

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY**

GARY PATRICK ANDERSON,)

Plaintiff-Petitioner)

vs.)

LEO P. McGUIRE, in his official capacity as)
Sheriff of Bergen County Jail; SCOTT WEBER,)
in his official capacity as Field Office Director for)
Detention & Removal, Newark District Office;)

CHRISTOPHER SHANAHAN, in his official)
Capacity as Field Office Director for Detention &)
Removal, New York District Office;)

JULIE L. MYERS, in her official capacity as)
Assistant Secretary of United States Immigration)
And Customs Enforcement;)

JANET NAPOLITANO, in his official capacity as)
the Secretary of the United States Department of)
Homeland Security; and MICHAEL MUKASEY,)
in his official capacity as Attorney General of the)
United States.)

Defendants-Respondents.)
_____)

Civil Action No.

Hon. _____

**VERIFIED PETITION FOR WRIT OF HABEAS CORPUS PURSUANT TO
28 U.S.C. § 2241**

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INTRODUCTION

1. Petitioner Gary Anderson has been imprisoned by immigration authorities for nearly two years while challenging the Government's efforts to remove him. A longtime lawful permanent resident (LPR) of the United States, Mr. Anderson has lived in this country for over twenty-four years. Yet he faces removal based on a single misdemeanor conviction for simple possession for which he served a total of five days of imprisonment. Mr. Anderson has now spent more than 145 times his time served for his criminal conviction incarcerated by immigration authorities, even though he poses no danger or flight risk that would warrant such prolonged detention. Moreover, during this time, Mr. Anderson has never received any custody hearing, not to mention the kind of hearing that due process would require to justify detention of such length.

2. Mr. Anderson has a strong claim to cancellation of removal in light of his long residence in the United States and the hardship his deportation would cause both himself and his many U.S. citizen and LPR relatives, as well as to asylum, withholding, and relief under the Convention Against Torture (CAT) based on the persecution he would face as a mentally ill and disabled deportee if returned to Jamaica. Though the Immigration Judge (IJ) initially deemed Mr. Anderson ineligible for cancellation due to his criminal history and also denied his other claims for relief, his two simple possession convictions no longer bar him

from discretionary relief in light of *Alsol v. Mukasey*, 548 F.3d 207 (2d Cir. 2008).

Moreover, as the IJ previously noted in his June 3, 2008 decision, “Respondent’s case is an exceptionally sympathetic one” and Mr. Anderson has a high likelihood of success on his cancellation claim. IJ Dec. at 28. Yet the Government refuses even to consider his release, arguing that his continued detention is mandatory under 8 U.S.C. § 1226(c).

3. As set forth in the memorandum of law filed in support of the instant petition, the Government’s mandatory detention of Mr. Anderson, when he has strong challenges to removal and when his removal proceedings have already extended well beyond the “brief period of time” typically needed to complete such proceedings, *Demore v. Kim*, 538 U.S. 510, 513 (2003), violates both the Immigration and Nationality Act (INA) and the Constitution. The Supreme Court has repeatedly held that immigration detention violates due process unless it is reasonably related to its purpose. Moreover, where detention is prolonged, due process requires a “sufficiently strong special justification” to outweigh the significant deprivation of liberty, as well as strong procedural protections. *See Zadvydas v. Davis*, 533 U.S. 678, 690-91 (2001). Mr. Anderson’s continued and mandatory detention bears no such reasonable relationship to its purpose. Indeed, the sheer length of his detention—145 times his time served for his criminal conviction and almost five times the average five month period recognized by the

Supreme Court in *Demore*, 538 U.S. at 530—is patently unreasonable. The Government has never alleged a “sufficiently strong special justification” for such prolonged detention and never provided Mr. Anderson with a hearing on the issue.

4. This Court, however, need not—and should not—decide the serious constitutional questions presented by Petitioner’s detention. Principles of statutory construction require that, where possible, courts should construe statutes so as to avoid serious constitutional problems. Under these principles, the pre-final-order detention statute, 8 U.S.C. § 1226, must be construed to authorize detention only for a reasonable period of time. Thus, no statute—neither § 1226(c), which the government asserts requires Petitioner’s mandatory pre-final-order detention, nor § 1226(a), which provides for discretionary pre-final-order detention—authorizes Petitioner’s nearly two years of detention, at least not in the absence of a hearing where the government would bear the burden of demonstrating that such prolonged detention is warranted.

