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REPRESENTING CLIENTS IN BOND HEARINGS
AN INTRODUCTORY GUIDE

This guide provides an overview to representation in the immigration bond context. Representing someone in bond hearings can be incredibly impactful. Being released from detention means being present with friends and family, avoiding harmful detention conditions, better access to counsel, and can greatly improve someone's chance at winning their case. Not only that, representing someone in bond hearings is doable.

Special thanks to Orrick, Herrington & Sutcliffe LLP, Kirkland & Ellis LLP, Winston & Strawn LLP, and Legal Intern Sarah Lakhani, for your support in the creation of this guide.

Part I: Basic Bond Topics covers basic issues you are likely to encounter when representing your client in a bond case. Specifically, we will cover how to:

1. *Locate your client and assess bond eligibility*
2. *Enter your representation and request a bond hearing*
3. *Present your bond case*
4. *Pay bond*

Part II: Advanced Bond Issues. Because of some very harsh laws surrounding immigration bonds, not everyone will have access to a bond hearing. However, this is a complex legal determination and one which should always be challenged. If you are interested in more complex bond hearing issues, refer to **Part II: Advanced Bond Issues**.

1. *Mandatory Detention*
2. *Avoiding Transfer*

PART 1: TYPICAL BOND ISSUES

Step 1: Locate your client and assess bond eligibility

Finding your client

One of the first steps you should take is ensuring that you know where your client is detained. Technically, people can be transferred to immigration detention centers anywhere in the United States, though people may be detained closer to home.[1]

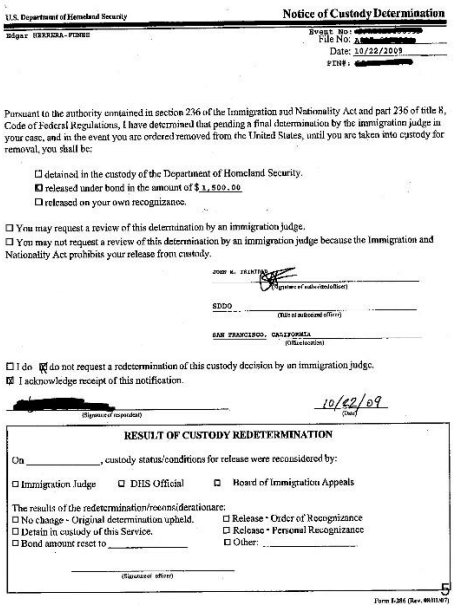
Use Immigration and Customs Enforcement's (ICE) Online Detainee Locator System[2] to find out where your client is in custody. You can search for your client by 1) his or her Alien Registration Number (Alien Number or A-Number)[3] and country of birth; or 2) by his or her first and last name and country of birth. Keep in mind that this database is only for individuals who are 18 years of age or older.[4] If you have trouble locating a client, contact your local

[1] For a map of immigration detention centers nationwide, see: www.endisolation.org/resources/immigration-detention/.
[2] See http://locator.ice.gov/odls/homePage.do.
[3] The A-Number is a unique seven-, eight- or nine-digit number assigned to a noncitizen at the time his or her A-file is created. The 9-digit USCIS number listed on the front of Permanent Resident Cards (Form I-551) issued after May 10, 2010 is the same as the Alien Registration Number. The A-Number can also be found on the back of these Permanent Resident cards. See www.uscis.gov/e-verify/customer-support/glossary.
[4] Children classified as Unaccompanied Alien Children (as defined in 6 U.S.C. § 279(g)(2)) are detained by the Office of Refugee Resettlement (ORR), a part of the Department of Health & Human Services, rather than ICE. The location

Enforcement and Removal Operations office (ERO).[5] However, you should only do this if you are certain that they are in ICE custody. Often family members are looking for the one apprehended, but don't know for sure that the arrest is immigration related. We don't want to alert ICE of a potential criminal arrest for someone at risk of removal.

Form I-286 and ICE's initial custody determination

When someone is first arrested by ICE, they are taken to a local ICE processing office where an ICE officer makes a custody determination, deciding whether the person should remain in custody or should be released. Technically, this is the person's *first* custody determination. The second one will be in front of the Immigration Judge (the bond hearing). An ICE officer fills out Form I-286, the "Notice of Custody Determination," which provides the details of this determination.



U.S. Department of Homeland Security — **Notice of Custody Determination**

Alien: HERRERA-FIGUEROA, [redacted]

Event No: [redacted]
File No: [redacted]
Date: 10/22/2009
FINS: [redacted]

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 the Department of Homeland Security.
- ☒ released under bond in the amount of $ 1,500.00
- ☐ 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.

JOSEPH M. [redacted] (Signature of authorized officer)

SDDO (Title of authorized officer)

SAN FRANCISCO, CALIFORNIA (Office location)

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

[redacted] (Signature of recipient) 10/22/09 (Date)

RESULT OF CUSTODY REDETERMINATION

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

☐ Immigration Judge ☐ DHS Official ☐ 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. 08/01/07)

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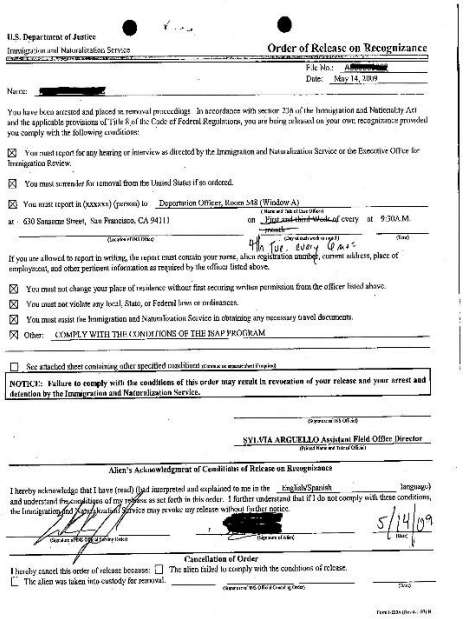
of detained juveniles is confidential, but parents or sponsors may contact the ORR Helpline for information, at (800) 203-7001. Attorneys must make a request to ORR for information following other procedures. See www.acf.hhs.gov/orr/about/ucs/contact-info. There is currently ongoing litigation surrounding the right of unaccompanied minors to request release on bond. The Ninth Circuit has found that all detained children have a right to a bond hearing. Please see, ILRC Practice Alert, *Practice Alert on Flores v. Sessions: Ninth Circuit Holds that All Detained Children Have the Right to a Bond Hearing* (July 2017), available at www.ilrc.org.

[5] See www.ice.gov/contact/ero/ to locate your local Enforcement and Removal Operations (ERO) office.

ICE may do one of three things. First, ICE may release the person with no bond (this is called "release on own recognizance"). If this is the case, the I-286 box "released on your own recognizance" will be checked and the person receives an Order of Release on Recognizance specifying any terms of release.



U.S. Department of Justice
Immigration and Naturalization Service

Order of Release on Recognizance

File No.: [redacted]
Date: May 14, 2009

Name: [redacted]

You have been arrested and placed in removal proceedings. In accordance with section 236 of the Immigration and Nationality Act and the applicable provisions of Title 8 of the Code of Federal Regulations, you are being released on your own recognizance provided you comply with the following conditions:

☒ You must report for any hearing or interview as directed by the Immigration and Naturalization Service or the Executive Office for Immigration Review.

☒ You must surrender for removal from the United States if so ordered.

☒ You must report in (xxxxxx) (person) to Deportation Officer, Room 548 (Window A) (Name of Tax of Our Office)
at 630 Sansome Street, San Francisco, CA 94111 (Location of Bill Office) on ~~First and third Week of~~ every ~~month~~ (Day of Week and Month of Year) at 9:30A.M. (Time)

If you are allowed to report in writing, the report must contain your name, alien registration number, current address, place of employment, and other pertinent information as required by the officer listed above.

☒ You must not change your place of residence without first securing written permission from the officer listed above.

☒ You must not violate any local, State, or Federal laws or ordinances.

☒ You must assist the Immigration and Naturalization Service in obtaining any necessary travel documents.

☒ Other: COMPLY WITH THE CONDITIONS OF THE ISAP PROGRAM

☐ See attached sheet containing other specified conditions (Contact or remove Part Employ)

NOTICE: Failure to comply with the conditions of this order may result in revocation of your release and your arrest and detention by the Immigration and Naturalization Service.

(Signature of IES Official)

SYLVIA ARGUELLO Assistant Field Office Director
(Printed Name and Title of Officer)

Alien's Acknowledgment of Conditions of Release on Recognizance

I hereby acknowledge that I have (read) (had interpreted and explained to me in the English/Spanish language) and understand the conditions of my release as set forth in this order. I further understand that if I do not comply with these conditions, the Immigration and Naturalization Service may revoke my release without further notice.

(Signature of IES Official Serving Order) [redacted] (Signature of Alien) 5/14/09 (Date)

Cancellation of Order

I hereby cancel this order of release because: ☐ The alien failed to comply with the conditions of release.
☐ The alien was taken into custody for removal.

