UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
NORTHERN DIVISION
COVINGTON
CIVIL ACTION NO. 2:25-CV-00145-DCR

MOR MATY NDIAYE PETITIONER

V. **HABEAS RESPONSE AND MOTION TO STAY**

SAM OLSON, ET AL., RESPONDENT

*** *** *** ***

Petitioner Mor Maty Ndiaye admits in his habeas petition that he is a Senegalese national, who is subject to a final order of removal. (*See* R. 1, ¶ 2.) Ndiaye's petition also indicates that he understands the Department of Homeland Security (DHS) is detaining him "while it seeks to remove him to an alternate country" (*id.* at ¶ 9) as an Immigration Judge has withheld removal to Senegal, his home country. (*See id.* at ¶ 2.) However, Ndiaye claims that he is entitled to habeas relief because he has been detained for more than six months after the order withholding his removal to Senegal became final. (*See id.* at ¶ 5.) In response to his Petition, Respondents Sam Olson, Kristi Noem, Todd Lyons, and Pamela Bondi, in their official capacities, hereby submit the attached Declaration of Deportation Officer Christopher Wiet, which states that DHS continues to investigate third country removal options for Ndiaye. (*See* Exhibit A – Wiet Declaration.) Because Ndiaye has not shown there is good reason to believe that his deportation is significantly unlikely in the reasonably foreseeable future, his detention claims should be dismissed. As for Ndiaye's due process claims related to his potential removal to a third country, those claims should be dismissed without prejudice or stayed pending the outcome of *D.V.D. v. Department of Homeland Security*, a class action which raises identical claims.

FACTUAL BACKGROUND

According to Ndiaye, he entered the United States from Senegal on a B2 visitor visa at age seven with his mother and became a lawful permanent resident at age eighteen. (*See* R. 1, ⁋ 24, 25; R. 1-1, ⁋ 3. *See also* Ex. A, ⁋ 7, Att. 1 – Notice to Appear.) In 2022, at the age of thirty, Ndiaye says he was passing through Kentucky when he experienced a mental health crisis at a gas station in Georgetown, which led to his eventual arrest and indictment for five felonies, including attempted burglary second degree, assault under extreme emotional disturbance, wanton endangerment first degree, attempted theft by unlawful taking, and assault third degree on a police officer. (*See* R. 1, ⁋ 30; R. 1-4, ⁋ 33. *See also* Ex. 1-6, Page ID #62; Ex. A, Att. 1.) Ndiaye admits that he eventually pled guilty to all five felonies plus assault third degree on a correction officer (*see* R. 1, ⁋⁋ 27, 30; R. 1-6, Page ID #62; *see also* Ex. A, Att. 1), but by his telling, he did nothing wrong and to the extent that he did, his actions were the result of a serious mental health episode. (*See* R. 1, ⁋ 27; R. 1-1, ⁋ 13; R. 1-4, ⁋⁋ 33—34.) According to the Uniform Citation and the Indictment, during the episode at the gas station, Ndiaye stole someone's cell phone from their vehicle, entered a stranger's van with a woman and infant in the backseat and started the vehicle, then ran over a gas station employee's foot while attempting to flee the scene in his own vehicle, later attempted to enter the vehicle of another stranger and the stranger's five-year old daughter while fleeing on foot, and then broke a window of a residence, entered the home, and confronted the homeowner while wielding a nail file as a weapon. (*See* Ex. 2 – Court Records.) He was also accused of physically fighting with a police officer after he was apprehended and taken into custody. (*See id.*) After his guilty plea, Ndiaye was taken into ICE custody, and on February 14, 2025, an immigration judge found Ndiaye removable based on Sections 237(a)(2)(A)(iii) (allowing deportation of aliens convicted of an aggravated felony at any time after admission) and

237(a)(2)(A)(ii) (allowing deportation of aliens convicted of two or more crimes involving moral turpitude not arising from a single scheme of criminal misconduct). (*See* R. 1-3. *See also* Ex. A, Att. 2.) *See also* 8 U.S.C. §§ 1227(a)(2)(A)(ii), (iii). In the same Order, the judge withheld removal to Senegal under the Convention Against Torture because of Ndiaye's "fear of return based on his mental health and the risk that he would be institutionalized or tortured if removed to Senegal." (R. 1, ¶¶ 32, 34. *See also id.* Ex. A, Att. 2.)