5. Mr. Anderson thus respectfully requests that this Court issue a writ of habeas corpus and order his immediate release under reasonable conditions of supervision or, in the alternative, order a constitutionally adequate hearing where Respondents must prove that his continued detention is justified.

6. Pursuant to 28 U.S.C. § 2243, and as set forth in an application filed herein, Mr. Anderson requests further that the Court immediately order

Respondents to show cause why the writ of habeas corpus should not be granted.

Mr. Anderson also requests that the Court set a prompt hearing on this matter upon

Respondents' return on the order to show cause.

JURISDICTION AND VENUE

7. This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 2241 (habeas corpus); 28 U.S.C. § 1651 (All Writs Act); 28 U.S.C. § 1331 (federal question); 28 U.S.C. §§ 2201-02 (declaratory relief); and the U.S. Constitution, art. I, § 9, cl. 2 (Suspension Clause).

8. Mr. Anderson has exhausted any and all administrative remedies to the extent required by law.

9. While the courts of appeals have jurisdiction to review removal orders directly through petitions for review, *see* 8 U.S.C. § 1252(a)(1), (b), the federal district courts have jurisdiction under 28 U.S.C. § 2241 to hear habeas claims by non-citizens challenging the lawfulness or constitutionality of their detention by ICE. *See, e.g., Demore v. Kim*, 538 U.S. at 516-17; *Zadvydas*, 533 U.S. at 687; *Nnadika v. Attorney General of U.S.*, 484 F.3d 626, 632 (3rd Cir. 2007) (holding that, post-REAL ID, challenges to detention remain within the jurisdiction of the district court).

10. Venue is proper in the District of New Jersey pursuant to 28 U.S.C. § 2241(d) because Mr. Anderson is incarcerated at Bergen County Jail in Hackensack, New Jersey.

PARTIES

11. Petitioner Gary Anderson is a national and citizen of Jamaica and a lawful permanent resident of the United States for over twenty-four years. He suffers from schizophrenia and mild mental retardation. For two years, he has been imprisoned by immigration authorities, most of this time at the Bergen County Jail in Hackensack, New Jersey.

12. Respondent Leo P. McGuire is the Sheriff of the Bergen County Jail and is Mr. Anderson's immediate custodian. Mr. McGuire is sued in his official capacity.

13. Respondent Scott Weber is the Field Office Director for Deportation and Removal in the Newark District Office of U.S. Immigration and Customs Enforcement. In this capacity, he has jurisdiction over the detention facility in which Mr. Anderson is held, is authorized to release Mr. Anderson, and is a legal custodian of Mr. Anderson. Mr. Weber is sued in his official capacity.

14. Respondent Chris Shanahan is the Acting Field Office Director for Deportation and Removal in the New York District Office of U.S. Immigration and

Customs Enforcement. In this capacity, he has jurisdiction over the detention of Respondent's before the Executive Office of Immigration Review in the New York District under whose control Mr. Anderson is held. He is authorized to release Mr. Anderson, and is a legal custodian of Mr. Anderson. Mr. Shanahan is sued in his official capacity.

15. Respondent Julie L. Myers is the Assistant Secretary of Immigration and Customs Enforcement. In this capacity, she has responsibility for the enforcement of the immigration laws. As such, she is a legal custodian of Mr. Anderson. Ms. Myers is sued in her official capacity.

16. Respondent Janet Napolitano is the Secretary of Homeland Security and heads the Department of Homeland Security, the arm of the U.S. government responsible for enforcement of the immigration laws. Ms. Napolitano is the ultimate legal custodian of Mr. Anderson. Ms. Napolitano is sued in her official capacity.

17. Respondent Michael Mukasey is the Attorney General of the United States and the head of the Department of Justice, which encompasses the Board of Immigration Appeals and immigration judges as a subunit, the Executive Office of Immigration Review. Mr. Mukasey shares responsibility for the implementation and enforcement of immigration laws along with Respondent Napolitano. Mr.

Mukasey is a legal custodian of Mr. Anderson. Mr. Mukasey is sued in his official capacity.

FACTS AND PROCEDURAL HISTORY

Personal and Medical History

18. Petitioner Gary Anderson is a longtime lawful permanent resident (LPR) who has lived in the United States for over twenty four years, having entered the United States in 1984 at the age of 17. He has two U.S. citizen siblings and a number of nieces and nephews, and a mother and brother who are both LPRs. He is a national and citizen of Jamaica.

