

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO: 25-21439-CIV-MARTINEZ

VICTOR SMIRNOV,

Petitioner,

v.

DEPARTMENT OF HOMELAND
SECURITY, *et al.*,

Respondents.

RESPONDENT'S MEMORANDUM OF FACT AND LAW TO SHOW
CAUSE WHY PETITION SHOULD NOT BE GRANTED

Respondents,¹ by and through the undersigned Assistant United States Attorney, respectfully submit this *Memorandum of Fact and Law to Show Cause Why Petition Should Not Be Granted*, consistent with this Court's Order (ECF No. 5). In his *Petition for a Writ of Habeas Corpus*, Petitioner Victor Smirnov asks this Court to "determine that Petitioner's detention is not justified," "order Petitioner's release within 30 days unless [Respondents] schedule a hearing before an immigration judge," or "[i]ssue a declaration that Petitioner's ongoing

¹ The United States adopts this Court's case captioning (ECF No. 5) and notes that Petitioner improperly named as Respondents "Kriti Noem, Secretary of the Department of Homeland Security; Pamela Bondi, Attorney General of the United States; and Jose Sierra, Director of the Miami Field Office" (ECF No. 1). A writ of habeas corpus must "be directed to the person having custody of the person detained," 28 U.S.C. § 2243, which means "the immediate custodian, not a supervisory official who exercises legal control, is the proper respondent" in cases involving present physical confinement (like the one here). *Rumsfeld v. Padilla*, 542 U.S. 426, 439 (2004). Because Petitioner is currently detained at the Krome Detention Center, an ICE detention facility in Miami, Florida, his immediate custodian is Charles A. Parra, Assistant Field Office Director, and the proper Respondent in the instant case is Mr. Parra in his official capacity.

prolonged detention” violates his constitutional rights (ECF No. 1 at ¶¶ 4-5 and p. 14).² This Court should deny the Petition because, contrary to Petitioner’s claims, the United States Constitution affords him no rights beyond those afforded to him by statute. *See, e.g., D.A.V.V. v. Warden, Irwin County Detention Center*, 2020 WL 13240240, Case No. 7:20-CV-159, at *6 (M.D. Ga., Dec. 7, 2020) (“Applying this rule in [*Department of Homeland Security v. Thuraissigiam*, 591 U.S. 103, 140 (2020)], which squares with longstanding Supreme Court precedent, this Court similarly holds that arriving aliens’ procedural due process rights entitle them only to the relief provided by the [Immigration and Naturalization Act].”).

BACKGROUND

There are three separate but intertwined proceedings at issue in this case: (1) Petitioner’s removal proceedings, (2) his asylum claim, and (3) a request for release by parole.

I. Petitioner is Subject to Detention under INA § 235(b)(1)(A)(ii).

A. Applicable Law

Arriving aliens who apply for admission into the United States at a port-of-entry can be subject to an expeditious process to remove them from the United States under 8 U.S.C. § 1225(b)(1). Under this process—known as expedited removal—aliens arriving in the United States (as designated by the Secretary of Homeland Security) who entered illegally and lack valid entry documentation or make material misrepresentations shall be “order[ed] . . . removed from the United States without further hearing or review unless the alien indicates either an intention to apply for asylum under [8 U.S.C. § 1158] or a fear of persecution.” 8 U.S.C. § 1225(b)(1)(A)(i).

² Petitioner also seeks attorney fees (ECF No. 1 at 14), although he is proceeding *pro se*.

