Petitioner appeared to recognize this important distinction. *See* Dkt. 57 at 27 n.18 ("Each of the cases cited by the government involved situations where the habeas petition[er]s had already been *convicted* of unlawful conduct") (emphasis original). In contrast, in his most recent filing, he states that the parties "agree" that this Court has the power to grant Petitioner immediate conditional release pending resolution of his habeas petition. Dkt. 66 at 3. But Respondents never agreed that this relief is available in the civil context. *See* Dkt. 32 at 8; Dkt. 52 at 9 n.7. Moreover, there is another important difference between the civil and criminal context: in the criminal context, petitioners are generally required to exhaust their remedies in state court before even filing a habeas petition. *See* 28 U.S.C. § 2254(b)(1). Thus, if this Court is going to import the possible remedy of conditional release from the criminal habeas context, it should also import this important limitation by requiring exhaustion of Petitioner's release claim in a bond hearing before immigration judge.


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release. Thus, a request for "conditional release" is nothing more than a request for the ultimate relief on an expedited basis and is therefore inappropriate.[9]

Assuming that conditional release on bond is available, a petitioner must demonstrate both exceptional circumstances and a high probability of success. *See Hall v. San Francisco Super. Ct.*, No. 09-5299 PJH, 2010 WL 890044, at *3 (N.D. Cal. 2010) (explaining that the standard is meant to be conjunctive rather than disjunctive); *United States v. Costa*, Crim No. 04-00055 HG-01, 2016 WL 1555676, *4 (D. Haw.) (same); *see also McCandless*, 841 F.3d at 823 (stating that this remedy is not available where a petitioner fails to show that he has "a high probability of success on the merits of his habeas petition or that he will likely end up over-serving his constitutionally permissible sentence if he is denied bail."); *In re Roe*, 257 F.3d 1077, 1080 (9th Cir. 2011) (assuming that a district court had authority to release a state prisoner on bail but finding that the district court clearly erred in ordering release).[10]

Even if a federal court could properly order the release of a petitioner on bail pending a resolution of his habeas case, Petitioner fails to meet this standard. Dkt. 52 at 23-25 citing, *inter alia*, *Martin v. Solem*, 801 F.2d 324, 329 (8th Cir. 1986) ("there is nothing unusual about a claim of unlawful confinement in a habeas proceeding"). As a threshold matter, Petitioner's argument that there are exceptional circumstances here is not tied to any existing case law. *See* Dkt. 66 at

[9] The Second Circuit, in a pre-REAL ID Act, did not adopt this approach and stated that conditional release may be available in the immigration context. *Mapp v. Reno*, 241 F.3d 221, 223, 229-30 (2d Cir. 2001) (vacating the district court's decision granting conditional release because the district court failed to explain how release was necessary to make the petitioner's habeas remedy effective). But here, unlike in *Mapp*, the Petitioner is asserting that he is not challenging a final order of removal or the removal proceedings in any way. In addition, *Mapp* fails to consider that prevailing in a challenge to a state criminal conviction has the possible result of release and, therefore, it is understandable why a federal court would, in extraordinary circumstances, "conditionally release" a petitioner pending determination of whether the conviction was proper. But if, as is the case here, the Petitioner is not challenging a final order (or even the removal proceedings), he would remain in custody even if he prevails with his claims that the arrest and related actions were unlawful.

[10] The Ninth Circuit has suggested that failing health and a need for medical attention might support a claim for exceptional circumstances, but only if the petitioner requires treatment that is not available to him while in custody. *See Roe*, 257 F.3d at 1081; *see Healy v. Spencer*, 406 F. Supp. 2d 129, 130 (D. Mass. 2005) (finding exceptional circumstances based on strong evidence of a *Brady* violation and lack of a risk of flight or risk to the community) *but see Roe*, 257 F.3d at 1080 (the seriousness of the constitutional violations alleged do not justify release on bond).


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5-9. Rather, for example, he argues that he is entitled to immediate release because the case has garnered extensive media attention and resulted in thousands of protestors taking to the streets and that the rulings in this case could have an impact on hundreds of thousands of people. Dkt. 66 at 8. But none of these contentions are relevant to determine whether release is appropriate.

Petitioner also argues that this case is extraordinary because of "the background of DACA." Dkt. 66 at 7. But he is not challenging the decision to terminate DACA and commence removal proceedings and he is not seeking a reinstatement of DACA. *See* Dkt. 64 at 16 n.16, 31; Transcript at 51:11-15. Rather, he is challenging his arrest (and related actions) and, as the Magistrate Judge found, "[t]he evidence does not support the inference that the ICE officers knew Petitioner was a DACA beneficiary before they arrived at the ICE processing center [i.e. at the time of the arrest]." Dkt. 64 at 42 n.31; *see id*. citing Dkt. 53-1 (Petitioner's declaration) at 3.