19. Mr. Anderson has a long history of struggling with mental illness and mental disability. In early 1985, he was hospitalized at the Kings County Hospital after experiencing his first psychotic “break” and began receiving mental healthcare. Within five months of beginning school at Wingate High School in Brooklyn, New York, he was transferred first to special education classes and then to a school for adolescents with developmental and emotional disabilities.

20. Mr. Anderson is diagnosed with mild mental retardation. His medical records from 1986 indicate a diagnosis of mental retardation due to a low IQ score. A psychological evaluation Mr. Anderson determined that Mr. Anderson’s

Full Scale IQ Score is 61 which is equivalent to the lowest 0.5 percentile of the general population. In real terms, Mr. Anderson functions well below the average for his age. For example, his sentence comprehension was scored at 0.2 percentile, equivalent to the second percentile for word comprehension. Due to his mental retardation, his family and social workers have observed that Mr. Anderson has been taken advantage of in the past, he is “slow,” smiles inappropriately at times, and is non-complaining in nature.

21. In addition to mild mental retardation, Gary is diagnosed with schizophrenia, a severe and chronic mental illness, for which he requires various medications and several forms of counseling.

22. Prior to his detention, Mr. Anderson received housing and Assertive Community Treatment (ACT) mental health and substance use services from Pathways to Housing, a non-profit organization based on New York City. ACT services provide intensive treatment for individuals, such as Mr. Anderson, suffering from severe and chronic mental illnesses. Mr. Anderson’s ACT team, made up of a social worker, case workers, and a psychiatrist, met with him a minimum of two times a week and sometimes more to address his emotional, psychiatric, medical, and human needs. While at Pathways, Mr. Anderson experienced a marked improvement in his mental health. For example, prior to becoming a Pathways client, Mr. Anderson had frequent and often lengthy

hospitalizations. His treatment at Pathways increasingly stabilized his psychiatric symptoms and sharply reduced his hospitalizations.

23. Despite his mental illness, Mr. Anderson has maintained relationships with members of his family in the United States. Most important among his family members is his mother, Kathleen Hamilton-Lowers.

24. Ms. Hamilton-Lowers, who also suffers from mental illness as well as high blood pressure, is employed by Pathways to Housing. Though Mr. Anderson has lived with his mother at different times throughout his life, Ms. Hamilton-Lowers has primarily lived alone since Mr. Anderson's detention in January 2007. Mr. Anderson's detention has caused her significant stress and anxiety, as she relies on Mr. Anderson for assistance with basic household duties, such as cleaning and preparing meals, as well as emotional and mental support. Moreover, because her medical problems make visits to the Bergen County Jail impossible without support, Hamilton-Lowers has only been able to visit her son twice during his nearly two years of detention.

The Government's Removal Case

25. On February 4, 2005, Mr. Anderson was convicted of Criminal Possession of a Controlled Substance in the seventh degree pursuant to section 220.03 of the New York Penal Law ("NYPL") for which he was served five days

in jail. This conviction is the Government's basis for seeking Mr. Anderson's removal from the United States.¹

26. Following his guilty plea in 2007, Mr. Anderson was placed into the custody of U.S. Immigration and Customs Enforcement (ICE). ICE then transferred him to the Otero Detention Center in El Paso, Texas.

27. The Government filed a Notice to Appear (NTA) in the El Paso Immigration Court in El Paso, Texas on or about February 5, 2007, charging Mr. Anderson as removable from the United States for violating a law related to controlled substances pursuant to the Immigration and Nationality Act (INA), 8 U.S.C. § 1227(a)(2)(B)(i). Mr. Anderson conceded the charges against him at a hearing before an Immigration Judge (IJ) on March 28, 2007.

28. Subsequently, a motion to change venue was granted and Mr. Anderson was transferred on or about July 17, 2007 to the Bergen County Jail for proceedings before an Immigration Judge in New York Immigration Court, where he could be closer to his family and mental health service providers.

29. Mr. Anderson submitted an application for cancellation of removal on or about August 29, 2007 and applications for asylum, withholding of removal, and relief under the Convention Against Torture (CAT) to the New York

¹ Mr. Anderson pled guilty on January 18, 2007 to attempted simple possession of a controlled substance and served 15 days imprisonment. This guilty plea is on direct appeal, however, the Petitioner is in the process of withdrawing his appeal. He is not charged as removable for this offense.

