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

CLIVE E. FOSTER,	:	
	:	
Petitioner,	:	
	:	**Case No. 4:25-CV-117-CDL-AGH**
v.	:	**28 U.S.C. § 2241**
	:	
WARDEN, STEWART DETENTION CENTER,[1]	:	
	:	
	:	
Respondent.	:	

MOTION TO DISMISS

On April 8, 2025, Petitioner filed a petition for a writ of habeas corpus ("Petition"). ECF No. 1. Petitioner appears to raise a Fourth Amendment claim concerning his arrest, a claim under the Speedy Trial Act, and a due process claim challenging his immigration detention. Pet. 6-7, ECF No. 1. For the reasons stated below, the Petition should be dismissed.

BACKGROUND

Petitioner is a native and citizen of Jamaica who is detained pre-final order of removal pursuant to 8 U.S.C. § 1226(a). Atkinson Decl. ¶¶ 4, 14 & Ex. A. On September 3, 1989, Petitioner was admitted into the United States pursuant to an H2A agricultural worker visa with authorization to remain in the United States through October 17, 1989. *Id.* ¶ 4 & Ex. A. In February 2000, Petitioner married a United States citizen who filed a Form I-130 Petition for Alien Relative on his behalf. *Id.* ¶ 4 & Ex. A. The I-130 was approved on July 24, 2001, and Petitioner adjusted

[1] Petitioner names the United States Department of Homeland Security as the respondent in the 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.

status to lawful conditional resident on November 21, 2001. *Id.* ¶ 4 & Ex. A. On April 15, 2005, Petitioner adjusted status to lawful permanent resident. *Id.* ¶ 4 & Ex. A.

On January 14, 2019, Petitioner was arrested by the Conyers, Georgia Police Department and charged with child molestation. *Id.* ¶ 5 & Ex. B. On or about November 12, 2021, Petitioner was convicted of the lesser-included offense of sexual battery against a child under 16 years of age in the Superior Court of Rockdale County, Georgia. Atkinson Decl. ¶ 5 & Ex. B. He was sentenced to, *inter alia*, five years on probation. *Id.* ¶ 5 & Exs. B, C.

On or about January 17, 2019, Petitioner submitted an Application for Naturalization to the United States Citizenship and Immigration Services ("USCIS"). *Id.* ¶ 6. On February 11, 2020, USCIS administratively closed the application because Petitioner failed to appear for his interview scheduled on February 10, 2020. *Id.* ¶ 6.

On December 11, 2024, Immigration and Customs Enforcement ("ICE"), Enforcement and Removal Operations ("ERO") encountered Petitioner at the Rockdale County Felony Probation Office, and he entered ICE/ERO custody. *Id.* ¶ 7 & Ex. A. On the same day, ICE/ERO served Petitioner with a Notice to Appear ("NTA") charging him with removability pursuant to Immigration and Nationality Act ("INA") § 237(a)(2)(E)(i), 8 U.S.C. § 1227(a)(2)(E)(i), based on his conviction of a crime of domestic violence, a crime of stalking, or a crime of child abuse, child neglect, or child abandonment. *Id.* ¶ 8 & Ex. D. On the same day, ICE/ERO also served Petitioner with an I-286 Notice of Custody Determination, finding that Petitioner should be detained. *Id.* ¶ 9 & Ex. E.

Petitioner's initial hearing before an immigration judge ("IJ") was set for January 9, 2025. *Id.* ¶ 10 & Ex. F. On January 2, 2025, the IJ *sua sponte* continued Petitioner's initial hearing to January 16, 2025. *Id.* ¶ 10 & Ex. F. On January 16, 2025, Petitioner appeared *pro se* before the IJ

and was given advisals. Atkinson Decl. ¶ 11. Petitioner requested a continuance to retain counsel, and the IJ granted the request and continued the case to February 12, 2025. *Id.* ¶ 11 & Ex. G. On February 3, 2025, ICE/ERO filed an I-261 Additional Charges of Inadmissibility/Deportability amending one factual allegation in Petitioner's NTA. *Id.* ¶ 12 & Ex. H. On February 12, 2025, Petitioner appeared *pro se* for his master hearing and again requested a continuance to retain counsel. *Id.* ¶ 13. The IJ granted Petitioner's request and continued the case to February 28, 2025. *Id.* ¶ 13 & Ex. I.

