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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Guillermo Ortiz,)	No. CV-09-45-PHX-MHM (LOA)
Petitioner,)	REPORT AND RECOMMENDATION
vs.)	
Janet Napolitano, et al.,)	
Respondents.)	

Petitioner has filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2241. (docket # 1) Petitioner contends that Respondents are holding him in mandatory detention pursuant to an “unwarranted and unreasonable interpretation of 8 U.S.C. § 1226(c).” (docket # 1) Petitioner further argues that the mandatory detention provision violates the substantive and procedural due process provisions of the Fifth Amendment and is “ultra vires.” (docket # 1) Respondents argue that § 1226(c) is retroactive and applies to Petitioner because, after the provision’s effective date, Petitioner was detained in non-DHS custody and then released. (docket # 14)

Because the Court finds that the mandatory detention provision does not apply to Petitioner, the Petition should be granted and the matter should be remanded to the Immigration Court to conduct an individualized bond hearing. The Court need not consider Petitioner’s challenge to the constitutionality of the mandatory detention statute or his “ultra vires” argument.

1 **I. Statutory Background**

2 On September 30, 1996, Congress enacted the Illegal Immigration Reform and
3 Immigrant Responsibility Act of 1996. Pub.L. No. 104-208, 110 Stat. 3009-586 (“IIRIRA”).
4 Among the provisions that IIRIRA added to the immigration laws is the mandatory detention
5 provision, 8 U.S.C. § 1226(c), which imposes mandatory detention upon aliens convicted of
6 enumerated crimes upon release. Although the IIRIRA was enacted on September 30, 1996,
7 implementation of the mandatory detention provision was deferred for two years, until
8 October 9, 1998. *See Thomas v. Hogan*, 1:08-CV-417, 2008 WL 4793739, at *1 (M.D.Pa.
9 Oct. 31, 2008) (discussing history of § 1226(c)). During that period, the “Transition Period
10 Custody Rules” (“TPCR”) were implemented. *See IIRIRA § 303(b)(3)* (found in the
11 historical notes to 8 U.S.C. § 1226). These rules provided for individualized bond
12 determinations for those who could demonstrate legal entry into the United States and that
13 the alien did not present a substantial risk of flight or threat to persons or property. IIRIRA
14 § 303(b)(3). *See Thomas*, 2008 WL 4793739, at *1; *Martinez v. Greene*, 28 F.Supp.2d
15 1275, 1280 (D.Colo. 1998). The IIRIRA’s Transition Period Custody Rules expired on
16 October 9, 1998, and the mandatory detention provision, 8 U.S.C. § 1226(c) took effect.
17 Section 1226(c) requires the mandatory detention of certain criminal aliens and provides that:

18 (c) Detention of criminal aliens

19 (1) Custody. The Attorney General shall take into custody any alien who-

20 (A) is inadmissible by reason of having committed any offense covered
21 in section 1182(a)(2) of this title,

22 (B) is deportable by reason of having committed any offense covered
23 in section 1227(a)(2)(A)(ii), (A)(iii), (B), (C), or (D) of this title,

24 (C) is deportable under section 1227(a)(2)(A)(i) of this title on the basis
25 of an offense for which the alien has been sentenced to a term of
26 imprisonment of at least 1 year, or

27 (D) is inadmissible under section 1182(a)(3)(B) of this title or deportable
28 under section 1227(a)(4)(B) of this title,

when the alien is released, without regard to whether the alien is released on
parole, supervised release, or probation, and without regard to whether the alien

1 may be arrested or imprisoned again for the same offense.

2 8 U.S.C. 1226(c) (emphasis added).

3 If a detainee falls under any of the provisions of § 1226(c), he is subject to
4 mandatory detention during removal proceedings, meaning he is not afforded an
5 individualized bond determination by an immigration judge. 8 C.F.R. § 1003.19(h)(2)(i)(D).