(Signature of IES Official Cancelling Order) (Date)

Form I-286 (Rev. 6-1-09)

Second, ICE may release the person under supervision or special conditions.[6] If this is the case, the I-286 box "released on your own recognizance" will be checked and the person receives an Order of Release on Recognizance specifying the terms of release.

Third, ICE may choose to detain the person and set a monetary immigration bond, which is listed on the I-286 (the box "released under bond in the amount of $ ___" will be checked). This amount can vary greatly depending on ICE's determination of how likely it is that the person will appear at later hearings. ICE can also decide to not issue a bond or release the immigrant by marking the box "detained in the custody of the Department of Homeland Security."

Some individuals will not be eligible for bond. Notably, "arriving aliens" and immigrants with certain criminal convictions or terrorism concerns can be subject to *mandatory detention*, which is discussed in Part 2: Advanced Bond Issues. If ICE believes an individual is subject to mandatory detention, the boxes on Form I-286 indicating, (1) "detained in the custody of the Department of Homeland Security" and (2) "You may not request a review of this determination by an immigration judge because the Immigration and Nationality Act prohibits your release from custody" will be marked. Advocates should always do their own assessment and where appropriate, challenge a determination of mandatory detention.

Importantly, your client may seek review of ICE's initial custody determination in front of an immigration judge (see Step 2: Requesting a bond hearing). Even in cases where the government has indicated that your client is not eligible for bond, your client may appear in front of the immigration judge to challenge that finding. See Part II.

To evaluate the content of ICE's initial custody determination, ask your client for his or her I-286 as soon as possible. If your client does not have access to the I-286 in detention, ask if a family member can help obtain

[6] ICE currently maintains three of these Alternative to Detention, or "ATD," programs: (1) Intensive Supervision Appearance Program (ISAP), which includes private contractors monitoring respondents through telephonic reporting, radio frequency, GPS (ankle bracelets), and unannounced home visits; (2) Enhanced Supervision/Reporting (ESR), which involves a private company using the same methods as ISAP; and (3) Electronic Monitoring, which ICE operates with the same methods. See ICE, Alternatives to Detention for ICE Detainees (Oct. 23, 2009), AILA Doc. No. 09110666. See also 8 CFR §§ 236.1(d), 1236.1(d); INA § 236(a)(2)(B).

it. The ICE officer in charge of your client's case may also be able to get you a copy. Another option is to contact the ICE Office of Chief Counsel to locate the government lawyer (often called the "Trial Attorney," or "TA") assigned to your client's case. Under *Dent v. Holder*[7] in the Ninth Circuit, the TA should allow you to review the I-286. Know that in order to communicate with ICE on your client's behalf, you will need to file a G-28 with the agency to enter your representation (see Step 2: Entering representation).

As a practical matter, investigating the pathways to obtaining the I-286 can be time-consuming. They may only be feasible if you are retained before your client's bond hearing has been set or several weeks in advance of a scheduled hearing. This means that in practice, you may not be able to review your client's I-286 before appearing in Immigration Court for the bond hearing. However, you can ask to review the I-286 at the hearing. It is best to ask the ICE attorney before going on the record, just in case it changes your strategy. For instance, if you learn a low bond has already been set, you might want to continue the case and check in with the client about whether it is better to pay the bond set by ICE.

PRACTICE TIP: If you have been retained as counsel by a detained person for whom ICE has not yet made a custody determination (in this case, there would be no I-286), advocate with ICE for your client's release before removal proceedings are initiated. ICE officers can exercise prosecutorial discretion and release individuals in their custody. Persuade them to do so by emphasizing your client's equities (see Step 3: Equities) or potential relief opportunities, such as family adjustment or Temporary Protected Status (TPS).

PRACTICE TIP: Always do your own assessment of a client's bond eligibility, since ICE may get the initial custody determination wrong. Be especially critical if ICE believes your client is subject to mandatory detention, as that determination is very tricky. Additionally, always screen your client for criminal history. You might learn that your client has convictions that impact bond eligibility.

Step 2: Enter your representation and request a bond hearing

Entering representation

In order to communicate with Department of Homeland Security (DHS) employees (i.e., ICE and USCIS) on your client's behalf, you must file a "Notice of Entry of Appearance as Attorney or Accredited Representative," Form G-28,[8] with the agency. Typically, you must submit a paper version of the G-28 that includes your and your client's original signatures. However, Enforcement and Removal Offices (ERO), will often accept faxed G-28s. With this form, you will be able to speak with the custody officer about important issues in your client's case including, where your client is held, what custody decisions have been made, and details around your client's release once bond is granted and paid.

To represent your client before the immigration courts, you must be registered with the Executive Office for Immigration Review's (EOIR) e-Registry system[9] and have a "Notice of Entry as Attorney or Representative before the Immigration Court," Form E-28,[10] on file in the particular case. Note that the E-28 includes a box where you must indicate whether you are entering your appearance for all proceedings, the custody proceeding only, or all proceedings other than custody and bond proceedings. The E-28 does not need to be signed by your client. You must serve a copy of the E-28 on the government attorney at the beginning of the bond hearing.

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[7] 627 F.3d 365 (9th Cir. 2010).

[8] Be sure to use the most recent version of Form G-28. See www.uscis.gov to access the form. For more information on the G-28, see www.uscis.gov/forms/filing-your-form-g-28.

[9] For information about e-Registry and to complete the registration process, see www.justice.gov/eoir/internet-immigration-info. See www.justice.gov/eoir/eregistry-program for e-Registry information specific to each immigration court.

[10] Be sure to use the most recent version of Form E-28. See www.justice.gov/eoir to access the form.

Once you're e-Registered, you can use e-Filing to electronically file the E-28 in most circumstances.[11] However, if you electronically file an E-28 close to a hearing, you may be required to complete a paper E-28 at the hearing. Also, if you file the E-28 electronically, you *don't* need to file a paper version of the form with the court but you *do* need to serve the government attorney with a printed copy of the e-Filed form at the beginning of the bond hearing.

Requesting a bond hearing

After ICE has made an initial custody determination to detain your client, he or she may seek review of the decision in front of the immigration judge.[12] This is technically called a bond redetermination hearing, but is often referred to simply as a bond hearing.[13] Most commonly, a person requests a bond redetermination hearing by marking the I-286 boxes indicating "I do…request a redetermination of this custody decision by an immigration judge" and "I acknowledge receipt of this notification," and signing the form at the time of ICE's initial custody determination. However, a bond hearing may also be requested orally (in court), in writing (via written motion for bond redetermination), or, at the discretion of the immigration judge, by telephone.[14] Typically, attorneys request a bond hearing in court or via written motion. However, it is appropriate to call the court clerk to inquire - other courts will often accept a call to the court clerk to schedule the hearing. A bond hearing may be requested for an individual in removal proceedings at *any* time after the person is in ICE custody.[15] This means that you can ask for a bond hearing *before* a Notice to Appear (NTA) is *filed* with the Immigration Court or your client has his or her first hearing.[16]

Once you request a bond hearing, the immigration judge will probably schedule one a few days to a few weeks away. It will likely be your only opportunity for a bond hearing, so be sure to have all of your evidence ready before you ask for the hearing. If your client requested a bond hearing before retaining you and you have not had adequate time to prepare, consider asking the immigration judge for a continuance (delay in hearing date). The judge will probably grant your request and reschedule the hearing for two or three weeks away. In deciding whether to go forward with the originally scheduled bond hearing or defer it, you and your client must weigh the value of a continuance for case preparation against your client's desire to try to get out of detention immediately.

PRACTICE TIP: Don't rely on the 1-800 number for Bond Hearing dates. Many practitioners call 1-800-898-7180 to learn of upcoming court dates for new clients. This system will provide the next master calendar or merits hearing date in removal proceedings. Bond proceedings information is not in this system. You must call the Immigration Court Clerk to determine if there is a bond hearing date in a case.

[11] For information on e-Filing the E-28, see www.justice.gov/eoir/i-cubed-faqs/download (pp. 6-7). Note that e-Filing the E-28 is not mandatory. EOIR continues to accept paper submission of the E-28.
[12] Whereas ICE's initial custody determination happens as a matter of course, you must proactively request a bond hearing.
[13] See 8 CFR §§ 3.19, 236.1, 1003.19, and 1236.1.
[14] 8 CFR § 1003.19(b).
[15] INA § 240.
[16] 8 CFR § 1003.14(a). However, immigration judges have no jurisdiction over bond hearings for individuals who have not been *issued and served* an NTA in relation to removal proceedings pursuant to 8 CFR § 1240. Immigration judges also have no jurisdiction over Visa Waiver Program individuals in asylum-only proceedings. *Matter of Werner*, 25 I&N Dec. 45 (BIA 2009).

Step 3: Present your bond case

Now that there is a pending bond hearing, the next step is ensuring that you are prepared to present the bond case.