On February 28, 2025, Petitioner appeared *pro se* for his master hearing, admitted to the factual allegations in the NTA, and conceded the charge of removability. *Id.* ¶ 14. The IJ sustained the NTA and designated Jamaica as Petitioner's country of removal. Atkinson Decl. ¶ 14. The IJ set a master hearing for March 28, 2025 to allow Petitioner an opportunity to file an applications for relief from removal. *Id.* ¶ 14 & Ex. J. On March 28, 2025, Petitioner appeared *pro se* for his master hearing and submitted a Form EOIR-42A Application for Cancellation of Removal for Certain Permanent Residents. *Id.* ¶ 15. Based on Petitioner's responses to the IJ's questions, the IJ reset the case to May 15, 2025 for Petitioner to file all applications for relief from removal. *Id.* ¶ 15 & Ex. K.

To the extent Petitioner becomes subject to a final order of removal, there is a significant likelihood of removal in the reasonably foreseeable future. Jamaica is open for international travel and issuing travel documents to ICE/ERO to facilitate removals. *Id.* ¶ 18. ICE/ERO is currently removing non-citizens to Jamaica. *Id.*

LEGAL FRAMEWORK

Petitioner is detained pre-final order of removal pursuant to 8 U.S.C. § 1226(a). ICE/ERO has the discretion to detain certain non-citizens "pending a decision on whether the [non-citizen]

is to be removed from the United States." 8 U.S.C. § 1226(a); *see* 8 U.S.C. § 1226(c). Provided the non-citizen does not fall under the § 1226(c) mandatory detention provisions, ICE/ERO may either "continue to detain the arrested [non-citizen" or "release the [non-citizen] on" a bond or on conditional parole. 8 U.S.C. § 1226(a)(1)-(2); *see also Nielsen v. Preap*, 586 U.S. 392, 396 (2019).

ICE/ERO has promulgated regulations setting out the process by which a non-mandatorily detained non-citizen may obtain release. When a non-citizen is taken into ICE custody pursuant to 8 U.S.C. § 1226(a), an ICE/ERO official makes an initial custody determination, including consideration of a bond. *See* 8 C.F.R. §§ 236.1(c)(8), 236.1(d). An ICE/ERO officer may "in the officer's discretion, release [a non-citizen]" provided that the [non-citizen] demonstrates to the officer that "the [non-citizen] is likely to appear for any future proceeding." 8 C.F.R. § 236.1(c)(8). The ability to pay a cash bond is one factor among many that ICE officials may consider in making the initial custody determination, including bond amounts. 8 C.F.R. § 236.1. The regulations further provide ICE/ERO officials with discretion to set a bond amount and/or prescribe other conditions for release. 8 U.S.C. § 1226(a); *see also* 8 C.F.R. §§ 236.1(c)(8), (d)(1). ICE/ERO officials make these determinations based on the likelihood a non-citizen may abscond and whether the non-citizen poses a danger to property or persons. 8 C.F.R. § 236.1(c)(8).

In some circumstances, a non-citizen may seek review of ICE/ERO's initial custody determination before an IJ, commonly referred to as a "bond hearing." 8 U.S.C. § 1226; 8 C.F.R. § 236.1(d)(1). The non-citizen must submit the request for custody redetermination to the IJ either orally or in writing. 8 C.F.R. § 1003.19(b), (c)(1). Upon a non-citizen's "[a]pplication to an immigration judge" to "request amelioration of the conditions under which he or she may be released[,]" the IJ may decide "to detain the [non-citizen] in custody, release the [non-citizen], and determine the amount of bond, if any, under which the [non-citizen] may be released[.]" 8 C.F.R.

