United States District Court
Western District of Texas
San Antonio Division

Alain Marrero Castano,
Petitioner,

v.

Kristi Noem, Secretary of United States Department of Homeland Security et. al.,
Respondents.

No. 5:25-cv-00904-FB-RBF

Respondents' Response in Opposition to Petitioner's Petition for Writ of Habeas Corpus

Petitioner, through counsel, filed a habeas petition with this Court on or about July 30, 2025. ECF No. 1. Any allegations that are not specifically admitted herein are denied. Petitioner is not entitled to the relief he seeks, including attorney's fees under the Equal Access to Justice Act ("EAJA")[1], and this Court should deny this habeas petition without the need for an evidentiary hearing. The only impediment to immediate removal in this case is this Court's order granting a stay. ECF Nos. 11, 16. Petitioner is a convicted aggravated felon, 8 U.S.C. § 1101(a)(43)(D), who concedes that he has (1) a final order of removal from 2023; (2) a conviction for which he served twenty-five years of incarceration; and (3) notice of ICE's intent to seek third country removal options. ECF No. 10 at 2–3; *see also* Ex. A (A-File Excerpts) at 1, 21–22, 26–29. Nonetheless, Petitioner claims that his detention under 8 U.S.C. § 1231(a) is contrary to statute and to the Constitution, because he alleges that his removal is not reasonably foreseeable. *Id.* at 5–7. Removal is reasonably foreseeable and imminent. Federal Respondents aver that Mexico has accepted third country removal of Petitioner, and but for this Court's stay of removal, ICE would have already executed his removal order.

[1] *Barco v. Witte*, 65 F.4th 782 (5th Cir. 2023).

As a threshold matter, this Court lacks jurisdiction to grant the relief that Petitioner seeks, which is to enjoin the execution of his removal order unless he is provided a "constitutionally sound" hearing on his fear claims. *See* ECF No. 10 at 4–8; 8 U.S.C. § 1252(g); *see also Westley v. Harper*, No. 25–229, 2025 WL 592788 at *4–6 (E.D. La. Feb. 24, 2025) (denying preliminary injunction and dismissing case for lack of jurisdiction where district court lacked jurisdiction to stay removal). On the merits, 8 U.S.C. § 1231(a) authorizes Petitioner's post-removal-order detention while ICE prepares to execute his final order of removal and Petitioner has not shown that he is entitled to the type of hearing he is seeking prior to the execution of his removal order to a third country. This TRO should be dissolved, and the habeas petition should be denied.

I. Relevant Background

Petitioner is a native and citizen of Cuba. ECF No. 1 at ¶ 1. He is currently detained in ICE custody with a final order of removal issued by an immigration judge in 2023. *Id.* ¶ 5–6. Although Petitioner was once a lawful permanent resident of the United States, he was placed into removal proceedings after serving more than twenty-five years of imprisonment after being convicted of manslaughter in 2002. *Id.* ¶ 4; *See* Ex. A (A-File Excerpts) at 26–29. Federal Respondents properly revoked Petitioner's Order of Supervision on or about January 26, 2025, and provided him with written notice of the same. *See* Ex. A (A-File Excerpts) at 11–12. Petitioner has been in ICE custody since January 26, 2025, and this Court ordered a stay of removal on or about August 18, 2025, which remains in effect. ECF No. 1 at ¶ 1; ECF Nos. 11, 16.

There is no indication that Petitioner's aggravated felony conviction or his final removal order have been vacated. ICE avers that ICE served Petitioner with notice of third country removal to Rwanda, and Petitioner lodged a written claim of fear of persecution in Rwanda. *See, e.g.,* Ex. A (A-File Excerpts) at 1. ICE did not refer him for further screening, opting instead to abandon

Rwanda as a viable third country removal option.

Subsequently, ICE sought third country removal to Mexico, and Mexico accepted Petitioner. On October 2, 2025, ICE notified the undersigned AUSA that this removal to Mexico had been approved and could be executed within 24 hours, but for the stay of removal. The parties, through counsel, conferred regarding the possibility of dissolving the TRO to allow ICE to execute the order to Mexico, but Petitioner ultimately declined to withdraw his habeas petition, leaving the stay intact. As such, ICE deplaned Petitioner from the removal flight to comply with the Court's stay order. As of Tuesday, October 28, ICE avers that it has no record of any verbal or written fear claim regarding Mexico. Without such a claim, ICE will not refer Petitioner for further screening.