What the Judge Can Do

An immigration judge can only re-determine a bond that has been previously set. This is why you want to know what ICE determined initially. At the bond hearing, the immigration judge may lower the bond amount set by ICE, maintain it, or increase it.

PRACTICE POINT: In the past, immigration judges denied that they had authority to grant release on conditional parole as an alternative to release on a monetary bond. However, a class action lawsuit, *Rivera v. Holder*,[17] held that immigration judges are permitted to grant parole instead of a monetary bond. While only binding in Washington State, *Rivera* may be helpful in making this argument in other jurisdictions.

The immigration judge may lower the bond amount set by ICE, maintain it, or increase it. The lowest bond a judge can set is $1,500, and there is no maximum. Therefore, depending on your client's equities and the assigned judge, your client may want to rethink whether requesting a bond redetermination hearing is prudent.

> **Example:** Manny is in custody, and his bond has been set at $10,000. His brother can only come up with $3,000 to get him released. Manny has a bond redetermination hearing. Through evidence, he persuades the judge that he is likely to come back for all future hearings and he does not pose a danger. The judge agrees to lower Manny's bond to $3,000. Manny's brother can now post the bond, and Manny will go free.
>
> **Example:** Laura has three past DUI convictions, and is now in ICE detention after her last arrest. Her ICE officer believed in her support system, and against the normal practice of her office, authorized release on a bail of $7,000. If Laura chooses to have a bond hearing, it is important she understands that the immigration judge could increase her bond as well as lower it. Many judges would set a higher bond in Laura's case, so she will need to consider whether it is better to find a way to pay $7,000.

The immigration judge will usually issue his or her bond decision orally. Sometimes, as in the case of an appeal, the judge will provide a written decision.

In traditional bond proceedings, a person only gets one opportunity to present his case for bond before the court. Following the judge's decision, a request to reconsider the bond will only be allowed if "circumstances have changed materially since the prior bond determination."[18] Such a request must be made in writing. Additionally, both the noncitizen and ICE can appeal the immigration judge's custody determination to the Board of Immigration Appeals within 30 days.[19] To do so, reserve appeal at the end of the immigration bond hearing. While the appeal is pending, the removal case will continue as normal and your client will remain detained pending appeal.[20]

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[17] *Rivera v. Holder*, 307 F.R.D. 539, 553 (W.D. Wash. 2015).

[18] 8 CFR § 1003.19(e). This rule is separate from certain appellate court holdings requiring a new bond hearing after a certain amount of time of prolonged detention. For instance, under *Rodriguez*, the IJ must set a bond hearing after 6 months of detention, regardless of whether the person already had a bond hearing. See Part II of this guide.

[19] 8 CFR §§ 236.1(d)(3)(i), 1003.19(f), 1003.38.

[20] One exception to this is where your client succeeds in having the bond paid, and obtains release, before ICE files a notice of intent to appeal with the court.

Proving the Bond Case

a. Burden of proof

Your client has the burden of proving that he or she merits bond by proving that 1) **he or she does not pose a danger to the community**[21] and, 2) is not a **flight risk.**[22] Your client also must prove that he or she is not a threat to national security.[23]

b. Documenting the case

i. Danger to the community

The immigration judge assesses an individual's danger to the community based on:

- Your client's criminal history in the record, the number of arrests/convictions, the nature of the arrests/convictions, the length of sentences, your client's compliance with sentences, and his or her record of rehabilitation.
- Your client's criminal history not in the record but disclosed by your client.
- Testimony regarding negative or illegal conduct or illegal conduct that your client may not have been arrested for.

Bond determinations are discretionary and the immigration judges can attach significance to arrests even if they did not ultimately result in convictions. Proving that your client is not a danger to the community or a threat to national security is particularly important if your client has a criminal history, including arrests that did not lead to convictions.

PRACTICE POINT: The Notice to Appear (NTA) is not a rap sheet. Do not rely on the NTA as an indicator of your client's criminal history. Some options for getting your client's criminal records include:

1. As a starting point, ask your client, but *never* rely solely only on your client's memory.
2. If your client knows where he or she was arrested, check with the individual courts where he or she may have appeared. Get a signed "release of information" so that you can request files directly from the prior criminal defense attorney.
3. Have your client request an Identity History summary from the Federal Bureau of Investigation[24] and/or a record clearance from the relevant state (for example, the California Department of Justice).[25] Keep in mind that both requests require the submission of fingerprints, which may be difficult or impossible to obtain if your client is detained.[26]
4. Check the I-213.[27] Although you never want to admit to facts in the I-213 in court, the form may include general information about what ICE knows about your client.

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[21] *Matter of Urena*, 25 I&N Dec. 140, 141 (BIA 2009) (clarifying that an immigration judge may not release a person on bond who has not met his burden of demonstrating that his "release would not pose a danger to property or persons"). *See also* 8 CFR §§ 236.1(c)(8), 1236.1(c)(8).

[22] *Matter of Guerra*, 24 I&N Dec. 37 (BIA 2006).

[23] *Matter of D-J-*, 23 I&N Dec. 572 (AG 2003) (Attorney General's discretion to detain not limited to danger and flight risk; justifying detention of Haitian asylum seekers based on the government's asserted national security interest in deterring mass migration of Haitians by boat). *See also Matter of Khalifah*, 21 I&N Dec. 107 (BIA 1995) (deeming person a terrorist where person facing serious criminal charges in another country in a proceeding whose fairness is in doubt).

[24] See www.fbi.gov/services/cjis/identity-history-summary-checks.

[25] See https://oag.ca.gov/fingerprints/visaimmigration.

[26] Some advocates have successfully had the jail or immigration detention center take the fingerprints.

[27] The I-213 ("Record of Deportable/Inadmissible Alien") is a DHS document that is used to prove alienage in a removal proceeding. An ICE officer completes the forms upon arresting a noncitizen, before placing him or her in removal proceedings; it includes personal details about the noncitizen and information about the arrest.

5. In the Ninth Circuit, ask the ICE attorney for an opportunity to review your client's Alien-file ("A-file," the file maintained by various government agencies for each alien on record) under *Dent v. Holder.*[28]

PRACTICE POINT: Keep in mind that a particular crime does not need to be alleged or charged in the Notice to Appear (NTA) to trigger mandatory detention on the basis of that crime.[29] For more information, see Part 2: Advanced Bond Issues.

PRACTICE TIP: In recent years, immigration judges and ICE have become especially strict on substance abuse, particularly when it leads to a Driving Under the Influence (DUI) charge. While a DUI may seem like a relatively minor offense, put extra effort into rehabilitation and a strong system of accountability and support if a DUI is present.

When tackling the danger to society component of a bond case, the best strategy is to **research the facts** and **mitigate bad facts with context and equities**. Time permitting, find out as much as possible about what happened during the commission, or alleged commission, of any crimes. Request police reports, talk to the previous defense attorney, talk to others with knowledge of the crimes, and interview your client extensively. Note, in many cases the ICE attorney will submit the police report related to your client's criminal offense(s). While you should always object, these reports will likely be entered into evidence. Make sure you have reviewed these and – if you are in a jurisdiction that takes testimony – make sure that your client has been prepared to talk about his or her criminal offenses.

Rehabilitation is critical. *Collect evidence* of any past rehabilitation (e.g., treatment program completion, probation compliance) and testimony from family or community members regarding your client's good character or rehabilitation. Also, create a plan for future rehabilitation. For example, if your client is an alcoholic, establish where and when your client will receive treatment upon release. Discuss how family/friends will be supportive in this rehabilitation, including transportation to work, transportation to AA meetings, etc. You want to ensure the judge that when your client is released, there is an established path to recovery. If your client has substance abuse issues, note also that substance abuse can affect memory and the ability to recall important details.

Finally, where there is a conviction, it is important for the client to "take responsibility" for what they have done. Clients sometimes state that they did not do what they were convicted of. However, immigration court is not another opportunity to litigate the criminal case, and it will hurt your client to deny responsibility if there is a criminal conviction. In a world where many criminal convictions are a result of plea bargaining, admitting guilt can sometimes be problematic for your client. You might need to discuss the criminal conviction in detail to determine for which conduct your client will be able to take responsibility. It is important to explain to your client that they cannot revisit the criminal conviction, and a finding of guilt is already part of the record.

If your client is questioned regarding events that were charged but have not yet been adjudicated in criminal court, direct your client to assert their Fifth Amendment right to silence. Anything your client says in immigration court could be used against your client in a future criminal proceeding.

ii. Flight risk (including relief)

"Flight risk" refers to the likelihood that your client will show up for their immigration hearings in court. In assessing flight risk, the immigration judge takes into consideration a large number of factors collectively

[28] 627 F.3d 365 (9th Cir. 2010) (holding that government's failure to provide noncitizen copy of his A-file when contents bore on noncitizen's case violated noncitizen's due process rights and that noncitizen was entitled to copy of his A-file under mandatory access provision of removal statute).
[29] *In re Kotliar,* 24 I&N Dec. 124 (BIA 2007).

known as bond equities. Thus, in preparing for the hearing, the advocate should collect evidence addressing bond equities as well as danger/security concerns.