6 **II. Factual and Procedural Background**

7 Petitioner, a native and citizen of Mexico, entered the United States at El Paso,
8 Texas on or about December 10, 1980, and subsequently obtained lawful permanent resident
9 status. (Respondents' Exh. 1, docket # 1 at 4) Petitioner has been married to a United States
10 citizen since August 5, 1988 and has two children who are U.S. citizens. (docket # 1 at 5)
11 Petitioner's youngest child suffers from mental retardation. (docket # 1 at 5; Respondents'
12 Exh. 6 at 2)

13 On May 13, 1991, nearly seven years before the mandatory detention provision
14 went into effect, Petitioner was convicted in the Superior Court of California, Los Angeles
15 County, of the following offenses: (1) Robbery in the Second Degree, in violation of
16 California Penal Code § 211, with an enhancement for § 12022.5(a), use of a firearm, and
17 (2) for Attempted Robbery in the Second Degree in violation of § 664 and § 211 of the
18 California Penal Code, with an enhancement for § 12022.5(a), use of a firearm.
19 (Respondents' Exh. 2) Petitioner was sentenced to two years of imprisonment for the
20 robbery conviction and to an additional 3 years for the enhancement. (Respondents' Exh.
21 2; docket # 1 at 5) Petitioner served 2.5 years of his 5 year sentence, and completed his
22 sentence in 1993, well before the effective date of the mandatory detention provision. (docket
23 # 1 at 5; Respondents' Exh. 6 at 2)

24 On August 22, 2008, Petitioner was arrested by the Maricopa County Sheriff for
25 Extreme DUI-BAC of .15 or more. He was subsequently convicted of violating A.R.S. § 28-
26 1382A and was sentenced to ten days in the Maricopa County Jail. (docket # 1 at 5;
27 Respondents' Exhs. 3, 5) Petitioner was released on August 31, 2008, and was taken into
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1 custody by Immigrations and Customs Enforcement (“ICE”). (Respondents’ Exhs. 3, 5) On
2 or about September 1, 2008, the Government served Petitioner a Notice of Custody
3 Determination, Form I-286, holding him without bond, and subject to mandatory detention
4 pursuant to 8 U.S.C. § 1226(c). (Respondents’ Exh. 5)

5 On September 3, 2008, Petitioner was charged with removability, based on his
6 1991 second degree robbery conviction. Specifically, on September 3, 2008, a Notice to
7 Appear (“NTA”) was issued charging Petitioner as removable pursuant to § 237(a)(2)(A)(iii)
8 of the Immigration and Nationality Act (“INA”) for having been convicted of an aggravated
9 felony, as defined in INA § 101(a)(43)(F), in 1991. (Respondents’ Exh. 4)

10 On September 15, 2008, the Government filed Additional Charges of
11 Inadmissibility/Deportability, adding allegations that Petitioner’s 1991 conviction was
12 enhanced based on his personal use of a firearm pursuant to California Penal Code §
13 12022.5(a), and adding a charge of removal pursuant to 8 U.S.C. § 1227(a)(2)(C), an alien
14 “convicted under any law of purchasing, selling, offering for sale, exchanging, using,
15 owning, possessing or carrying, or of attempting or conspiring to purchase, sell, offer for
16 sale, exchange, use, own, possess, or carry, any weapon, part, or accessory which is a firearm
17 or destructive device. . . .” (Respondents’ Exh. 7)

18 Petitioner requested redetermination of his custody status pursuant to 8 C.F.R.
19 § 1236.1(d). Accordingly, on September 15, 2008, Petitioner appeared before an
20 Immigration Judge (“IJ”). The IJ denied Petitioner’s request for a change in custody status.
21 The IJ explained that “because [Petitioner] stands convicted of an aggravated felony, he is
22 subject to mandatory detention and the Court has no jurisdiction to redetermine his custody
23 status. INA § 236(c)(1)(A); 8 C.F.R. § 1003.19(h)(2)(i)(D).” (Respondents’ Exh. 6) y

24 On October 10, 2008, Petitioner appealed the September 15, 2008 decision to
25 the Board of Immigration Appeals (“BIA”). (Respondents’ Exhs. 8, 9) On December 19,
26 2008, the BIA summarily affirmed the IJ’s bond decision. (Respondents’ Exh. 11) On
27 January 8, 2009, Petitioner filed a motion for reconsideration and a request for review by a

1 three judge panel. (Respondents' Exh. 12) On January 21, 2009, the Government responded.
2 (Respondents' Exh. 13) To date, the record does not include information regarding the
3 outcome of this proceeding which was pending when briefing closed.