II. Argument

A. This Honorable Court Lacks Jurisdiction to Review Petitioner's Claims because they arise from a Decision and Action by the Attorney General to Execute Petitioner's Final Order of Removal.

The REAL ID Act of 2005 divests district courts of jurisdiction over claims arising from a decision or action by the Attorney General to execute a removal order. 8 U.S.C. § 1252(g) (stating, in part, that "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"). As the Supreme Court has explained, this jurisdiction-stripping provision 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. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 482 (1999) (emphasis in original).

Here, Petitioner is subject to a final order of removal, and he essentially seeks this Court's review of a decision and action by the Attorney General to execute that order. Evaluating the merits

of the Petition would require this Court to review "claim[s] . . . arising from the decision or action by the Attorney General to . . . execute [a] removal orders," 8 U.S.C. § 1252(g). *See also Duron v. Johnson*, 898 F.3d 644, 647 (5th Cir. 2018). Under both statutory text and judicial precedent, § 1252(g) bars judicial review of ICE's decisions in this context. *See Reno*, 525 U.S. at 482; *Velasquez v. Nielsen*, No. 18–40140, 2018 WL 5603610, at *4 (5th Cir. Oct. 29, 2018); *see also, generally, Idokogi v. Ashcroft*, 66 F. App'x 526 (5th Cir. 2003) (per curium); *Fabuluje v. Immigration & Naturalization Agency*, 244 F.3d 133 (5th Cir. 2000) (per curium); *Hidalgo-Mejia v. Pitts*, 343 F.Supp.3d 667, 673 (W.D. Tex. 2018). Because Petitioner's claims arise from a decision and action by the Attorney General to execute a removal order, this Court lacks jurisdiction to review the Petition.

B. Petitioner's Post-Order Detention Is Authorized under 8 U.S.C. § 1231.

As an alien with a final order of removal, Petitioner is detained under 8 U.S.C. § 1231(a)(6). ICE's detention authority under § 1231 is well-settled. *Zadvydas v. Davis*, 533 U.S. 678, 701 (2001). There is a significant likelihood of removal in the reasonably foreseeable future. 8 C.F.R. §§ 241.13(b)(2)(ii); 241.13(f). The only reason for Petitioner's continued detention at this point is this Court's stay of removal.

Petitioner alleges that his arrest and detention violate his liberty and Fifth Amendment rights under the Constitution. Respondents construe this statement as a substantive due process claim. Respondents would have already removed Petitioner to Mexico but for this Court's stay order. Under § 1231, the removal period can be extended in a least three circumstances. *See Glushchenko v. U.S. Dep't of Homeland Sec.*, 566 F.Supp.3d 693, 703 (W.D. Tex. 2021). Extension is warranted, for example, if the alien fails to comply with removal efforts or presents a flight risk or other risk to the community. *Id.*; *see also* 8 U.S.C. § 1231(a)(1)(C); (a)(6). Where the

alien challenges the discretionary basis for detention authority, that decision is protected from judicial review. 8 U.S.C. § 1252(a)(2)(B). An alien may be held in confinement until there is "no significant likelihood of removal in a reasonably foreseeable future." *Zadvydas*, at 533 U.S. at 680.

Although Petitioner's removal order became final in 2002, the 90-day removal period may be extended, for example, where ICE determines the alien is unlikely to comply with the removal order. *See Johnson v. Guzman-Chavez*, 594 U.S. 523, 528–29, 544 (2021); *see also* 8 C.F.R. § 1231(a)(6); 8 C.F.R. § 241.4. Continued detention under this provision is the "post-removal-period." *Guzman-Chavez*, 594 U.S. at 529. The statute does not specify a time limit on this post-removal period, but the Supreme Court has read an implicit limitation into the statute and held that the alien may be detained only for a period reasonably necessary to remove the alien from the United States. *Id.*; 8 C.F.R. § 241.13. Six months is the presumptively reasonable timeframe in the post-removal context. *Zadvydas*, 533 U.S. at 701. Although the Court recognized this presumptive period, *Zadvydas* "creates no specific limits on detention . . . as 'an alien may be held in confinement until it has been determined that there is no significant likelihood of removal in the reasonably foreseeable future.'" *Andrade v. Gonzales*, 459 F.3d 538, 543 (5th Cir. 2006) (quoting *Zadvydas*, 533 U.S. at 701).

