U.S. Department of Justice

United States Attorney
Eastern District of New York

271 Cadman Plaza East
Brooklyn, New York 11201

December 9, 2025

By ECF
Honorable Gary R. Brown
United States District Judge
Eastern District of New York
100 Federal Plaza
Central Islip, New York 11722

Re: *Clarke v. Nassau County Correctional Center, et al.*,
Civil Action No. 25-cv-6773 (Brown, J.)

Dear Judge Brown:

The U.S. Department of Homeland Security and the Executive Office for Immigration Review ("Federal Respondents") respectfully submit this letter briefing in accordance with the Court's Supplemental Order of today, December 9, 2025 and in partial response to the petition for writ of habeas corpus ("Petition") filed by Erron Anthony Clarke ("Petitioner"). The Federal Respondents request leave to submit additional briefing in this matter through December 16, 2025, following a December 15, 2025 Master Calendar hearing in Petitioner's removal proceedings.

Facts

This Office offers the following synopsis of facts based upon its current, best understanding of the relevant facts.

On April 20, 2018, Petitioner, a national of Jamaica, was admitted into the United States on a non-immigrant visa for a temporary period not to exceed November 15, 2018. He has remained in the United States beyond the validity date of November 15, 2018, and continues to be present in the United States without lawful status.

Petitioner was arrested and detained on December 5, 2025 and removal proceedings have been commenced against him. The basis for his detention is § 236(a) of the Immigration and Naturalization Act ("INA"), 8 U.S.C. § 1226(a).

Petitioner does not have a final order of removal and is scheduled for a master calendar hearing in his removal case for December 15, 2025. Petitioner has filed a Bond Redetermination Request with the Executive Office for Immigration Review.

Argument

Petitioner has not exhausted available administrative remedies and is therefore not entitled to relief from this Court.

In the INA, Congress enacted a multi-layered statutory scheme for the civil detention of aliens pending a decision on removal, during the administrative and judicial review of removal orders, and in preparation for removal. See generally 8 U.S.C. §§ 1225, 1226, 1231. Section 1226 "generally governs the process for arresting and detaining . . . aliens pending their removal." *Jennings v. Rodriguez*, 583 U.S. 281, 288 (2018). Section 1226(a) provides that "an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States." 8 U.S.C. § 1226(a). When a noncitizen is taken into ICE custody under § 1226(a), an ICE official makes the initial custody determination, including the setting of a bond. See 8 C.F.R. §§ 236.1(c)(8), 236.1(d)(1). Per regulations, an ICE officer may "in the officer's discretion, release an alien . . . provided that the alien demonstrates to the satisfaction of the officer that such release would not pose a danger to property or persons, and that the alien is likely to appear for any future proceeding." 8 C.F.R. § 236.1(c)(8); 8 C.F.R. § 1236.1(c)(8).

The Attorney General and DHS thus have broad discretionary authority to detain an alien during removal proceedings. *See* 8 U.S.C. §§ 1226(a)(1) (DHS "may continue to detain the arrested alien" during the pendency of removal proceedings); *Nielsen v. Preap*, 586 U.S. 392, 409 (2019) (highlighting that "subsection (a) creates authority for anyone's arrest or release under § 1226—and it gives the Secretary broad discretion as to both actions").

Numerous courts in this Circuit have held in cases substantially similar to this one, that "'[a] habeas petitioner must normally exhaust administrative remedies before seeking federal court intervention.'" *See Castillo Lachapel v. Joyce, et al.*, No. 25-cv-4693, 25 WL 1685576, at *3 (S.D.N.Y. June 16, 2025) (*quoting Michalski v. Decker*, 279 F. Supp. 3d 487, 495 (S.D.N.Y. 2018). *See also Capunay Guzman v. Joyce, et al.*, No. 25-cv-4777, 2025 WL 1696891, at *2 (S.D.N.Y. June 17, 2025); *J.C.G. v. Genalo*, No. 24-cv-8755, 2025 WL 88831, at *4 (S.D.N.Y. Jan. 14, 2025); *Roman v. Decker*, No. 20-cv-3752, 2020 WL 4273823, at * 7 (S.D.N.Y. July 24, 2020); *Paz Nativi v. Shanahan*, No. 16-cv-8496, 2017 WL 281751, at *1 (S.D.N.Y. Jan. 23, 2017) ("before immigration detention may be challenged in federal court . . . exhaustion is generally required as a prudential matter" (collecting cases)). The exhaustion requirement "aims to provide the agency with a chance to correct its own errors, 'protect[ ] the authority of administrative agencies,' and otherwise conserve judicial resources by 'limiting interference in agency affairs, developing the factual record to make judicial review more efficient, and resolving issues to render judicial review unnecessary.'" *Id.* (*quoting Beharry v. Ashcroft*, 329 F.3d 51, 62 (2d Cir. 2003) (Sotomayor, J.)).

Here, Petitioner has not availed himself of administrative remedies pursuant to § 1226(a), that is, a two-level administrative review process that includes a "custody redetermination hearing" (also referred to as a "bond hearing") before an immigration judge (*see* 8 C.F.R. §§ 236.1(d)(1), 1003.19, 1236.1(d)) and an appeal to the Board of Immigration Appeals should the immigration judge conclude that he should not be released, or the immigration judge has set a bond amount that he believes is too high (*see* 8 C.F.R. §§ 236.1(d)(3), 1003.19(f), 1003.38, 1236.1(d)(3)). *See*

Monterosa v. Decker, No. 20-cv-02653, 2020 WL 1847771, at *3 (S.D.N.Y. Apr. 11, 2020) ("After ICE makes an initial detention decision, any person who is detained has the right to request a bond hearing before an Immigration Judge."); *Michalski*, 279 F. Supp. 3d at 496 (finding that a bond hearing is the appropriate avenue for petitioner's request for release from detention where "as opposed to challenging the length of his detention, [petitioner] essentially challenges the arrest and detention under § 1226(a) without any evaluation of legal justification as unconstitutional"). As the court in *Castillo Lachapel* explained, "If the immigration judge releases [Petitioner] on bond, his [habeas] petition would be moot . . . And even if the immigration judge denies bond, [Petitioner]'s petition could be mooted if the Board of Immigration Appeals reverses that determination." 2025 WL 1685576 at *3 (internal quotations and citation omitted). Thus, "[b]ecause [Petitioner]'s [potential] bond hearing may provide him with the relief that he seeks—i.e., his release", the Court should require that Petitioner exhaust the administrative avenues available to him pursuant to § 1226(a) before seeking judicial relief. *See id.*[1]

The Federal Respondents thank the Court for its consideration of their arguments and respectfully request leave to submit additional briefing through December 16, 2025.

Respectfully submitted,
JOSEPH NOCELLA, JR.
United States Attorney

By: /s/ *Richard K. Hayes*
Richard K. Hayes
Assistant U.S. Attorney
(718) 254-6050
richard.hayes@usdoj.gov

cc: Counsel for Petitioner (by ECF)

[1] *Matter of Yajure Hurtado*, 29 I&N Dec. 216, 218 (BIA 2025), cited by Petitioner at 3, paragraph 16, does not support Petitioner's allegation that the Executive Office of Immigration Review has "divested itself of jurisdiction" over Petitioner's request for a bond. That decision concerned detention under INA § 235, not § 236.