4 **III. Discussion**

5 **A. Jurisdiction**

6 There is no dispute that this Court has subject matter jurisdiction to review the
7 pending Petition for Writ for Habeas Corpus under 28 U.S.C. § 2241(c)(3) (noting that the
8 writ of habeas corpus may extend to those "in custody in violation of the Constitution or laws
9 or treaties of the United States."); *see also Demore v. Kim*, 538 U.S. 510, 517 (2003) (finding
10 that the INA does not bar habeas review of statutory or constitutional challenges to
11 detention).

12 **B. Mandatory Detention under Section 1226(c)**

13 Petitioner challenges his mandatory detention under 8 U.S.C. § 1226(c). Section
14 1226(c) requires mandatory detention when an alien is taken into state custody for an offense
15 enumerated in the statute and is subsequently released. 8 U.S.C. § 1226(c). A conviction
16 for second degree robbery would qualify an alien for mandatory detention. However,
17 Petitioner's conviction and custody for that offense occurred before § 1226(c) took effect in
18 1998. Petitioner asserts that he is not subject to mandatory detention because he was not
19 released from custody for a removable offense after the October 8, 1998 effective date of 8
20 U.S.C. § 1226(c). (docket # 1) Respondents argue that because Petitioner was charged with
21 a removable offense based on his 1991 conviction, and was later arrested and released from
22 custody in 2008 - after the effective date of § 1226(c) - he is subject to mandatory detention.
23 (docket # 14) Thus, the issue is whether Petitioner's release from state custody for unrelated
24 charges after § 1226(c) took effect is considered in conjunction with his earlier conviction
25 to qualify Petitioner for mandatory detention.

26 As discussed below, consistent with every district court that has considered this
27 issue, the Court concludes that the mandatory detention provision, 8 U.S.C. § 1226(c), does
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1 not apply to Petitioner because he was released from custody for the removable offense well
2 before the effective date of the mandatory detention provision. *See, e.g., Pastor-Camarena*
3 *v. Smith*, 977 F.Supp. 1415, 1417 (W.D. Wash. 1997) (holding that “[t]he plain meaning of
4 [‘when the alien is released’] is that it applies immediately after release from incarceration,
5 not to aliens released many year [sic] earlier”); *Alwaday v. Beebe*, 43 F.Supp.2d 1130, 1133
6 (D.Or. 1999) (finding it is “arbitrary and capricious for respondent to interpret the phrase
7 ‘when the alien is released’ to include aliens, like petitioner, who were released from
8 incarceration many years before coming into the custody of the INS for deportation
9 proceedings” (internal quotations and alterations omitted)); *Velasquez v. Reno*, 37 F.Supp.2d
10 663, 671-73 (D.N.J.1999) (holding that the mandatory detention provision is inapplicable to
11 alien who was released from custody for a removable offense thirteen years before the
12 effective date of the statute, but was taken into custody and made subject to removal
13 proceedings after the effective date); *Rivera v. Demore*, C 99-3042 TEH, 1999 WL 521177,
14 at *5 (N.D.Cal. July 13, 1999) (finding that petitioner who was released from criminal
15 custody three years before the statute’s effective date is “well beyond section [1226(c)]’s
16 temporal reach”); *Alikhani v. Fasano*, 70 F.Supp.2d 1124, 1132 (S.D.Cal. 1999) (holding that
17 an alien was subject to section 1226(c) because his post-October 9, 1998 release from
18 custody related to the underlying offense that rendered him removable): *Grant v. Zemski*, 54
19 F.Supp.2d 437, 442 (E.D.Pa.1999) (rejecting argument that Congress intended for the
20 mandatory detention provision to apply regardless of when the individual was released);
21 *Vang v. Ashcroft*, 149 F.Supp.2d 1027, 1034 (N.D.Ill.2001) (finding that § 1226(c) is
22 inapplicable to alien released prior to statute’s effective date); *Quezada-Bucio v. Ridge*, 317
23 F.Supp.2d 1221, 1224 (W.D.Wash.2004) (finding that petitioner who was released from state
24 custody and was not taken into immigration custody until three years later was not subject
25 to mandatory detention under Section 1226(c)); *Bromfield v. Clark*, No. C-06-757-RSM,
26 2007 WL 527511, at *4-5 (W.D.Wash. Feb.17, 2007) (declining to defer to BIA’s decisions
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1 and concluding that the “when the alien is released” requires aliens to be detained at the time
2 of release from state custody).

