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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

E ■■■ D ■■■ R ■■■,

Petitioner,

v.

CHAD WOLF, et al.,

Respondents.

CASE NO. C20-0377JLR

ORDER ADOPTING IN PART  
AND MODIFYING IN PART  
REPORT AND  
RECOMMENDATION

**I. INTRODUCTION**

This matter comes before the court on the Report and Recommendation of United States Magistrate Judge Mary Alice Theiler (R&R (Dkt. # 16)) and the objections thereto filed by the Government respondents (Gov't Obj. (Dkt. # 17)) and by Petitioner ■■■■■ (■■■■■ Obj. (Dkt. # 18)). Magistrate Judge Theiler recommends to the court that it deny the Government's motion to dismiss Ms. ■■■■■'s 28 U.S.C. § 2241 immigration habeas petition, grant Ms. ■■■■■'s habeas petition, and order the Government to provide Ms. ■■■■■ a bond hearing. (R&R at 1.) Ms. ■■■■■ filed a response to the Government's

1 objection (██████ Resp. (Dkt. # 19)) and a notice regarding the status of her removal  
2 proceedings before the Ninth Circuit Court of Appeals (██████ Notice (Dkt. # 20)). The  
3 Government did not respond to Ms. ██████'s objections. (*See generally* Dkt.) Having  
4 carefully reviewed the foregoing documents, the balance of the record, and the applicable  
5 law, the court ADOPTS the Report and Recommendation as modified.

## 6 II. BACKGROUND

7 Because the Report and Recommendation sets forth the detailed factual and  
8 procedural background of this case (*see* R&R at 2-4), the court does not repeat it here.  
9 Since the Report and Recommendation was filed, however, the Ninth Circuit issued its  
10 decision granting in part, denying in part, and dismissing in part Ms. ██████'s *pro se*  
11 petition for review of the Board of Immigration Appeals' ("BIA") dismissal of her appeal  
12 of the Immigration Judge's ("IJ") decision denying her application for relief under the  
13 Convention Against Torture ("CAT"). (*See* ██████ Notice.) The Ninth Circuit affirmed  
14 the BIA's conclusion that Ms. ██████ had failed to show that it was more likely than not  
15 that she would be tortured by family members or former guerillas if she returned to El  
16 Salvador. ██████ v. *Barr*, No. 19-70955, 2020 WL 6375732, at \*1 (9th Cir. Oct. 26,  
17 2020). The Ninth Circuit also held, however, that the BIA "failed to analyze [Ms.  
18 ██████s] claims that she fears future torture by ██████ and by the father of her  
19 children, ██████ *Id.* The Ninth Circuit stayed Ms. ██████'s removal and  
20 remanded the matter to the BIA to consider the likelihood of torture by Mr. ██████ and  
21 Mr. ██████ and whether procedural safeguards for Ms. ██████ are necessary in light  
22 of the mental health issues she outlined in her reply brief. *Id.*

### III. ANALYSIS

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2 In their objections, both Ms. [REDACTED] and the Government argue that Magistrate  
3 Judge Theiler applied the incorrect test when determining that Ms. [REDACTED] was entitled to  
4 a bond hearing. (*See* [REDACTED] Obj. at 1-5; Gov't Obj. at 2-3.) The Government also objects  
5 to Magistrate Judge Theiler's consideration of two the factors she applied in her analysis  
6 as incomplete and to her determination that the Government bears the burden to prove at  
7 Ms. [REDACTED]'s bond hearing that Ms. [REDACTED] is dangerous or a flight risk. (*See* Gov't Obj. at  
8 3-7.) The court begins by reviewing Magistrate Judge Theiler's recommendation  
9 regarding the test that the court should apply when evaluating whether Ms. [REDACTED] is  
10 entitled to a bond hearing. The court then turns to the Government's objections regarding  
11 Magistrate Judge Theiler's consideration and weighing of the applicable factors and her  
12 recommendation regarding the burden of proof at the bond hearing.