Ndiaye was held at Boone County Detention Facility in Burlington, Kentucky from September 1, 2024, to October 2, 2025. (*See* Ex. A, ¶ 6.) Ndiaye is currently detained at Miami Correctional Center in Bunker Hill, Indiana. (*See id.*) According to ICE's records, ICE's Enforcement and Removal Operations (ERO) Office in Chicago has submitted Requests for Acceptance of Alien (Form I-241) to Mexico, El Salvador, and Guatemala, but has not been able to successfully place Ndiaye in any of those countries. (*See* R. 1-7, Page ID #69—70. *See also* Ex. A, ¶ 9.) However, ICE represents that it is still actively investigating third country removal options for Ndiaye and continues to detain him because he poses a "threat to public safety." (*See* Ex. A, ¶¶ 11—12.)

ARGUMENT

I. ICE'S CONTINUED DETENTION OF NDIAYE

First, Ndiaye contends that he is entitled to habeas relief because he has been detained beyond the presumptive six-month period set forth in *Zadvydas v. Davis*, 533 U.S. 678 (2001). (*See* R. 1, ¶¶ 5, 41, 50.) ICE's detention authority stems from 8 U.S.C. § 1231 which provides for the detention and removal of aliens with final orders of removal. Section 1231(a)(1)(A) directs immigration authorities to remove an individual with a final order of removal within a period of ninety days, which is known as the "removal period." During the removal period, ICE must detain

the alien. *See* 8 U.S.C. § 1231(a)(2) ("shall detain"). If the removal period expires, ICE can either release an individual pursuant to an Order of Supervision as directed by § 1231(a)(3) or may continue detention under § 1231(a)(6). For aliens removable under §§ 1227(a)(1)(C), 1227(a)(2), or § 1227(a)(4), section 1231(a)(6) plainly allows ICE to continue to detain them beyond the removal period if the Attorney General determines they are "a risk to the community or unlikely to comply with the order of removal[.]" According to Ndiaye's Order of Removal, he is removable under section 1227(a)(2). (*See* Ex. A, Att. 2.) That brings us to the question of whether the Attorney General has determined that Ndiaye is a danger to the community or a flight risk. Immigration and Naturalization Service (INS) regulations promulgated to enforce § 1231(a)(6) delegate the Attorney General's authority to make such a determination to certain INS officials, who must review an alien's detention status after the three-month removal period lapses and determine whether the alien should be further detained or released under supervision. *See* 8 C.F.R. § 241.4(c), (h), (k). As the Supreme Court explained in *Zadvydas*, 533 U.S. at 683,

> In making this decision, the panel will consider, for example, the alien's disciplinary record, criminal record, mental health reports, evidence of rehabilitation, history of flight, prior immigration history, and favorable factors such as family ties. § 241.4(f). To authorize release, the panel must find that the alien is not likely to be violent, to pose a threat to the community, to flee if released, or to violate the conditions of release. § 241.4(e).

The ICE memo dated September 4, 2025, attached to Ndiaye's petition as Exhibit G, shows that ICE does view him as a threat to the community or a significant flight risk. (*See* R. 1-7, Page ID #69—70.) It states that the "panel recommends he be detained in ICE custody" because "the criteria for release set forth at 8 C.F.R. § 241.4(e)(1) has not been met[.]" (*Id. See also* Ex. A, ¶ 11.) Because ICE has determined that Ndiaye does present a public safety risk, ICE may continue to detain him pursuant to § 1231(a)(6).

