IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
COLUMBUS DIVISION

HERMAN FLORES,	:	
	:	
Petitioner,	:	
	:	**Case No. 4:25-CV-70-CDL-AGH**
v.	:	**28 U.S.C. § 2241**
	:	
WARDEN, STEWART DETENTION CENTER,[1]	:	
	:	
	:	
Respondent.	:	

MOTION TO DISMISS

On February 24, 2025, Petitioner filed an application for a writ of habeas corpus (the "Petition"). ECF No. 1. Petitioner asserts that his detention is unconstitutional and seeks release from custody. Pet. 6-7, ECF No. 1. As explained below, the Petition should be dismissed.

BACKGROUND

Petitioner is a native and citizen of Nicaragua detained post-final order of removal under 8 U.S.C. § 1231(a). Carter Decl. ¶¶ 3-4 & Ex. A; Thompson Decl. ¶ 4. On December 5, 2022, Petitioner was paroled into the United States in Port Everglades, Florida. Carter Decl. ¶ 5 & Ex. A. On April 25, 2024, Petitioner was convicted in the U.S. District Court for the Eastern District of Virginia of possession with intent to distribute more than 1,000 kilograms of marijuana on board

[1] In addition to Warden of Stewart Detention Center Terrence Dickerson, Petitioner also names former officials with the Department of Homeland Security ("DHS") and Immigration and Customs Enforcement ("ICE") as Respondents in his Petition. "[T]he default rule [for claims under 28 U.S.C. § 2241] is that the proper respondent is the warden of the facility where the prisoner is being held, not the Attorney General or some other remote supervisory official." *Rumsfeld v. Padilla*, 542 U.S. 426, 434-35 (2004) (citations omitted). Thus, Respondent has substituted the Warden of Stewart Detention Center as the sole appropriately named respondent in this action.

a vessel in violation of 46 U.S.C. § 70503. *Id.* ¶ 6 & Ex. B. He was sentenced to 24 months imprisonment. *Id.* ¶ 6 & Ex. B.

On July 16, 2024, Immigration and Customs Enforcement ("ICE"), Enforcement and Removal Operations ("ERO") issued Petitioner a Form I-851 Notice of Intent to Issue a Final Administrative Removal Order charging him with removability pursuant to Immigration and Nationality Act ("INA") § 237(a)(2)(A)(iii), 8 U.S.C. § 1227(a)(2)(A)(iii), based on his conviction of an aggravated felony after admission. *Id.* ¶ 7 & Ex. C. On August 2, 2024, Petitioner entered ICE/ERO custody and was served with the I-851. *Id.* ¶ 8. On September 9, 2024, ICE/ERO issued and served Petitioner with a Form I-851A Final Administrative Removal Order ("FARO"). *Id.* ¶ 9 & Ex. D; Thompson Decl. ¶ 5.

On or about September 11, 2024, ICE/ERO submitted a travel document request to Nicaragua. Carter Decl. ¶ 10. On or about November 4, 2024, ICE Headquarters ("HQ"), Removal and International Operations ("RIO") was notified that Nicaragua had denied ICE/ERO's travel document request. Thompson Decl. ¶ 6; *see also* Carter Decl. ¶ 11. On or about February 25, 2025, HQ-RIO was notified that Nicaragua had committed to fully cooperate with the return of its citizens and will accept removals of Nicaraguan citizens. Thompson Decl. ¶¶ 7-8. Since that date, Nicaragua has issued travel documents at ICE/ERO's request. *Id.* ¶ 8. On March 6, 2025, ICE/ERO successfully completed a removal flight to Nicaragua. *Id.* ICE/ERO has scheduled a future removal flight to remove non-citizens to Nicaragua. *Id.* On March 12, 2025, ICE/ERO resubmitted a travel document request to Nicaragua, and that request remains pending. Carter Decl. ¶ 13; Thompson Decl. ¶ 9.

Since Petitioner entered ICE/ERO custody, he has received a custody review. On or about March 7, 2025, ICE/ERO served Petitioner with its decision to continue his detention. Carter Decl. ¶ 12 & Ex. E.

