

the Plymouth facility, constitutes “extraordinary circumstances” justifying immediate release.

See *Calderon* Order at Tr. 4-5.

A copy of the *Calderon* Order is attached hereto as Exhibit A.

Dated: March 26, 2020

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*pro hac application forthcoming

**pro hac application forthcoming; not admitted in D.C.; practice limited to federal courts

Exhibit A

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

LILIAN PAHOLA CALDERON JIMENEZ)
AND LUIS GORDILLO, ET AL.,)
individually and on behalf of all)
others similarly situated,)
)
Petitioners-Plaintiffs,)
)
v.) C.A. No. 18-10225-MLW
)
CHAD WOLF, ET AL.,)
)
Respondents-Defendants.)

MEMORANDUM AND ORDER

WOLF, D.J.

March 26, 2020

Attached is a transcript of the decision, issued orally on March 25, 2020, granting the Motion for Immediate Interim Release of Class Member Salvador Rodriguez-Aguasviva (Docket No. 500).


UNITED STATES DISTRICT JUDGE

1 * * * * *

2 THE COURT: I'm going to decide this matter, and I will
3 explain my decision. The transcript will be a record of the
4 decision and you must order it. It's possible I'll write this
5 up, but I do think this is an urgent matter and I should tell
6 you my decision, so I will.

7 First, I've concluded for the reasons described by the
8 Second Circuit in Mapp v. Reno, 241 F. 3d 221 at 230, a 2001
9 Second Circuit case, that District Courts do have the power to
03:23 10 order the release of immigration detainees on bail. I don't
11 think that the REAL ID Act alters that fundamental authority.

12 As I said earlier, I believe that the Glynn v. Donnelly
13 case, the First Circuit case, 470 F.2d 95, 98 is
14 distinguishable in a material respect. In Glynn, the First
15 Circuit did hold that in certain extraordinary circumstances a
16 District Court could release a detained petitioner before the
17 petition was decided on the merits. It created a higher
18 standard or stated a higher standard than the Second Circuit in
19 Mapp. In Glynn, the petitioner was somebody who had been
03:24 20 convicted of a crime. I believe his appeal had been denied,
21 and then he was petitioning for habeas corpus, but he had no
22 presumption of innocence.

23 In this case, it's important to remember we're talking
24 about a civil detainee, somebody who has never been charged,
25 let alone convicted of any crime. And I think that the Mapp

1 test or something similar or perhaps less is appropriate. As I
2 said, the Mapp test where the court in Mapp said -- I don't
3 know -- somebody perhaps didn't mute their phone because,
4 unless I'm hearing the court reporter, there's something
5 clicking, banging.

6 But the court in Mapp said the court considering a habeas
7 petitioner's fitness for bail must inquire into whether the
8 habeas petitioner raises substantial claims and whether
9 extraordinary circumstances exist to make the grant of bail
03:25 10 necessary to make the habeas remedy effective. And I would add
11 to that that, even if those requirements are met, the court
12 would have to be satisfied that the petitioner would not be a
13 danger to the community, reasonably assured that the petitioner
14 would not be a danger to the community or not would flee if
15 released on reasonable feasible conditions.

16 I do find, without expressing any prediction of how the
17 merits will be resolved, that a substantial claim or question
18 is raised by the petitioner's habeas petition. The initial
19 description by ICE of the reason for his detention -- well, the
03:26 20 reason for his detention sent to petitioner's counsel in an
21 email was that in effect -- well, that he was likely to be
22 unable -- the petitioner was likely to be unable to receive an
23 approved I-601A because he did not appear at his removal
24 hearing. He was ordered removed in absentia. The essence of
25 this, the way it was stated initially indicated that ICE was

1 under the impression or misimpression that the petitioner is
2 ineligible for an I-601A.

3 While I've commended Mr. Lyons and Mr. Charles on many
4 things they've done, since June 2018, I have found ICE has
5 repeatedly failed to understand its own regulations as I held
6 in 2018. And I learned, to my dismay, in the fall of 2019,
7 when the witness responsible for much of the national program
8 for many years testified that he didn't understand -- he didn't
9 realize there was a regulation that required that everybody
03:28 10 detained more than six months had to be interviewed. It would
11 be sadly consistent with the pattern in this case if ICE
12 misunderstood whether somebody who failed to appear for a
13 removal hearing was ineligible for an I-601A.