Immigration Court on November 14, 2007. Mr. Anderson's application for cancellation and documents filed in support of his applications detailed the many factors supporting a grant of relief, including his long residence in this country, the extensive hardship that his removal would cause his U.S. citizen and LPR family members—in particular his mother, who is also mentally ill and depends heavily on his support—his close ties to the community, the minor nature of his crime, and the hardship he faces should he be deported on account of his mentally illness and disability.

30. Moreover, Mr. Anderson's fear-based claims explained his fear of persecution and torture due to his mental illness and mental disability, his status as a deportee, and his history of substance abuse if he were to be returned to Jamaica.

31. The IJ initially scheduled an individual hearing for January 4, 2008. Mr. Anderson's counsel requested an oral adjournment due to a scheduling conflict and to obtain further supporting documentation and psychological evaluation, and the IJ reset Petitioner's individual hearing date to February 22, 2008.

32. At the February hearing, he found Mr. Anderson ineligible for cancellation and asylum as a matter of law under *Matter of Carachuri-Rosendo*, 24 I&N Dec. 382 (BIA 2007), because his second guilty plea to possession of

drugs constituted an “aggravated felony” barring him from relief. Even so, in his decision he stated “Respondent’s case is an exceptionally sympathetic one.”

33. A hearing proceeded regarding Mr. Anderson’s application for withholding of removal and relief under CAT, which was continued to complete testimony and cross-examination of Petitioner’s expert witnesses to April 15, 2008 and May 9, 2008.

34. At the April 15, 2008 hearing, Mr. Anderson requested that he be removed in order to get out of jail. Subsequently, Dr. Ali Khadivi, Petitioner’s psychiatric expert, found that Mr. Anderson was suffering from delusions which interfered with his ability to work rationally with his legal representatives.

35. The IJ adjourned the case to the following day to permit counsel to inform the court of Mr. Anderson’s decision and, the next day Mr. Anderson submitted a letter stating he wished to proceed. On or about May 7, 2008 Mr. Anderson’s counsel also moved the court to appoint a representative from Pathways to Housing as Mr. Anderson’s guardian *ad litem*.

36. On May 9, 2008, the IJ denied Petitioner’s request for a guardian *ad litem* and completed Petitioner’s merits hearing.

37. On June 3, 2008, the IJ denied Mr. Anderson’s applications for withholding and CAT relief and ordered him removed.

38. Subsequent to the IJ's decision, Petitioner's counsel became aware that the Second Judicial Department's Appellate Term had accepted Mr. Anderson's late-filed notice of appeal of his second misdemeanor drug conviction. *See* NYCPR § 460.30. Because this conviction is on direct appeal, it is no longer a final conviction for immigration purposes and, as such, no longer bars Mr. Anderson's claims for cancellation of removal and asylum. *See* 8 U.S.C. § 1101(a)(48)(A); *Matter of Polanco*, 20 I&N Dec. 894, 897-98 (BIA 1994) (holding that late appeal accepted as a direct appeal is not a final conviction for immigration purposes).

39. Petitioner's counsel moved to reopen Mr. Anderson's case on the basis of his direct appeal on June 20, 2008. However, because the IJ did not decide the motion prior to Petitioner's deadline to submit his notice to appeal, Petitioner filed a notice of appeal with the Board of Immigration Appeals (BIA) on July 3, 2008. In a reply dated July 3, 2008, the Government stated it did not oppose the Petitioner's request to reopen his case for purposes of a hearing on cancellation of removal. Because the IJ no longer had jurisdiction to grant the motion, Petitioner then filed an unopposed expedited motion to remand the case to the IJ, which the Board granted on September 15, 2008.

40. On November 14, 2008, the Second Circuit decided *Alsol v. Mukasey*, 548 F.3d 207 (2d Cir. 2008), holding that a second misdemeanor conviction under

NYPL § 220.03 does not constitute a “drug trafficking” aggravated felony. Mr. Anderson is in the process of withdrawing his appeal to the second misdemeanor conviction for possession of a controlled substance and is scheduled for an individual hearing on February 5, 2008.