Nevertheless, Ndiaye argues that his continued detention violates his Fifth Amendment substantive due process rights. (*See* R. 1, ⁋⁋ 64—72.) In *Zadvydas*, the Court considered similar claims made by two aliens with extensive criminal histories, who had been detained well past the removal period in anticipation of third country removal. *See* 533 U.S. at 684—686 (For example, Zadvydas was ordered to be deported in 1994, and the Supreme Court issued this decision remanding his case in 2001.) There, the Supreme Court held that the government cannot detain an alien "indefinitely" beyond the ninety-day removal period, limiting "post-removal-period detention to a period reasonably necessary to bring about the alien's removal from the United States." *Id.* at 682, 689. The Court further held that a detention period of six months is "presumptively reasonable." *Id.* at 701. Then, after this first six months, the burden is on the petitioner to show "good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future" before the burden shifts back to the government to rebut that showing. *Id.*

In his petition, Ndiaye argues that "removal to a third country has historically been highly unlikely" for individuals like him "who have been granted protection from their home country." (R. 1, ⁋ 45.) To support that contention, Ndiaye cites to a statistic from a Supreme Court case decided in 2021. (*See id.*) Notably though, that case was decided four years ago, prior to the Department of Homeland Security's guidance discussed more fully below, which offers a more detailed roadmap for how to effectuate third country removals. The ICE memorandum that Ndiaye attached to his petition only indicates that requests for removal to three countries in the last six months have been unsuccessful and does not show that there is good reason to believe that there is no significant likelihood of removal to a third country in the reasonably foreseeable future. (*See* R. 1-7, Page ID 69—70.) Further, Respondents offer the attached Declaration of Deportation

Officer Christopher Weit, who represents that ICE ERO continues to investigate third country removal options for Ndiaye and that Ndiaye continues to be held because he presents a threat to public safety. (*See* Ex. A, ¶¶ 11—12.)

II. NDIAYE'S CLAIMS DUE PROCESS CLAIMS RELATED TO THIRD COUNTRY REMOVAL

In March 2025, three plaintiffs instituted a putative class action suit challenging their third country removals in the District of Massachusetts captioned *D.V.D. v. Department of Homeland Security*, No. 12-cv-10767 (BEM) (D. Mass.). On March 28, 2025, that court entered a Temporary Restraining Order (ECF No. 34 at 2) ("*D.V.D.* TRO") enjoining DHS and others from "[r]emoving any individual subject to a final order of removal from the United States to a third country, *i.e.*, a country other than the country designated for removal in immigration proceedings" unless certain conditions are met. On April 18, 2025, the court in *D.V.D.* issued an order (*D.V.D.*, 25-10676-BEM) (*see* ECF No. 64) granting the plaintiffs' motion for class certification (*see* ECF No. 4) and motion for preliminary injunction. (*See* ECF No. 6.) That Preliminary Injunction was national in effect, certified a non-opt out class, and established certain procedures that DHS must follow before removing an alien with a final order of removal to a third country. Specifically, the class is defined as:

> All individuals who have a final removal order issued in proceedings under Section 240, 241(a)(5), or 238(b) of the INA (including withholding-only proceedings) who DHS has deported or will deport on or after February 18, 2025, to a country (a) not previously designated as the country or alternative country of removal, and (b) not identified in writing in the prior proceedings as a country to which the individual would be removed.

(*D.V.D.* ECF No. 64 at p. 23.)

