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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 Macjhay Yagao,

12 Petitioner,

13 v.

14 Fred Figueroa, Warden Otay Mesa
15 Detention Center, et al.,

16 Respondents.
17
18

Case No.: 17-cv-2224-AJB-MDD

ORDER:

**(1) GRANTING IN PART AND
DEYING IN PART PETITIONER'S
REQUEST FOR A HEARING
(Doc. No. 6); and**

**(2) ORDERING A BOND HEARING
BE PROVIDED WITHIN 35 DAYS.**

19 Before the Court Petitioner Macjhay Yagao's request for a hearing on his petition
20 for writ of habeas corpus. (Doc. No. 6.) Petitioner alleges that he has been detained, at the
21 time of the motion's filing, for over forty-two months without an end in sight and has gone
22 over a year since a bond hearing before an Immigration Judge. (*Id.* at 1.) Petitioner argues
23 that the "BIA's final decision denying him release on bond constituted legal and
24 constitutional error." (*Id.*) Complicating matters is the fact that the Supreme Court
25 overturned the Ninth Circuit's practice of requiring a bond hearing every six months.
26 However, as elaborated on herein, due process still requires Petitioner be afforded a bond
27 hearing, although the Court opts to decline to release Petitioner, without prejudice.
28 Because it has been nearly two years without a bond hearing, the Court **GRANTS IN**

1 **PART AND DENIES IN PART** Petitioner’s motion. (Doc. No. 6.) The Court **ORDERS**
2 a bond hearing be provided within 35 days but **DENIES** releasing Petitioner.

3 **I. LEGAL STANDARDS**

4 A district court may grant a writ of habeas corpus when a petitioner is “in custody
5 in violation of the Constitution or laws or treaties of the United States.” 28 U.S.C.
6 § 2241(c)(3). “[T]he Fifth Amendment entitles aliens to due process of law in deportation
7 proceedings.” *Demore v. Kim*, 538 U.S. 510, 523 (2003).

8 **II. BACKGROUND**

9 Petitioner files this writ for habeas corpus under 28 U.S.C. § 2241 challenging the
10 Board of Immigration Appeals’ (“BIA”) decision denying him bond. He raises four
11 challenges. First, he argues the BIA erred in finding Petitioner’s past criminal background
12 supported denial of bond based on dangerousness. Second, Petitioner argues the decision
13 to deny his bond was arbitrary when compared to bonds which were granted in cases more
14 serious than his. Third, Petitioner argues that the BIA failed to follow Ninth Circuit
15 precedent because they failed to change the due process analysis as the length of his
16 detention grew. And finally, the BIA erred in finding his case was not subject to bond
17 hearings every six months under Ninth Circuit precedence. Petitioner requests that the
18 Court reverse the BIA’s decision and release Petitioner on conditional parole.

19 **III. DISCUSSION**

20 In the current motion, Petitioner requests that he be released on bond, arguing the
21 government failed to meet its legal burden for continued detention. (Doc. No. 6.) Petitioner
22 also argues that his continued detention without a bail hearing violates due process. (*Id.*)
23 Under now-overruled Ninth Circuit precedence, detainees were given a bond hearing every
24 six months. *Rodriguez v. Robbins* (“*Rodriguez III*”), 804 F.3d 1060 (9th Cir. 2015),
25 reversed by *Jennings v. Rodriguez*, 138 S. Ct. 830, 847, (2018) (holding that Section
26 “1226(c) mandates detention of any alien falling within its scope and that detention may
27 end prior to the conclusion of removal proceedings ‘only if’ the alien is released for
28 witness-protection purposes.”). The Supreme Court in *Jennings* overruled mandatory bond

1 hearings, stating the only mandated hearing is for witness-protection purposes. *Jennings*,
2 138 S. Ct. at 847. However, *Jennings* only held that aliens detained are not *statutorily*
3 entitled to periodic bond hearings. *Jennings*, 138 S. Ct. at 845. “The Supreme Court did
4 not, however, determine whether arriving aliens facing prolonged detention are entitled to
5 a bond hearing as a matter of constitutional Due Process.” *Lett v. Decker*, 346 F. Supp. 3d
6 379, 383 (S.D.N.Y. 2018).