#### A. Standard of review

13  
14 A district court has jurisdiction to review a magistrate judge's report and  
15 recommendation on dispositive matters. *See* Fed. R. Civ. P. 72(b). "The district judge  
16 must determine de novo any part of the magistrate judge's disposition that has been  
17 properly objected to." *Id.* "A judge of the court may accept, reject, or modify, in whole  
18 or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C.  
19 § 636(b)(1). The court reviews de novo those portions of the report and recommendation  
20 to which specific written objection is made. *United States v. Reyna-Tapia*, 328 F.3d  
21 1114, 1121 (9th Cir. 2003) (*en banc*).  
22

1 **B. The test for determining whether Ms. [REDACTED]'s detention violates the Due**  
2 **Process Clause**

3 Ms. [REDACTED] generally agrees with the Report and Recommendation. [REDACTED] Obj. at  
4 1.) She objects, however, to the Magistrate Judge's conclusion that the court should  
5 apply the eight-factor test outlined in *Martinez v. Clark*, No. C18-1669RAJ-MAT, 2019  
6 WL 5968089, at \*9 (W.D. Wash. May 23, 2019), *adopted by* No. C18-1669RAJ, 2019  
7 WL 5962685 (W.D. Wash. Nov. 13, 2019), to determine whether the Due Process Clause  
8 entitles her to a bond hearing. (*See* [REDACTED] Obj. at 2-5.) Specifically, Ms. [REDACTED] objects  
9 to Magistrate Judge Theiler's inclusion of two of the *Martinez* factors in her analysis: the  
10 length of time Ms. [REDACTED] spent in prison for the crime that made her removable and the  
11 nature of the crimes Ms. [REDACTED] committed.<sup>1</sup> (*Id.*) She contends that these two factors are  
12 not relevant to determining whether the procedural protections of a bond hearing apply in  
13 the first instance and should be considered only at the bond hearing itself. (*Id.* at 2.) She  
14 asks the court to apply instead the six-factor test set forth in *Banda v. McAleenan*, 385 F.  
15 Supp. 3d 1099, 1106 (W.D. Wash. 2019), which omits any consideration of the  
16 detainee's criminal history and sentence. [REDACTED] Obj. at 2.)

17 The Government did not respond to Ms. [REDACTED]'s objection. In its own objections,  
18 however, the Government argues that Magistrate Judge Theiler should have employed the

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20 <sup>1</sup> The complete set of *Martinez* factors includes "(1) the total length of detention to date;  
21 (2) the likely duration of future detention; (3) whether the detention will exceed the time the  
22 petitioner spent in prison for the crime that made him removable; (4) the nature of the crimes the  
petitioner committed; (5) the conditions of detention; (6) delays in the removal proceedings  
caused by the petitioner; (7) delays in the removal proceedings caused by the government; and  
(8) the likelihood that the removal proceedings will result in a final order of removal." *Martinez*,  
2019 WL 5968089, at \*9.

1 three-part test articulated in *Mathews v. Eldridge*, 424 U.S. 319 (1976) rather than the  
2 eight-part *Martinez* test.<sup>2</sup> (Gov't Obj. at 1-2.) Alternatively, the Government argues that  
3 Magistrate Judge Theiler should have considered an additional factor informed by  
4 *Mathews* in applying the *Martinez* test: the Government's burden in providing a bond  
5 hearing. (Gov't Obj. at 2-3.)

6 The parties presented thorough argument in their briefing on the Government's  
7 motion to dismiss regarding the test the court should apply and the factors the court  
8 should consider. (See Gov't Mot. to Dismiss (Dkt. # 8) at 4-6; ████████ Resp. to Mot. to  
9 Dismiss (Dkt. # 10) at 2-6.) The parties' objections fail to raise any novel issues that  
10 were not addressed in their prior briefing or by Magistrate Judge Theiler's Report and  
11 Recommendation. The court has thoroughly examined the record and the cited law and is  
12 persuaded by Magistrate Judge Theiler's explanation of why she recommends that the  
13 court apply the eight-factor *Martinez* test rather than the *Banda* or *Mathews* tests, and  
14 why she rejected the Government's proposal to add a factor that considers the  
15 Government's burden in providing a bond hearing. (See R&R at 7-11.) Because the  
16 parties merely repeat the arguments that they made to Magistrate Judge Theiler, the court  
17 rejects those arguments for the same reasons Magistrate Judge Theiler rejects them in her  
18 Report and Recommendation. The court therefore overrules the parties' objections and  
19 ADOPTS Magistrate Judge Theiler's conclusion that the court should apply the

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21 <sup>2</sup> The *Mathews* test requires considering (1) the private interest affected, (2) the  
22 government's interest, and (3) the value added by additional or substitute procedural safeguards  
in the situation before the court. *Mathews*, 424 U.S. at 334.

1 eight-factor *Martinez* test in evaluating Ms. ██████ entitlement to a bond hearing (*see*  
2 R&R at 7-11).