§ 236.1(d)(1). In a bond hearing, the burden is on the non-citizen to establish to the satisfaction of the IJ, that he or she is not "a threat to national security, a danger to the community at large, likely to abscond, or otherwise a poor bail risk." *In re Guerra*, 24 I. & N. Dec. 37, 40 (B.I.A. 2006). Non-citizens may present evidence in support of their request for a bond determination. *See* 8 C.F.R. § 1003.19(d) ("The determination of the Immigration Judge as to custody status or bond may be based upon any information that is available to the Immigration Judge or that is presented to him or her by the [non-citizen] or the Service.").

IJs have broad discretion in deciding whether to release a non-citizen on bond. *Guerra*, 24 I. & N. Dec. at 39. They can consider multiple discretionary factors, including any information that the IJ may deem to be relevant. *Id.* at 40. These nonexclusive factors include: (1) whether the [non-citizen] has a fixed address in the United States; (2) the [non-citizen's] length of residence in the United States; (3) the [non-citizen's] family ties in the United States, and whether they may entitle the [non-citizen] to reside permanently in the United States in the future; (4) the [non-citizen's] employment history; (5) the [non-citizen's] record of appearance in court; (6) the [non-citizen's] criminal record, including the extensiveness of criminal activity, the recency of such activity, and the seriousness of the offenses; (7) the [non-citizen's] history of immigration violations; (8) any attempts by the [non-citizen] to flee prosecution or otherwise escape authorities; and (9) the [non-citizen's] manner of entry to the United States. *Id.* In considering these or other relevant factors, IJs "may choose to give greater weight to one factor over others, as long as the decision is reasonable." *Id.* Further, the INA in no way "limit[s] the discretionary factors that may be considered" in bond determinations. *Id.*; *see also* 8 C.F.R. § 1003.19(d) ("The determination of the Immigration Judge as to custody status or bond may be based upon any information that is

available to the Immigration Judge or that is presented to him or her by the [non-citizen] or [ICE].").

After an initial bond hearing, a non-citizen may request another bond determination by showing that his or her "circumstances have materially changed since the prior bond" hearing. *See* 8 C.F.R. § 1003.19(e). Non-citizens can then seek administrative review of the IJ's bond decision from the BIA by filing an appeal of the IJ's order within 30 days. *See* 8 C.F.R. § 236.1(d)(3) ("An appeal relating to bond and custody determinations may be filed to the Board of Immigration Appeals[.]"); 8 C.F.R. §§ 1003.1(b)(7), 1003.19(f), 1003.38.

The Secretary's "discretionary judgment" regarding "the detention or release of any [non-citizen] or the grant, revocation, or denial of bond or parole[]" is not subject to judicial review. 8 U.S.C. § 1226(e). The bond decision of the Secretary does not statutorily have to be revisited at any point in the removal process and the length of detention does not have to be considered in the bond decision. *Jennings v. Rodriguez*, 583 U.S. 281, 306 (2018).

ARGUMENT

Petitioner argues that his arrest was unlawful, that he has a right to a "speedy trial," that his confinement is unlawful, and that his continued detention violates his due process rights. Pet. 6. The Court lacks jurisdiction over Petitioner's challenges to his arrest and detention, and his apparent Speedy Trial Act claim lacks merit. Accordingly, the Petition should be dismissed.

I. The Court lacks jurisdiction over Petitioner's claim challenging his arrest.

Petitioner states that he was "unduly arrested without a warrant and due process." Pet. 6. Although not specifically referenced, this claim appears to be a claim under the Fourth Amendment. This claim should be denied because Fourth Amendment claims are not cognizable in habeas, the Court lacks jurisdiction over the claim, and the Eleventh Circuit has declined to

recognize a Fourth Amendment cause of action in this context under *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971).