Mr. Anderson’s Detention

41. Mr. Anderson has been subject to mandatory detention under the INA, 8 U.S.C. § 1226(c), for nearly two years during the entire length of his removal proceedings to date. As a mandatory detainee, he has received no review as to whether he presents a flight risk or danger justifying his continued detention, and the Government does not intend to provide him with any such review in the future.

42. On January 26, 2007, when Mr. Anderson was served with the Notice to Appear, he received a Notice of Custody Determination stating that he is “detained in the custody of this Service,” and he “may not request a review of this determination by an immigration judge because the Immigration and Nationality Act prohibits your release from custody.”

Nevertheless, on November 28, 2007, after 11 months of detention, Mr. Anderson submitted a request for release from ICE custody on humanitarian grounds. In his request, Mr. Anderson requested a release from detention in order

to continue receiving services from Pathways to Housing and additional services from the Kings County Hospital. With his request, he submitted letters from service providers, friends and family members, along with a detailed letter highlighting the reasons Mr. Anderson does not pose a flight risk or a danger to the community. Mr. Anderson even consented to release on a supervision order or even under the restrictive Intensive Supervision Appearance Program. *See* Letter to Deportation Officer Darius Reeves, Dec. 12, 2007.

43. The Government denied Mr. Anderson's request on December 19, 2007, stating summarily that he was subject to mandatory detention. For the same reasons, the Government rejected Mr. Anderson's request to be released under a supervision order.

44. On March 26, 2008, after nearly 14 months of detention, Mr. Anderson submitted a second request for release from detention on humanitarian grounds. In his request, Mr. Anderson explained that he had a substantial claim to cancellation—a permanent form of relief from removal—and faced potentially years of detention as he litigated his removal proceedings. He explained the hardship that detention has caused him and his family. He also explained that he posed no flight risk or danger to the community and that Pathways to Housing stood ready to meet his ongoing treatment needs and ensure that he appear at Immigration Court. *See infra*. Finally, Mr. Anderson submitted a range of new

information in support of his request, including a psychological evaluation documenting his mild mental retardation and finding that he presents a very low probability of flight risk/danger to the community; affidavits from his relatives; letters from psychiatric experts and law school clinics; and 98 letters of support from community members.

45. Nevertheless, on April 17, 2008, ICE denied Mr. Anderson's request without an individualized determination that he posed a danger or flight risk "as a matter of law" because he is subject to mandatory detention. ICE asserted further that, even assuming that Mr. Anderson could be lawfully released, his request would be denied because he had ostensibly not been diagnosed with any medical condition which could not be treated by medical authorities in Jamaica and that Mr. Anderson was receiving his psychiatric medications. In addition, ICE noted that Mr. Anderson "was given the opportunity to accept a final order of removal [on April 15, 2008], and [counsel] declined on his behalf."

46. Mr. Anderson's removal case is currently pending before the IJ, and he has a merits hearing scheduled on February 5, 2009. There is no set time frame for the adjudication of his proceedings. Meanwhile, Mr. Anderson remains in detention at the Bergen County Jail.

Mr. Anderson's Treatment Plan Upon Release from Detention

47. As noted above, Mr. Anderson will have access to comprehensive and continuous mental healthcare, other treatment, and reentry services upon his release from detention. Pathways to Housing has maintained contact with Mr. Anderson throughout his detention and remains committed to meeting his needs. Upon release, Mr. Anderson will resume intensive treatment with Dr. Alexa Whiorsky, MD, his treating psychiatrist; Vivien K. Zak, a licensed clinical social worker with a specialty in substance abuse; Virginia Selman, a family specialist; Matthew Charles Siegal, a vocational specialist; a team leader who will supervise Mr. Anderson's treatment team. Moreover, Mr. Anderson will reside with his mother, who is also committed to providing him with support.

48. Furthermore, Mr. Anderson has requested placement in a drug abuse treatment program for mentally ill individuals through the Kings County Hospital, and the hospital's Project Access Outpatient Center has determined that Mr. Anderson meets its out-patient program criteria. Upon release, Mr. Anderson will participate in group and individual activities Monday through Friday from 9:00 a.m. to 2:15 p.m. The hospital will monitor his attendance and ensure compliance with daily medications and enforce his total abstinence from drugs and alcohol. Rick Mullins, the Community Liaison/Counselor from the outpatient center, has

committed to working with Pathways to ensure Mr. Anderson receives the best treatment possible.