To qualify for expedited removal, an alien must either lack entry documentation or seek admission through fraud or misrepresentation. Immigration and Nationality Act (INA) § 235(b)(1)(A)(i), 8 U.S.C. § 1225(b)(1)(A)(i) (referring to INA §§ 212(a)(6)(C), (a)(7), 8 U.S.C. § 1182(a)(6)(C), (a)(7)). In addition, the alien must either be “arriving in the United States” or within a class that the Secretary of Homeland Security (“Secretary”) has designated for expedited removal. The Secretary may designate “any or all aliens” who have “not been admitted or paroled into the United States” and also have not “been physically present in the United States continuously for the 2-year period immediately prior to the date of the determination of inadmissibility.” INA § 235(b)(1)(A)(iii), 8 U.S.C. § 1225(b)(1)(A)(iii). The Secretary (and previously the Attorney General) have designated only subsets of that class. *See* Notice Designating Aliens Subject to Expedited Removal Under Section 235(b)(1)(A)(iii) of the Immigration and Nationality Act, 67 Fed. Reg. 68,924 (Nov. 13, 2002); Designating Aliens for Expedited Removal, 69 Fed. Reg. 48,877 (Aug. 11, 2004) (2004 Designation).

Where an alien establishes a credible fear of persecution upon return to his or her country (*infra* Part II), that alien is no longer subject to expedited removal proceedings, pursuant to INA § 235, and is referred to full removal proceedings, pursuant to INA § 240. *See, generally, Matter of M-S-*, 27 I&N Dec. 509 (A.G. 2019) (citing INA § 235(b)(1)(B)(iii)(IV)). In such circumstances, the alien must be detained until his asylum claim is adjudicated (unless the alien is paroled, *infra* Part III). *Id.*

B. Facts Related to Petitioner's Detention

Petitioner Victor Smirnov is a native and citizen of Russia, who arrived at the United-States-Mexico border on April 5, 2024, and requested admission to the United States at the Calexico West port of entry (*see* Exhibit A, Form I-213, dated April 5, 2024; ECF No. 1 at ¶

17 (describing Petitioner as “noncitizen”). The U.S. Customs and Border Patrol determined that Petitioner was inadmissible to the United States (Exhibit A) and issued a Notice of Expedited Removal Order (*see* Exhibit B, Notice of Expedited Removal Order, dated April 6, 2024). On April 6, 2024, Petitioner was taken into the custody of the U.S. Department of Homeland Security (DHS), Immigration and Customs Enforcement (ICE), Enforcement and Removal Operations (ERO) (*See* Exhibit C, Detention History).

Following a finding of a credible fear of persecution upon his return to Russia, Petitioner was placed in removal proceedings through the issuance of a Notice to Appear (NTA) on April 24, 2024, filed with the Miami Immigration Court (*see* Exhibit D, NTA dated April 24, 2024). Petitioner was charged with removal under 8 U.S.C. § 1182(a)(7)(A)(i)(I), as amended, in that at the time of application for admission, Petitioner was not in possession of a valid unexpired immigrant visa, reentry permit, border crossing card, or other valid entry document required by the Act (*id.*).

On May 28, 2024, the pleadings on the NTA were completed (*see* Exhibit G, Clarke Declaration, ¶ 12), but removal was not effectuated because of Petitioner’s asylum claim.

II. Petitioner’s Asylum Claim is Pending Before the Board of Immigration Appeals.

A. Applicable Law

For an alien originally placed in expedited proceedings, the removal process varies depending upon whether the alien indicates either “an intention to apply for asylum” or “a fear of persecution or torture.” 8 C.F.R. §§ 235.3(b)(4), 1235.3(b)(4)(1); *see* INA § 235(b)(1)(A)(ii). If, as in this case, the alien does so indicate, the officer “shall refer the alien for an interview by an asylum officer.” *Id.* § 235(b)(1)(A)(ii). That officer assesses whether the

alien has a “credible fear of persecution or torture,” 8 C.F.R. § 208.30(d). In other words, the officer assesses whether there is a “significant possibility” that the alien is eligible for “asylum under section 208 of the Act,” “withholding of removal under section 241(b)(3) of the Act,” or withholding or deferral of removal under the Convention Against Torture (CAT), 8 C.F.R. § 208.30(e)(2)–(3). If the alien does establish such a fear, he is entitled to “further consideration of the application for asylum.” *Id.* § 235(b)(1)(B)(ii). By regulation, that “further consideration” takes the form of full removal proceedings under section 240 of the Act. 8 C.F.R. §§ 208.30(f), 1208.30(g)(2)(iv)(B).