### 3 **C. Evaluation of the *Martinez* factors**

4 The Government objects that Magistrate Judge Theiler’s consideration of two of  
5 the *Martinez* factors—the likelihood that removal proceedings will result in a final order  
6 of removal and the delays in the removal proceedings attributable to Ms. ██████—was  
7 incomplete. (Gov’t Obj. at 3-6.) In addition, the court notes that the passage of time  
8 since Magistrate Judge Theiler issued her Report and Recommendation has affected the  
9 court’s analysis of two additional factors: the length of Ms. ██████’s detention to date and  
10 the likely duration of future detention.<sup>3</sup> The court’s review of these four factors is  
11 informed by the Ninth Circuit’s recent decision granting in part Ms. ██████’s petition for  
12 review of the denial of her application for relief under the CAT. ██████, 2020 WL  
13 6375732, at \*1.

#### 14 **1. Likelihood that removal proceedings will result in a final order of 15 removal**

16 The “likelihood of removal” inquiry focuses on whether the “noncitizen has  
17 asserted a good faith challenge to removal.” *Martinez*, 2019 WL 5968089, at \*10.  
18 Magistrate Judge Theiler declined to weigh in on the merits of Ms. ██████’s appeal to the

19  
20 <sup>3</sup> The court finds that Magistrate Judge Theiler’s analysis of the remaining *Martinez*  
21 factors—Ms. ██████’s criminal sentence, the nature of her crime, the conditions of detention, and  
22 delays in the removal proceedings attributable to the Government—are unaffected by subsequent  
events and are unchallenged by the parties. (*See* R&R at 12-14.) The court therefore ADOPTS  
those portions of the Report and Recommendation and considers them in its weighing of the  
*Martinez* factors below.

1 Ninth Circuit. (R&R at 16.) Nevertheless, she concluded that this factor weighed  
2 slightly in Ms. ██████'s favor because the Ninth Circuit had granted Ms. ██████ a stay of  
3 removal pending the resolution of her appeal of the BIA's decision denying her CAT  
4 relief, thus demonstrating that Ms. ██████'s challenge to her removal was in good faith.  
5 (*Id.*) The Government objects that this "cursory analysis" is insufficient, and that instead  
6 the court should "consider whether the noncitizen's continued pursuit of relief from  
7 removal is likely to be successful on the merits." (Gov't Obj. at 3-4.)

8 In support of its argument, the Government cites *Martinez*, 2019 WL 5968089 at  
9 \*10, in which the court stated that it did "not have sufficient information to determine  
10 whether the appeal is nonfrivolous or whether petitioner ultimately will prevail" and  
11 therefore concluded that the factor did not weigh in favor of either party. (Gov't Obj. at  
12 4.) The Government also emphasizes that the Ninth Circuit's review of a petition is  
13 deferential to the Government. (*Id.*) For these reasons, the Government argues, it is  
14 likely that the Ninth Circuit proceedings would conclude in a final order of removal.  
15 (*Id.*)

16 Since the Report and Recommendation was filed, however, the Ninth Circuit  
17 granted in part Ms. ██████'s petition for review. ██████ 2020 WL 6375732, at \*1.  
18 Because Ms. ██████ prevailed in part on her appeal to the Ninth Circuit, it is now  
19 apparent—in contrast to *Martinez*—that Ms. ██████'s appeal was nonfrivolous and that  
20 her challenge to her removal was in good faith. Although the court is unable to  
21 determine on the record before it whether Ms. ██████ will ultimately prevail on her  
22 application for CAT relief, the court finds that Ms. ██████ has now established that she

1 has legitimate, good faith defenses to removal. Therefore, the court concludes that this  
2 factor weighs in Ms. ██████'s favor.

3 **2. Delays in the removal proceedings attributable to Ms. ██████**

4 In considering the nature and extent of any delays in the removal proceedings  
5 attributable to Ms. ██████, the court is mindful that Ms. ██████ “is entitled to raise  
6 legitimate defenses to removal . . . and such challenges to [her] removal cannot  
7 undermine [her] claim that detention has become unreasonable.” *Martinez*, 2019 WL  
8 5968089, at \*10 (quoting *Liban M.J. v. Sec’y of Dept. of Homeland Security*, 367  
9 F. Supp. 3d 959, 965 (D. Minn. 2019)). This factor weighs against the noncitizen where  
10 she “has ‘substantially prolonged [her] stay by abusing the processes provided,’” but not  
11 when she “simply made use of the statutorily permitted appeals process.” *Hechavarria v.*  
12 *Sessions*, 891 F.3d 49, 56 n.6 (2d Cir. 2018) (quoting *Nken v. Holder*, 556 U.S. 418, 436  
13 (2009)).