The court assesses flight risk through several factors including the following:

1. Whether the person has a fixed address in the U.S.;
2. the length of residence in the U.S.;
3. family ties;
4. employment history;
5. record of appearance in court;
6. criminal history (including how recent and serious);
7. history of immigration violations;
8. attempts to flee prosecution;
9. manner of entry into the United States;[30] and
10. immigration relief avenues.[31]

The court is attempting to assess your client's incentives and likelihood to appear at future hearings. The more evidence you present to show that your client is not a flight risk through these factors, the lower the bond will likely be.

- **Permanent Address and Length of Residence:** A stable address is very important. The longer a client has resided at one address, or in one town, the better.
    - **Sample Evidence:** Lease agreement or proof of property tax payments.
- **Family Ties:** If a client has relatives (a spouse or children, for example) who are either U.S. citizens or lawful permanent residents, the judge will be more likely to believe that a client's ties to the community are real and strong. This is especially true if the family has lived in the area for a considerable length of time or if the family is able to confer immigration benefits to the client.
    - **Sample Evidence:** Birth certificates, certificates of citizenship, marriage certificates, and photographs of client with family.
- **Employment History:** If a client is currently employed, it tends to show that she has a strong reason to remain in the area. The length and stability of the job is also important.
    - **Sample Evidence:** Pay stubs or letters from employers showing dates, job title and job description. An offer of employment or employer reference might also be helpful where a long history is not possible.
- **History of Failure to Comply with Court Hearings or Immigration Law:** The immigration judge may also take into consideration a history of non-compliance with immigration laws or a history of failure to appear for other court hearings. These are facts that you should screen for; if they exist, there is a good chance that the government will bring them up at the hearing. As with crimes, you should know all bad facts prior to the hearing and be prepared to provide an explanation and mitigate the consequences.
    - **Sample Evidence:** Submit proof of times when your client has complied with court-mandated programs (e.g. mandated DUI or domestic violence classes); testimony or evidence indicating that your client appeared for all prior hearings in criminal court, or immigration matters.

[30] *Matter of Guerra*, 24 I&N Dec. 37 (BIA 2006).
[31] *Matter of Ellis*, 20 I&N Dec. 641 (BIA 1993) (upholding denial of bond where respondent had no relief available and is, therefore, a flight risk, and has a serious criminal history rendering him a threat).

- **Criminal History:** This is very important to assessing the first factor, "danger to the community."
- **Manner of Entry:** If your client entered unlawfully, the judge may see this as a negative factor in terms of the propensity to follow rules. Here, emphasize examples of the client as a responsible individual and compliance with laws in other areas of their life.
    - **Sample Evidence:** Submit proof of compliance with laws in other areas of life such as having filed taxes, compliance with court-mandated programs, etc.
- **Other Community Ties:** Any other evidence you can present to show that a client has strong ties to the community and is therefore likely to remain for her future hearings is helpful.
    - **Sample Evidence:** Submit evidence of church membership or attendance, enrollment in classes, membership in organizations or sports clubs, and involvement in children's school activities. Evidence can include certificates of enrollment or completion, letters from individuals who can attest to your client's involvement, etc. This is an opportunity to be creative and get to know your client.
- **Eligibility for Immigration Relief:** An important consideration is whether a client is eligible for immigration relief in order to remain in United States. For example, if the person soon will immigrate through a family member or is eligible to apply for relief from removal, he or she has more invested in coming to court and is less likely to abscond. Additionally, the likelihood of success on the merits will be weighed. This means that if there is relief, but the likelihood of winning the case is extremely weak, this factor may carry less weight.

Letters of Support. Letters of support from family members, friends, employers, landlords, teachers, churches, etc. can be helpful to demonstrate many of the factors above. Below are some tips for submitting letters of support.

- Make sure that these letters identify the person, if relevant that they are a U.S. citizen (or have other lawful status), how long they have known the client, and in what capacity. Attach proof of citizenship or immigration status if available.
- Urge people to include details and examples. For example, "my neighbor has good character," is not as strong as "my neighbor has good character as evidenced by when they brought me dinner every day for a month while I was recovering from surgery."
- Letters will carry more weight if they are notarized, and/or the person is available in court to testify.

c. Presenting in court

Now that we've discussed the legal factors we need to prove, this section discusses the practical considerations of putting all of this evidence together and presenting it to the judge.

i. ***Be aware of relevant procedures and practices.***

Consult the Immigration Court Practice Manual for general procedures to follow.[32] Also, ask local practitioners about practices and procedures in the particular immigration court where your client's bond hearing will take place. If you have time, go observe someone else's bond hearing in front of the judge who will hear your case. For example, certain judges will have certain quirks about certain issues. Also, certain courts take testimony whereas others prefer to have informal conferences with counsel. Some judges record their hearings whereas others do not.

Many courts require submission of a "Bond Request Worksheet" or "Custody Redetermination Questionnaire." This is a simple form that asks for information to establish community ties, and other relevant factors like criminal history and employment. In some jurisdictions, these worksheets are used to set bond without taking extensive testimony. For example, in Arizona the court will set bond based on evidence

[32] Available at www.justice.gov/eoir/vll/OCIJPracManual/ocij_page1.htm.

in the worksheet and any other evidence submitted. The court will allow a profer of the evidence, but no testimony is taken.

Generally, filing legal briefs is not common practice. Courts result to briefing the legal issues in cases where there is a question of bond eligibility, i.e. whether mandatory detention applies. See Part 2: Advanced Bond Issues.

ii. *Submitting documentary evidence.*

Once you've collected evidence in your client's case, there are some guidelines to follow regarding its submission. Bond evidence should be submitted in a packet, with a court caption or cover page indicating the documents are for "bond proceedings." The court will expect an index, chronicling the evidence that you are submitting, especially with large packets of information. Since bond hearings are separate proceedings from the removal proceedings, any evidence in the removal case will have to be resubmitted in the bond case if you want it considered, and vice versa. Even in cases where the same judge will hear both the primary case in removal proceedings and the bond request, the records of evidence are separate.

Obtain a letter attesting that someone can provide room and board at a fixed address for your client upon his or her release. Ideally this person should have status. See "Letters of Support" above for basic guidance on letter submission. Some practitioners submit an Affidavit of Support, on Form I-134 from a sponsor to further establish the person is not a flight risk.

Finally, remember to check the immigration court practice manual before any and all filings with the court.

iii. *Testimony.*

Some immigration courts take oral testimony during bond hearings. Others don't take testimony and instead allow for an offer of proof. If you are in a court which takes testimony during bond hearings, the general advice is to **be the first to bring up bad facts** including arrest or convictions, particularly if they are charged on the Notice to Appear. If a conviction is going to be brought up regardless by the prosecution, it is better for the noncitizen to bring it up first and have the first opportunity to describe what happened and include any mitigating facts. Neither the court nor the prosecution likes the appearance that the noncitizen is "hiding the ball." If your client has convictions, it is important for him or her to be able to talk about remorse and rehabilitation. It is also important for your client to come across as credible.

> **Example:** Sara has a theft conviction and a hard time remembering details due to past alcohol abuse. Sara is the first to admit that she has a drinking problem and presents evidence that she has rehabilitated and continues to attend Alcoholics Anonymous classes. Sara also provides letters of support showing that she has a strong community support system which keeps her accountable. Sara is granted bond.

PRACTICE POINT: If your client has family members, employers, or others who are willing to attend the bond hearing, their presence can be persuasive. If your client's hearing is at a court that takes testimony, ask family members, employers, or other supporters to testify on your client's behalf.

iv. *Bond hearings are separate from individual hearings.*

Bond proceedings are distinct and separate from the merits case.[33] Therefore, documents and testimony taken in the bond hearing are not automatically included in the individual hearing. This evidence must be resubmitted at the merits hearing if it is to be considered at that time. However, testimony in a bond hearing can be used to impeach the client during the merits hearing, so testimony preparation is important. Please note that the inverse is also true—any documents already part of the record in removal proceedings will not transfer automatically into the bond proceedings. This is not frequently a concern since most immigrants start with a bond hearing, but in some cases individuals are already in removal proceedings when they are taken

[33] 8 CFR § 1003.19(d).

into custody. In such cases, any documents that should be considered with a bond request will need to be submitted in bond proceedings.

v. ***Use relaxed evidentiary rules to your client's advantage.***

The Federal Rules of Evidence (FRE) are used but they are not binding in immigration court. Therefore, proceed with submitting helpful evidence even if you believe such a submission does not comport with the FRE. For example, submit letters of support even if you are not able to authenticate them. However, do follow the FRE as much as you can as the judge will provide your evidence more weight. Just like you are not constrained by the FRE, neither is the ICE attorney. Documents outside the record of conviction, and documents against your client that rely on hearsay, will likely be allowed into the record. Nonetheless, it is still important to object to evidence that does not comply with the FRE. Always object to the submission by the government of a police report (e.g., it is based on hearsay, the prejudicial impact outweighs the probative value) and other documents outside a formal record of conviction.