B. Facts Related to Petitioner’s Asylum Claim

On or about April 6, 2024, Petitioner expressed fear of returning to Russia (*see* Exhibit A), and on or about April 23, 2024, the U.S. Citizenship and Immigration Service conducted Petitioner’s credible fear interview, resulting in a finding that Petitioner had a credible fear of returning to Russia.

On or about May 27, 2024, Petitioner filed his Application for Relief, asking the Immigration Court to grant him protection from the Expedited Removal Order (Exhibit B) because of Petitioner’s fears of returning to Russia (*see* Exhibit G, Clarke Declaration, ¶ 11). Based on the Application for Relief and the finding of credible fear, the removal proceedings were continued, and a merits hearing was scheduled for July 12, 2024 (*see* Exhibit I, Notice of Hearing, dated May 28, 2024). After Petitioner amended his Application for Relief, the Immigration Judge conducted a hearing on the merits on July 12, 2024 (*see* Exhibit G, Clarke Declaration, ¶¶ 13-14). Petitioner testified, and the case was continued for testimony of any potential witnesses (*id.*). On August 8, 2024, testimony concluded, and the Immigration Judge reserved decision (*see id.* ¶ 15).

On September 9, 2024, the Immigration Judge issued a written decision granting Petitioner's application for relief (Exhibit J, Order of the Immigration Judge, dated September 9, 2024). DHS filed a timely Notice of Appeal to the Board of Immigration Appeals, appealing the Immigration Judge's September 9, 2024, order (*see* Exhibit K, Board Appeal Receipt, dated September 19, 2024). On October 30, 2024, DHS and Petitioner filed written briefs in compliance with the briefing schedule, and on February 5, 2025, the Board of Immigration Appeals issued a Background Check Hold Notice, requesting that the DHS advise it of Petitioner's compliance with the background check requirements (*see* Exhibit M, Board Background Check Hold Notice, dated February 5, 2025). On April 1, 2025, DHS complied and filed the background check notice (*see* Exhibit N, DHS's Background Check Notice).

DHS's appeal remains pending before the Board. If the Board of Immigration Appeals were to deny DHS's appeal, the Immigration Judge's decision to grant Petitioner's application for relief would be affirmed and Petitioner would be released, thereby mooting this case.

III. Petitioner's Request for Release by Parole

A. Applicable Law

Section 235 of the Immigration and Naturalization Act expressly provides for the detention of aliens originally placed in expedited removal who have a credible fear of persecution in their home countries. INA § 235(b)(1)(B)(iii)(IV) (stating that such aliens "shall be detained pending a final determination of credible fear"); *id.* § 235(b)(1)(B)(ii) (stating aliens found to have such a fear "shall be detained for further consideration of the application for asylum"). *See also Matter of M-S-*, 27 I&N Dec. 509 (A.G. 2019). Like all aliens applying

for admission, however, aliens detained for further consideration of an asylum claim may generally be “parole[d] into the United States . . . for urgent humanitarian reasons or significant public benefit.” INA § 212(d)(5)(A).

Accordingly, the Act’s implementing regulations assume that aliens in expedited proceedings will be detained, but provide that, if an alien establishes a credible fear, “[p]arole . . . may be considered . . . in accordance with section 212(d)(5) of the Act and [8 C.F.R.] § 212.5.” 8 C.F.R. § 208.30(f). The applicable regulation states that parole for arriving aliens with pending asylum applications, such as Petitioner, “would generally be justified only on a case-by-case basis for urgent humanitarian reasons or significant public benefit, providing the aliens present neither a security risk not a risk for absconding:

- (1) Aliens who have serious medical conditions in which continued detention would not be appropriate;
- (2) Women who have been medically certified as pregnant;
- (3) Aliens who are defined as minors in § 236.3(b) of this chapter and are in DHS custody. . . .
- (4) Aliens who will be witnesses in proceedings being, or to be, conducted by judicial, administrative, or legislative bodies in the United States; or
- (5) Aliens whose continued detention is not in the public interest as determined by those officials identified in paragraph (a) of this section.

