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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

INNOVATION LAW LAB and LUIS JAVIER SANCHEZ GONZALEZ by XOCHITL RAMOS VALENCIA as next friend,

Plaintiffs-Petitioners,

v.

KIRSTJEN NIELSEN, Secretary, Department of Homeland Security, et al.

Defendants-Respondents.

Case No. 3:18-CV-01098-SI

BRIEF OF AMICA CURIAE FEDERAL PUBLIC DEFENDER IN SUPPORT OF THE PLAINTIFFS' APPLICATION FOR EMERGENCY ACCESS TO SHERIDAN DETAINEES

INTEREST OF AMICA CURIAE

The Office of the Federal Public Defender (FPD) provides representation to persons facing loss of liberty who lack financial means to hire private counsel in the District of Oregon pursuant to 18 U.S.C. § 3006A. The FPD advocates on behalf of the criminally accused as well as persons in custody whose detention may violate the laws and Constitution of the United States within the meaning of 28 U.S.C. § 2241. The FPD's core mission is to protect the liberty and constitutional rights of our clients while safeguarding the integrity of the federal justice system. The Court has authorized the FPD to consult with 123 persons detained at the Federal Detention Center at the Federal Correctional Institution in Sheridan, Oregon. Our appointment is limited to determining whether the custody of immigration detainees, who are not serving criminal sentences and may be seeking asylum, comports with constitutional standards. Our appointment does not include representation in immigration proceedings. The FPD seeks to participate in this request for emergency relief from denial of access to pro bono immigration attorneys, for those detainees who are seeking representation, to provide the Court with our experience and expertise on three basic issues: (1) the importance of representation of counsel in the context of immigration detainees; (2) the obstacles faced by persons with language and cultural barriers to successfully participating in the American legal system; and (3) the facts supporting the imperative need for the Sheridan detainees to have immediate and effective access to immigration counsel. The Federal Public Defender's participation as amica is limited to these issues common to the detainees.

I. Representation By Counsel In The Context Of Immigration Detention Provides An Essential Element For A Just Outcome.

The Oregon FPD has a long history of representing aliens detained in violation of statutory and constitutional protections. For a decade, the FPD represented many indefinitely detained aliens before Judge Panner, obtaining conditional releases under 28 U.S.C. § 2241 for persons held after

having completed sentences who could not be deported. Our representation culminated in successful arguments on behalf of Sergio Martinez in *Clark v. Martinez*, 543 U.S. 371 (2005) (conditional release required after six months). For the following eight years, again under § 2241, the FPD represented Guantánamo detainees, establishing grounds for all six of our clients to be released. *See, e.g., Al Ginco v. Obama*, 626 F. Supp. 2d 123 (D.D.C. 2009); *Basardh v. Obama*, 612 F. Supp. 2d 30 (D.D.C. 2009). The consistent lesson is that, when aliens are detained, counsel can provide the difference between liberty and incarceration. This reality is reflected in the experience of the Innovation Law Lab in providing representation to those in family detention: persons represented experienced a far higher rate of release than those without representation.[1]

The governing precedent in this area recognizes the importance of representation, which includes the right to proceed through counsel in immigration proceedings. In one of the seminal cases on the right to counsel, the Supreme Court recognized the importance of counsel in both civil and criminal contexts. *Powell v. Alabama*, 287 U.S. 45, 69 (1932) ("If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense."). This right to an attorney applies directly in the immigration context. *Orantes-Hernandez v. Thornburgh*, 919 F.2d 549, 554 (9th Cir. 1990) (aliens have a Fifth Amendment due process right to be represented by counsel in deportation proceedings, albeit at their own expense). The right to counsel of choice is so

[1] "[L]awyers mean the difference between winning and losing: More than seven in 10 unaccompanied immigrant children with lawyers win the right to stay legally in the United States, while nine in 10 without representation lose." Sonia Nazario, *There's A Better, Cheaper Way To Handle Immigration*, N.Y.Times (June 24, 2018).

fundamental that, in the criminal context, failure to respect choice of counsel constitutes structural error. *United States v. Lopez-Gonzalez*, 548 U.S. 140, 150 (2006).