LEGAL FRAMEWORK

Petitioner is detained post-final order of removal pursuant to a final administrative removal order ("FARO"). 8 U.S.C. § 1228 permits ICE/ERO to issue FAROs to certain non-citizens convicted of aggravated felonies. Section 1228 applies to, *inter alia*, non-citizens who (1) have not been admitted as lawful permanent residents or who have permanent residency on a conditional basis, and (2) are removable under 8 U.S.C. § 1227(a)(2)(A)(iii) based on a conviction of an aggravated felony as defined in 8 U.S.C. § 1101(a)(43). 8 U.S.C. § 1228(b)(1), (2); 8 C.F.R. § 1238.1(b)(1)(i)-(iv). ICE/ERO may commence proceedings under section 1228 and detain a non-citizen by serving a Form I-851 Notice of Intent to Issue a Final Administrative Removal Order. 8 C.F.R. § 238.1(b)(1), (b)(2)(i), (g). The non-citizen has an opportunity to respond to the Form I-851. 8 C.F.R. § 238.1(c). If ICE/ERO determines that the requirements of section 1228(b)(1) have been satisfied, ICE/ERO issues a FARO 8 C.F.R. § 238.1(d)(1), (d)(2)(i), (d)(2)(ii)(B). If a non-citizen subject to section 1228 requests withholding of removal, ICE/ERO "shall, upon issuance of a [FARO], immediately refer the [non-citizen's] case to an asylum officer to conduct a reasonable fear determination[.]" 8 C.F.R. § 238.1(f)(3).

Because a FARO operates as a final order of removal, the detention of a non-citizen subject to a FARO is governed by 8 U.S.C. § 1231(a). *See* 8 U.S.C. § 1231(a)(6) (authorizing detention of, *inter alia*, a non-citizen "who is . . . removable under section . . . 1227(a)(2) . . . of this title"); *Clark v. Martinez*, 543 U.S. 371, 377-78 (2005) (holding that the detention of non-citizens described in section 1231(a)(6) is governed by *Zadvydas*); *see also Guo Xing Song v. U.S. Att'y*

Gen., 516 F. App'x 894, 899 (11th Cir. 2013) (per curiam) (applying the provisions of section 1231(a) and the *Zadvydas* standards to a non-citizen detained pursuant to a FARO); *Gozo v. Napolitano*, 309 F. App'x 344, 346 (11th Cir. 2009) (per curiam) (same).

Congress provided in 8 U.S.C. § 1231(a)(1) that ICE/ERO shall remove an alien within ninety (90) days of the latest of: (1) the date the order of removal becomes administratively final; (2) if a removal is stayed pending judicial review of the removal order, the date of the reviewing court's final order; or (3) the date the alien is released from criminal confinement. *See* 8 U.S.C. §§ 1231(a)(1)(A)-(B). During this ninety-day time frame, known as the "removal period," detention is mandatory. *See id.* at § 1231(a)(2).

If ICE/ERO does not remove an alien within ninety days, detention may continue if it is "reasonably necessary" to effectuate removal. *See Zadvydas v. Davis*, 533 U.S. 678, 689 (2001); 8 U.S.C. § 1231(a)(6) (providing that an alien who is subject to mandatory detention, inadmissible, or who has been determined to be a risk to the community or a flight risk, "may be detained beyond the removal period"). In *Zadvydas v. Davis*, 533 U.S. 678 (2001), the Supreme Court determined that, under the Fifth Amendment, detention for six months is presumptively reasonable. 533 U.S. at 700. "After this 6-month period, once the alien provides good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future, the Government must respond with evidence sufficient to rebut that showing." *Id.* at 701 (emphasis added); *see also* 8 C.F.R. § 241.13. Where there is no significant likelihood of removal in the reasonably foreseeable future, the alien should be released from confinement. *Id.*

In *Akinwale v. Ashcroft*, 287 F.3d 1050 (11th Cir. 2002), the Eleventh Circuit further elaborated on the framework announced by the Supreme Court in *Zadvydas*, stating that "in order to state a claim under *Zadvydas* the alien not only must show post-removal order detention in

excess of six months but also must provide evidence of a good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future." 287 F.3d at 1052. Thus, the burden is on Petitioner to demonstrate: (1) post-removal order detention lasting more than six months; and (2) evidence of a good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future. *Gozo*, 309 F. App'x at 346 (quoting *Akinwale*, 287 F.3d at 1051-52).