See 8 C.F.R. §§ 212.5(b).

B. Facts Applicable to Petitioner’s Parole

On April 17, 2025, Petitioner was served a notice that ERO scheduled an interview for Petitioner to be conducted on April 28, 2025, at 2:00 p.m., to assess whether Petitioner meets the qualifications for parole (Exhibit O). If the Deportation Officer agrees that parole is warranted for “urgent humanitarian reasons or significant public benefit” (a decision within the Deportation Officer’s unreviewable discretion, *see Jean v. Nelson*, 72 U.S. 846 (1985)), and grants parole, Petitioner will be released from custody, thereby mooting this case.

PROCEDURAL BACKGROUND

In March 2025,³ Petitioner filed a *Petition for Writ of Habeas Corpus* (ECF No. 1), claiming that he has been “detained in immigration custody for over 10 months even though no neutral decision maker – whether a federal judge or an immigration judge – has conducted a hearing to determine whether this lengthy incarceration is warranted based on danger or flight risk, the only two permissible bases for immigration detention prior to entry of an executable removal order” (*id.* at ¶ 2). Claiming that this “prolonged detention” violates his constitutional rights (*id.* at ¶ 3), Petitioner asks this Court to either “determine that Petitioner’s detention is not justified” or “order Petitioner’s release within 30 days unless [Respondents] schedule a hearing before an immigration judge” (*id.* at ¶¶ 4-5).

On March 31, 2025, this Court issued an Order to Show Cause, directing Respondents to “file a memorandum of fact and law to show cause why this Petition should not be granted” and to submit “documents and transcripts necessary for the resolution of the Petition” (ECF No. 5 at 2).

To date, Petitioner remains in ICE custody at Krome located in Miami, Florida (*see* Exhibit C, Detention History; ECF No. 1 at ¶ 6).

³ Petitioner appears to have signed the Petition on March 20, 2025 (ECF No. 1 at 14), although the Certificate of Service is dated October 7, 2024 (*id.* at 15). The envelope to this Court is postmarked March 27, 2025 (*id.* at 16).

ARGUMENT

THIS COURT SHOULD DENY THE PETITION BECAUSE PETITIONER IS NOT ENTITLED TO RELIEF.

This Court should deny the Petition because, as the Supreme Court stated, an arriving alien in the United States “has only those rights regarding admission that Congress has provided by statute,” *Department of Homeland Security v. Thuraissigiam*, 591 U.S. 103, 140 (2020), and those requirements have been met here.

I. The Supreme Court Stated That Petitioner Is Afforded “Only Those Rights” Proscribed by Statute.

Petitioner does not dispute that he is subject to detention, pursuant to INA § 235(b)(1)(B)(ii), which mandates detention (i) for the purpose of ensuring additional review of an asylum claim, and (ii) for so long as that review is ongoing. *See Matter of M-S-*, 27 I&N Dec. 509, 517-518. Moreover, Petitioner does not dispute that the Supreme Court in *Jennings v. Rodriguez* held that the Immigration and Naturalization Act renders aliens transferred from expedited to full proceedings after establishing a credible fear ineligible for bond. 583 U.S. 281 (2018). Instead, Petitioner argues that the United States Constitution’s guarantee of due process applies to him as an arriving alien (ECF No. 1). On that point, he is mistaken.

United States Supreme Court precedent on due process clearly distinguishes between noncitizens seeking initial entry to the United States at the border, like Petitioner, and those who entered the country legally. *See Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) (“The distinction between an alien who has effected an entry into the United States and one who has never entered runs throughout immigration law.”); *Thuraissigiam*, 591 U.S. at 140. *See also Jean v. Nelson*, 727 F.2d 957, 967 (11th Cir. 1984) (“Any analysis of the constitutional rights of [noncitizens] in the immigration context *must* begin by taking note of th[is]

fundamental distinction. . . .”) (emphasis added).⁴ In elaborating on this distinction, the Supreme Court in *Department of Homeland Security v. Thuraissigiam* explained that an arriving alien, like Petitioner, “has only those rights regarding admission that Congress has provided by statute.” *Thuraissigiam*, 591 U.S. at 40 (2020). See also *Landon v. Plasencia*, 459 U.S. 21, 32 (1982) (“This Court has long held that an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application, for the power to admit or exclude aliens is a sovereign prerogative.”).