Step 4: Pay bond

The following are some practical tips on posting (paying) the bond so that a person can get out of ICE custody.

Who Can Pay the Bond? Any person (a relative, friend, the legal worker) with lawful status can post the bond. If ICE discovers that the person posting the bond, called the **obligor**, is not here legally, it can put him or her in removal proceedings.

> **Example:** Clem Clean, who resides in the U.S. without legal status, goes to the ICE office to post the bond for his friend, Tom Trouble. ICE discovers that Clem is here illegally, and arrests him, initiating removal proceedings.

Where Can the Obligor Post the Bond? The obligor can post the bond at ANY ICE Enforcement and Removal branch office.

> **Example:** Manny's brother has the $1,500 bond to post. Manny is detained in Texas. His brother can post the bond with the removal branch of the San Francisco ICE Enforcement and Removal office. He does not have to go to Texas and should not send the money to Texas.

How Does the Obligor Make the Payment to Post the Bond? The obligor can either post a bank's cashier's check or U.S. postal money order. The obligor *cannot* post a money order from any other business, such as Western Union—it must be from the post office.

What Happens if the Person Released on Bond Fails to Show up for a Court Hearing or an Immigration Appointment? If this occurs, it is possible that the obligor will lose the bond. (This is called a **breach** of the bond.)

Benefits of Posting Bond. If your client is successfully released on bond, much changes in terms of case strategy. First, the case slows down tremendously, and the case is moved to the non-detained docket. (In some cases, you will need to file a motion to change venue in order to ensure that the case is next scheduled in the court near where your client lives.) Additionally, you will now have an opportunity to build a case with your client and family members outside the time and location constraints of detention. It is now possible to have family meetings. Your client can seek evidence to support her case, and the client can start to build positive equities by obtaining employment, rehabilitation, etc. Thus, even the passage of time can help strengthen your client's case; it might lead to new avenues of relief.

Additionally, because the place of detention might be far from the person's residence, witnesses and persons to support your client's efforts to seek relief can be difficult to secure while a client is in detention. In the non-detained setting, your client will have more time to prepare and is more likely to have loved ones to stand in support when it comes time to present a case for relief from removal before the court.

Extra Practice Tips: Representing Detained Clients

Detention centers

- Once you locate your client, familiarize yourself with the policies and procedures of the facility where he or she is located (e.g., client's phone access, full contact visits v. partition, legal visitation hours). Contact the detention facility for this information.
- Remember that cases on the detained docket will be expedited. Detained cases are sometimes resolved within a matter of months, so it is important to work quickly and efficiently.
    - Keep a checklist of documents that you need to request early in every case, e.g.:
        - Criminal documents
        - FOIAs
        - Medical records
        - Employment records, tax records, education records, etc.
- Maximize client visits by:
    - Preparing a checklist of documents you need signed and information that you need from your client prior to visiting (e.g., intake sheet with vital information and contact information for family and friends who can provide additional assistance)
    - Giving your client case-relevant homework (e.g., tell them to list out employment history, leads on collecting evidence, etc.).
- Keep a couple of client-signed Form G-28s on file so you can provide them to various offices/officers you may interact with.
- If your detained client is indigent, request a fee waiver for court filing fees by completing and submitting Form EOIR-26A. The form needs to be signed by the client, so plan ahead for the signature.
- Remain friendly with detention facility staff, who may be helpful when you need a favor such as getting forms faxed and signed.
- Protect attorney-client privilege by insisting that client meetings are in a private area where conversations are not monitored and labeling all legal mail "attorney-client privileged."
- Be mindful of the physical and mental health effects of confinement on your client's ability to mount an effective legal case (e.g., ability to recall important facts and to testify competently at a hearing).
- Provide your client with realistic expectations about confinement (e.g., length). Never promise that your client will be released or will win his or her case. Warn your client about unexpected delays (e.g., cramped docket).

Courtroom

- Argue that your client's bond amount should be proportional to your client's income. Watch *Hernandez v. Sessions*,[34] a case pending in the Central District of California that seeks to require the government to consider an immigrant's financial situation and resources when setting bond for individuals facing deportation or seeking asylum.
- Be a zealous advocate during court proceedings; be litigious and fight for your client! For example, never take for granted that ICE has correctly determined that your client is subject to mandatory detention. It is a very complex legal determination, and ICE agents are not lawyers. Do your own research to assess whether or not certain offenses trigger mandatory detention.

[34] See www.aclu.org/cases/hernandez-v-sessions.

- Video teleconferencing ("VTC") technology is now being used in many Immigration Courts to conduct some bond hearings for detained immigrants remotely. This poses special representation challenges that you should be mindful of, including but not limited to the following:
    - Access to clients can be constrained. You must choose whether to remain with your client in detention during the bond hearing or appear in court with the immigration judge and trial attorney while your client remains in detention. For instance, think about what is wisest to do in each case depending on client communication needs, the judge in whose court you are appearing, and local practice with trial attorneys. Whatever you decide, prepare the client in advance as well as any family members or other witnesses about VTC procedures so they know what to expect.
    - Your client may have trouble hearing the audio of his or her bond proceedings, as well as the interpreter if he or she is using one, since the interpreter sits in the immigration court. There may be slight delays in the transmission of audio between the court and detention facility.
    - If you will appear in immigration court during a VTC bond hearing, plan ahead and obtain signatures from your client on any documents that you will need to submit in court. There will likely be fax machines in the courtroom and detention facility that you or others (the judge or trial attorney) can use to share key case documents with your client during the bond hearing. However, you probably will not be able to use the fax machine to obtain the client's signature on an E-28, for instance.
    - Keep a record! If the VTC process is interfering with the fairness of the proceeding make sure you note it out loud on the record. Indicate instances in which the client could not actually hear questions or translations and other relevant parts of the proceeding; indicate instances in which the client could not see important gestures or expressions; indicate instances in which it is unclear who in the courtroom is talking. Additionally, if the court cannot see and hear the client it is difficult to consider the proceeding as full and fair.

PART 2: ADVANCED BOND ISSUES

This section describes complex legal issues that can arise in the bond hearing context, including when mandatory detention might apply to your client, your options for challenging mandatory or prolonged detention, and ICE transfers of detainees.

1. Mandatory Detention

Rules

The rules governing mandatory detention went into effect on October 9, 1998.[35] Under these rules, the following individuals are *not entitled to a bond* and must remain in detention while removal proceedings are pending against them.

- Arriving aliens in removal proceedings.

Applicants for admission who are coming or attempting to come into the United States at a point of entry[36] and who are determined to be inadmissible under INA §§ 212(a)(6)(C) or 212(a)(7) will be subject to expedited removal from the country unless they indicate an intention to apply for asylum or a fear of persecution.[37] In the latter case, they will be detained pending a final determination of credible fear of persecution and, if found not to have such a fear, until removed.[38] This includes returning LPRs who are "seeking admission."[39]

- *Individuals within the United States when placed in removal proceedings who are subject to certain crimes grounds of deportability or inadmissibility.*[40] Importantly, *all four*[41] of the below criteria must be met for such a person to be subject to mandatory detention.

    1. Persons who are inadmissible or deportable because of one or more of reasons (a) through (d).

    a) Persons who are *inadmissible* for having committed an offense in INA § 212(a)(2) [crimes involving moral turpitude and drug offenses];

        i. **Petty offense exception:** If the individual has only one crime involving moral turpitude (CIMT), he or she may qualify for the "petty offense exception" and therefore not be subject to mandatory detention. To qualify, 1) the individual must have only *one* CIMT, 2) the individual must not have been *sentenced* to a term of imprisonment in excess of six months, and 3) the offense of conviction carried a maximum possible sentence of one year or less.[42]

    b) Persons who are ***deportable*** for having committed any offense in INA § 237(a)(2)(A)(ii) [multiple criminal convictions], 237(a)(2)(A)(iii) [aggravated felony], 237(a)(2)(B)

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[35] See INA § 236(c)(1).
[36] 8 CFR § 1003.19(h)(2)(i)(B).
[37] INA §§ 208(a)(1), 235(b)(1)(A)(i). For a helpful practice advisory on expedited removal in the era of President Trump, see www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/final_expedited_removal_advisory-_updated_2-21-17.pdf.
[38] INA § 235(b)(1)(B)(iii)(IV).
[39] See INA 101(a)(13)(C) and *In Re Oseiwusu*, 22 I&N Dec. 19 (BIA 1998).
[40] See INA § 236(c)(1)(A)-(D). Keep in mind that this section provides a *primer* on these crimes grounds but is not intended to provide an in-depth or exhaustive explanation. See the ILRC's *Inadmissibility & Deportability* (4th Ed., 2016) for more information on these issues: www.ilrc.org/publications/inadmissibility-deportability. See also www.ilrc.org/crimes.
[41] But see discussion at point number three, regarding the "when released" provision, which varies from jurisdiction to jurisdiction.
[42] See INA § 212(a)(2)(A) (II), 8 USC § 1182(a)(2)(A) (II).