ARGUMENT[2]

Petitioner seeks relief under *Zadvydas*, asserting that his post-final order of removal detention violates due process because there is no significant likelihood of removal in the reasonably foreseeable future. Pet. 6-7. The Petition should be dismissed for two reasons. ***First***, Petitioner's Zadvydas claim is premature on its face because he has not been detained post-final order of removal for six months. ***Second***, even assuming Petitioner could state a claim for relief under Zadvydas—which he cannot—he fails to show that he is entitled to relief. For these reasons, the Court should dismiss the Petition.

I. The Petition should be dismissed as premature under *Zadvydas*.

In evaluating *Zadvydas* claims, the Eleventh Circuit has made clear that the "six-month period thus must have expired at the time [Petitioner's] § 2241 petition was filed in order to state a claim under *Zadvydas*." *Akinwale v. Ashcroft*, 287 F.3d 1050, 1052 (11th Cir. 2002); *see also*

[2] Respondent addresses Petitioner's claims for relief together because, in each claim, Petitioner seeks relief for alleged prolonged post-final order detention under *Zadvydas*. *See, e.g., Linares v. Dep't of Homeland Sec.*, 598 F. App'x 885, 887 (11th Cir. 2015) (evaluating the petitioner's claims together because the "procedural and substantive due process claims were both grounded in the government's alleged violation under *Zadvydas*[]"). To the extent that the Court interprets Petitioner's claims for relief differently, Respondents respectfully request an opportunity to amend this Response. To the extent Petitioner claims he has not received custody reviews, his claim should be denied because ICE/ERO has reviewed Petitioner's custody status and determined that he should remain detained. Carter Decl. ¶ 12 & Ex. E.

Themeus v. U.S. Dep't of Justice, 643 F. App'x 830, 833 (11th Cir. 2016); *Guo Xing Song*, 516 F. App'x at 899.

Here, Petitioner entered ICE/ERO custody on August 2, 2024. Carter Decl. ¶ 8. Petitioner was ordered removed on September 9, 2024. *Id.* ¶ 9 & Ex. D. Because he was ordered removed pursuant to a FARO, his removal order became final the same day. *See Guo Xing Song*, 516 F. App'x at 899 (denying *Zadvydas* claim because the petitioner "had not been detained in excess of six months following the FARO's issuance"); *Gozo*, 309 F. App'x at 846 ("[T]he statutory removal period was triggered . . . when [ICE/ERO] issued its Final Administrative Removal Order.").

Petitioner filed the Petition on February 24, 2025[3]—before the six-month presumptively reasonable detention period under *Zadvydas* did not end until March 9, 2025. 533 U.S. at 700. Although the six-month period has now ended, the Eleventh Circuit has made clear that the "six-month period thus must have expired *at the time [Petitioner's] § 2241 petition was filed* in order to state a claim under *Zadvydas*." *Akinwale*, 287 at 1052 (emphasis added). Courts throughout the Eleventh Circuit—including this Court—have dismissed non-citizens' habeas petitions raising *Zadvydas* claims where the presumptively reasonable six-month period had not expired when they filed their petitions. *S.H. v. Warden, Stewart Det. Ctr.*, No. 4:21-CV-185-CDL-MSH, 2022 WL 1280989, at *2 (M.D. Ga. Feb. 15, 2022), *recommendation adopted*, 2022 WL 1274385 (M.D. Ga. Apr. 28, 2022); *Singh v. Garland*, No. 3:20-cv-899, 2021 WL 1516066, at *2 (M.D. Fla. Apr. 16, 2021); *Elienist v. Mickelson*, No. 15-61701-Civ, 2015 WL 5316484, at *3 (S.D. Fla. Aug. 18,

[3] Although the Court received the Petition on February 24, 2025, Petitioner signed it on December 12, 2024. Pet. 8-9. "Under the prison mailbox rule, a *pro se* prisoner's court filing is deemed filed on the date it is delivered to prison authorities for mailing." *United States v. Glover*, 686 F.3d 1203, 1205 (11th Cir. 2012) (internal quotations and citation omitted). "Unless there is evidence to the contrary, like prison logs or other records, we assume that a prisoner's motion was delivered to prison authorities on the day he signed it." *Id.* Using either date, Petitioner filed the Petition before the six-month presumptively reasonable detention period under *Zadvydas* expired.