Applying the “only those rights” language in *Thuraissigiam*, numerous courts have held that the Supreme Court meant what it said, and they have ruled that arriving aliens do not have a constitutional right to a bond hearing, unless one is prescribed by statute. See *D.A.V.V. v. Warden, Irwin County Detention Center*, 2020 WL 13240240, Case No. 7:20-CV-159, at *6 (M.D. Ga., Dec. 7, 2020) (“Applying this rule in *Thuraissigiam*, which squares with longstanding Supreme Court precedent, this Court similarly holds that arriving aliens’ procedural due process rights entitle them only to the relief provided by the INA.”) (citing authorities);⁵ *Gonzales Garcia v. Rosen*, 513 F.Supp.3d 329, 336 (W.D.N.Y., Jan. 13, 2021) (finding no “bond hearing was constitutionally required”); *Petgrave v. Aleman*, 529 F.Supp.3d 665, 676 (S.D. Tex. Mar. 29, 2021) (discussing *Thuraissigiam* and denying habeas claims of

⁴ Petitioner ignores this important distinction when he cites *Demore v. Kim*, 538 U.S. 510 (2003), *Zadvydas v. Davis*, 533 U.S. 678 (2001), and *Sopo v. U.S. Attorney General*, 825 F.3d 1199 (11th Cir. 2016) (ECF No. 1 at ¶¶ 23-25). *Demore* involved “an alien lawfully admitted to permanent residence in the United States,” 538 U.S. at 540 (Souter, J., concurring in part and dissenting in part), as did *Sopo*, 825 F.3d at 1202 (“resided lawfully”); and the Supreme Court in *Zadvydas* made clear “Aliens who have not yet gained initial admission to this country would present a very different question,” 533 U.S. at 682.

⁵ Based on a review of the *D.A.V.V.* docket, the parties filed a Stipulation of Dismissal before the Court had an opportunity to enter an order on the Report and Recommendation (R&R) concerning denial of the habeas petition. Accordingly, only the R&R is cited above.

arriving alien challenging continued detention without a bond hearing because “when a noncitizen attempts to unlawfully cross the borders as Petitioner did, his constitutional right to due process does not extend beyond the rights provided by statute”). *See also Sandoval-Linares v. Albencer*, 2020 WL 7343128, Case No. 2:20-CV-928, at *9 (C.D. Cal., Dec. 10, 2020) (citing *Thuraissigaim* and finding that Due Process Clause did not create habeas review of how asylum determination was made).

Instead of relying on *Thuraissigaim*, Petitioner cites the dissent in *Jennings v. Rodriguez*, 583 U.S. 281, 286 (2018), in support of his claim that he, as an arriving alien, has constitutional rights (ECF No. 1 at ¶¶ 27-28, 45). In *Jennings*, the majority of the Supreme Court made clear that no statute gave “detained aliens the right to periodic bond hearings during the course of their detention,” 583 U.S. at 286, and that “periodic bond hearings” were not “required under the immigration provisions at issue,” *id.* at 312. Thus, the Supreme Court in *Jennings* did not address an arriving alien’s rights to constitutional protections, as the Supreme Court did in *Thuraissigiam*, 591 U.S. at 40 (2020).⁶

For these reasons, Petitioner is entitled to no rights beyond those afforded to him by statute.

⁶ Even if constitutional protections applied to Petitioner as an arriving alien, his Eighth Amendment claim would fail because that constitutional provision does not apply to immigration detention. The right not to be subjected to excessive bail is conferred by the Eighth Amendment and implemented, as applied to federal criminal defendants, in the Bail Reform Act, 18 U.S.C. § 3142. *See United States v. Salerno*, 481 U.S. 739, 753-54 (1987). The Eighth Amendment does not afford the right to be released on bail, only the right not to be subjected to excessive bail as a condition of release. *Id.* at 752. *See also Bolante v. Keisler*, 506 F.3d 618, 619 (7th Cir. 2007) (“[T]he Court has never held that persons detained in civil proceedings, such as deportation . . . proceedings, are entitled to release on bail.”).