3 Petitioner’s 2008 DUI conviction is not a removable offense and does not trigger
4 the mandatory detention provision. *See* 8 U.S.C. § 1226(c). Petitioner’s 1991 conviction for
5 second-degree robbery is an enumerated offense under U.S.C. §§ 1227(a)(2)(B)(i) and (iii).
6 Petitioner completed his sentence for that offense before the IIRIRA was enacted in 1996 and
7 before the mandatory detention provision took effect in 1998. The IIRIRA applies
8 prospectively, to noncitizens “released” on or after the statute’s effective date. *See* Pub.L.
9 104-208, Div. C, Title III, § 303(b), Sept. 30, 1996, 110 Stat. 3009-586. Congress expressly
10 provided that 8 U.S.C. § 1226(c) “shall apply only to individuals released after [the statute
11 took effect.]” IIRIRA § 303(b); Pub.L.104-208, Div. C, Title III, § 303(b), Sept. 30, 1996,
12 110 Stat. 3009-586. 8 U.S.C. § 1226(c); *See Matter of Adeniji*, 22 I. & N. Dec. 1102, 1111
13 (BIA 1999) (finding that “the respondent is not subject to mandatory detention under section
14 [1226(c)] of the Act because he was released from his nonservice custodial setting (i.e., from
15 criminal custody) prior to the expiration of the Transition Rules”); *see also In re Rojas*, 23
16 I. & N. Dec. 117, 126-27, Interim Decision, (BIA 2001) (“We are not, however, applying
17 section 236(c) to aliens who were released from criminal custody prior to the date on which
18 the provision went into effect. We have previously determined that such aliens are beyond
19 the reach of section 236(c)”) (citation omitted).

20 Respondents assert that Petitioner is subject to mandatory detention under
21 § 1226(c) because he was “released” from custody in September 2008 -after the mandatory
22 detention provision became law-even though that detention had no relation to the 1991
23 conviction which renders him removable. The Court disagrees. Petitioner was last released
24 from custody for conduct included in the NTA in 1993, before the effective date of
25 § 1226(c). Petitioner’s 2008 conviction is not included in the NTA and is not related to the
26 removal proceedings.

1 Finding no binding precedent on the issue, the Court follows the persuasive
2 reasoning of several district courts in other circuits in concluding that, because Petitioner’s
3 2008 release from custody is not related to the 1991 offense rendering him removable, the
4 mandatory detention provision does not apply and Petitioner is entitled to an individualized
5 bond hearing. *See Garcia v. Shanahan*, ___ F.Supp.2d ___, 2009 WL 1395837 (S.D.N.Y.,
6 May 1, 2009); *Hy v. Gillen*, 588 F.Supp.2d 122 (D.Mass. 2008); *Thomas v. Hogan*, No.
7 1:08-CV-0417, 2008 WL 4793739 (M.D.Pa., Oct. 31, 2008); *Cox v. Monica*, No. 1:07-CV-
8 534, 2007 WL 1804335 (M.D. Pa. June 20, 2007); *Quezada-Bucio v. Ridge*, 317 F.Supp.2d
9 1221, 1229 (W.D.Wash. 2004). *See also Martinez-Herrera v. Crawford*, CV-07-267-PHX-
10 NVW (DKD), 2007 WL 2023469 (D.Ariz., June 20, 2007) (characterizing as “strong”
11 petitioner’s argument that because his “release” from custody for the crime subjecting him
12 to mandatory detention occurred five years ago, § 1226(c) should not apply, but
13 recommending relief on other grounds).

14 In *Cox*, petitioner challenged his detention pursuant to § 1226(c). *Cox*, a native
15 and citizen of Barbados, was taken into ICE custody in February 2007 pursuant to a Notice
16 to Appear (NTA), which charged him with removability based on three previous convictions.
17 *Cox*, 2007 WL 1804335, at *2. Although *Cox* had been released from state custody in
18 November 2006, he was in custody for an offense that did not render him removable. *Id.* His
19 latest release for a removable offense occurred in January 1998-nine months before the
20 effective date of the mandatory detention provision. *Id.* Nevertheless, an immigration judge
21 denied *Cox*’s request for bond, finding that he was subject to mandatory detention because
22 he had been “released” from custody in 2006. *Id.* *Cox* sought habeas relief in the
23 Pennsylvania district court and was granted relief.