2015), *recommendation adopted*, 2015 WL 5308882 (S.D. Fla. Sept. 11, 2015); *Maraj v. Dep't of Homeland Sec.*, No. CA 06-0580-CG-C, 2007 WL 748657, at *3 (S.D. Ala. Mar. 7, 2007); *Fahim v. Ashcroft*, 227 F. Supp. 2d 1359, 1363-65 (N.D. Ga. 2002). The Court should similarly dismiss the Petition here.

II. In the alternative, Petitioner fails to show he is entitled to relief under *Zadvydas*.

Even if the Court ignores that Petitioner's *Zadvydas* claim is premature on its face—which it should not—Petitioner fails to show that he is entitled to release under *Zadvydas*. This is because Petitioner fails to carry his burden of demonstrating that there is no significant likelihood of removal in the reasonably foreseeable future. *Zadvydas*, 533 U.S. at 701. To satisfy his burden, Petitioner must provide "*evidence* of a good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future." *Akinwale*, 287 F.3d at 1052 (emphasis added). Petitioner fails to make this showing.

In an attempt to meet his burden under *Zadvydas*, Petitioner appears to rely on the passage of time without removal, asserting that despite his cooperation with ICE/ERO's efforts to secure a travel document, Pet. 5, "Petitioner still has not been removed," *id.* at 6. However, as other courts have recognized, a non-citizen cannot meet his burden under *Zadvydas* on this basis. *See Ortiz v. Barr*, No. 20-CV-22449, 2021 WL 6280186, at *5 (S.D. Fla. Feb. 1, 2021) ("[T]he mere existence of a delay of Petitioner's deportation is not enough for Petitioner to meet his burden." (citations omitted)), *recommendation adopted*, 2022 WL 44632 (S.D. Fla. Jan. 5, 2022); *Ming Hui Lu v. Lynch*, No. 1:15-cv-1100, 2016 WL 375053, at *7 (E.D. Va. Jan. 29, 2016) ("[A] mere delay does not trigger the inference that an alien will not be removed in the foreseeable future." (internal quotations and citations omitted)); *Newell v. Holder*, 983 F. Supp. 241, 248 (W.D.N.Y. 2013) ("[T]he habeas petitioner's assertion as to the unforeseeability of removal, supported only by the

mere passage of time [is] insufficient to meet the petitioner's initial burden . . . ." (collecting cases)).

Aside from this statement, Petitioner relies only on conclusory assertions that his is unlikely to be removed in the near future. Pet. 6-7. Such conclusory statements are insufficient to state a claim under *Zadvydas*. *See Novikov v. Gartland*, No. 5:17-cv-164, 2018 WL 4100694, at *2 (S.D. Ga. Aug. 28, 2018), *recommendation adopted*, 2018 WL 4688733 (S.D. Ga. Sept. 28, 2018); *Gueye v. Sessions*, No. 17-62232-Civ, 2018 WL 11447946, at *4 (S.D. Fla. Jan. 24, 2018); *Rosales-Rubio v. Att'y Gen. of United States*, No. 4:17-cv-83-MSH-CDL, 2018 WL 493295, at *3 (M.D. Ga. Jan. 19, 2018), *recommendation adopted*, 2018 WL 5290094 (M.D. Ga. Feb. 8, 2018). Rather, Petitioner must provide "*evidence* of a good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future. *Gozo*, 309 F. App'x at 346 (internal quotations omitted) (emphasis added). Because Petitioner provides none, he cannot meet his burden under *Zadvydas*, and the Petition should be denied.

Even assuming Petitioner offered evidence sufficient to shift the burden to Respondent to show a likelihood of removal—which he has not—Respondent meets his burden. Nicaragua has recently committed to cooperating with ICE/ERO's travel document requests and accepting Nicaraguan citizens for removals. Thompson Decl. ¶¶ 7-8. Indeed, over the past month, Nicaragua has issued travel documents to ICE/ERO, and Nicaraguan nationals have been successfully removed. *Id.* ¶ 8. For this reason, ICE/ERO recently submitted a second travel document request for Petitioner on March 12, 2025—less than one week ago. *Id.* ¶ 9; Carter Decl. ¶ 13. This travel document request remains pending. Thompson Decl. ¶ 9; Carter Decl. ¶ 13.

