NINTH CIRCUIT PRACTICE ADVISORY:
Bond Hearings for Immigrants Under *Preap v. Johnson* and *Khoury v. Asher*
(August 2016)

This advisory discusses immigration detainees' right to a bond hearing under *Preap v. Johnson*, --- F.3d ----, 2016 WL 4136983 (9th Cir. 2016), and *Khoury v. Asher*, No. 14-35482, 2016 WL 4137642 (9th Cir. Aug. 4, 2016) (unpublished).[1]

Preap and *Khoury* are class action lawsuits filed on behalf of individuals in California and Washington State, respectively, whom the government had detained under the mandatory immigration detention statute, 8 U.S.C. § 1226(c). In *Preap*, the Ninth Circuit rejected the government's interpretation of the statute, holding that **"[u]nder the plain language of 8 U.S.C. § 1226(c), the government may detain without a bond hearing *only those criminal aliens it takes into immigration custody promptly upon their release"* from criminal custody for an offense referenced in the mandatory detention statute.** *Preap*, 2016 WL 4136983 at *11 (emphasis added).[2]

The Ninth Circuit affirmed the district courts' orders requiring bond hearings for detainee class members in California and Washington State who were not ***immediately*** detained upon their release from relevant criminal custody. Individuals in these states who have *any* gap in

[1] Class counsel in *Preap* are the ACLU Immigrants' Rights Project, ACLU of Northern California, Asian Americans Advancing Justice—Asian Law Caucus, and the law firm of Keker & Van Nest LLP. Class counsel in *Khoury* are the ACLU Immigrants' Rights Project, ACLU of Washington, Northwest Immigrant Rights Project, and the law firm of Gibbs Houston Pauw.

[2] The Ninth Circuit agreed with the opinion of three judges of an *en banc* panel of the First Circuit in *Castañeda v. Souza*, 810 F.3d 15 (1st Cir. 2015) (en banc) (affirming the judgments of the district court by an evenly divided *en banc* court). In contrast, four other circuits have held that the government may subject individuals to mandatory detention *regardless* of when they take them into immigration custody. *See Lora v. Shanahan*, 804 F.3d 601 (2d Cir. 2015); *Sylvain v. Att'y Gen. of United States*, 714 F.3d 150 (3d Cir. 2013); *Hosh v. Lucero*, 680 F.3d 375 (4th Cir. 2012); *Olmos v. Holder*, 780 F.3d 1313 (10th Cir. 2015).

time between their criminal and immigration custody remain entitled to a bond hearing. Furthermore, individuals in states outside California and Washington who were not *promptly* detained upon their release from relevant criminal custody are now also entitled to a bond hearing under the Ninth Circuit's holding.

We are monitoring the implementation of the Ninth Circuit's rulings. For more information, please contact Michael Tan, ACLU Immigrants' Rights Project, mtan@aclu.org or Anoop Prasad, Advancing Justice – Asian Law Caucus, anoopp@advancingjustice-alc.org.

What did the Ninth Circuit hold in *Preap* and *Khoury*?

8 U.S.C. § 1226(c) requires that the government take custody of noncitizens "when the alien is released" from serving their criminal sentences for certain crimes that trigger removal proceedings, and hold those noncitizens in mandatory detention. *Id*. To trigger mandatory detention, the release must be from *physical* criminal custody[3]—an individual in civil confinement or subject to an alternative to incarceration is not considered to be in criminal custody. The release must also be from criminal custody for a mandatory detention offense referenced in § 1226(c), not from unrelated criminal custody.[4]

In *Matter of Rojas*, 23 I. & N. Dec. 117 (BIA 2001), the Board of Immigration Appeals (BIA) held that the government may impose mandatory detention if it detains the individual *any time after* their release from relevant criminal custody, even if the release occurred months or years ago.[5]

Preap and *Khoury* reject the BIA's interpretation of the statute. As the Court in *Preap* held, "[u]nder the plain language of [the statute], the government may detain without a bond hearing *only those criminal aliens it takes into immigration custody promptly upon their release from triggering criminal custody*." *Preap*, 2016 WL 4136983 at *11 (emphasis added).[6]

[3] *Matter of West*, 22 I. & N. 1405 (BIA 2000).

[4] *Matter of Garcia-Arreola*, 25 I. & N. 267 (BIA 2010).

