

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

_____)	
SAMUEL PENSAMIENTO,)	
)	C.A. No. _____
Petitioner,)	
)	
v.)	PETITION FOR WRIT OF
)	HABEAS CORPUS
JOSEPH D. MCDONALD, JR.,)	
Plymouth County Sheriff,)	
ANTONE MONIZ,)	
Superintendent of the Plymouth County)	
Correctional Facility,)	
THOMAS BROPHY,)	
Immigration and Customs Enforcement,)	
Enforcement and Removal Operations,)	
Acting Field Office Director,)	
)	
Respondents.)	
_____)	

INTRODUCTION

1. Petitioner Samuel Pensamiento was detained by federal immigration authorities inside the Chelsea District Court on January 31, 2018, after he appeared for a pre-trial hearing on pending misdemeanor charges arising from a traffic accident. These federal authorities, and Mr. Pensamiento’s state custodians, now refuse to honor the Massachusetts court’s writ of habeas corpus *ad prosequendum* requiring his appearance to resolve those charges. That failure senselessly interferes with the proceedings of the Massachusetts courts that ordered Mr. Pensamiento’s appearance; it also violates Mr. Pensamiento’s due process rights and causes him significant prejudice. Mr. Pensamiento has already been denied bond on the basis of allegations that he is deprived of the opportunity to resolve or defend against; and his

removal from the United States with open charges could effectively cause permanent exile and separation from his U.S. citizen wife and family.

2. Mr. Pensamiento hereby seeks immediate relief, in the form of a federal writ of habeas corpus *ad prosequendum* or other order, to require that he be transported to the Massachusetts court to appear at his next pre-trial hearing on March 19, 2018. He also seeks permanent relief, including an order requiring a constitutionally adequate bond hearing at which the government bears the burden to justify any further detention by proving by clear and convincing evidence that Mr. Pensamiento is a danger to others or a flight risk, and, even if he is, that no condition or combination of conditions will reasonably assure his future appearance and the safety of the community.

PARTIES

3. Petitioner Samuel Pensamiento is detained at the Plymouth County Correctional Facility, 26 Long Pond Road, Plymouth, Massachusetts.
4. Respondent Joseph D. McDonald, Jr. is Sheriff of Plymouth County and is Mr. Pensamiento's immediate custodian.
5. Respondent Antone Moniz is the Superintendent of the Plymouth County Correctional Facility and is also Mr. Pensamiento's immediate custodian.
6. Respondent Thomas Brophy is the Acting Field Office Director of Immigration and Customs Enforcement (ICE), Enforcement and Removal Operation's Boston Field Office. He is Mr. Pensamiento's immediate legal custodian.

JURISDICTION AND VENUE

7. This Court has jurisdiction pursuant to 28 U.S.C. § 2241.

8. Venue lies in the District of Massachusetts because Mr. Pensamiento is currently detained within this District.

FACTS ALLEGED

A. MR. PENSAMIENTO IS NOT DANGEROUS AND HAS STRONG TIES TO OUR COMMUNITY.

9. Mr. Pensamiento was born in Guatemala. He is 26 years old.
10. Mr. Pensamiento is married to a U.S. citizen. The couple is expecting a child in May 2018.
11. Mr. Pensamiento has never been convicted of any crime anywhere in the world.
12. In 2013, Mr. Pensamiento fled to the United States to escape persecution in Guatemala.
13. Mr. Pensamiento entered the United States without inspection on July 10, 2013. He was immediately apprehended and placed into immigration proceedings. He applied for asylum and was released on bond in September 2013.
14. Immigration officials granted Mr. Pensamiento authorization to work during the pendency of his asylum proceedings. The Commonwealth of Massachusetts lawfully issued Mr. Pensamiento a driver's license.
15. While Mr. Pensamiento's asylum proceeding was pending, he met Ms. Yaritza Moreno while they were employed together at the same restaurant. They married in August 2016.
16. Ms. Moreno later filed a Form I-130 petition to sponsor Mr. Pensamiento to become a lawful permanent resident. The U.S. Citizenship and Immigration Service approved that petition on March 9, 2017.
17. Because Mr. Pensamiento had initially entered the United States without inspection, his application for permanent residency also required him to file a Form I-601A to obtain a waiver of the 10-year bar to re-entry. *See* 8 C.F.R. § 212.7. He filed that request in January 2018.

