UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
NORTHERN DIVISION
AT COVINGTON

CIVIL ACTION NO. 26-117-DLB

RAFAEL ARMANDO PENOTT RODRIGUEZ **PETITIONER**

v. **ORDER**

MARC FIELDS, et al. **RESPONDENTS**

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This matter is before the Court upon Petitioner Penott Rodriguez's Motion to Enforce (Doc. # 8), wherein he requests that this Court enforce its previous Order granting Penott Rodriguez's Petition for Writ of Habeas Corpus (Doc. # 7). Specifically, Petitioner requests that the Court order his immediate release or conduct its own bond hearing to ensure that the hearing is conducted through constitutionally adequate procedures. (Doc. # 8 at 13). As grounds for his request, Petitioner maintains that, at his first bond hearing before the Memphis Immigration Court on April 24, 2026, Immigration Judge ("IJ") Kelly Johnson "refus[ed] to allocate the burden of proof to the government during the hearing[.]" (*Id*. at 2). [1]

[1] Petitioner also argues that the IJ failed to conduct a constitutionally adequate proceeding "by failing to consider certain factors or meaningfully engage with the evidence." (*Id*.). By arguing that the IJ came to the wrong conclusion after reviewing evidence, Petitioner "raises quintessentially factual arguments about the IJ's decision[,]" which this Court has held "fall[s] outside the bounds of the Court's jurisdiction." *Marroquin v. Noem*, No. 26-45-DLB, 2026 WL 575222, at *4 (E.D. Ky. Mar. 2, 2026) (concluding that 8 U.S.C. § 1226(e) precludes this Court's review of challenges to an act of administrative discretion). Accordingly, the court declines to review any discretionary decision by the IJ.

The transcript of the hearing reflects that IJ Johnson expressed confusion about the Court's Order granting Penott Rodriguez's Petition. (*See* Doc. # 8-2 at 8:3-4) (IJ Johnson declining to "make a decision [about who carries the burden] on the front end because [he] just literally [didn't] know."). As a result of that confusion, IJ Johnson never made a finding on the record about who carried the burden of proof. *(See generally id*.). However, in his post-hearing order, IJ Johnson denied bond "[a]ssuming arguendo that the Department carries the burden of proof[.]" (Doc. # 8-3). Nevertheless, Petitioner argues that he was "deprived of a constitutionally adequate process" when IJ Johnson "refus[ed] to place the burden on the Government *during the hearing itself*." (Doc. # 8 at 4) (emphasis in original). Specifically, Petitioner contends that IJ Johnson's "post hoc attempt to apply the burden of proof to the government in 'arguendo' impermissibly prejudiced the Petitioner's ability to present his case in explicit defiance of this Court's order." (*Id*.).

During the April 24, 2026 hearing, IJ Johnson began by reciting the final paragraph of this Court's Order granting Penott Rodriguez's Petition (Doc. # 7). (Doc. # 8-2 at 3-4). There, this Court stated that it "agree[d] with other district courts in the Country which have concluded that the proper remedy to [violation] is a constitutionally adequate bond hearing in which the government bears the burden." (Doc. # 7 at 27). The Court thus ordered a "**constitutionally adequate bond hearing**" within seven (7) days of the date of that Order. (*Id*. at 28) (emphasis in original). Despite this Court's clear directions, IJ Johnson seemingly took issue with the fact that this Court's Order only required a "constitutionally adequate bond hearing" and did not "specifically order the burden shift to the [government]." (Doc. # 8-2 at 4:9-17). Petitioner's counsel directed IJ Johnson to the

paragraph in which the Court concluded that a constitutionally adequate bond hearing is one where the government bears the burden. (*Id*. at 24-32). Petitioner's counsel argued that the use of the term "constitutionally adequate bond hearing" "referred to the burden falling on the government . . . . [E]specially when reading above when the court says that . . . the government bears the burden." (*Id*.). The government offered no rebuttal except to state that the government would "go with the usual hearing in which the respondent would have the burden of proof." (*Id*. at 34-35). IJ Johnson was not persuaded by Petitioner's argument, and continued to voice his confusion, stating that he was just "not sure where to fall on this," that he "just [didn't] know," and that he would need "some clarification from the district court as to who specifically the district court is ordering to carry the burden here."