To state a claim for relief under *Zadvydas*, Petitioner must show that: (1) he is in DHS custody; (2) he has a final order of removal; (3) he has been detained in *post*-removal-order detention for six months or longer; and (4) there is no significant likelihood of removal in the reasonably foreseeable future. *Zadvydas*, 533 U.S. at 700. Petitioner does not and cannot make this showing, because ICE has offered, and Petitioner has declined, imminent third country removal to Mexico.

In *Zadvydas*, the U.S. Supreme Court held that § 1231(a)(6) "read in light of the

Constitution's demands, limits an alien's post-removal-period detention to a period reasonably necessary to bring about that alien's removal from the United States" but "does not permit indefinite detention." 533 U.S. at 689. "[O]nce removal is no longer reasonably foreseeable, continued detention is no longer authorized by the statute." *Id.* at 699. The Court designated six months as a presumptively reasonable period of post-order detention but made clear that the presumption "does not mean that every alien not removed must be released after six months." *Id.* at 701. Once the alien establishes that he has been in post-order custody for more than six months at the time the habeas petition is filed, the alien must provide a "good reason" to believe that there is no significant likelihood of removal in the reasonably foreseeable future. *See Andrade*, 459 F.3d at 543–44; *Gonzalez v. Gills,* No. 20–60547, 2022 WL 1056099 at *1 (5th Cir. Apr. 8, 2022). Unless the alien establishes the requisite "good reason," the burden will not shift to the government to prove otherwise. *Id.*

ICE denies that there is no likelihood of removal in the reasonably foreseeable future. *Id.* § 1231(a)(6). The "reasonably foreseeable future" is not a static concept; it is fluid and country-specific, depending in large part on country conditions and diplomatic relations. *Ali v. Johnson,* No. 3:21– CV–00050-M, 2021 WL 4897659 at *3 (N.D. Tex. Sept. 24, 2021). Additionally, a lack of visible progress in the removal process does not satisfy the petitioner's burden of showing that there is no significant likelihood of removal. *Id.* at *2 (collecting cases); *see also Idowu v. Ridge*, No. 3:03-CV-1293-R, 2003 WL 21805198, at *4 (N.D. Tex. Aug. 4, 2003). Conclusory allegations are also insufficient to meet the alien's burden of proof. *Nagib v. Gonzales*, No. 3:06-CV-0294-G, 2006 WL 1499682, at *3 (N.D. Tex. May 31, 2006) (citing *Gonzalez v. Bureau of Immigration and Customs Enforcement*, No. 1:03-CV-178-C, 2004 WL 839654 (N.D. Tex. Apr. 20, 2004)). One court explained:

> To carry his burden, [the] petitioner must present something beyond speculation and conjecture. To shift the burden to the government, [the] petitioner must demonstrate that "the circumstances of his status" or the existence of "particular individual barriers to his repatriation" to his country of origin are such that there is no significant likelihood of removal in the reasonably foreseeable future.

Idowu, 2003 WL 21805198, at *4 (citation omitted). Petitioner's substantive due process claim fails here as a matter of law.

C. No Procedural Due Process Violation

To establish a procedural due process violation, Petitioner must show that he was deprived of liberty without adequate safeguards. *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976); *Daniels v. Williams*, 474 U.S. 327, 331 (1986). While an agency is required to follow its own procedural regulations, the Fifth Circuit finds no procedural due process violation where the constitutional minima of due process is otherwise met. *Murphy v. Collins*, 26 F.3d 541, 543 (5th Cir. 1994). In any event, a remedy for a procedural due process violation is substitute process. *Mohammad v. Lynch*, No. EP-16-CV-28-PRM, 2016 WL 8674354, at *6 n.6 (W.D. Tex. May 24, 2016) (finding no merit to petitioner's procedural due process claim where the evidence demonstrated that the review had already occurred, thereby redressing any delay in the provision of the 90-day and 180-day custody reviews). Even in the criminal context, failure to comply with statutory or regulatory time limits does not mandate release of a person who should otherwise be detained. *U.S. v. Montalvo-Murillo*, 495 U.S. 711, 722 (1990).