[drug offense], 237(a)(2)(C) [firearms offenses], or 237(a)(2)(D) [crimes related to espionage];

i. **Drug offense exception:** Watch out for a possession of marijuana that is 30 grams or less. Your client will not be subject to mandatory detention and will not be deportable!

c) Persons who are ***deportable*** under INA § 237(a)(2)(A)(i) [has been convicted of a crime involving moral turpitude that was committed within five years of admission] *and* has been sentenced to a term of imprisonment of at least one year; and

d) Persons who are ***inadmissible*** under INA § 212(a)(3)(B) or ***deportable*** under INA § 237(a)(4)(B) [involved in terrorist activities].

WARNING: If your client is suspected of terrorist activity, other provisions apply.[43] Please consult an expert for assistance.

Two Removability Frameworks and an Advocacy Opportunity:

- *Inadmissibility*[44]: If your client is seeking entry or admission to the United States, he or she may be charged with grounds of inadmissibility. Generally, a person present in the United States that entered without inspection is considered to be seeking admission.
    - Your *client bears the burden* to prove that he or she is admissible.
- *Deportability*[45]: If your client has been lawfully admitted to the United States (LPR, Visa, etc.), he or she may be charged with grounds of deportability.
    - The *government has the burden* of establishing by clear, convincing, and unequivocal evidence that your client is deportable.[46]

PRACTICE POINT: It is critical to establish which removability framework you are working within when assessing a client's mandatory detention determination. The importance of this distinction becomes clear through the following examples.

Example 1: Client Lucy, an LPR, has been mandatorily detained. On the Form I-286, ICE cites a theft offense charge (here, a CIMT) as the reason for which Lucy is removable and must be detained pending her removal proceeding, under INA § 237(a)(2)(A)(i).

- *Question:* Should Lucy be mandatorily detained for the theft charge?
- *Answer:* No! INA § 237(a)(2)(A)(i) refers to a *conviction* of a crime involving moral turpitude, whereas Lucy has merely been *charged* with theft. Importantly, as an LPR, Lucy is subject to the deportability grounds of removability, not the grounds of inadmissibility. Further, LPR Lucy is also not deportable based on this charge!

What if Lucy also had a DUI *conviction*?

PRACTICE TIP: A Driving Under the Influence (DUI) conviction cannot trigger mandatory detention because a DUI does not fit into any of the listed crime-based grounds of inadmissibility or deportability. If ICE makes the decision to detain your client based on a DUI, without any other type of convictions, they are eligible for a bond hearing.

[43] See INA § 236A.
[44] See INA § 212(a).
[45] See INA § 237(a).
[46] See *Woodby v. INS*, 385 U.S. 276 (1966).

Example 2: Client Peter, an undocumented immigrant, has been mandatorily detained. On the Form I-286, ICE cites Peter's firearms possession charge as the reason for which Peter is removable and must be detained pending his removal proceeding, under INA 237(a)(2)(C).

- *Question:* Should Peter be mandatorily detained for the firearms charge?
- *Answer:* No! Peter has not been admitted to the United States and is therefore *not* subject to the grounds of deportability. He is charged under the grounds of inadmissibility. He is thus not subject to mandatory detention based on being *deportable* for a firearm offense. Firearms possession is not a ground of inadmissibility, so Peter is not subject to mandatory detention.

Note, always research the consequences for a given criminal offense in your jurisdiction. A single criminal offense can trigger different immigration grounds, and consequences can vary from jurisdiction to jurisdiction.

Those who are new to removal defense and are unfamiliar with the grounds of deportability and/or inadmissibility, should take the time to learn these concepts, as they can be nuanced. For a more in-depth discussion, see ILRC publication Inadmissibility & Deportability, 4th Edition (2016).

2. **Because the mandatory detention rules went into effect on October 9, 1998, the release must be from criminal custody *after* October 9, 1998**. In other words, for clients with criminal convictions, the mandatory detention rules apply only to persons who completed their criminal sentences *after* October 9, 1998.
3. **ICE must take the person into custody when he or she is released from criminal custody.**[47]

The application of the "when released" language has been a point of dispute and varies from jurisdiction to jurisdiction. The Government has argued that in order to subject someone to mandatory detention, ICE does not have to take the person into custody immediately upon release from criminal custody. Rather, ICE argues that mandatory detention applies even if it picks the person up days, months, or years after release. The BIA agreed with this reasoning in *Matter of Rojas*, 23 I&N Dec. 117 (BIA 2001), and many other courts have agreed. However, a growing number courts have also held that "when released" requires ICE to detain the person immediately at the time of their release from criminal custody.

What Is "Release"? Can days, months, or even years lapse between release from criminal custody and ICE custody for mandatory detention to be valid, as long as the release was post-October 9, 1998?

- **Yes** (bad for our clients)
  - *Matter of Rojas*, 23 I&N Dec. 117 (BIA 2001)
  - *Lora v. Shanahan*, 804 F.3d 601 (2d Cir. 2015)
  - *Sylvain v. Attorney General*, 714 F.3d 150 (3d Cir. 2013)
  - *Hosh v. Lucero*, 680 F.3d 375 (4th Cir. 2012)
  - *Olmos v. Holder*, 780 F. 3d 1313 (10th Cir. 2015)
  - *Khentani v. Petty*, 859 F.Supp.2d 1036 (W.D. Mo. 2012)
  - *Serrano v. Estrada,* 2002 WL 485699 (N.D.Tex. Mar. 6, 2002)
  - *See Deacon v. Shanahan*, 2016 WL 1688577 (N.D. Ala. Apr. 1, 2016)
  - *Hernandez v. Prindle*, No. 15-10-ART, 2015 WL 1636138 (E.D. Ky. Apr. 13, 2015)
- **No** (good for our clients)[48]
  - *Preap v. Johnson*, 831 F.3d 1193 (9th Cir. 2016) (CA State)
  - *Khoury v. Asher*, 2016 WL 4137642 (9th Cir. Aug. 4, 2016) (WA State)

[47] INA § 236(c) states that "the Attorney General shall take into custody any alien who" comes within these grounds "when the alien is released."

[48] Advocates should read these cases and otherwise research to assess whether ICE is required to detain clients *immediately* upon release from criminal custody, or whether courts have allowed for some "reasonable" time period.

- *Castaneda v. Souza*, 810 F.3d 15 (1st Cir. 2015) (en banc)
- *Hosh v. Lucero*, No. 11-464, 2011 U.S. Dist. LEXIS 52040 (E.D. Va. May 16, 2011)
- *Cummings v. Holder*, No. 10-1114 (E.D. Va. Jan. 14, 2011)
- *Louisaire v. Muller*, 758 F. Supp. 2d 229 (S.D.N.Y. 2010)
- *Nimako v. Shanahan*, 2012 WL 4121102 (D.N.J. 2012)
- *Khodr v. Adduci*, 697 F. Supp. 2d 774 (E.D. Mich. 2010)
- *Scarlett v. U.S. Dep't of Homeland Sec.*, 632 F. Supp. 2d 214 (W.D.N.Y. 2009)
- *Zabadi v. Chertoff*, No. 05-0335, 2005 U.S. Dist. LEXIS 31914 (N.D. Cal. Nov. 22, 2005)
- *Quezada-Bucio v. Ridge*, 317 F. Supp. 2d 1221 (W.D. Wash. 2004)
- *Mudhallaa v. BICE*, No. 15-10972, 2015 WL 1954436 (E.D. Mich. Apr. 29, 2015)[49]
- *Rosciszewski v. Adducci*, 983 F. Supp. 2d 910 (E.D. Mich. 2013)[50]

Practice Point: Advocates should research the relevant law in their jurisdiction and argue that "when released" requires apprehension immediately upon release from criminal custody.

4. **The person must be in custody for an offense that triggers mandatory detention *at the time of release.***[51] In other words, the reason for criminal custody must be a conviction that triggers mandatory detention.

   Example: LPR Patrick has a firearm offense from 1996, prior to the mandatory detention law. Then in 2006 he is arrested and convicted for petty theft (a CIMT in this scenario) and serves three days in jail.[52] If ICE takes him into custody after the 2006 custody, is he subject to mandatory detention?

   Answer: No, he is not subject to mandatory detention. Under *Matter of Garcia-Arreola*,[53] the Board held that mandatory detention is triggered only when the non-DHS custody is related to a removal ground that triggers mandatory detention. Mandatory detention does not apply where the release from incarceration is unrelated to the ground that triggered mandatory detention, such as in the example above. Patrick's firearm offense both pre-dates the effective date of mandatory detention, and his later custody for a non-deportable crime involving moral turpitude cannot trigger mandatory detention.

