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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

DIONY YORDANO BASTIDAS-SILVA,

Petitioner,

v.

PATRICK DIVVER, et al.,

Respondents.

Case No. 3:26-cv-03014-TWR-MSB

RESPONSE TO PETITION

I. Introduction and Factual Background

This is the fourth habeas petition that Petitioner has filed to challenge his immigration detention which began on May 23, 2025. The Court partially granted his first petition on March 12, 2026 and ordered Respondents to “provide Petitioner with an individualized bond hearing,”¹ which they did on March 26, 2026. After full consideration of the evidence presented, the immigration judge determined that Petitioner is a flight risk and denied bond accordingly (Order of the Immigration Judge, attached as *Exhibit 1*). Petitioner reserved appeal, but he ultimately did not appeal the immigration judge’s order. Petitioner’s second habeas petition was then dismissed on April 8, 2026,² and his third habeas petition was denied on May 1, 2026 because he “failed to exhaust his administrative remedies by appealing to the Board of Immigration

¹ Case No. 3:26-cv-01249-TWR-DDL, Minute Order (ECF No. 5)

² See Case No. 26-cv-02144-RSH-MSB

1 Appeals and has not raised any basis for waiving exhaustion[.]”³

2 Petitioner now argues that his failure to appeal the immigration judge’s March
3 26, 2026 Order to the Board of Immigration Appeals (BIA) should be excused because
4 his former counsel allegedly missed the filing deadline. But even accepting that
5 allegation as true, a habeas petition is not the proper mechanism to raise such claim.
6 Instead, to the extent Petitioner claims he was deprived of the opportunity to pursue
7 administrative review due to ineffective assistance of counsel, that issue must first be
8 presented to the BIA itself, and he has once again failed to exhaust administrative
9 remedies by failing to do so. Moreover, even if the Court were to consider the petition
10 on the merits, it should reject Petitioner’s conclusory allegation that he has not been
11 provided a constitutionally adequate custody determination⁴ because he fails to allege
12 a single fact explaining why the prior custody determination was constitutionally
13 deficient. For these reasons, his petition should be denied.

14 **II. Petitioner Failed to Exhaust Administrative Remedies as to his Argument**
15 **Regarding Ineffective Assistance of Counsel**

16 The Court should reject Petitioner’s argument that he should be excused from
17 appealing the immigration judge’s order to the BIA because his prior attorney missed
18 the filing deadline. A habeas petition is not the proper mechanism to raise such a claim.
19 Instead, that issue must first be presented to the BIA itself through proper
20 administrative procedures such as a motion to reopen or request for acceptance of a late
21 appeal based on ineffective assistance of counsel.

22 Petitioner does not allege that the BIA rejected his untimely appeal. Instead, he
23 alleges only that his former counsel failed to submit an appeal at all. But he cites no
24 authority supporting the proposition that an attorney’s failure to submit an
25 administrative appeal permits him to bypass the administrative process altogether and
26 proceed directly to federal court through a habeas petition. Nor does he identify any

27 _____
28 ³ See Case No. 26-cv-2555-TWR-DDL

⁴ See Petition (ECF No. 1), ¶ 2

1 authority suggesting that such an alleged failure entitles him to immediate release from
2 custody.

3 Furthermore, *Dearinger ex rel. Volkova v. Reno*, 232 F.3d 1042, 1045 (9th Cir.
4 2000) is inapposite for a few reasons. First, it involves an appeal of a BIA decision to
5 the Ninth Circuit, not an appeal of an immigration judge's order to the BIA like in the
6 present case. This is significant because it demonstrates that raising the ineffective
7 assistance of counsel issue to the BIA is essential before proceeding with a habeas
8 petition. Second, in that case, "counsel filed a petition for review of the BIA decision
9 in [the Ninth Circuit] one day late." *Id.* at 1044. Here, by contrast, Petitioner does not
10 allege that his former counsel filed a late appeal to the BIA –rather, his former counsel
11 did not file any appeal at all. The complete failure to pursue administrative remedies
12 based on alleged ineffective assistance of counsel is fundamentally different from a
13 slightly untimely appeal. Finally, in *Volkova v. Reno*, the remedy for ineffective
14 assistance of counsel was to give the habeas petitioner "a new thirty-day period in which
15 to appeal the Board of Immigration Appeals' (BIA) denial of her claim . . . to
16 the Ninth Circuit." *Id.* at 1043. Thus, even if that case were to apply here, it would at
17 most support allowing Petitioner to pursue an untimely appeal to the BIA. It would not,
18 however, justify bypassing the administrative process altogether or compel his
19 immediate release from custody.

20 **III. Petitioner Fails to Allege Any Constitutional Defect in His Prior Bond**
21 **Proceeding**

22 Even if the Court were to consider the petition on the merits, it should reject
23 Petitioner's conclusory allegation that he has not been provided a constitutionally
24 adequate custody determination because he does not identify any procedural deficiency
25 in the bond proceeding, nor does he dispute a single factual finding underlying the
26 immigration judge's denial of bond. Petitioner does not allege that the immigration
27 judge relied on false information, applied the wrong legal standard, or otherwise denied
28 him a meaningful opportunity to be heard. Instead, he merely disagrees with the

1 outcome, which does not amount to a constitutional violation. The Court should
2 likewise reject Petitioner's argument that he is entitled to immediate release based on
3 the length of his detention because the remedy for such claim is a bond hearing, which
4 he has already been given.

5 **IV. Conclusion**

6 For the foregoing reasons, Respondents respectfully request that the petition be
7 denied. To the extent the Court determines that additional relief is appropriate, and
8 without waiving the arguments raised herein, Respondents do not oppose Petitioner
9 receiving a second bond hearing before an immigration judge.

10 DATED: May 21, 2026

Respectfully submitted,

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15 Assistant United States Attorney
16 Attorneys for Respondents
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