The Court has no reason to conclude that IJ Johnson is being purposefully obtuse when he requested further clarification from the district court. However, this is not the first time that the Court has clarified this issue for IJ Johnson. Indeed, this Court recently issued an Order clarifying which party bears the burden after IJ Johnson "expressed confusion about the Court's Order, initially telling Petitioner that he bears the burden of proving he is not a danger to society or a flight risk." Order at 1, *Jewenti v. Olson*, No. 26-cv-121-DLB (E.D. Ky. Apr. 30, 2026).

In its Order, the Court stated

> Under a plain reading of the Court's Order, there is hardly anything to clarify. Per the Court's Order, Petitioner [] is entitled to a constitutionally adequate bond hearing in which **the government bears the burden of proving Petitioner is either a danger to the community or a flight risk by clear and convincing evidence**. Indeed, this Court's interpretation of the burden of proof is well established in district courts and circuits across the country.
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> *Id*. at 1-2 (emphasis in original).

This Court once again reiterates that the government bears the burden in a custody redetermination hearing. Its previous orders have been unambiguous and straight-forward. A constitutionally adequate hearing is one in which the government bears the burden by clear and convincing evidence that the noncitizen is either a danger to the community or a flight risk. That the Order itself contained only the language "constitutionally adequate" does not nullify the Court's attached Memorandum, in which it states that a constitutionally adequate hearing is one where the government bears the burden. (*See generally* Doc. # 7). No further clarification is necessary.

However, the Court will address another issue IJ Johnson seemingly grappled with during his April 24, 2026 hearing. The transcript reflects that IJ Johnson took issue with the fact that none of the cases this Court cited in its determination to place the burden on the government are Sixth Circuit Court of Appeals cases. (Doc. # 8-2 at 5:31-32) ("None of the cases cited are 6th Circuit cases."). However, IJ Johnson almost immediately recognized that this issue has not yet been decided by the Sixth Circuit. (*Id*. at 6:2-4) ("It hasn't gone to the circuit yet . . . . They've had oral arguments and haven't issued the decision yet."). Certainly, if the Circuit has not issued an opinion on who carries the burden of proof, then this Court is unable to rely upon Sixth Circuit case law, no matter how much the undersigned or IJ Johnson may wish it to. There is simply no guidance from the Circuit that this Court may follow. Rather, this Court looked to other persuasive authority—both within this circuit and outside—something it is more than permitted to do. *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011) ("[A]bsent controlling authority," clearly established law may be supported by a "robust 'consensus of cases of persuasive authority.'" (quoting *Wilson v. Layne*, 526 U.S. 603, 617 (1999))). The Court recognizes

that the cited case law is merely persuasive. Yet, it has persuaded this Court, nonetheless.

For the time being, the Court has collected cases from district courts within the Sixth Circuit that have concluded that the government has the burden to demonstrate dangerousness or flight risk by clear and convincing evidence. *See Aliete v. Noem*, No. 1:26-cv-400, 2026 WL 690018, (W.D. Mich. Mar. 11, 2026); *J.Z.S. v. Fields*, No. 26-80-DLB, 2026 WL 1031320 (E.D. Ky. Apr. 16, 2026); *Mamadou Ba v. Raycraft*, No. 26-10838, 2026 WL 1213803 (E.D. Mich. May 4, 2026); *Gonzales v. Raycraft*, No. 1:26-cv-112, 2026 WL 607562 (S.D. Oh. Mar. 4, 2026); *Kuzam v. Noem*, No. 1:26-cv-694, 2026 WL 793912 (W.D. Mich. Mar. 20, 2026); *Kumar v. Warden of Corr. Center of Nw. Oh.*, No. 3:26-cv-0569, 2026 WL 787937 (N.D. Oh. Mar. 20, 2026); *Singh v. Olson*, No. 26-88-DLB, 2026 WL 988505 (E.D. Ky. Apr. 13, 2026); *Soto-Medina v. Lynch*, No. 1:25-cv-1704, 2026 WL 161002 (W.D. Mich. Jan. 21, 2026); *Rodriguez v. Raycraft*, No. 4:26-cv-0302, 2026 WL 656956 (N.D. Oh. Mar. 9, 2026); *Perez-Perez v. Raycraft*, No. 26-10533, 2026 WL 1121930 (E.D. Mich. Apr. 25, 2026); *Azalyar v. Raycraft*, 814 F. Supp. 3d. 926 (S.D. Oh. 2026).