24 On habeas corpus review, the court noted that, “Congress has expressly provided
25 that 8 U.S.C. § 1226(c) is to be applied only prospectively to aliens who were released from
26 criminal custody after the statute took effect” *id.* at *4 (citing *Mathews v. Kidder, Peabody*
27 *& Co., Inc.*, 161 F.3d 156, 160-61 (3d Cir.1998)), and “conclude[d] that the statutory
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1 provision does not retroactively apply to aliens who were released from custody prior to its
2 effective date because the provision clearly attaches new legal consequences to actions taken
3 before its enactment.” *Id.* at * 5. The court further held, “Petitioner’s 2006 arrest [and release
4 from custody] does not alter this conclusion as . . .the date of release from the offense for
5 which the individual is found removable determines whether the individual is entitled to an
6 individualized bond hearing or the mandatory detention provision.” *Id.* at *5 (citing *Alikhani*
7 *v. Fasano*, 70 F.Supp.2d 1124, 1132 (S.D.Cal. 1999); *Grant v. Zemski*, 54 F.Supp.2d 437,
8 442 (E.D.Pa. 1999); *Velasquez v. Reno*, 37 F.Supp.2d 663 (D.N.J. 1999)). The *Cox* court
9 concluded that “ICE’s attempt to reap the benefits of section [1226(c)] by applying the
10 mandatory detention provision to aliens such as petitioner is overreaching and inconsistent
11 with the scheme established by Congress.” *Id.*

12 After *Cox* was decided, the BIA issued *Matter of Saysana*, 24 I. & N. Dec. 602,
13 2008 WL 3978211 (BIA Aug. 27, 2008), in which it interpreted Section 1226(c) to require
14 mandatory detention of deportable aliens who were released from custody for non-removable
15 offenses after the effective date of the statute. In *Saysana*, the BIA considered whether the
16 post-IIRIRA “release” from custody “must be directly tied to the basis for detention under
17 [section 1226(c)].” 24 I. & N. Dec. 602 at 603-04. The BIA concluded a “release” from
18 custody need not relate to the removable offense for mandatory detention to apply. *Id.* at 608.

19 Respondents argue that this Court should defer to the BIA’s interpretation of §
20 1226(c) in *Saysana* under *Chevron U.S.A., Inc. v. Nat’l Res. Def. Council, Inc.*, 467 U.S. 837
21 (1984), and deny the Petition for Writ of Habeas Corpus. (docket # 14) As discussed below,
22 the BIA’s decision in *Saysana* is not entitled to deference.

23 In *Chevron*, the Supreme Court articulated a two-step analysis for reviewing an
24 administrative agency’s interpretation of a statute. *Id.* Under *Chevron*, the court first
25 considers “whether Congress has directly spoken to the precise question at issue.” *Id.* at 842.
26 If Congress’ intent is clear, “that is the end of the matter; for the court, as well as the agency,
27 must give effect to the unambiguously expressed intent of congress.” *Id.* at 842-43. At the
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1 first step the court should “try to determine congressional intent using traditional tools of
2 statutory construction,” by looking at the language and the “provisions of the whole law, and
3 to its object and policy.” *Dole v. United Steelworkers of Am.*, 494 U.S. 26, 35 (1990)
4 (citations omitted). If Congressional intent is not clear because the statute is “silent or
5 ambiguous with respect to the specific issue,” then the court proceeds to *Chevron’s* second
6 step. At step two, the court determines whether the agency’s determination is reasonable,
7 meaning whether it is “based on a permissible construction of the statute.” *Chevron*, 467 U.S.
8 at 843. The agency’s interpretation is “given controlling weight unless [it is] arbitrary,
9 capricious, or manifestly contrary to the statute.” *Chevron*, 467 U.S. at 843-44.

10 The BIA’s interpretation of § 1226(c) in *Saysana* is not entitled to deference
11 under *Chevron*. As the District Court for the Southern District of New York recently found
12 on analogous facts, “the plain language of the statute is unambiguous and manifests
13 Congress’ clear intent that there must be a nexus between the date of release and the
14 removable offense.” *Garcia*, 2009 WL 1395837, at * 6.