"The right to the advice and assistance of retained counsel in civil litigation is implicit in the concept of due process . . . and extends to administrative, as well as courtroom, proceedings." *Mosely v. St. Louis Southwestern Ry*., 634 F.2d 942, 945 (5th Cir. 1981). As then-Judge Ginsburg noted, the complexity of a proceeding correlates to the need for professional advice: "We stress particularly that, in our complex, highly adversarial legal system, an individual or entity may in fact be denied the most fundamental elements of justice without *prompt access to counsel*." *American Airways Charters v. Regan*, 746 F.2d 865, 872-73 (D.C. Cir. 1984) (Ginsburg, J., concurring) (emphasis added). The immigration laws in the area of implementation of the treaty-based human rights statutes are complex and address the most serious of individual consequences: exposure to persecution, torture, and even death if an error is made. *See Arizona v. United States*, 567 U.S. 387, 395 (2012) ("Federal governance of immigration and alien status is extensive and complex."); *Padilla v. Kentucky*, 559 U.S. 356, 369 (2010) ("Immigration law can be complex, and it is a legal specialty of its own."); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 428-30 (1987) (describing the protections in place after the Refugee Act of 1980). The stakes in immigration proceedings may be greater than those at issue in criminal proceedings. *See Sessions v. Dimaya*, 138 S. Ct. 1204, 1213 (2018) (noting in the void for vagueness context the "grave nature of deportation," a "drastic measure" often amounting to lifelong "banishment or exile") (quoting *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948)). And the stakes can be exponentially higher in the asylum context.

The need for access without delay is matched by the need for adequate communication, both by contact visits and telephone access. *See, e.g., Orantes-Hernandez v. Holder*, 321 F. App'x

625, 629 (9th Cir. 2009) (affirming district court's injunction requiring the government to provide immigration detainees with legal materials regarding immigration in English and Spanish, access to telephones during proceedings, at least one telephone per twenty-five detainees at detention centers, privacy of attorney-client communications; access by counsel and paralegals to plaintiffs during certain hours, including the option to meet during meal times); *Orantes-Hernandez v. Thornburgh*, 919 F.2d at 566–67 ("Telephones are important in detention centers because, given the pattern of INS misconduct, the only opportunity the alien may have to learn of rights and options in lieu of voluntary departure is by contacting an attorney or relative."); *Ching v. Lewis*, 895 F.2d 608, 610 (9th Cir. 1990) ("a prisoner's right of access to the courts includes contact visitation with his counsel" even when mail and telephone are available); *Johnson v. Brelje*, 701 F.2d 1201, 1207-08 (7th Cir. 1983) (limit of two telephones calls per week for inmates, including both social and legal calls, denied meaningful access to attorneys) (superseded by statute on other grounds); *Benjamin v. Fraser*, 264 F.3d 175, 187 (2d Cir. 2001) (delays which sometimes caused attorneys to have to wait several hours after arriving at local holding facilities deprived defendants of meaningful access to counsel); *Nunez v. Bolden*, 537 F. Supp. 578, 582 (S.D. Tex. 1982) (given remoteness of facility, prohibiting attorney visits after 3:30 p.m. was unduly restrictive).

In addressing the application for emergency relief, the Court should give great weight to the right of persons in immigration proceedings to proceed with the assistance of pro bono counsel, as well as to the need for speed in providing initial access and follow-up communication.

II. The Court Should Give Additional Weight To The Need For Pro Bono Attorney Access Without Delay Because Of The Special Obstacles That Language And Cultural Barriers Can Bring To Interaction With The American Legal System.

The Sheridan detainees are from countries in Asia, Africa, and Latin America. They speak at least nine languages, and many speak little or no English. They have little or no competence in

the American justice system, with its complex layers of authority and Article II and Article III courts. There has been limited information to the detainees about their status or what can be expected next, causing significant stress. Some did not know where they were, and many feared the indefinite nature of the detention.

These circumstances favor access by immigration attorneys to those who want representation without delay. Attorneys can arrange for the assistance of interpreters to provide advice in native languages. The professionalization of interpreters has been a key improvement in the quality of the justice system, with both the federal government and the state system developing standards of competence, rules of ethics, and training in cultural competence. *See, e.g.*, 28 U.S.C. §1827 (Court Interpreters Act); Or. Rev. Stat. §§ 45.288-45.292; Code of Prof'l Responsibility for Court Interpreters in the Oregon Courts; Muneer I. Ahmad, *Interpreting Communities: Lawyering Across Language Difference*, 54 UCLA L. Rev. 999, 1076 (2007) (explaining integral role of interpreter when lawyering across language differences). Without legal professionals communicating through trained interpreters, the Sheridan detainees are in a stressful situation.