14 And indeed it appears that ICE's position has evolved and
15 they don't take that position anymore. Mr. Lyons has
16 articulated in his declaration other reasons for the detention,
17 but there is the question of whether those reasons were in his
18 mind when he decided to detain the petitioner or whether the
19 affidavit that appears to have been drafted by a lawyer has
03:29 20 rationalizations that weren't part of the decisionmaking
21 process at issue. That's an issue that I may need to hear
22 testimony on. I also -- but I do think that there's a
23 substantial question, a substantial claim.

24 In addition, I find that extraordinary circumstances exist
25 that make the grant of bail necessary to make the habeas

1 effective, to make the habeas remedy effective. To be blunt,
2 we're living in the midst of a coronavirus pandemic. Some
3 infected people die; not all, but some infected people die. If
4 the petitioner is infected and dies, the case will be moot.
5 The habeas remedy will be ineffective.

6 And being in a jail enhances risk. Social distancing is
7 difficult or impossible. Washing hands repeatedly may be
8 difficult. There is, it appears not to be disputed, one
9 court -- one Plymouth County jail employee who has been
03:31 10 infected, and there's a genuine risk that this will spread
11 throughout the jail. Again, the petitioner is in custody with
12 people charged with or convicted of crimes. He's not been
13 charged or convicted of anything.

14 I've also considered what I ordinarily consider in making
15 or reviewing bail decisions in criminal cases. There's no
16 contention that the petitioner will be dangerous to any
17 individual or the community if he's released on reasonable
18 conditions.

19 ICE does contend that he would be a risk of flight. That
03:32 20 is based on the fact that he missed one immigration hearing at
21 which his removal was ordered and apparently did not tell ICE
22 of his change of address. And he is facing a serious risk of
23 being removed. He may not prevail on the habeas petition. And
24 if he does, he may not get a provisional waiver.

25 However, there's no indication that the petitioner has

1 anyplace to go. Being among other people, say, in a homeless
2 shelter is very dangerous, like being in a jail. There's no
3 indication that he has any relatives or others who might take
4 him in other than his wife. And I am ordering that he live
5 with his wife in Lawrence, Massachusetts; that he stay in their
6 residence, except if there is a medical need for him to leave;
7 and, unless it's a genuine emergency, he would need the
8 permission of ICE to leave. And he is to be on electronic
9 monitoring, so if he leaves the residence when he hasn't been
03:33 10 authorized to leave, ICE would know that and, if appropriate,
11 could come back to me to revoke his release.

12 In addition, there are certain equities that favor the
13 release of the petitioner. He's now been detained since
14 September 4, 2019. On January 27, the motion was filed to
15 enjoin his removal. As I indicated in the course of the
16 argument, with the assent of petitioner's counsel, class
17 counsel, ICE has repeatedly been given extensions of time to
18 respond to the motion.

19 On January 31, 2020, the parties filed a joint motion to
03:35 20 give ICE until February 14 to confer, and then on February 13,
21 the respondents filed an unopposed motion for an extension of
22 time to file their opposition until February 20, which I
23 allowed. Then I was asked not to schedule a hearing in this
24 case until after March 25 because Mr. Lyons would not be
25 available from March 10 to 24. I accommodated that. And I was

1 told that local counsel, Ms. Piemonte, would be on trial until
2 April 6. On March 19 I allowed the respondent's motion for
3 respondents to file a sur-reply. And though it's possible,
4 except for ICE asking for and receiving extensions of time to
5 respond or file a sur-reply, that there would have been a
6 hearing and a decision on this case earlier.

7 So essentially we're in a circumstance where an individual
8 who has not been accused of any crime has been detained for --
9 I think it comes to about six and a half months. Part of that
03:36 10 is because I've stayed his removal pending the decision on his
11 motion to enjoin removal, but because of accommodations to ICE,
12 that wasn't fully briefed until less than a week ago, and I had
13 been asked to defer to Mr. Lyons' availability, which I did.

14 So for all of those reasons, I'm ordering that the
15 petitioner be released no later than tomorrow, March 26, 2020,
16 on the conditions I articulated and will memorialize in a brief
17 order.

18 I'm ordering counsel for ICE to inform me when he has been
19 released, and if there's some problem with implementing this
03:38 20 order by tomorrow, you'll have to let me know promptly.

21 Petitioners' counsel I'm directing, ordering, to inform the
22 petitioner and his wife of my decision, including the
23 requirements that he live with his wife and that he be on
24 electronic monitoring. And he'll have to confirm for ICE,
25 he'll have to provide ICE her address if they don't have it and

1 confirm her willingness to have her husband with her for the
2 duration of this case.

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