On May 21, 2025, the *D.V.D.* Court issued a Memorandum on Preliminary Injunction (ECF 118) offering the following summary and clarification of its Preliminary Injunction:

> All removals to third countries, i.e., removal to a country other than the country or countries designated during immigration proceedings as the country of removal on the non-citizen's order of removal, *see* 8 U.S.C. § 1231(b)(1)(C), must be preceded by written notice to both the non-citizen and the non-citizen's counsel in a language the non-citizen can understand. Dkt. 64 at 46– 47. Following notice, the individual must be given a meaningful opportunity, and a minimum of ten days, to raise a fear-based claim for CAT protection prior to removal. *See id.* If the non-citizen demonstrates "reasonable fear" of removal to the third country, Defendants must move to reopen the non-citizen's immigration proceedings. *Id.* If the non-citizen is not found to have demonstrated a "reasonable fear" of removal to the third country, Defendants must provide a meaningful opportunity, and a minimum of fifteen days, for the non-citizen to seek reopening of their immigration proceedings. *Id.*

The *D.V.D.* Court indicated that the Order applied "to the Defendants, including the Department of Homeland Security, as well as their officers, agents, servants, employees, attorneys, any person acting in concert, and any person with notice of the Preliminary Injunction." *Id.*

On June 23, 2025, the United States Supreme Court stayed the District of Massachusetts' preliminary injunction pending appeal in the United States First Circuit Court of Appeals. *See Dep't of Homeland Security v. D.V.D.*, No. 24-A-1153, 2025 WL 1732103 (2025). That same day, the District Court of Massachusetts ordered that its remedial order granting relief to eight individual class members DHS sought to remove to South Sudan remained in effect. (*See* Order, *D.V.D.* (ECF No. 176).) Defendants moved to clarify the Supreme Court's Order and, on July 3, 2025, the Supreme Court granted the motion allowing the eight individual aliens to be removed to South Sudan. The class certification in *D.V.D.* remains in effect notwithstanding the Supreme Court's stay. *See id.*

Here, Ndiaye is an individual subject to a final order of removal who ICE plans to remove to a third country, and thus, he is a member of the non-opt out *D.V.D.* certified class. While the Supreme Court stayed the preliminary injunction entered by the district court, it left certification of the non-opt out class intact. In his petition, Ndiaye seeks a declaration requiring the Government

to provide Ndiaye adequate notice and an opportunity to be heard if a third country is willing to accept him. (*See* R. 1, Page ID #25.) This, of course, is the exact relief that the class in *D.V.D.* is seeking. And this Court should avoid providing Ndiaye with relief that eventually may conflict with the relief, if any, ultimately provided to the *D.V.D.* class. To do otherwise would cut against the entire purpose of a Rule 23(b)(2) non-opt out class action and risk an order that will conflict with not only the relief, if any, eventually provided to the *D.V.D.* class but also the Supreme Court's rejection of the relief initially temporarily provided to class members by the District of Massachusetts.

Courts across the nation have recognized that members of class action lawsuits should not be permitted to bring separate actions that litigate issues raised in the class action. *See Wynn v. Vilsack*, No. 3:21-CV-514-MMH-LLL, 2021 WL 7501821, at *3 (M.D. Fla. Dec. 7, 2021) (collecting cases) ("Multiple courts of appeal have approved the practice of staying a case, or dismissing it without prejudice, on the ground that the plaintiff is a member of a parallel class action.") (internal quotations omitted). This prevents class members from avoiding the binding results of the class action. *Goff v. Menke*, 672 F.2d 702, 704 (8th Cir. 1982). The Fourth Circuit has observed that at least four Courts of Appeals have affirmatively held, in the prisoner context, that "it is error to allow a prisoner to prosecute a separate action once his class has been certified." *Horns v. Whalen*, 922 F.2d 835, 835 (4th Cir. 1991) (table op.) (finding district court did not abuse discretion when it declined to decide an issue that overlapped with a class action "to avoid the risk of inconsistent adjudications). *See also id.* at n.4 (collecting district court cases).