7 On remand from *Jennings*, the Ninth Circuit expressed “grave doubt” that prolonged
8 detention without a hearing would satisfy due process. *See Rodriguez v. Marin*, 909 F.3d
9 252, 256 (9th Cir. 2018) (“Arbitrary civil detention is not a feature of our American
10 government.”). And district courts in California have likewise found that due process
11 requires a bond hearing after prolonged detention. *See Rodriguez v. Nielsen*, No. 18-cv-
12 4187-TSH, 2019 U.S. Dist. LEXIS 4228, at *17–19 (N.D. Cal. Jan. 7, 2019) (hearing
13 necessary after six months); *Gonzalez v. Bonnar*, No. 18-cv-5321-JSC, 2019 WL 330906,
14 at *3–4 (N.D. Cal. Jan. 26, 2019) (13 months); *Meza v. Bonnar*, No. 18-cv-2708-BLF,
15 2018 WL 2554572, at *3 (N.D. Cal. June 4, 2018) (13 months). The Ninth Circuit has
16 ordered briefing in *Rodriguez v. Jennings* to address the very concern Petitioner raises and
17 district courts have addressed. The Court ordered that the briefs address:

18 whether the Constitution requires that, in bond hearings for aliens detained for
19 more than six months under §§ 1225(b), 1226(c), or 1226(a), the alien is
20 entitled to release unless the government demonstrates by clear and
21 convincing evidence that the alien is a flight risk or a danger to the community
22 or rather whether the government's proof of flight risk or danger could be by
23 only a preponderance of the evidence, whether the length of the alien's
detention must be weighed in favor of release, and whether new bond hearings
must be afforded automatically every six months.

24 *Rodriguez v. Jennings*, 887 F.3d 954, 956 (9th Cir. 2018).

25 The law post-*Jennings* regarding when and whether repeated bond hearings are
26 required is quite unsettled. However, the Court agrees with the many district courts finding
27 that prolonged detention without a bond hearing likely violates due process. *See cases*,
28 *supra*. A recent district court decision in the Northern District of California discussed this

1 issue in detail, and the Court finds its analysis persuasive. *Gonzalez v. Bonnar*, No. 18-cv-
2 05321-JSC, 2019 WL 330906, at *2–7 (N.D. Cal. Jan. 25, 2019). In general, “[a]s detention
3 continues past a year, courts become extremely wary of permitting continued custody
4 absent a bond hearing.” *Muse v. Sessions*, No. 18-CV-0054 (PJS/LIB), 2018 WL 4466052,
5 at *4 (D. Minn. Sept. 18, 2018) (collecting cases re: the same).

6 As of this order, Petitioner has been detained for roughly over four years. Further,
7 Petitioner has gone nearly two years without a bond hearing, as his last hearing was
8 April 25, 2017. Due to the uncertainty of this issue in the Ninth Circuit, the two Supreme
9 Court cases on this subject, and the pending briefing in *Rodriguez*, the Court declines to
10 order Petitioner’s release at this time. However, the Court does find that the government’s
11 failure to give Petitioner another bond hearing likely violates his due process rights in
12 accordance with the decisions of other district courts in this district and around the county,
13 and accordingly **ORDERS** Petitioner be provided one.

14 The Respondent’s opposition fails to persuade the Court otherwise. The
15 Respondent’s brief mischaracterizes Petitioner’s nuanced arguments by framing it as
16 Petitioner simply complaining he was not granted the automatic six-month review as
17 previously required under *Rodriguez*. (Doc. No. 8 at 1.) Respondent notes Petitioner has
18 not received another bond hearing because *Jennings* reversed that rule. (*Id.*) Respondent’s
19 fail to respond meaningfully to Petitioner’s due process arguments and the plethora of
20 district court rulings on this matter post-*Jennings*.¹

21 Finally, the Supreme Court’s recent decision in *Nielsen v. Preap*, No. 16-1363, slip
22 op. at , --- U.S. --- (U.S. Mar. 19, 2019), does not sway the Court’s analysis. In *Nielsen*,
23 the issue before the Court surrounded interpretation of the phrase “when the alien is
24 released” from custody found in 8 U.S.C. § 1226(c). That section states:

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26 ¹ While the Court notes briefing on this matter was done in May 2018, only months post-
27 *Jennings*, the Respondents (and Petitioner for that matter) could have petitioned the Court
28 to file supplemental briefing given the subsequent district court decisions between then and
now.