15 In *Garcia*, the District Court for the Southern District of New York considered
16 a factually analogous case. In *Garcia*, petitioner challenged his mandatory detention under
17 § 1226(c). *Garcia*, 2009 WL 1395837, * 2. In 1989, petitioner had pled guilty to attempted
18 criminal sale of a controlled substance in the third degree. *Id.* *Garcia* was sentenced to five
19 years probation, with six months’ incarceration. He completed his sentence before the
20 enactment of § 1226(c). *Id.* On March 8, 2008, *Garcia* was arrested on charges unrelated
21 to the 1989 conviction. The charges were dismissed and *Garcia* was released. Several days
22 after his release from custody, *Garcia* was charged with removal based on his 1989
23 conviction, and taken into ICE custody on the ground that he was subject to mandatory
24 detention under § 1226(c). *Garcia*, 2009 WL 1395837, at * 2. After an immigration judge
25 determined that *Garcia* was subject to mandatory detention, he sought habeas corpus relief.
26 *Id.* Similar to this case, the Government argued that the BIA’s statutory interpretation of the
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1 at 127. The court further noted that “the Government’s reading sweeps in the group of
2 criminal aliens most likely to qualify for a bond because only prior criminals who have been
3 released for at least ten years are affected by the interpretation.” *Id.* The *Hy* court held that
4 “[b]ecause the 2007 ‘release’ from state custody is not related to the 1991 offense rendering
5 Petitioner removable, Petitioner is not subject to mandatory detention.” *Id.*

6 In *Garcia*, the Southern District of New York reached the same conclusion in
7 reliance on the *Hy* decision. In *Garcia*, the court held that the mandatory detention provision
8 does not apply to an alien who was released from custody for a removable offense prior to
9 the October 9, 1998 effective date of § 1226(c), but had been released from custody for a
10 nonremovable and unrelated offense after the effective date of that provision. *Garcia v.*
11 *Shanahan*, 2009 WL 1395837 (S.D.N.Y., May 1, 2009).

12 This Court adopts the reasoning of the District of Massachusetts and the
13 Southern District of New York under the *Chevron* analysis. The BIA’s decision in *Saysana*
14 is not entitled to deference. This issue in this case can be resolved at the first step of the
15 *Chevron* analysis “by looking at the plain language of the statute which indicates that there
16 must be a nexus between the basis for custody from which the noncitizen is released and the
17 qualifying offenses for mandatory detention.” *Garcia*, 2009 WL 1395837, at * 7.

18 In contrast, BIA’s interpretation of § 1226(c) does not follow traditional rules
19 of statutory construction. “[A] statute ought, upon the whole, to be so construed that, if it can
20 be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.” *TRW,*
21 *Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (citing *Duncan v. Walker*, 533 U.S. 167, 174 (2001)
22 (internal quotation marks omitted)). BIA’s interpretation that “when the alien is released”
23 applies to any offense renders a later reference to the “same offense” meaningless. *Garcia*,
24 2009 WL 1395837, at * 7.

25 As the *Garcia* court noted, “all district courts that have considered whether an
26 alien must be mandatorily detained pursuant to Section 1226(c) after [the BIA’s decision in]
27 *Saysana*—including the district court considering *Saysana*’s own habeas petition—have also
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1 rejected the BIA’s interpretation of the statutory language.” *Garcia*, 2009 WL 13595837, *
2 7 (citing *Thomas v. Hogan*, 1:08-CV-417, 2008 WL 4793739, at *3-4 (M.D.Pa. Oct.31,
3 2008); *Saysana v. Gillen*, No-08-11749, 2008 WL 5484553, at *1 (D.Mass. Dec.1, 2008);
4 *Hy*, 588 F.Supp.2d at 126. *Oscar v. Gillen*, 595 F.Supp.2d 166, 170 (D.Mass.2009).

5 Moreover, as the *Garcia* court found, *Saysana* represents a change in position
6 for the BIA. *Garcia*, 2009 WL 1395837, at * 8. In an internal memorandum, dated July 12,
7 1999, the Immigration and Naturalization Service (“INS”), DHS’s predecessor, stated that
8 the “when . . . released” language in section 1226(c) refers to (1) a criminal sentence of
9 incarceration, (2) for one of the offenses enumerated in § 1226(c). *See Garcia*, 2009 WL
10 13595837, at * 8 (citing Michael A. Pearson, Executive Associate Commissioner for Field
11 Operations Headquarters, Field Guidelines for Applying Revised Interpretation of Mandatory
12 Custody Provisions, July 12, 1999 (“DHS Internal Memo”), at 1)). The memo stated: “[T]he
13 Office of Immigration Litigation has recommended a reinterpretation of the statute The
14 reinterpretation will now only mandate detention of those criminal aliens listed in [1226(c)]
15 who completed their criminal sentences on or after October 9, 1998.” The memo specified
16 that “release” must occur on or after October 9, 1998 from a criminal sentence “based on a
17 removable offense, regardless of the date of such conviction” *Id.* (quoting Michael A.
18 Pearson, Executive Associate Commissioner for Field Operations Headquarters, Field
19 Guidelines for Applying Revised Interpretation of Mandatory Custody Provisions, July 12,
20 1999 (“DHS Internal Memo”), at 1)).