Moreover, the Sheridan detainees are not in a position to even begin to competently represent themselves, with no access to any books, and especially not books in their native languages or addressing the legal issues they are confronting. Despite the minimum standards requiring law libraries or legal assistance programs to assure access to the court, no such assistance is currently available. *See Lewis v. Casey*, 518 U.S. 343, 351 (1996) (requiring access to law library when necessary for access to courts); *Orantes-Hernandez*, 321 F. App'x at 629 (affirming injunction requiring detention libraries sufficiently accessible to detainees); *Allen v. Sakai*, 40 F.3d 1001 (9th Cir. 1994) (requiring access to ink pen for court filings); *John L. v. Adams*, 969 F.2d 228, 234 (9th Cir. 1992) (requiring legal assistance for incarcerated juveniles); *Ward v. Kort*,

762 F.2d 856, 858 (10th Cir. 1985) (requiring law library access for mental patients at state hospital); *Cruz v. Houck*, 627 F.2d 710, 721 n. 21 (5th Cir. 1980) (holding that district court must examine whether the fact that inmates did not speak English and inmates were illiterate impacted meaningful access to law library).

The need for rapid access to counsel is reinforced by the Supreme Court's reasoning in finding a due process right to appointed counsel on appeal in *Halbert v. Michigan*, 545 U.S. 605 (2005). In her analysis, Justice Ginsburg relied heavily on evidence that the population at issue experienced a high rate of illiteracy and other obstacles to self-representation. *Id*. at 620-21. This Court should consider in evaluating the need for emergency relief that the population at issue is largely unable to understand or communicate in English and that many have recently experienced harsh and traumatic conditions.

After the difficulties that brought them to the border, the detainees have experienced highly punitive conditions of confinement, which the FPD has ascertained through interviews and observation to include:

- dress in prisoner uniforms;
- strip searches after meetings with counsel;
- confinement to cells 22 hours per day and more;
- triple bunking in cells that are approximately 75 square feet;
- meals served in crowded cells next to the toilet;
- meals that fail to accommodate religiously-based dietary restrictions;
- limited or non-existent recreational opportunities;
- no access to phones during long portions of detention;
- no library;

- no orientation or sufficient explanation of why they are there and what happens next; and
- for some, family separation.

Under these circumstances, many of the Sheridan detainees are experiencing stress that exacerbates an already difficult situation. Where pro bono counsel has come forward, ready and willing to represent Sheridan detainees now, and substantial numbers of Sheridan detainees are ready and eager to be represented now, the Court should order immediate and effective access to match the need with the resource.

III. The Court Should Grant Immediate Relief From The Failure To Provide Effective Access To Immigration Counsel For Sheridan Detainees.

On June 8, 2018, Chief Judge Michael Mosman first authorized the FPD to consult with the Sheridan ICE detainees regarding the legality of their detention. The FPD did not seek, nor did the Court authorize, representation on the underlying immigration cases. Based on the initial appointment and later amended order, FPD attorneys and staff met with about 75 percent of the detainees at FDC Sheridan between June 11 and June 21, 2018. As a result, the FPD can provide the Court with a description of the problems of access and of the need for a broad remedy, which should include providing immediate access to pro bono immigration attorneys, extending hours for attorney meetings, regularization of visit procedures, and conditional release for persons with a release plan that establishes the protection of the community and future appearances by the asylum applicant.

After a visit to FDC Sheridan on Saturday June 16, 2018, Senator Wyden pointed out the chaotic situation resulting from suddenly moving a large number of ICE detainees into a BOP facility designed for pretrial and convicted detainees: "What I saw yesterday was almost as if the rules were just being made up as they went along . . . . There weren't any clear procedures. There was no rhyme or reason." Kaitlin Washburn, *Ron Wyden, Immigration Lawyers Criticize Sheridan*

Prison Detention Of Asylum Seekers, THE OREGONIAN (June 17, 2018). Our observation has been the same. Visiting appointments were approved but then cancelled; use of the phones allowed one day and prohibited the next. Required separation of pretrial inmates – J1 kept separate from J2 – was applied to immigration detainees, even though the separation appeared factually unnecessary and resulted in separation of language groups. We arrived to meet one set of detainees and a different group was presented. ICE officers unfamiliar with the BOP regulations assisted in gathering detainees for attorney visits, resulting in delays that absorbed two-thirds of the three-hour visiting window. Visits were rushed in the limited time, generally without access to telephonic follow-ups.