49. Petitioner’s psychiatric expert, Dr. Khadivi, has evaluated Gary’s future treatment plan and found that the combination of ACT services with a day treatment program would provide Mr. Anderson with comprehensive services that are significantly better than the care Mr. Anderson has received in the past and that will increase his chance of remaining drug free and of avoiding future hospitalization.

CLAIMS FOR RELIEF

FIRST CAUSE OF ACTION **VIOLATION OF IMMIGRATION AND NATIONALITY ACT—** **MANDATORY DETENTION OF A NON-CITIZEN WHO HAS A** **SUBSTANTIAL CHALLENGE TO DEPORTABILITY**

50. The foregoing allegations are realleged and incorporated herein.

51. 8 U.S.C. § 1226(c)(1)(B), the sub-provision under which Mr. Anderson is detained, provides, in relevant part, that the Attorney General “shall take into custody any alien who . . . *is deportable* by reason of having committed” designated offenses. *Id.* (Emphasis added).

52. In light of the serious constitutional problems that would arise if the statute were construed as requiring the mandatory detention of non-citizens with substantial challenges to deportability—and in the absence of any indication that Congress intended this result—the “is deportable” language in § 1226(c) must be construed as not applying to such individuals.

53. Because Mr. Anderson has substantial claims for cancellation of removal, asylum, withholding of removal, and relief under the Convention Against Torture (CAT), he is not “deportable” under the meaning of § 1226(c) and his mandatory detention is not authorized by that statute.

SECOND CAUSE OF ACTION
VIOLATION OF IMMIGRATION AND NATIONALITY ACT—
MANDATORY DETENTION OF A NON-CITIZEN BEYOND THE
BRIEF PERIOD OF TIME CONTEMPLATED BY *DEMORE V. KIM*

54. The foregoing allegations are realleged and incorporated herein.

55. 8 U.S.C. § 1226(c), the statute under which Mr. Anderson is detained, is silent with regard to the length of mandatory detention authorized. Because of the serious constitutional problems that would be posed if § 1226(c) authorized mandatory detention for a prolonged period of time—and in the absence of any indication that Congress intended this result—this Court must construe the statute as authorizing such detention only for the “brief period of time necessary” to complete removal proceedings. *Demore*, 538 U.S. at 513.

56. Mr. Anderson's detention, nearly surpassing two years, far exceeds the "brief period of time necessary" to complete removal proceedings. As such, his mandatory detention is not authorized by 8 U.S.C. § 1226(c).

THIRD CAUSE OF ACTION
VIOLATION OF IMMIGRATION AND NATIONALITY ACT--
PROLONGED DETENTION BEYOND THE BRIEF AND
REASONABLE PERIOD OF TIME AUTHORIZED BY THE
STATUTE, IN THE ABSENCE OF A HEARING WHERE THE
GOVERNMENT BEARS THE BURDEN OF SHOWING THAT SUCH
PROLONGED DETENTION IS JUSTIFIED

57. The foregoing allegations are realleged and incorporated herein.

58. 8 U.S.C. § 1226(a), the statutory provision under which Mr. Anderson is detained if his detention is not authorized by 1226(c), is silent with regard to the length of pre-final-order detention authorized and the procedures required if such detention becomes prolonged. Serious constitutional problems would be arise if § 1226(a) authorized detention for a prolonged period of time without the kind of strong justification and procedural safeguards that such detention would require. To avoid these constitutional problems, this Court must therefore construe the statute as authorizing detention for only a brief period of time, or in the alternative as requiring a constitutionally adequate hearing where the government bears the burden of showing that such prolonged detention is justified.

59. Mr. Anderson's two years of detention exceeds the brief period of time authorized under the statute. There is no justification for his continued detention. Nor has he received any hearing to determine whether his prolonged detention is justified.

60. For the foregoing reasons, his continued detention is not authorized under 8 U.S.C. § 1226(a).

FOURTH CAUSE OF ACTION
VIOLATION OF DUE PROCESS CLAUSE OF THE FIFTH
AMENDMENT – PROLONGED DETENTION THAT BEARS NO
REASONABLE RELATION TO ITS PURPOSE

61. The foregoing allegations are realleged and incorporated herein.

62. Immigration detention violates due process unless such detention is reasonably related to its purpose. *Zadvydas*, 533 U.S. at 690 (citing *Jackson v. Indiana*, 406 U.S. 715, 738 (1972)); *Demore v. Kim*, 538 U.S. at 513 (upholding brief period of mandatory detention because it was necessary to purpose).