[5] The release, however, must have occurred after October 8, 1998, when the statute took effect. *See Matter of Adeniji*, 22 I. & N. Dec. 1102 (BIA 1999).

[6] *See also id*. at *3 ("The statute unambiguously imposes mandatory detention without bond only on those aliens taken by the [Attorney General] into immigration custody 'when [they are] released' from criminal custody. And because Congress's use of the word 'when' conveys immediacy, we conclude that the immigration detention must occur promptly upon the aliens' release from criminal custody.")

Who is entitled to a bond hearing in California and Washington State?

The Court in *Preap* also affirmed the order of the district court "grant[ing] preliminary injunctive relief to a class of aliens [in California] who were not '*immediately* detained' when released from triggering criminal custody," concluding that this "grant of relief accords with our interpretation of the statutory requirements." *Id*. (emphasis added). Likewise, in *Khoury*, the Court affirmed a declaratory judgment for a class of detainees in Washington State requiring bond hearings for individuals who were not *immediately* detained upon release from criminal custody. *Khoury*, 2016 WL 4137642 at *1. Thus, detainees in California and Washington State with *any* temporal gap between their criminal and immigration custody continue to be entitled to a bond hearing before the immigration judge. *See supra*.[7] Any action by ICE or the immigration court to *deny* a bond hearing to a detainee in California or Washington State on the grounds that they were "promptly" detained by ICE—even if ICE did not detain them immediately—would violate the orders of the district court as affirmed by the Ninth Circuit. ***If the government seeks to deny your client a bond hearing on this basis, please contact*** Michael Tan, ACLU Immigrants' Rights Project, mtan@aclu.org or Anoop Prasad, Advancing Justice – Asian Law Caucus, anoopp@advancingjustice-alc.org.

This is true even though the Court declined to address "exactly how quickly detention must occur to satisfy the 'when . . . released' requirement." *Preap*, 2016 WL 4136983 at *11. The Court noted that "[t]he plain meaning of 'when . . . released' in this context *suggests* that apprehension must occur with a reasonable degree of immediacy" and that "depending on the circumstances of an individual case, an alien *may* be detained 'when . . . released' even if immigration authorities take a very short period of time to bring the alien into custody." *Id*. (emphasis added). However, the Court ultimately held that this issue was not before it, as the government had failed to "challenge the class definition on the ground that it required further

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[7] The district court in *Preap* certified and granted injunctive relief to the following class:

> Individuals in the state of California who are or will be subjected to mandatory detention under 8 U.S.C. section 1226(c) and who were not or will not have been taken into custody by the Government *immediately* upon their release from criminal custody for a Section 1226(c)(1) offense.

Preap v. Johnson, 303 F.R.D. 566, 584 (N.D. Cal. 2014) (emphasis added); *see also id*. at 571. Similarly, the district court in *Khoury* certified and granted declaratory relief to the following class:

> All individuals in the Western District of Washington who the government asserts or will assert are subject to mandatory detention under 8 U.S.C. § 1226(c) and who were not taken into immigration custody *immediately* upon their release from criminal custody for an offense referenced in § 1226(c)(1).

Khoury v. Asher, 3 F. Supp. 3d 877, 890 (W.D. Wa. 2014) (emphasis added); *see also id*. at 892.

clarification as to the meaning of 'immediately'" or raise the issue in an appeal of class certification. *Id*.[8]

Who is entitled to a bond hearing in other states in the Ninth Circuit, such as Arizona?

The district court orders in *Preap* and *Khoury* apply only to individuals detained in California and Washington State, respectively. Other states in the Ninth Circuit—such as Arizona—are governed by the Ninth Circuit's holding that mandatory detention applies only to those noncitizens whom ICE detains "promptly" upon their release from triggering criminal custody. *See id*. Because the Court declined to specify how quickly ICE must detain individuals to subject them to mandatory detention, practitioners outside California and Washington may need to seek clarification of this issue from the immigration court in individual cases. *See* 8 C.F.R. § 1003.19(h)(2)(ii) (permitting the respondent to "seek[] a determination by an immigration judge that the alien is not properly included" under the mandatory detention statute).