Note: Whether a criminal conviction qualifies as one of the above immigration categories (e.g., crime of moral turpitude, aggravated felony, etc.) is a complex legal assessment and should be done by an immigration attorney.

Challenging Mandatory and Prolonged Detention

The following sections review ways to contest mandatory and prolonged detention of your clients. This is a rapidly changing area of law, so be sure to check current case law before proceeding along one of these avenues.

a. Contesting Mandatory Detention

   i. *Joseph* Hearing

A person may be able to show that he or she is not subject to mandatory detention at a *Joseph* hearing by demonstrating that he or she is not properly included within a mandatory detention category. In *Matter of Joseph* , the Board held that the Immigration Judge has jurisdiction to decide whether mandatory detention applies. This means you can always ask for a bond hearing under *Matter of Joseph* to contest ICE's determination that mandatory detention applies. Usually, this is a hearing on the legal arguments.

[49] Stating that four years and two months was unreasonable.
[50] Stating, "there can be no serious question that eleven years is unreasonable" *id.* at 916.
[51] *Matter of Garcia-Arreola*, 25 I&N Dec. 267 (BIA 2010).
[52] For purposes of this hypo, Patrick's CIMT was not committed within five years of admission.
[53] 25 I&N Dec. 267 (BIA 2010).

Additionally, *Matter of Joseph* held that a permanent resident is not properly included within a mandatory detention category if ICE is "substantially unlikely" to establish at the merits hearing the charges that would subject the person to mandatory detention.[54]

PRACTICE POINT: While counsel should try to meet the "substantially unlikely" standard, counsel also should assert in federal court that the proper standard is simply "likelihood of success on the merits of [the] charge." *Id.* at 809.

Respondents must request *Joseph* hearings which will require submitting a motion to the court and briefing your argument. A *Joseph* hearing should be scheduled immediately after requested, or else it may be a violation of the person's rights.[55] If the person prevails at the *Joseph* hearing, he or she is entitled to a bond hearing.[56] The results of the *Joseph* hearing, however, may be challenged in federal court.

One appellate court has questioned whether *Matter of Joseph* is adequate given the liberty interest at stake. In *Tijani v. Willis*, the Ninth Circuit found that imposing the burden on the permanent resident is contrary to the Constitution. When the fundamental right of liberty is at stake, the Supreme Court has consistently rejected laws that place the burden of protecting his or her fundamental right on the individual. *Tijani*, 430 F.3d at 1244-45.[57] The *Tijani* court also criticized *Matter of Joseph* because it placed little weight on the deprivation of individual liberty through lengthy detentions. *Tijani*, 430 F.3d at 1249.

PRACTICE POINT: Practitioners should therefore argue that when ICE alleges that a person is subject to mandatory detention under INA § 236(c), ICE should also bear the burden of proving that it would be substantially likely to prevail in sustaining the charges before a permanent resident client can be denied the right to bond. Practitioners in the Ninth Circuit should cite to *Tijani v. Willis*, while practitioners in other jurisdictions should cite both to *Tijani v. Willis* and to the Supreme Court cases cited therein.

b. Contesting Prolonged Detention

i. *Casas-Castrillon* Hearing[58]

In *Casas-Castrillon v. DHS*, 535 F.3d 942 (9th Cir. 2008), the Ninth Circuit found that detention pursuant to § 236(c) is authorized through the administrative appeal of the removal order to the BIA; however, upon judicial review, authority for detention shifts to § 236(a) (discretionary detention). This meant that the petitioner was entitled to a discretionary bond hearing. In addition to requiring a bond hearing for prolonged detention, *Casas-Castrillon* shifts the burden to the government to prove that the person should not be released because he is a flight risk or a danger to the community.[59] Many detainees and practitioners have reported, however, that the burden is being placed on the noncitizen to show that he or she is not a flight risk or a danger.[60] Because *Rodriguez* hearings are currently in place, detained immigrants don't generally need a

[54] 22 I&N Dec. 799 (BIA 1999).
[55] According to "Case Completion Goals" of the April 26, 2002 memo from the Office of the Chief Immigration judge, all custody hearings should be completed within three days. See Memo, OCIJ, Case Completion Goals (April 26, 2002) www.aila.org/content/default.aspx?bc=8735|17026|9002. Therefore, if a hearing is requested but not scheduled soon thereafter, it can be argued that the detention violates due process. By failing to provide a prompt hearing, the government is also arguably violating the procedural protection that the Supreme Court used to justify the application of § 236(c) to lawful permanent residents in *Demore v. Kim*. See *Kim*, 538 U.S. at 531-32 (Kennedy, J., concurring).
[56] *Joseph*, 22 I&N at 806.
[57] Citing *Addington v. Texas*, 441 U.S. 418 (1979); *Cooper v. Oklahoma* 517 U.S. 348, 363 (1996); *Foucha v. Louisiana*, 504 U.S. 71, 112(1992).
[58] Practice advisories on *Casas-Castrillon* are posted at www.immigrationadvocates.org in the Immigration and Crimes Resource Library, Detention subfolder (membership is required).
[59] 535 F.3d at 950.
[60] Immigration counsel who encounter problems with this issue and other issues relating to *Casas-Castrillon* should contact the ACLU of Southern California.

separate *Casas-Castrillon* hearing during the federal appeals process. Nonetheless, this is an important tool, should *Rodriguez* practice stop after a contrary decision from the Supreme Court.

ii. *Circuits Challenging Mandatory Detention Using a Bright Line Rule (2nd Cir. And 9th Circuit)*[61]

In *Rodriguez v. Robbins*,[62] the Ninth Circuit stated that all noncitizens, even those subject to mandatory detention, are allowed to request a bond hearing after they have been detained for six months or more pending removal proceedings. A similar decision, *Lora v. Shanahan*,[63] exists in the Second Circuit. These cases are based on the notion that at some point (here, 6 months), prolonged detention becomes unreasonable. In both *Rodriguez* and *Lora,* the *government* bears the burden of justifying continued imprisonment by clear and convincing evidence. However, practitioners have reported that the burden is still being placed on the noncitizen to show that he or she is not a flight risk or a danger, or there is at least confusion over the shift in burden.

While these decisions have been a great success in the fight against mandatory detention, advocates have raised process concerns. Individuals released under *Rodriguez* have had their master calendar hearings scheduled very quickly after release from detention, increasing the potential to accidentally miss their hearings and receive orders of removal *in absentia*.[64]

As of the date of this publishing, *Rodriguez* is under review at the U.S. Supreme Court.

iii. *Circuits Challenging Mandatory Detention Using a Case by Case Approach (1st Cir., 3rd Cir., 6th Cir. and 11th Cir.)*

While not adopting the bright line rule that a detention is presumptively unconstitutional after six months, another body of appellate cases provides respondents the ability to challenge prolonged detention on a case-by-case basis.

The First Circuit in *Reid v. Donelan*, 819 F.3d 486 (1st Cir. 2016) held that mandatory detention applies only for a reasonable time (based on amount of detention time and removability), indicating that such an assessment is case by case. While not delineating an exhaustive list of factors, guideposts offered by the court included the "total length of the detention, the foreseeability of proceedings concluding in the near future or the likely duration of future detention, the period of the detention compared to the criminal sentence, the promptness or delay of the immigration authorities or the detainee, and the likelihood that the proceedings will culminate in a final removal order."[65]

In the Third Circuit, respondents have *Diop v. ICE/Homeland Security*, 656 F.3d 221 (3rd Cir. 2011); *Leslie v. Attorney General of the United States*, 678 F.3d 265 (3rd Cir. 2012); and *Chavez-Alvarez v. Warden York County Prison*, 783 F.3d 469 (3d Cir. 2015).[66] *Diop* held that the Due Process Clause of the Fifth Amendment permits mandatory detention for only a "reasonable period of time." *Leslie* clarified that *Diop*

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[61] For more detail regarding what is required in *Rodriguez* bond hearings in the Ninth Circuit, see *Bond Hearings for Immigrants Subject to Prolonged Immigration Detention in the Ninth Circuit*, Practice Advisory, ACLU (Dec. 2015). To learn more about *Lora* bond hearings in the Second Circuit, see *Understanding Lora v. Shanahan and the Implementation of Bond Hearings for Immigrants in Prolonged Detention*, Practice Advisory, NYU Law Immigrant Rights Clinic (Nov. 2015).

[62] *Rodriguez v. Robbins*, 804 F.3d 1060 (9th Cir. 2015).

[63] *Lora v. Shanahan*, 804 F.3d 601 (2nd Cir. 2015).

[64] In a memorandum dated January 31, 2017, EOIR changed their case priorities. Detained individuals released on bond in a *Rodriguez* hearing remain expedited. See Memorandum re: "Case Processing Priorities," January 31, 2017 found at www.justice.gov/sites/default/files/pages/attachments/2017/01/31/caseprocessingpriorities.pdf. For a practice guide meant to assist, especially *pro se* respondents dealing with this issue, see www.aclu.org/feature/immigration-detention-resources.