Moreover, as detention becomes prolonged, the Due Process Clause requires a sufficiently strong justification to outweigh the significant deprivation of liberty, as well as strong procedural protections. *Zadvydas*, 533 U.S. at 690-91.

63. Mr. Anderson's continued immigration detention, when he raises substantial challenges to deportability, when he faces deportation based on a single

possession offense for which he served a total of five days in jail, when he has already been in immigration detention for almost two years (and more than 145 times longer than his time served for his criminal conviction), and when he has agreed to comply with reasonable conditions of release including electronic monitoring, bears no reasonable relation to the government's purpose.

64. For all of the foregoing reasons, Mr. Anderson's prolonged detention violates due process.

FIFTH CAUSE OF ACTION
VIOLATION OF DUE PROCESS CLAUSE OF THE FIFTH
AMENDMENT – PROLONGED DETENTION WITHOUT A
CONSTITUTIONALLY ADEQUATE HEARING WHERE THE
GOVERNMENT BEARS THE BURDEN OF SHOWING THAT SUCH
DETENTION IS JUSTIFIED

65. The foregoing allegations are realleged and incorporated herein.

66. Prolonged detention violates due process unless it is accompanied by strong procedural protections to protect against the erroneous deprivation of liberty. *Zadvydas*, 533 U.S. at 690-91; *Ngo. v. INS*, 192 F.3d 390, 398 (3rd Cir. 1999). Moreover, when the government deprives an individual of a significant liberty interest, the burden of justifying such a deprivation should be placed on the government. *See Tijani v. Willis*, 430 F.3d 1241, 1244-45 (9th Cir. 2005)

(Tashima, J. concurring) (noting that when a fundamental right such as the right to individual liberty is at stake, Supreme Court precedent rejects laws that place on the individual the burden of protecting that right) (citing *inter alia*, *Addington v. Texas*, 441 U.S. 418 (1979)).

67. During nearly two years of immigration imprisonment, Mr. Anderson has never received any custody hearing, not to mention a hearing where the government bore the burden of demonstrating that his prolonged detention was justified.

68. Mr. Anderson's prolonged detention has not been accompanied by the kind of procedural protections that such a significant deprivation of liberty requires.

69. For the foregoing reasons, Mr. Anderson's continued detention violates due process.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff-Petitioner prays that this Court grant the following relief:

- (a) Assume jurisdiction over this matter;

- (b) Order Respondents to show cause, within three days of filing this petition, why the writ of habeas corpus should not be granted; and set a hearing on this matter within five days of Respondents' return on the order to show cause, pursuant to 28 U.S.C. § 2243;
- (c) Grant the writ of habeas corpus and order Mr. Anderson's immediate release from custody under reasonable conditions of supervision; or in the alternative, order a constitutionally adequate hearing where Respondents must demonstrate that Petitioner's continued detention is justified.
- (d) Declare that Respondents' continued detention of Mr. Anderson violates the Immigration and Nationality Act because it exceeds the brief period authorized by the statute, or in the alternative, because Respondents have failed to provide him with a hearing where the government bears the burden of showing that such prolonged detention is justified;
- (e) Declare that Respondents' nearly two years of detention of Mr. Anderson violates the Due Process Clause of the Fifth Amendment because it bears no reasonable relation to a legitimate governmental purpose, and/or because Respondents have failed to provide him with a hearing where the government bears the burden of showing that such prolonged detention is justified.

- (f) Award reasonable attorney's fees, costs and other disbursements pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412; and
- (g) Grant any other and further relief that this court deems just and proper.

Dated: January 23, 2009

Respectfully submitted,

s/ Gitanjali Gutierrez

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*Application for Admission Forthcoming

Attorneys for Petitioner

VERIFICATION

Gary Anderson, under penalty of perjury, states the following:

1. I am the Petitioner to whom the foregoing Petition for Writ of Habeas Corbus relates.
2. I affirm the truth of the factual contents of the Petition.

Dated: January 23, 2009

GARY ANDERSON
Gary Patrick Anderson
Bergen County Jail
160 South River Street
Hackensack, NJ 07601