This Court should decline to exercise jurisdiction over the Petition as a matter of comity because the District of Massachusetts has certified a class of people that will cover the same claim Ndiaye pursues in Kentucky. *See Pacesetter Systems, Inc. v. Medtronic, Inc.*, 678 F.2d 93, 94-95

(9th Cir. 1982) ("There is a generally recognized doctrine of federal comity which permits a district court to decline jurisdiction over an action when a complaint involving the same parties and issues has already been filed in another district."). *See also, e.g., Goff*, 672 F.2d at 704; *Horns*, 922 F.2d at 835; *McNeil v. Guthrie*, 945 F.2d 1163, 1165 (10th Cir. 1991) (individual suits for injunctive and declaratory relief cannot be brought where class action exists); *Gillespie v. Crawford*, 858 F.2d 1101, 1103 (5th Cir. 1988) (same); *Groseclose v. Dutton*, 829 F.2d 581, 582 (6th Cir. 1987) (same); *Bennett v. Blanchard*, 802 F.2d 456 (6th Cir. 1986) (duplicative suits should be dismissed once class action certified); *Green v McKaskle*, 770 F.2d 445, 446-47 (5th Cir. 1985), *on reh'g*, 788 F.2d 1116 (5th Cir. 1986) (class member should not be permitted to pursue individual lawsuit seeking equitable relief within subject matter of class action); *Bryan v. Werner*, 516 F.2d 233, 239 (3d Cir. 1975) (district court did not err in refusing to consider issue pending in a separate class action). Thus, dismissal is warranted.

Alternatively, this Court could stay this matter pending resolution of *D.V.D.* District courts have the inherent discretionary authority "to stay litigation pending the outcome of related proceedings in another forum." *Chappell v. United States*, 2016 WL 11410411, at *2 (M.D. Ga. Dec. 16, 2016) (*quoting CTI-Container Leasing Corp. v. Uiterwyk Corp.*, 685 F.2d 1284, 1288 (11th Cir. 1982) (*citing Landis v. N. Am. Co.*, 299 U.S. 248, 255 (1936), *Will v. Calvert Fire Ins. Co.*, 437 U.S. 655, 665 (1978), and *P.P.G. Indus. Inc. v. Cont'l Oil Co.*, 478 F.2d 674 (5th Cir. 1973)). "A stay is also necessary to avoid the inefficiency of duplication, the embarrassment of conflicting rulings, and the confusion of piecemeal resolutions where comprehensive results are required." *Chappell*, 2016 WL 11410411, at *3 (internal quotations and citations omitted). "Consistency of treatment [is at the heart of what] Rule 23(b)(2) was intended to assure." *Cicero v. Olgiati*, 410 F. Supp 1080, 1099 (S.D. NY 1976).

Here, staying this case avoids the potential for conflicting decisions on central issues. *See Nio v. U.S. Dep't of Homeland Sec.*, 323 F.R.D. 28, 34 (D.D.C. Oct. 27, 2017); Fed. R. Civ. P. 23(b)(1)(A) (permitting a class action to proceed when "prosecuting separate actions by or against individual class members would create a risk of: (A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class ..."); *id.* at (b)(2) (permitting a class action when "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole.").

Because the District Court for the District of Massachusetts has certified a class that already has and will continue to address Ndiaye's claims, staying this proceeding would be prudent as a matter of comity. *See Munaf v. Geren*, 553 U.S. 674, 693 (2008) ("prudential concerns, such as comity . . . may require a federal court to forgo the exercise of its habeas corpus power"). Dismissing, or at a minimum, staying these proceedings to allow resolution of a nationwide class action to which Ndiaye belongs allows for consistent treatment and promotes efficiency. To the extent this Court is inclined to stay this action, the parties could submit periodic status reports or conduct telephonic conferences until the *D.V.D.* nationwide class action is resolved, the resolution of which would necessarily resolve Ndiaye's claims.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 17, 2025, the foregoing was electronically filed with the clerk of the court by using the CM/ECF system which will send a copy of same to Sarah C. Larcade, Esq., Counsel for Plaintiff.

/s/ Elizabeth Davis Stone
Elizabeth Davis Stone