[65] *Reid v. Donelan*, 819 F.3d 486, 500 (1st Cir. 2016).

[66] For a practice advisory on *Diop*, *Leslie*, and *Chavez-Alvarez*, see ACLU, *Practice Advisory: Prolonged Mandatory Detention and Bond Eligibility in the Third Circuit* (May 2015).

extends not just to individuals before the immigration judge and Board of Immigration Appeals, but also to individuals who have obtained a stay of removal pending judicial review of their removal orders.[67] *Chavez-Alvarez* further refined the point at which the bond hearing is triggered, discussing the existence of a good faith challenge to removal, the length of detention (sometime between six months and one year is unreasonable),[68] and the prospect of future proceedings.[69] Once a hearing is granted, the government bears the burden of proof.

The Sixth Circuit has taken a similar approach, stating in *Ly v. Hansen*, 351 F.3d 263 (6th Cir. 2003) that individuals may be detained "for a time reasonably required to complete removal proceedings in a timely manner, and if the process takes an unreasonably long time, detainee may seek relief in habeas proceeding." In *Ly*, the respondent's one and a half years' detention with no chance of actual, final removal was found to be unreasonable.

In *Sopo v. U.S. Attorney General*,[70] the Eleventh Circuit found that INA § 236(c) "authorizes detention for [only] a reasonable amount of time."[71] While there is no presumptive trigger point, the court did indicate that anything less than six months is unlikely to be unreasonable.[72] The Court also laid out a series of factors to define the "triggering point" for a bond hearing. For example, the length of detention, the causes of case delay, and other factors ("likely duration of future detention"; "likelihood that [removal] proceedings will culminate in a final removal order"; foreseeability of the person's removal if ordered removed; length of the person's criminal sentence as compared to the length of his immigration detention; and conditions of immigration detention). The burden of proof remains on the respondent to prove that he or she is not a danger or flight risk.[73]

Some advocates have reported having to file a *habeas* petition in order to obtain a hearing under *Sopo*. Advocates facing this challenge should point to Footnote 8 in the majority's opinion.[74]

In addition to these appellate courts, several federal district courts have also adopted a case-by-case approach.[75]

iv. Challenging Detention in Withholding-Only Proceedings

Individuals in withholding-only proceedings are traditionally unable to obtain a bond hearing. However, in *Guerra v. Shanahan*,[76] the Second Circuit held that a respondent's detention was governed by INA § 236(a), and thus he was entitled to a bond hearing despite being in "withholding-only" proceedings. Unfortunately, in *Padilla-Ramirez v. Bible*, 862 F.3d 881 (9th Cir. 2017), the Ninth Circuit found that a respondent in

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[67] *Leslie*, 678 F.3d at 270.
[68] The *Chavez-Alvarez* court held that detention without an individualized hearing became unreasonable "sometime after the six-month timeframe considered by *Demore*, and certainly by the time Chavez-Alvarez had been detained for one year." 783 F.3d at 478.
[69] *Chavez-Alvarez*, 2015 WL 1567019, at *7.
[70] *Sopo v. U.S. Attorney General*, 825 F.3d 1199 (11th Cir. 2016).
[71] *Id*. at 1214.
[72] *Id.* at 1217.
[73] For a practice advisory on *Sopo*, see ACLU, *Practice Advisory: Prolonged Mandatory Detention and Bond Eligibility in the Eleventh Circuit* (June 2016).
[74] Stating that "[t]he government is constitutionally obligated to follow the law, and the law under § 1226(c) now includes a temporal limitation against the unreasonably prolonged detention of a criminal alien without a bond hearing. The government does not need to wait for a § 2241 petition to be filed before affording an alien an opportunity to obtain bond." *Sopo v. U.S. Attorney Gen*., 825 F.3d 1199, 1217 (11th Cir. 2016).
[75] *Jarpa v. Mumford*, 211 F.Supp.3d 706 (D. Md. 2016); *Ramirez v. Watkins*, 2010 WL 6269226 (S.D.Tex. 2010); *Chairez-Castrejon v. Bible*, 188 F. Supp. 3d 1221 (D. Utah 2016).
[76] 831 F.3d 59 (2nd Cir. 2016).

withholding-only proceedings was not entitled to a bond hearing. No other appellate courts have considered this issue, though several district courts have also considered this issue.[77]

v. Release under *Zadvydas* for Certain People with Final Orders of Removal

In *Zadvydas v. Davis*, 533 U.S. 678 (2001), the U.S. Supreme Court held that noncitizens subject to a final order of removal who cannot find a country to be deported to cannot be detained indefinitely.[78]

INA § 241(a)(1)(A) mandates that a final order of removal must be carried out within a 90-day period, called the "removal period." INA § 241(a)(2) requires that persons subject to final orders of removal may be detained during the removal period, and that persons who have been found inadmissible or removable for criminal or security related grounds *must* be detained during this time.

In *Zadvydas v. Davis*, the Supreme Court decided that the detention of aliens with final orders of removal under INA § 241 is limited to a period that is reasonably necessary to bring about the person's removal. The court designated six months as a "reasonably necessary period" to bring about deportation. After six months, if an alien provides good reason to believe that there is no significant likelihood that he or she will be removed in the reasonably foreseeable future, the government must rebut that showing to continue detention.

Advocating for Release under *Zadvydas*: Custody Review Process

- After your client's final order of removal is issued, the U.S. government has *six months* to effectuate your client's removal
    - Your client must cooperate or the time period can be extended. (This means signing requests for travel documents, verifying identity information, etc.)
- As soon as possible after the *90-day removal period* has lapsed, submit documents for custody review advocating for your client to be released as soon as possible
    - As in a bond hearing, highlight factors showing client is not a flight risk or danger to community
- If your client has fully cooperated and is not released in *six months*, file a habeas corpus petition in federal court

QUICK GUIDE TO CHALLENGING DETENTION

a. Your client has been in detention for *less than 6 months*
- *i. Joseph* hearing possibility?

b. Your client has been in custody for *more than 6 months*
- *i. Joseph* hearing possibility?
- *ii.* Depending on your Circuit, possible challenge to prolonged detention? Brightline at six months: *Rodriguez, Lora.* Case by Case: *Reid, Diop, Ly, Sopo.*

c. Your client has appealed his or her case to a circuit court of appeals (in the Ninth Circuit)
- *i. Casas-Castrillon*

d. Your client has been issued a final order of removal
- *i.* 90 days have passed
    1. INA §§ 240(a)(1)(a), 241(a)(2), 241(a)(3)
- *ii.* Six months have passed
    1. *Zadvydas*

[77] See, e.g., *Rafael Ignacio v. Sabol*, No. 1:CV-15-2423, 2016 WL 4988056 (M.D. Pa. Sept. 19, 2016); *Alvarado v. Clark*, No. C14-1322-JCC, 2014 WL 6901766 (W.D. Wa. Dec. 8 2014); *Guerrero v. Aviles*, No. 14-4367, 2014 WL 5502931 (D.N.J. Oct. 30, 2014).

[78] Countries with whom the United States lacks repatriation agreements, such as Laos and Cuba, will not accept people back into their countries after they have been ordered removed.

2. Avoiding Transfer

Be aware that ICE sometimes transfers detainees to different jurisdictions before bond hearings have been requested or scheduled due to limited detention bed space or other reasons. If your client is detained near you, family and friends, key witnesses, or other critical resources and you are concerned about him or her being transferred out of the area, consider whether you could use 8 CFR § 1003.19(c) to request a bond hearing in the venue nearest the detention center as soon as possible. According to 8 CFR § 1003.19(c), venue lies first with the court nearest the place of detention, or secondarily, with the court having administrative control over the case.

You should also use the January 2012 ICE Detainee Transfers memorandum for the same purpose. The memo, which established new guidelines for detainee transfer determinations, specifies that unless a transfer is necessary,[79] ICE should not transfer a detainee when there is documentation confirming an attorney of record in the area where he or she is detained. ICE is also not supposed to transfer detainees who have 1) immediate family nearby; 2) pending or ongoing removal proceedings in the vicinity, or 3) been granted bond or been scheduled for a bond hearing.[80] Alternatively, if your client is detained in a location far from you or other essential aid, use the ICE memo to help you obtain a transfer. Know that this may turn into a race to the courthouse with ICE to secure the venue of your choice.

[79] See ICE Detainee Transfers memorandum of January 4, 2012, part 5.2, paragraph 3, available at www.ice.gov/doclib/detention-reform/pdf/hd-detainee-transfers.pdf.
[80] See ICE Detainee Transfers memorandum of January 4, 2012, part 5.2, paragraph 1, available at www.ice.gov/doclib/detention-reform/pdf/hd-detainee-transfers.pdf.