Critically, the Ninth Circuit did *not* foreclose the argument that the "when . . . released" clause requires immediate detention. Indeed, the panel specifically held that the district court's grant of "preliminary injunctive relief to a class of aliens who were not 'immediately detained' when released from criminal custody . . . accords with our interpretation of the statutory requirements." *Preap*, 2016 WL 4136983 at *11; *see also id*. at *9 (noting that "Congress chose words that signal an expectation of immediate action."). Thus, practitioners should make sure to preserve the argument—adopted by the district courts in *Preap* and *Khoury*—that the statute requires ICE to detain immediately upon release from criminal custody.[9]

At a minimum, it should be clear that ICE does not "promptly" detain when it detains the individual days or weeks after their release from the triggering criminal custody.[10] This is because the term "when" as used in Section 1226(c) "unambiguously requires detention with some degree of *immediacy*." *Preap*, 2016 WL 4136983 at *8 (internal quotation marks omitted) (emphasis added). Moreover, the Court explained that *at most*, the statute might impose mandatory detention where "immigration authorities take *a very short period of time* to bring the alien into custody." *Id*. at *11 (emphasis added). Thus, in cases where ICE does not detain for days or weeks, the individual should be entitled to a bond hearing. Notably, at least one district court has held that ICE does not detain "when . . . released" where it does

[8] *See also Preap*, 2016 WL 4136983 at *4 n.7 (deeming any appeal of class certification waived).

[9] *See Preap*, 303 F.R.D. at 576-77; *Khoury*, 3 F. Supp. 3d at 887-88.

[10] *See Preap*, 2016 WL 4136983 at *4 (noting that ICE detained the named plaintiffs "years later," after they had "returned to their families and communities"); *id*. at *8 (accepting Plaintiffs' argument that the statute requires that individuals "be taken into custody *promptly* after release, not years later, as were the named Plaintiffs here.").

not do so within *48 hours* after the release from criminal custody.[11] Indeed, the BIA in *Rojas* itself recognized that a noncitizen was not "promptly" detained where the government waited two days to take him into custody.[12]

[11] *Gordon v. Johnson*, 300 F.R.D. 31, 38 (D. Mass. 2014), *appeal docketed*, No. 14-1559 (1st Cir. June 4, 2014) (explaining that "[T]he 48–hour limit (or five-day limit when a two- or three-day weekend intervenes) recognizes the practical problems Defendants noted that they would experience if the court held that § 1226(c) could only be invoked when there was a direct *immediate* transfer of an alien from criminal to immigration custody.").

[12] *See Rojas*, 23 I. & N. Dec. at 118, 120; *see also Preap*, 2016 WL 4136983 at *8 (citing *Rojas*).

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
_____ [CITY, STATE]

In the matter of:	)	
_____	)	File No.: A _____
Respondent, In bond proceedings	)	

REQUEST FOR BOND HEARING UNDER *PREAP v. JOHNSON*

I respectfully request a bond redetermination hearing because I am not subject to mandatory detention under INA § 236(c). I was not promptly detained by immigration authorities after being released from criminal custody. In *Preap v. Johnson*, the Ninth Circuit held that mandatory detention only applies to noncitizens who are taken into immigration custody "promptly upon their release from triggering criminal custody." --- F.3d ----, 2016 WL 4136983, at *11 (9th Cir. 2016). Because my detention was not prompt, I am entitled to a bond hearing.

Date: _____ Respectfully submitted,

_____
Respondent, *pro se*

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT

In the Matter of: A Number:

ORDER OF THE IMMIGRATION JUDGE

Upon consideration of the Respondent's Request for Bond Hearing Under *Preap v. Johnson*, it is HEREBY ORDERED that the motion be □ **GRANTED** □ **DENIED** because:

□ DHS does not oppose the motion.
□ The respondent does not oppose the motion.
□ A response to the motion has not been filed with the court.
□ Good cause has been established for the motion.
□ The court agrees with the reasons stated in the opposition to the motion.
□ The motion is untimely per _____.
□ Other:

Deadlines:
□ The application(s) for relief must be filed by _____.
□ The respondent must comply with DHS biometrics instructions by _____.

_____ _____
Date

Immigration Judge

Certificate of Service
This document was served by: [ ] Mail [ ] Personal Service

To: [ ] Alien [ ] Alien c/o Custodial Officer [ ] Alien's Atty/Rep [ ] DHS

Date: _____ By: Court Staff_____

CERTIFICATE OF SERVICE

I, _____, hereby certify that a copy of the attached was mailed on the date below to the Department of Homeland Security at the following address:

_____

Signature: _____ Date: _____