21 When determining the weight to be afforded an agency’s position, the court
22 should consider the surrounding circumstances. *See U.S. v. Ten Cartons, Ener-B Nasal Gel*,
23 888 F.Supp. 381, 412 (E.D.N.Y.1995) (citing *Good Samaritan Hosp. v. Shalala*, 508 U.S.
24 402, 417 (1993)). “Although inconsistency in itself is not enough to render *Chevron*
25 deference inappropriate-especially if the statute is ambiguous, *see Rust v. Sullivan*, 500 U.S.
26 173, 186 (1991) - ‘an agency interpretation of a relevant provision which conflicts with the
27 agency’s earlier interpretation may be entitled to considerably less deference than a
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1 consistently held agency view.’’ *Garcia*, 2009 WL 1395837, at * 8 (quoting *Ten Cartons*,
2 888 F.Supp. at 413).

3 In view of the plain language of § 1226(c), the case law supporting Petitioner’s
4 argument, and the BIA’s own conflicting interpretations of § 1226(c), the Court finds that
5 the BIA’s statutory reading is not entitled to deference.

6 Petitioner also raises equal protection and due processes challenges to his
7 detention under § 1226(c). He further argues that the mandatory detention provision is “ultra
8 vires.” (docket # 1) The Court need not reach these issues because the statutory construction
9 issue is dispositive. *Aguilar v. Lewis*, 50 F.Supp.2d 539, 544 (E.D.Va.1999) (citing *Jean v.*
10 *Nelson*, 472 U.S. 846, 854 (1985).

11 **IV. Conclusion**

12 For the foregoing reasons, the Petition for Writ of Habeas Corpus should be
13 granted and Petitioner should be provided an individualized bond hearing before an
14 Immigration Judge.

15 Accordingly,

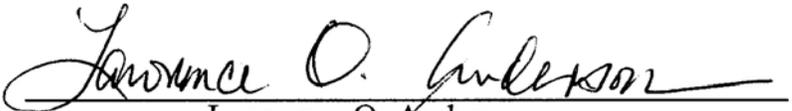
16 **IT IS HEREBY RECOMMENDED** that the Petition for Writ of Habeas
17 Corpus (docket # 1) be **GRANTED**.

18 **IT IS FURTHER RECOMMENDED** that, if the Honorable Mary H. Murguia
19 adopts this Report and Recommendation, an Immigration Judge must provide Petitioner with
20 an individualized bond hearing within 10 days of the date of such order.

21 This recommendation is not an order that is immediately appealable to the Ninth
22 Circuit Court of Appeals. Any notice of appeal pursuant to Rule 4(a)(1), Federal Rules of
23 Appellate Procedure, should not be filed until entry of the District Court’s judgment. The
24 parties shall have ten days from the date of service of a copy of this recommendation within
25 which to file specific written objections with the Court. *See*, 28 U.S.C. § 636(b)(1); Rules
26 72, 6(a), 6(e), Federal Rules of Civil Procedure. Thereafter, the parties have ten days within
27 which to file a response to the objections. Failure to timely file objections to the Magistrate
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1 Judge's Report and Recommendation may result in the acceptance of the Report and
2 Recommendation by the District Court without further review. *See United States v. Reyna-*
3 *Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003). Failure to timely file objections to any factual
4 determinations of the Magistrate Judge will be considered a waiver of a party's right to
5 appellate review of the findings of fact in an order or judgment entered pursuant to the
6 Magistrate Judge's recommendation. *See*, Rule 72, Federal Rules of Civil Procedure.

7 DATED this 24th day of June, 2009.

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11 Lawrence O. Anderson
12 United States Magistrate Judge
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