14 Magistrate Judge Theiler found that the primary dispute in this case regarding Ms.  
15 ██████'s responsibility for delays in her removal proceedings arose from the stay of  
16 proceedings in the Ninth Circuit that Ms. ██████ requested pending the adjudication of her  
17 application for a T visa. (R&R at 14-15.) Magistrate Judge Theiler did not find that Ms.  
18 ██████'s request for a stay was an abuse of the available processes. (*Id.* at 15.) Rather,  
19 she concluded that even if the twelve-month delay in Ms. ██████'s removal proceedings  
20 resulting from her request for a stay were attributed to Ms. ██████ that delay would not  
21 affect her entitlement to a bond hearing. (*Id.*) In weighing the *Martinez* factors,  
22 Magistrate Judge Theiler determined that, even if the twelve-month delay arising from

1 Ms. ██████ request for a stay were attributed to Ms. ██████ there remained twelve  
2 months of detention that could not be attributed to delays by Ms. ██████. (*Id.* at 17.)

3 The Government objects that Magistrate Judge Theiler failed to account “for the  
4 fact that Petitioner chose to pursue an appeal of the Immigration Judge’s decision to the  
5 Board of Immigration Appeals . . . which was not successful but served to lengthen her  
6 proceedings before the agency and, consequently, her mandatory detention.” (Gov’t Obj.  
7 at 5.) It contends that the decision to “take an unsuccessful administrative appeal to the  
8 [BIA] was solely Petitioner’s choice.” (*Id.* at 6.) But Ms. ██████ was entitled to pursue in  
9 good faith the processes available to her under the immigration laws, and the Ninth  
10 Circuit ultimately granted in part her petition for review of the BIA’s adverse decision.  
11 *See Martinez*, 2019 WL 5968089, at \*10; ██████, 2020 WL 6375732, at \*1. The  
12 court, therefore, agrees with Magistrate Judge Theiler that no more than twelve months of  
13 delay can be attributed to Ms. ██████. Assuming without deciding that Ms. ██████ is  
14 responsible for twelve months of delay out of her 28-month detention (*see below*), the  
15 court finds that this factor weighs only slightly in favor of the Government.

### 16 3. Length of detention to date

17 The length of Ms. ██████’s detention is the most important factor in the court’s  
18 review of the *Martinez* test. *See Martinez*, 2019 WL 5968089, at \*9; (*see also* R&R at 11  
19 (citing cases)). As Magistrate Judge Theiler observed, courts have found that detention  
20 periods of greater than six months, twelve months, and thirteen months weighed in favor  
21 of granting a bond hearing. (*See* R&R at 11-12 (citing *Sajous v. Decker*, No. C18-2447,  
22 2018 WL 2357266, at \*10 (S.D.N.Y. May 23, 2018); *Liban M.J.*, 367 F. Supp. 3d at 963-

1 64; and *Martinez*, 2019 WL 5968089, at \*9).) Here, Ms. ██████ has been held in ICE  
2 custody since July 19, 2018, or 28 months.<sup>4</sup> The court finds, therefore, that this factor  
3 weighs more heavily in Ms. ██████'s favor today than it did in Magistrate Judge Theiler's  
4 analysis.

#### 5 **4. Likely duration of future detention**

6 Finally, the court "considers how long the detention is likely to continue absent  
7 judicial intervention; in other words, the anticipated duration of all removal proceedings  
8 including administrative and judicial appeals." *Martinez*, 2019 WL 5968089, at \*9.

9 When Magistrate Judge Theiler issued her Report and Recommendation, the Ninth  
10 Circuit had recently lifted its stay of proceedings in Ms. ██████'s petition for review.  
11 Magistrate Judge Theiler estimated, at that time, that it might take another nine to twelve  
12 months for the Ninth Circuit to issue its decision. The Ninth Circuit, however, issued its  
13 decision granting in part Ms. ██████'s petition for review less than three months after  
14 Magistrate Judge Theiler filed the Report and Recommendation. The Ninth Circuit has  
15 now remanded Ms. ██████'s case for further consideration by the BIA, *see* ██████,  
16 2020 WL 6375732, at \*1, and it is unclear how long subsequent proceedings before the  
17 BIA will take. Furthermore, as Ms. ██████ points out, if the BIA again denies relief  
18 following remand, Ms. ██████ will be entitled to appeal that decision to the Ninth Circuit.  
19 (*See* Resp. Notice at 1.) Accordingly, the court finds that this factor weighs in Ms.

20  
21 <sup>4</sup> As discussed above, even if twelve months of delay in her removal proceedings can be  
22 attributed to Ms. ██████, the result is that she has been in detention pending the completion of her  
removal proceedings for sixteen months. The court finds, based on the authorities above, that  
sixteen months of detention weighs strongly in favor of Ms. ██████

1 [REDACTED] favor slightly more heavily than it did when Magistrate Judge Theiler filed the  
2 Report and Recommendation.