First, Petitioner's Fourth Amendment claim is not cognizable in habeas because it attempts to raise a civil claim concerning the nature of his arrest—not a challenge to his ongoing detention. At most, this claim would amount to a *Bivens* claim against the officials who arrested Petitioner. *See Alvarez v. U.S. Immigr. & Customs Enf't*, 818 F.3d 1194, 1205-1213 (11th Cir. 2016). Petitioner, however, may not raise a habeas claims and a *Bivens* claim in the same action. *See Corbin v. Dep't of Veteran Affairs*, No. 2:15-cv-1174, 2015 WL 10384134, at *2 (N.D. Ala. Dec. 11, 2015). "Although the scope of the writ of habeas corpus has been extended beyond that which the most literal reading of the statute might require, the Court has never considered it a generally available federal remedy for every violation of federal rights." *Lehman v. Lycoming Cty. Children's Servs. Agency*, 458 U.S. 502, 510, (1982). "[W]hatever the expanded scope of our jurisdiction may be, the remedy that habeas corpus provides remains tied to some form of relief from the petitioner's custody." *Arnaiz v. Federal Satellite Low*, 594 F.3d 1326, 1329 (11th Cir. 2010) (per curiam). Given that Petitioner's Fourth Amendment claim challenges only the nature of his arrest and not his ongoing detention, the claim is not cognizable in habeas and should be denied.

Second, even if Petitioner's claim is generally cognizable in habeas, the Court lacks subject-matter jurisdiction over the claim. 8 U.S.C. § 1252(g) is a jurisdiction-stripping provision in the INA, which provides that

> [e]xcept as provided in this section and notwithstanding any other provision of law (statutory or nonstatutory), . . . no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter.

8 U.S.C. § 1252(g). "When asking if a claim is barred by § 1252(g), courts must focus on the action being challenged." *Canal A Media Holding, LLC v. U.S. Citizenship & Imm. Servs.*, 964 F.3d 1250, 1257-58 (11th Cir. 2020). Section 1252(g) applies "to three discrete actions that the Attorney General may take: [the] 'decision or action' to '*commence* proceedings, *adjudicate* cases, or *execute* removal orders.'" *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 482 (1999) (emphasis in original).

The Eleventh Circuit's opinion in *Gupta v. McGahey*, 709 F.3d 1062 (11th Cir. 2013), makes clear that the Court lacks jurisdiction over Petitioner's claim concerning the circumstances of his arrest. There, a non-citizen raised Fourth Amendment claims under *Bivens*, alleging, *inter alia*, that ICE/ERO officers unlawfully arrested him. *Gupta*, 709 F.3d at 1064. The district court dismissed the non-citizen's complaint, finding that 8 U.S.C. § 1252(g) deprived it of subject-matter jurisdiction. *Id.* On appeal, the Eleventh Circuit affirmed, finding that "securing a[] [non-citizen] while awaiting a removal determination constitutes an action taken to commence proceedings" within the purview of section 1252(g). *Id.* at 1065; *see also id.* (holding that the non-citizen's "claims that [the ICE/ERO agents] illegally procured an arrest warrant, that the agents illegally arrested him, and that the agents illegally detained him each arise from an action taken to commence removal proceedings.").

Here, like the non-citizen in *Gupta*, Petitioner challenges ICE/ERO's actions in arresting him, alleging that the arrest was unlawful. Pet. 6. Petitioner's arrest "constitutes an action taken to commence proceedings" within the meaning of section 1252(g). *Gupta*, 709 F.3d at 1065. As this Court has previously held, district courts lack jurisdiction over such claims. *See Cho v. United States*, No. 5:13-cv-153-MTT, 2016 WL 1611476, at *7 (M.D. Ga. Apr. 21, 2016) ("Plaintiff's claims that she was falsely arrested when she was transferred into ICE custody . . . 'challenge[]

the actions the agents took to commence removal proceedings—exactly the claims that § 1252(g) bars from the subject-matter jurisdiction of federal courts.'" (quoting *Gupta*, 709 F.3d at 1065 (alterations in original))). Petitioner's Fourth Amendment claim should be denied.