ICE has provided Petitioner with sufficient procedural due process in the revocation of his order of supervision, in notice of third country removals, and in notice of his continued detention. *See* Ex. A (A-File Excerpts) at 1–12. Additionally, because Petitioner has failed the *Zadvydas* test, he has also failed to prove a due process violation. *See Linares v. Collins*, No. 1:25–CV–00584–RP, 2025 WL 2726549 at *3–*6 (W.D. Tex. Aug. 12, 2025), *report and recommendation adopted,*

Linares v. Collins, 2025 WL 2726067 (Sept. 24, 2025) (collecting cases and analyzing *Castaneda v. Perry*, 95 F.4th 750, 760 (4th Cir. 2024) (citing *Zadvydas v. Davis*, 533 U.S. 678 (2001))). To state a due process claim under *Zadvydas*, therefore, Petitioner must first show that, after six months of detention, "his removal is not likely to occur in the reasonably foreseeable future." *See Castaneda*, 95 F.4th at 756. The Fourth Circuit interpreted *Zadvydas* as "largely ... foreclos[ing] due process challenges to § 1231 detention apart from the framework [*Zadvydas*] established." *Castaneda*, 95 F.4th at 760. In other words, the *Zadvydas* standard is not only the standard by which courts determine whether continued detention under § 1231 violates *substantive* due process, but it is also the standard by which the courts should determine a *procedural* due process violation. *Id.*

The Sixth Circuit came to the same conclusion. *See Martinez v. Larose*, 968 F.3d 555, 565-66 (6th Cir. 2020) (stating that since the Supreme Court had "had occasion to consider the constitutional implications of indefinite detention under § 1231(a)" in *Zadvydas*, and had there "offered a standard through which to judge indefinite-detention cases," the Sixth Circuit saw "no cause to question" the *Zadvydas* decision by applying a different framework). In the words of the Fourth Circuit, courts have held that *Zadvydas* "*is* due process" when it comes to § 1231 detainees. *Castaneda*, 95 F.4th at 760 (emphasis original).

The Fifth Circuit has not adopted any clear standard, though district courts in the Fifth Circuit have applied *Zadvydas* to procedural due-process challenges. *See Hernandez-Esquivel*, 2018 WL 3097029, at *8 (stating that to the extent petitioner sought periodic bond hearings in federal court, "*Zadvydas* addressed the extent to which due process demands relief in the § 1231(a) setting"); *M.P.*, 2023 WL 5521155, at *5-6 (finding petitioner was not in custody in violation of his procedural due process rights where petitioner received requisite custody review panels, where

petitioner's detention was not "indefinite" or "potentially permanent," and, "to the extent the *Mathews* factors" applied, the government's interests outweighed petitioner's); *cf. Roman v. Garcia*, No. 6:24-cv-01006, 2025 WL 1441101, at *3 (W.D. La. Jan. 29, 2025) (finding that petitioner's detention did not violate due process because the government could detain her beyond the 90-day removal period pursuant to § 1231(a)(6), and § 1231(a)(6) does not require a bond hearing). Additionally, while the Fifth Circuit has not analyzed a procedural due process challenge under § 1231(a)(6) under the same framework as the Fourth Circuit, it has applied *Zadvydas* to constitutional claims by detainees held under § 1231. *See Andrade v. Gonzales*, 459 F.3d 538, 543-44 (5th Cir. 2006) (denying petitioner's due process claim on the grounds that he could not show that there was "no significant likelihood of removal in the reasonably foreseeable future").

This Court should reach the same conclusion: that *Zadvydas* "largely…foreclose[d] due process challenges to § 1231 detention apart from the framework it established." *Castaneda,* 94 F.4th at 790. This standard is consistent with the practice of other district courts in the Fifth Circuit. *See Hernandez-Esquivel,* 2018 WL 3097029, at *8; *M.P.*, 2023 WL 552155, at *5-6. As the court in *Hernandez-Esquivel* stated, due process demands relief in the § 1231(a) setting "only once continued detention is unreasonable." 2018 WL 3097029, at *8. In the instant case, removal to Mexico is imminent once this Court dissolves the stay. Any procedural due process claim that Petitioner might have had regarding the sufficiency of process in revoking his supervised release, notice of third country removals, or notice of continued detention, has been cured by substitute process.

Conclusion

For these reasons, Petitioner's claim fails to meet the *Zadvydas* standard, both substantively and procedurally. Petitioner is lawfully detained by statute, and his detention comports with the

limited due process he is owed as a convicted aggravated felon with a final order of removal. This Court should deny the Petition.

Respectfully submitted,

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