We hasten to add that officers from both ICE and BOP appeared to be working hard and in good faith to coordinate and meet our requests. Nevertheless, staff are hampered by the lack of guidance and the seeming institutional failures to consider the different detention standards that apply to individuals in immigration custody. While the ICE standards may not be binding, they indicate the significant difference between ordinary immigration custody and the punitive conditions to which these detainees are now subject. 2016 Operations Manual ICE Performance-Based National Detention Standards, 5.7 at 392.[2] For example, standard 5.7 on visits provides in part:

> 1. …Detainees shall be able to receive visits from legal representatives, consular officials and others in the community.
>
> 2. Visits between legal representatives and assistants and an individual detainee are confidential and shall not be subject to auditory supervision. Private consultation rooms shall be available for such meetings.
>
> 4. Facilities are encouraged to provide opportunities for both contact and non-contact visitation with approved visitors during both day and evening hours.

[2] Available at https://www.ice.gov/doclib/detention-standards/2011/5-7.pdf.

> 5. Information about visiting policies and procedures shall be readily available to the public.
>
> 6.....Generally visits should be for the maximum period practicable but not less than one hour with special consideration given to family circumstances and individuals who have traveled long distances.
>
> 10.....Oral interpretation or assistance shall be provided to any detainee who speaks another language in which written material has not been translated or who is illiterate.

Id. at 392.

Similarly, the standards on legal visits reflect acknowledgment of the need for immigration detainees to have adequate time to consult with counsel:

> 1. General
>
> In visits referred to as "legal visitation," each detainee may meet privately with current or prospective legal representatives and their legal assistants. Legal visits may not be terminated for routine official counts.
>
> 2. Hours
>
> Each facility shall permit legal visitation seven days a week, including holidays, for a minimum of eight hours per day on regular business days (Monday through Friday), and a minimum of four hours per day on weekends and holidays.
>
> The facility shall provide notification of the rules and hours for legal visitation as specified above. This information shall be prominently posted in the waiting areas and visiting areas and in the housing units.
>
> On regular business days, legal visitations may proceed through a scheduled meal period, and the detainee shall receive a tray or sack meal after the visit.
>
> In emergency circumstances, facilities may consider requests from legal representatives for extended visits or visits outside normal facility visiting hours.

Id. at 398. Needless to say, access at Sheridan FDC falls far short of these standards.

It should be emphasized that the detainees have requested immigration counsel. During interviews, the FPD staff explained that we are not immigration lawyers. At least sixty-four detainees reported they wanted the assistance of an immigration attorney but could not contact one

or afford one. The FPD forwarded the names of detainees seeking immigration attorneys to the pro bono immigration lawyers of the Innovation Law Lab, but no pro bono immigration lawyer has met with our unrepresented clients as we have requested.

For the Court to formulate its remedy, the physical lay-out of the visiting area at FDC Sheridan may be helpful. The room resembles a small linoleum-floored high school cafeteria, capable of holding about 75 people seated in rows of movable chairs. At one end of the room is a sally port to the inmate cell area, from whence individuals or groups emerge. At the other end is a desk for the corrections officer, who collects the identifications of the detainees as they enter. Along one wall are four attorney or visiting rooms, each with a table, four chairs, and a noise-blocking door. Our general practice is to arrange chairs in the main part of the room and to provide general information to a group or groups of detainees, then meet separately for attorney-client meetings in the individual rooms when time allows. The FPD has sufficient Spanish-speakers for interviews; for Punjabi or Nepali language speakers, we have brought in an interpreter. Because we do not necessarily know what language will be spoken until we arrive and meet the detainees, many of our initial conversations have only resulted in the most basic information being communicated through detainees with rudimentary English and through multi-lingual but non-fluent staff.

We strongly urge the Court to grant relief in the form of requiring immediate and adequate opportunity for pro bono immigration attorneys to meet with each of the Sheridan detainees we have identified as wanting to speak with an immigration attorney. While the limited representation by our office is important, for the Sheridan detainees, consultations with immigration counsel is their highest priority. The Court's order should include the requirement that BOP and ICE resources be sufficiently allocated to allow for expanded attorney visiting time to assure no group

at the FDC is denied adequate representation. To the extent that further visiting sites need to be located, or individual detainees are determined to be safely releasable on conditions, the Court should order individualized review to assure that attorney access can be accommodated and that the punitive conditions of confinement are ameliorated.

CONCLUSION

For the foregoing reasons, the Court should exercise the full range of its equitable authority to remedy the denial of access to counsel without delay.

Respectfully submitted this 24th day of June, 2018.

/s/ Lisa Hay
Lisa Hay
Federal Public Defender

/s/ Stephen R. Sady
Stephen R. Sady
Chief Deputy Federal Public Defender