18. Because Mr. Pensamiento has a pathway to become a permanent resident, the Immigration Judge ordered his removal proceedings to be administratively closed on September 20, 2017.

19. Before being detained, Mr. Pensamiento worked two jobs to support his pregnant wife.

B. MR. PENSAMIENTO IS BEING DETAINED DUE TO MISDEMEANOR CHARGES ALLEGING HE LEFT THE SCENE OF A CAR ACCIDENT.

20. On December 17, 2017, the Chelsea police arrested Mr. Pensamiento after he allegedly left the scene of a car accident that resulted in some damage to both vehicles and an “apparent minor injury” to the other driver’s leg. Mr. Pensamiento was charged with two misdemeanor counts, violation of G. L. c. 90, § 24(2) (leaving scene of accident resulting in property damage) and G. L. c. 90, § 24(2)(a½)(1) (leaving scene of accident resulting in personal injury). He was released on personal recognizance.

21. Mr. Pensamiento appeared in Chelsea District Court for arraignment on December 18, 2017.

22. On January 31, 2018, Mr. Pensamiento appeared in Chelsea District Court for a pretrial hearing. After his hearing, and before Mr. Pensamiento left the courthouse, U.S. Immigration and Customs Enforcement (“ICE”) arrested him.

23. Following his detention, Mr. Pensamiento’s immigration removal proceedings were re-calendared. ICE is seeking his removal to Guatemala. The case is pending in Immigration Court for adjudication of Mr. Pensamiento’s asylum claim.

24. On February 13, 2018, the Immigration Judge conducted a hearing on Mr. Pensamiento’s request for release from immigration detention on bond. The Immigration Judge required that Mr. Pensamiento bear the burden of proving his lack of dangerousness and risk of flight by clear and convincing evidence. The Immigration Judge ruled that Mr. Pensamiento had failed to prove that he was not dangerous in light of the police report of Mr. Pensamiento’s recent charges, and therefore denied bond.

25. Mr. Pensamiento is detained at the Plymouth County Correctional Facility (“PCCF”). PCCF is operated by the Plymouth County Sheriff’s Department, which has contracted with ICE to house ICE’s immigration detainees.

C. RESPONDENTS ARE REFUSING TO COMPLY WITH STATE COURT ORDERS REQUIRING THAT MR. PENSAMIENTO BE TRANSPORTED TO COURT SO THAT HE WILL HAVE A FAIR OPPORTUNITY TO RESPOND TO THE PENDING CHARGES.

26. After Mr. Pensamiento’s detention, the next hearing on his misdemeanor charges was scheduled for March 5, 2018. Mr. Pensamiento’s attendance at the hearing was required. His attendance would also be required, and would be particularly important, in order to resolve the charges with a plea or any other disposition.

27. Upon the request of Mr. Pensamiento’s counsel, the Chelsea District Court issued writs of habeas corpus *ad prosequendum* to ICE (which would ordinarily instruct the Plymouth County Sheriff’s Department and PCCF) and to the Suffolk County Sheriff’s Department (which would ordinarily provide at least part of the necessary transportation to and from the court) requiring Mr. Pensamiento’s appearance on March 5, 2018. The writs were provided to an Assistant District Attorney, who then made multiple attempts to secure ICE’s cooperation.

28. However, on information and belief, ICE and its state-operated detention facilities in Massachusetts have, in the last several months, adopted a practice or policy of refusing to comply with writs of habeas corpus *ad prosequendum* issued by Massachusetts courts. In practical terms, this means that detained immigrants are not being transported to court and have no opportunity to defend or resolve pending criminal charges.

29. On information and belief, ICE and the Plymouth County Sheriff’s Department refused to comply with the Massachusetts court’s writ. Mr. Pensamiento was not transported to the

Chelsea District Court on March 5, 2018, and, consequently, could not appear for his hearing to respond to the pending misdemeanor charges.