II. Respondents Have Complied with Applicable Statutes.

Respondents have afforded Petitioner all rights to which he is entitled to by statute. Here, Petitioner is a native and citizen of Russia who arrived at the United-States -Mexico border without a valid unexpired immigrant visa, reentry permit, border crossing card, or other valid entry document, (*see* Exhibit A; Exhibit D; ECF No. 1 at ¶ 17), meaning he was inadmissible to the United States and subject to expedited removal. 8 U.S.C. § 1182(a)(7)(A)(i)(I), as amended. As an applicant for admission under 8 U.S.C. § 1225(a)(1), and more specifically, an arriving alien as defined under 8 C.F.R. § 1001.1(q), Petitioner was not entitled to a bond hearing, as none is prescribed by the expedited removal statute, 8 U.S.C. § 1225.

Moreover, after Petitioner expressed fear of returning to Russia (*see* Exhibit A) and an initial finding that this fear was credible, Petitioner was entitled to an asylum hearing under procedures set forth in INA § 240, *see, generally, Matter of M-S-*, 27 I&N Dec. 509 (A.G. 2019), and an Immigration Judge conducted a hearing during which Petitioner testified (*see* Exhibit G). Finally, ERO is providing Petitioner an opportunity to assert that he meets the qualifications for parole (Exhibit O).

For these reasons, Respondents have afforded Petitioner all rights to which he is entitled by statute.⁷

⁷ Even if the Court concludes that Petitioner, as an arriving alien, can invoke the Due Process Clause, he cannot establish that his detention violates the Constitution on the facts of this case. As previously stated, Petitioner has been detained for just over a year (Exhibit C (describing how Petitioner was taken into custody on April 6, 2024), and proceedings related to his asylum and his request for parole are proceeding expeditiously. Courts have found no constitutional violation on similar facts. *See, e.g. O.D. v. Warden, Stewart Detention Ctr.*, 2021 WL 5413968 at *4-5 (M.D. Ga. Jan. 14, 2021) (Report and Recommendation), *adopted by*, 2021 WL 5413966 (M.D. Ga. Apr. 1, 2021) (denying habeas relief to § 1226(c) petitioner who

CONCLUSION

Petitioner asks this Court to determine that his detention is not justified, order his release within 30 days unless Respondents schedule a hearing before an immigration judge, or issue a declaration that Petitioner's ongoing prolonged detention violates his constitutional rights (ECF No. 1 at ¶¶ 4-5 and p. 14). His right to claim such remedies, however, appear nowhere in the applicable statutory provisions, and the Supreme Court made clear that arriving aliens, like Petitioner, have "only those rights regarding admission that Congress has provided by statute," *Thuraissigiam*, 591 U.S. at 140. For all these reasons, this Court should deny the Petition.

Respectfully submitted,

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had been detained for nineteen months); *Sigal v. Searls*, 2018 WL 5831326 at *5, 9 (W.D.N.Y. Nov. 7, 2018) (denying habeas relief to petitioner detained for seventeen months after "tak[ing] into account all of the factual circumstances"); *see also Hylton v. Shanahan*, No., 2015 WL 3604328, at *6 (S.D.N.Y. June 9, 2015) (detention without bail for roughly two years did not violate due process); *Luna-Aponte v. Holder*, 143 F. Supp. 2d 189, 197 (W.D.N.Y. 2010) (three years).

CERTIFICATE OF SERVICE

I certify that on April 21, 2025, I uploaded the attached document to the Court's PACER system and mailed a copy to:

Victor Smirnov
A 
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Inmate Mail/Parcels
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Miami, FL 33194
PRO SE

By: /s/ H. Ron Davidson
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