3 **5. Weighing the factors**

4 Following its de novo review of the record, the court finds that the following  
5 *Martinez* factors weigh in favor of finding that Ms. [REDACTED] continued detention has  
6 become unreasonable: the length of her detention, which has surpassed 28 months and  
7 thus strongly favors Ms. [REDACTED] the duration of her future detention, which is uncertain  
8 but could be prolonged depending on the BIA's decision following remand; the  
9 conditions of detention at the NWIPC (*see* R&R at 13-14); and the likelihood that  
10 removal proceedings will result in a final order of removal. The following factors weigh  
11 in favor of finding that Ms. [REDACTED] detention is reasonable and does not violate due  
12 process: Ms. [REDACTED] conviction for a serious crime and a ten-year criminal sentence that  
13 was far longer than her current detention (*see* R&R at 12 & 17 (noting that the weight of  
14 these factors "is mitigated somewhat by the circumstances surrounding Petitioner's  
15 participation in the crime and the sentencing judge's belief that the mandatory minimum  
16 was overly harsh in her case")); the lack of delay by the Government; and a delay in  
17 removal proceedings of up to twelve months attributable to Ms. [REDACTED]

18 Having considered the totality of these factors, the court finds that the factors  
19 favoring Ms. [REDACTED] weigh most heavily. In particular, as discussed above, the length of  
20 Ms. [REDACTED]'s detention and the likelihood that her removal proceedings will result in a  
21 final order of removal bear greater weight today than they did when Magistrate Judge  
22 Theiler filed the Report and Recommendation, while none of the factors favoring the

1 Government bear more weight today than they did before. The court concludes that Ms.  
2 ██████'s mandatory detention of 28 months has become unreasonable and is in violation  
3 of her due process rights and that Ms. ██████ is, therefore, entitled to a bond hearing  
4 before an IJ.

5 **D. The Government's burden of proof at the bond hearing**

6 Finally, the Government objects to Magistrate Judge Theiler's conclusion that the  
7 Government must provide clear and convincing evidence at Ms. ██████ bond hearing  
8 that she is dangerous or a flight risk to justify her continued detention. (Gov't Obj. at  
9 6-7; *see* R&R at 17-19.) Magistrate Judge Theiler based her determination that the  
10 Government bears the burden at the bond hearing on *Singh v. Holder*, 638 F.3d 1196,  
11 1203-04 (9th Cir. 2011), in which the Ninth Circuit determined that constitutional due  
12 process required the government to meet the clear and convincing burden of proof  
13 standard. (*See* R&R at 18-19.) Although the Government relies in its objections on  
14 *Jennings v. Rodriguez*, 138 S. Ct. 380 (2018), the Ninth Circuit has recently held that  
15 *Jennings* does not invalidate *Singh's* constitutional due process holding. *Aleman*  
16 *Gonzales v. Barr*, 955 F.3d 762, 781 (9th Cir. 2020) (rejecting the Government's reliance  
17 on *Jennings* and reaffirming that the Government must justify an alien's continued  
18 detention under by clear and convincing evidence). (*See* R&R at 19.) The court must  
19 follow the Ninth Circuit's holdings in *Singh* and *Aleman Gonzales*. Therefore, the court  
20 overrules the Government's objection and ADOPTS Magistrate Judge Theiler's  
21 conclusion that the Government must justify Ms. ██████ continued detention by clear  
22 and convincing evidence at her bond hearing (*see* R&R at 17-19).

1 **VI. CONCLUSION**

2 For the foregoing reasons, the court hereby ORDERS as follows:

- 3 (1) The court ADOPTS the Report and Recommendation as modified above  
4 with respect to the analysis and weighing of the *Martinez* factors;
- 5 (2) The court DENIES the Government's motion to dismiss (Dkt. # 8);
- 6 (3) The court GRANTS Ms. [REDACTED] habeas petition (Dkt. # 1);
- 7 (4) Within 30 days of the date of this order, the Government shall release Ms.  
8 [REDACTED] on bond or reasonable conditions unless Ms. [REDACTED] receives a bond hearing before  
9 an immigration judge at which the Government justifies her continued detention by clear  
10 and convincing evidence; and
- 11 (5) The Clerk is directed to send copies of this order to the parties and to  
12 Magistrate Judge Theiler.

13  
14 Dated this 20th day of November, 2020.

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17 JAMES L. ROBART  
18 United States District Judge  
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