30. The pendency of the misdemeanor charges is extremely prejudicial to Mr. Pensamiento. The Immigration Judge relied upon these allegations to deny Mr. Pensamiento bond. If Mr. Pensamiento is able to appear in Chelsea District Court, certain of the allegations may be dismissed, reduced to lesser charges, or otherwise resolved without a conviction. The disposition of these state charges would be critical to Mr. Pensamiento's future efforts to seek a redetermination of bond in his immigration case. Moreover, if Mr. Pensamiento is deported while these charges remain unresolved, then the mere pendency of the charges may permanently prevent him from obtaining a visa to enter the United States to reunite with his wife and child.

31. Upon learning that Mr. Pensamiento was not transported to court on March 5, 2018, the Chelsea District Court rescheduled the hearing for March 19, 2018, and issued new writs of habeas corpus *ad prosequendum* to ICE and to the Sheriff's Department.

32. On information and belief, Mr. Pensamiento will not be transported to court on March 19, 2018, unless this Court orders that such transportation occur by issuing a complementary writ of habeas corpus *ad prosequendum*, or other order, in aid of the Massachusetts court's existing writs.

CLAIMS FOR RELIEF

COUNT I – WRIT OF HABEAS CORPUS *AD PROSEQUENDUM*

33. The forgoing allegations are re-alleged and incorporated herein.

34. The Chelsea District Court requires Mr. Pensamiento's appearance on March 19, 2018.

35. The Chelsea District Court has issued writs of habeas corpus *ad prosequendum* to ICE and the Plymouth County Sheriff's Department requiring that Mr. Pensamiento be transported to court on March 19, 2018.
36. On information and belief, ICE and the Plymouth County Sheriff's Department will not transport Mr. Pensamiento to court on March 19, 2018, unless this Court orders that such transportation occur by issuing a complementary writ of habeas corpus *ad prosequendum*, or other order, in aid of the Massachusetts court's existing writs, including pursuant to 28 U.S.C. § 2241(c)(5). This Court may and should issue the writ even if it does not conclude that Respondents' failure to allow Mr. Pensamiento to attend his state court proceedings violates any provisions of law or of the U.S. Constitution.

COUNT II – WRIT OF HABEAS CORPUS

37. The forgoing allegations are re-alleged and incorporated herein.
38. Mr. Pensamiento's detention at a state facility without the opportunity to respond to pending charges, in violation of state court order, is unauthorized and unlawful, notwithstanding any purported agreements to the contrary that the state facility may have made with federal authorities.
39. Mr. Pensamiento's detention without an opportunity to respond to the pending charges is an unlawful deprivation of his constitutional rights, including his right to due process and confrontation.

COUNT III – WRIT OF HABEAS CORPUS

40. Mr. Pensamiento's detention is unlawful and violates his right to due process because he has not received a detention hearing at which the government was required to prove by clear and convincing evidence that Mr. Pensamiento is a danger to others or a flight risk, and, even if

so, that no condition or combination of conditions will reasonably assure Mr. Pensamiento's future appearance and the safety of the community.

PRAYER FOR RELIEF

Wherefore, Petitioner asks this Court to GRANT the following relief:

1. An order prohibiting Mr. Pensamiento's transfer from this District pending resolution of this petition;
2. A writ of habeas corpus *ad prosequendum*, or other order, requiring that Mr. Pensamiento be transported to Chelsea District Court, in accordance with the writs issued by that court, on March 19, 2018;
3. An order requiring that Mr. Pensamiento be transported to Chelsea District Court on such future occasions as that court may order;
4. A writ of habeas corpus ordering that Mr. Pensamiento be released, or, alternatively, ordering a detention hearing before this Court at which the government bears the burden to justify any further detention by proving by clear and convincing evidence that Mr. Pensamiento is a danger to others or a flight risk, and, even if he is, that no condition or combination of conditions will reasonably assure his future appearance and the safety of the community;
5. Attorneys' fees under the Equal Access to Justice Act, 28 U.S.C. § 2412(d) and 5 U.S.C. § 504 *et seq.*, if applicable; and
6. Any further relief this Court deems just and proper.

March 12, 2018

Respectfully submitted,

/s/ Adriana Lafaille

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