1 The Attorney General shall take into custody any alien who--

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

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

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

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

11 when the alien is released, without regard to whether the alien is released on
12 parole, supervised release, or probation, and without regard to whether the
13 alien may be arrested or imprisoned again for the same offense.

14 As the Supreme Court detailed, the Ninth Circuit had “held that this mandatory-detention
15 requirement applies only if a covered alien is arrested by immigration officials as soon as
16 he is released from jail.” *Nielsen*, 2019 WL 1245517, at *3. “If the alien evades arrest for
17 some short period of time—according to respondents, even 24 hours is too long—the
18 mandatory-detention requirement is inapplicable, and the alien must have an opportunity
19 to apply for release on bond or parole.” *Id.* This distinction mattered because the Ninth
20 Circuit was treating § 1226(a) detainees and § 1226(c) detainees as separate categories of
21 detainees. Those arrested under § 1226(a) could be eligible for a bond hearing, since the
22 release provision is only found in § 1226(a)(2), and those arrested under § 1226(c) face
23 mandatory detention. *See Nielsen*, 2019 WL 1245517, at *9 (explaining the Ninth Circuit’s
24 reasoning). Essentially, the Ninth Circuit believed unless an arrest was effectuated
25 immediately upon release from prior criminal detention, the detainee would be arrested
26 under § 1226(a), and could enjoy the option to be released on bond. *Id.*

27 The Supreme Court ultimately rejected that stance and reversed the judgments
28 below. *Id.* Helpful to our analysis is Justice Kavanaugh’s concurrence, which notes the
“narrowness of the issue before us. . . .” *Id.* at *14 (Kavanaugh, J., concurring). He states
that the narrow issue before the Court is “whether, under § 1226, the Executive Branch’s
mandatory duty to detain a particular noncitizen when the noncitizen is released from

1 criminal custody remains mandatory if the Executive Branch fails to *immediately* detain
2 the noncitizen when the noncitizen is released from criminal custody.” (*Id.* (emphasis in
3 original).) The Court concluded that “when . . . released” applies “when there is a release”
4 and rejected the Ninth Circuit’s reliance on immediacy. *Id.* at *13.


5 The Supreme’s Court analysis in *Nielsen* does not affect Petitioner’s arguments or
6 this Court’s findings. The Supreme Court explained that mandatory detention under
7 § 1226(c) arose from a concern “that deportable criminal aliens who are not detained
8 continue to engage in crime and fail to appear for their removal hearings in large numbers.
9 To address this problem, Congress mandated that aliens who were thought to pose a
10 heightened risk be arrested and detained without a chance to apply for release on bond or
11 parole.” *Id.* at *4 (internal citations omitted). It makes sense, then, why subsection (c) does
12 not permit bond hearings. However, Petitioner’s argument does not challenge prolonged
13 detention without a hearing under the statutory framework and § 1226(c). Rather, Petitioner
14 asserts that prolonged detention without a hearing triggers constitutional issues and violates
15 due process. *Nielsen* does not address this.

16 IV. CONCLUSION

17 For the reasons stated above, the Court **GRANTS IN PART AND DENIES IN**
18 **PART** Petitioner’s motion for a hearing on his petition. (Doc. No. 6.) The Court **DENIES**
19 ordering Petitioner’s immediate removal from immigration detention. However, the Court
20 **GRANTS** a bond hearing for Petitioner. Within 35 days of the date of this order, Petitioner
21 must be provided with a bond hearing before an immigration judge. At that hearing, the
22 government must establish by clear and convincing evidence that Petitioner is a flight risk
23 or a danger to the community in order to continue his detention pending his appeal before
24 the Ninth Circuit.

25 **IT IS SO ORDERED.**

26 Dated: March 29, 2019

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28 Hon. Anthony J. Battaglia
United States District Judge

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