Third, even if Petitioner's Fourth Amendment claim is cognizable in habeas and the Court has jurisdiction, the claim lacks merit. Any Fourth Amendment claim against the immigration officials who arrested Petitioner may only be raised under *Bivens*. However, the Eleventh Circuit has declined to recognize a *Bivens* cause of action arising from a non-citizen's arrest and detention by immigration officials. *Alvarez*, 818 F.3d at 1205-1213. Accordingly, even ignoring that Petitioner's Fourth Amendment claim is not cognizable in habeas and that the Court lacks jurisdiction over the claim, Petitioner's claim otherwise lacks merit.

II. The Speedy Trial Act does not apply to Petitioner's immigration detention.

Petitioner claims that he must immediately be released from custody because his continued detention violates the Speedy Trial Act. Pet. 6. However, because detention pending immigration proceedings is "civil in nature," it "do[es] not trigger the Speedy Trial Act." *United States v. Noel*, 231 F.3d 833, 836 (11th Cir. 2000). In *Noel*, the Eleventh Circuit joined all other circuits to address this issue—"holding that the Speedy Trial Act does not apply to routine [immigration] detentions incident to deportation."[2] Simply put, the Speedy Trial Act is inapplicable to Petitioner's current detention and his application for habeas relief should be denied.

[2] There is a very limited exception to this rule. The Speedy Trial Act may trigger "when detentions are used by the government, not to effectuate deportation, but rather as 'mere ruses to detain a defendant for later criminal prosecution.'" *Noel*, 231 F.3d at 836 (quoting *United States v. Cepeda-Luna*, 989 F.2d 353, 357 (9th Cir. 1993)). This exception is inapplicable to Petitioner as he is currently detained for the purpose of removal.

III. The Court lacks jurisdiction to review Petitioner's discretionary detention.

As stated above, Petitioner is detained pre-final order of removal pursuant to 8 U.S.C. § 1226(a). Whether to detain a non-citizen pre-final order of removal is entrusted to the discretion of the Attorney General. 8 U.S.C. § 1226(a). The Court lacks jurisdiction to review the Petitioner's custody determination. 8 U.S.C. § 1226(e) provides in full

> The Attorney General's discretionary judgment regarding the application of this section shall not be subject to review. No court may set aside any action or decision by the Attorney General under this section regarding the detention or release of any alien or the grant, revocation, or denial of bond or parole.

"[Section] 1226(e) precludes an alien from challenging a discretionary judgment by the Attorney General or a decision that the Attorney General has made regarding his detention or release." *Jennings*, 583 U.S. at 295 (quoting *Demore v. Kim*, 538 U.S. 510, 516 (2003)) (internal alterations and quotations omitted). Rather, section 1226(e) permits only "challenges to the statutory framework." *Id.* (quoting *Demore*, 538 U.S. at 517) (internal alterations and quotations omitted).

As explained below, Petitioner has not sought a bond, so he can only be challenging the initial decision to detain him during the immigration proceedings. Thus, his request for release in the Petition constitutes a challenge to an "action or decision by the Attorney General under this section regarding the detention or release of any alien or the grant, revocation, or denial of bond or parole." 8 U.S.C. § 1226(e). Courts lack jurisdiction over such challenges. *Jennings*, 583 U.S. at 295.

IV. Petitioner has failed to exhaust administrative remedies to the extent he claims entitlement to a bond hearing.

To the extent Petitioner seeks release on bond or a bond hearing, the Petition should be denied because Petitioner has failed to exhaust available administrative remedies before seeking habeas relief in the district court.