Although Nicaragua denied ICE/ERO's prior travel document request on or about November 4, 2024, Thompson Decl. ¶ 6, circumstances have changed significantly, which

precipitated ICE/ERO submitting the pending travel document request, *id.* ¶¶ 7-8. In evaluating *Zadvydas* claims, this Court has "emphasize[d] that the proper perspective is *today*. Not whether someone may subjectively believe that Petitioner's rights have been violated in the past; and not even whether his *Zadvydas* rights may have been encroached upon at some arbitrary date months ago." *Meskini v. Att'y Gen. of United States*, 4:14-cv-42-CDL, 2018 WL 1321576, at *4 (M.D. Ga. Mar. 14, 2018) (emphasis in original). For this reason, "[t]he question is, *as of this moment* and given the current circumstances, whether Petitioner is likely to be removed in the reasonably foreseeable future or whether he is not." *Id.* (emphasis in original).

Here, there is a significant likelihood of removal in the reasonably foreseeable future given the significant changes in Nicaragua's handling of ICE/ERO's travel document requests, Thompson Decl. ¶¶ 7-8, and ICE/ERO's submission of a new travel document request less than a week ago, *id.* ¶ 9. This request remains pending, and the mere fact that ICE/ERO has not yet received an update on the week-old request is insufficient to warrant relief under *Zadvydas*. *See Novikov*, 2018 WL 4100694, at *2 (denying non-citizen's *Zadvydas* claim where the non-citizen did "not explain how the past lack of progress in the issuance of his travel documents means that [his country of nationality] will not produce the documents in the foreseeable future"); *Meskini*, 2018 WL 1321576, at *4 ("[C]ircumstances have changed . . . . [E]xpert deportation authorities believe that Algeria will accept Petitioner for repatriation, and the current record indicates that they are taking steps to make that happen."); *Linton v. Holder*, No. 10-20145-Civ-Lenard, 2010 WL 4810842, at *4 (S.D. Fla. Oct. 4, 2010) ("[A] delay in issuance of travel documents does not, without more, establish that a petitioner's removal will not occur in the reasonably foreseeable future, even where the detention extends beyond the presumptive 180 day (6 month) presumptively reasonable period." (citations omitted)); *Fahim*, 227 F. Supp. at 1366 ("The lack of visible progress

since [ICE] requested travel documents from the [foreign] government does not in and of itself meet [the non-citizen's] burden of showing that there is no significant likelihood of removal." (citation omitted)). Rather, there is a significant likelihood of removal given Nicaragua's present cooperation with ICE/ERO's removal efforts. Thompson Decl. ¶ 10. For these reasons, the Petition should be dismissed.

CONCLUSION

For the reasons stated herein, Respondent respectfully requests that the Court dismiss the Petition.

Respectfully submitted this 17th day of March, 2025.

C. SHANELLE BOOKER
ACTING UNITED STATES ATTORNEY

BY: *s/ Roger C. Grantham, Jr.*
ROGER C. GRANTHAM, JR.
Assistant United States Attorney
Georgia Bar No. 860338
United States Attorney's Office
Middle District of Georgia
P. O. Box 2568
Columbus, Georgia 31902
Phone: (706) 649-7728
roger.grantham@usdoj.gov

CERTIFICATE OF SERVICE

This is to certify that I have this date filed the Respondent's Motion to Dismiss with the Clerk of the United States District Court using the CM/ECF system, which will send notification of such filing to the following:

N/A

I further certify that I have this date mailed by United States Postal Service the document and a copy of the Notice of Electronic Filing to the following non-CM/ECF participants:

Herman Flores
A# [redacted]
Stewart Detention Center
P.O. Box 248
Lumpkin, GA 31815

This 17th day of March, 2025.

BY: *s/ Roger C. Grantham, Jr.*
ROGER C. GRANTHAM, JR.
Assistant United States Attorney