Petitioner argues that he has a constitutionally-protected property interest in DACA and that the Government cannot summarily revoke DACA "without due process of law." Dkt. 66 at 13. But, again, he has clarified that in this action he is not challenging the revocation of DACA or seeking its reinstatement. *See* Transcript at 51:11-15. He challenges only his arrest and related actions. Thus, this constitutional question has nothing to do with the relief that he is seeking.[11] Even if he prevails with all of his constitutional claims, Petitioner would still be properly detained under 8 U.S.C. § 1226(a). As a result, a request for "conditional release" under these circumstances makes no sense.[12]

[11] In addition, in a footnote, Petitioner contends ICE failed to comply with its own statutory scheme in revoking DACA. Dkt. 66 at 8 n. 13 citing *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954). But DACA is not governed by any regulatory, let alone, statutory scheme. Thus, there are no statutes or regulations that ICE even arguably could have "failed[] to follow." *See* Dkt. 66 at 8 n.13.

[12] Petitioner argues that his "immediate conditional release is required at this early stage of the case, not in spite of the unresolved issues in the case, but because of them." Dkt. 66 at p. 8. But this is backwards. His argument claims merely that he should be released because the parties disagree about the facts giving rise to his detention. Petitioner is in the same position as every other individual whom ICE has determined should be detained under 8 U.S.C. § 1226(a) pending their removal proceedings; presumably they all want to be released immediately rather than at a later date. The only extraordinary aspect of this case is the Petitioner's attorney's cancellation of the bond hearing that could have resulted in Petitioner's release.


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**4. This Court should not order release because it lacks jurisdiction over Petitioner's claims.**

As set forth in Respondents' Motion to Dismiss, this Court lacks jurisdiction over Petitioner's claims that, under the REAL ID Act, must be channeled through the removal process. The Magistrate Judge disagreed, Dkt. 64, but this Court has directed that Respondents file this response in advance of their objections to the R&R. Dkt. 67. Respondents request that this Court wait to rule on whether Petitioner is entitled to release until after Respondents' objection is fully briefed. The reason is simple; if there is no jurisdiction, there is no basis for ordering any relief.

**5. There are disputed issues that preclude release at this time.**

There are important merit-based matters in dispute that preclude ordering Petitioner's release at this time, including whether Petitioner is a flight risk or a risk to the community.[13] If this Court disagrees with Respondents and decides to address these issues in the first instance, this Court should at least hold a hearing to give Respondents an opportunity to present evidence. *See* Dkt. 52 at 24 n.21.[14] The Respondents have not yet presented such evidence given the Magistrate Judge's briefing schedule that "trifucated this matter." Dkt. 64 at p. 15; Dkt. 39 (setting the briefing schedule).

WHEREFORE, this Court should decline to order Petitioner's immediate release from custody at this time.

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[13] In addition, there are important factual disputes regarding Petitioner's Fourth and Fifth Amendment claims. Dkt. 66 at 11-12. As an example of how unconventionally this matter has proceeded, Petitioner is now relying in part on a quotation from a purported expert found in a recently published magazine article about this case that has never been tendered to this Court. *See* Dkt. 66 at 4-5, n.3.

[14] Although it has no bearing on any issue before the Court, Respondents briefly address the R&R's observation, Dkt. 64 at 13 n.14, that there are two different versions of the Form I-213: an initial one (attached to the Motion to Dismiss), Dkt. 52-9, and an amended version (attached to Respondent's initial filing). Dkt. 32-3. As Respondents previously noted, both versions are in Petitioner's A File and, moreover, both versions indicate that Petitioner was a beneficiary of DACA. The amended version, Dkt. 32-3, was created because Petitioner initially indicated to ICE that he had reason to believe that he was a U.S. citizen. Under ICE practice (at least in this district), whenever an individual indicates that he or she may be a U.S. citizen, the ICE officer must describe in the I-213 the steps taken to evaluate that claim. *See* Dkt. 64 at 13 n.14 (setting forth these steps). One reason for this practice is to provide this information to the IJ. Because the initial I-213 did not include those steps, ICE created an amended version of the I-213 that did. To be clear, nothing was removed from the I-213; instead, additional information was included. This Court may consider either version for ruling on the parties' objections.


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