Accordingly, Respondents bore the burden of proof in Petitioner's bond hearing. The transcript reflects that IJ Johnson refused to make a determination during the hearing as to who bore the burden of proof. (Doc. # 8-2 at 8:3-8) ("I'm not going to make a decision on the front end because I just literally don't know. I may have to look at those other cases that are cited by the district court. I have not done that, so I'll make a decision as to the burden after the close of evidence. I'm not prepared to do that on the front end."). However, even after all the evidence was presented IJ Johnson still did not make a finding

as to who bore the burden of proof. Rather, his post-hearing order merely stated that "assuming arguendo" the government bore the burden of proof, it had met that standard.

The burden of proof is a critical legal requirement that determines which party is responsible for putting forth enough evidence to prevail. This fundamental legal principle ensures fair proceedings and defines party responsibility. *See Burden of Proof*, *Black's Law Dictionary* (12th ed. 2024) ("Strictly speaking, burden of proof denotes the duty of establishing by a fair preponderance of the evidence the truth of the operative facts upon which the issue at hand is made to turn by substantive law."). Looking at the transcript in this case, Petitioner presented his case first by calling two witnesses to the stand. (Doc. # 8-2 at 10-15). The Government put on no evidence at all, and the entirety of its cross-examination of both witnesses consisted only of asking each witness if Petitioner had a car and if he had children. (*Id*.). The Government reserved its opening statement, and during closing arguments said in its entirety,

> His friend said that he was a very self-sufficient person and that he's got kids but they are not going to hold him down in his community because they are not with him. And it's difficult to figure out who is going to be a flight risk or not, but a self-sufficient person could leave quickly, and he does not really have any ties to the community that we know of.

(*Id*. at 16:3-9).

This Court ordered a *constitutionally adequate bond hearing* in which the government bears the burden. The Government did not put forth an opening statement, offered no evidence at all, participated minimally in cross-examination, and its closing argument was two sentences. Alternatively, Petitioner put forth two different witnesses, engaged in both an opening and closing statement, and repeatedly argued that the

burden should be on the government. The Court hardly sees how this hearing was conducted in such a manner that the burden was clearly placed on the government.

The Court was clear in its prior Order—a constitutionally adequate hearing requires the government to bear the burden of proof by a clear and convincing standard. That did not occur here. IJ Johnson's post-hoc attempt to save the hearing by stating that the motion was denied "assuming arguendo" the government bears the burden does not make up for the fact that the *hearing itself* was not constitutionally adequate. *See Gonzales*, 2026 WL 607562, at *2 ("[I]t is exceedingly difficult to see how Petitioner's bond proceedings could have comported with the Court's order when the hearing was conducted under the specter of an improperly apportioned burden of persuasion. Even if the IJ later reconsidered all the evidence and testimony under the appropriate standard, *the hearing itself* still ran afoul of that standard.") (emphasis added). The error here was prejudicial and the application of the appropriate standard of proof could well have affected the outcome of the bond hearing. Accordingly, the appropriate remedy is a new constitutionally adequate bond hearing at which the government bears the burden.[2]

Accordingly, for the reasons stated herein, **IT IS SO ORDERED** as follows:

(1) Petitioner's Motion to Enforce (Doc. # 8) is **GRANTED**;

(2) Respondents are **ORDERED** to **immediately release** Petitioner, or in the alternative, provide him with a **constitutionally adequate bond hearing at which the government bears the burden of proof by clear and**

[2] Petitioner requests the Court order his immediate release or conduct its own bail hearing to ensure that the hearing is conducted through constitutionally adequate procedures. (Doc. # 8 at 13). The Court finds that the appropriate remedy in this case is a new bond hearing to be conducted by the assigned IJ.

convincing evidence under 8 U.S.C. § 1226(a) **within seven (7) days of the date of this Order;**

(3) Respondents shall file a Status Report with this Court **on or before May 19, 2026** to certify compliance with this Order.

This 5th day of May, 2026.

Signed By:
David L. Bunning
Chief United States District Judge

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