"[T]he general rule [is] that parties exhaust prescribed administrative remedies before seeking relief from the federal courts." *McCarthy v. Madigan*, 503 U.S. 140, 144-45 (1992), *superseded by statute on other grounds as recognized in Woodford v. Ngo*, 548 U.S. 81, 88-89 (2006). Although it is not jurisdictional in nature, "[t]he exhaustion requirement is still a requirement" for petitioners seeking relief under 28 U.S.C. § 2241. *Santiago-Lugo v. Warden*, 785 F.3d 467, 474-75 (11th Cir. 2015). "[C]ases . . . are ripe for dismissal unless administrative remedies [have] been exhausted before the cases [are] brought to the district court." *Perez-Perez v. Hanberry*, 781 F.2d 1477, 1481 (11th Cir. 1986) (citing *Garcia-Mir v. Smith*, 766 F.2d 1478, 1483 n.6, 1486 n.8, 1489, 1492 (11th Cir. 1985)).

Where non-citizens detained pre-final order of removal under section 1226(a) have filed habeas petitions seeking release from custody, district courts in the Eleventh Circuit—including this Court—have dismissed those petitions where the non-citizens failed to exhaust available administrative remedies for obtaining bond before seeking habeas relief. *See M.A.M.M. v. Warden, Irwin Cty. Det. Ctr.*, No. 7:21-cv-47-WLS-MSH, 2022 WL 452452, at *3 (M.D. Ga. Feb. 14, 2022), *recommendation adopted*, 2022 WL 794716 (M.D. Ga. Mar. 14, 2022); *Douglas v. Gonzalez*, No. 8:06-cv-890, 2006 WL 5159196, at *2 (M.D. Fla. June 12, 2006); *Sequeira-Blamaceda v. Reno*, 79 F. Supp. 2d 1378, 1381-82 (N.D. Ga. 2000).

As noted above, as a non-citizen detained pre-final order of removal under § 1226(a), the applicable regulations provide Petitioner multiple opportunities to seek bond at the administrative level. After an immigration officer initially denies a non-citizen bond, 8 C.F.R. § 236.1(c)(8), (d), Petitioner may request a bond hearing from an IJ. 8 C.F.R. § 236.1(d)(1). In order to do so, the non-citizen must submit a request to the IJ either orally or in writing. 8 C.F.R. § 1003.19(b). If the IJ denies bond, he must appeal this denial to the BIA. 8 C.F.R. § 236.1(d)(3). If the BIA affirms

the IJ's initial denial of bond, Petitioner must then seek a custody redetermination—*i.e.*, a second bond decision—from the IJ by attempting to show that his "circumstances have changed since the prior bond redetermination." 8 C.F.R. § 1003.19(c).

Here, Petitioner failed to exhaust administrative remedies by failing to seek a bond before the IJ. ICE/ERO made its discretionary initial custody determination on December 11, 2024—the same day ICE/ERO encountered Petitioner. Atkinson Decl. ¶ 9 & Ex. E. But since that time, Petitioner has not requested a custody redetermination or bond hearing from the IJ nor appealed any adverse ruling to the BIA. *Id.* ¶ 17. Because he has not pursued an available administrative remedy to possibly secure release on bond, he has deprived the agency of the opportunity to review his claim under the administrative bond scheme set forth by Congress and the applicable regulations. "Preventing petitioners from doing that is what the exhaustion requirement is all about." *Sundar v. I.N.S.*, 328 F.3d 1320, 1325 (11th Cir. 2003) (citations omitted). Therefore, the Court should dismiss Petitioner's habeas petition to the extent he requests release from custody. *See Perez-Perez*, 781 F.2d at 1481; *M.A.M.M.*, 2022 WL 452452, at *3, *Douglas*, 2006 WL 5159196, at *2; *Sequeira-Blamaceda*, 79 F. Supp. 2d at 1381-82.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that the Petition be dismissed.

Respectfully submitted this 7th day of May, 2025.

C. SHANELLE BOOKER
ACTING UNITED STATES ATTORNEY

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CERTIFICATE OF SERVICE

This is to certify that I have this date filed the 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:

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

This 7th day of May, 2025.

BY: *s/ Michael P. Morrill*
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