IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

DUONG THUC NGUYEN,

Petitioner,

v. Case No. 26-3008-JWL

C. CARTER, Warden, FCI-Leavenworth,
TODD LYONS, Acting Director, ICE; and
PAM BONDI, Attorney General,

Respondents.

RESPONSE TO § 2241 HABEAS PETITION AND ORDER TO SHOW CAUSE

This matter is before the Court on the petition of Duong Thuc Nguyen ("Petitioner") for a writ of habeas corpus under 28 U.S.C. § 2241. ECF 1. Shortly after Petitioner was taken into custody in May 2024, proceedings before an Immigration Judge began. An Immigration Judge granted Petitioner's request for cancellation of removal. The United States Department of Homeland Security ("DHS") has administratively appealed that decision. The appeal is currently pending at the Board of Immigration Appeals ("BIA"). Based on these alleged facts, Petitioner asserts he is entitled to release because (1) he has not received a "constitutionally adequate custody determination" for his detention, as required by the Fifth Amendment to the United States Constitution; (2) he has not received a bond hearing in administrative proceedings under 8 U.S.C. § 1226(a) or a post-order custody review ("POCR") under "DHS regulations"; and (3) to the extent 8 U.S.C. § 1231(a)(6) applies, his detention without removal has become unreasonably prolonged.

The habeas petition should be denied. Taking the claims in reverse order, claim three fails because 8 U.S.C. § 1231(a)(6) is inapplicable. That statute, and *Zadvydas v. Davis*, 533 U.S. 678 (2001), which interpreted and applied that provision, applies only after an alien is subject to a final order of removal and he is awaiting removal in custody. But Petitioner does not have a final order

of removal. Nor does Petitioner have a final order granting cancellation of removal because the Immigration Judge's decision is on appeal. Claim two fails because Petitioner is subject to mandatory detention without a bond hearing under 8 U.S.C. § 1226(c). Congress enacted § 1226(c) to enable DHS to detain and remove aliens who have committed certain crimes. Petitioner is one of those aliens, as he has been repeatedly convicted of theft. He is not entitled to a bond hearing under § 1226(c). Nor is he entitled to the POCR process under DHS regulations because, as the name suggests, that process is available only after an alien receives a final order of removal and remains in custody pending removal. Claim one fails because Petitioner's mandatory detention under § 1226(c) does not run afoul of the Fifth Amendment. Although Petitioner has been detained for about 20 months, that is largely the result of ongoing administrative proceedings. Those proceedings are being conducted in good faith and do not justify Petitioner's release under cases such as *Demore v. Kim*, 538 U.S. 510 (2003) and *Jennings v. Rodriguez*, 583 U.S. 281 (2018).

STATEMENT OF FACTS

The following facts are based on the declaration of Neil Wheeler, a Deportation Officer ("DO") for Enforcement and Removal Operations ("ERO") at Immigration Customs Enforcement ("ICE"), which is a component of DHS. Exhibit ("Ex.") 1, Wheeler Decl. ¶¶ 1-3. Some facts alleged in the habeas petition are included as well.

Petitioner is a native and citizen of Vietnam. *Id.* ¶ 4; *see also* ECF 1 ¶¶ 9, 14. He was admitted to the United States in June 2000 as a lawful permanent resident. Ex. 1 ¶ 5; *see also* ECF 1 ¶ 14. Since 2022, he has been convicted of retail theft at least seven times. Ex. 1 ¶ 6. He also has several other charges for possession of a controlled substance. *Id.* He was taken into ICE custody in May 2024. *Id.* ¶ 7; *see also* ECF 1 ¶ 19.

In May 2024 when Petitioner was taken into custody, a Notice to Appear was issued, thereby placing him in removal proceedings before an Immigration Judge. Ex. 1 ¶ 7. Among other things, the Notice to Appear alleged that Petitioner is removable under sections 237(a)(2)(A)(ii) and (iii) of the Immigration and Nationality Act ("INA"). *Id.* ¶ 8 (citing 8 U.S.C. §§ 1227(a)(2)(A)(ii)-(iii)). Specifically, the Notice to Appear alleged that Petitioner is removable for having been convicted of two crimes involving moral turpitude and of an aggravated felony under section 101(a)(43)(G) of the INA. *Id.* (citing 8 U.S.C. § 1101(a)(43)(G)). The charges stem from Petitioner's retail theft convictions. *Id. See also* Ex 2.

Petitioner appeared before an Immigration Judge in June 2024. *Id.* ¶ 9. The case was reset to July 2024, at which point Petitioner denied the charge of removability under 8 U.S.C. § 1227(a)(2)(A)(iii) and raised other objections. *Id.* ¶¶ 9-10. The charge under § 1227(a)(2)(A)(iii) was withdrawn by DHS. *Id.* ¶ 10. The case was reset to allow DHS to make corrections to the Notice to Appear and to allow Petitioner to file an application for relief. *Id.* In late July 2024, Petitioner filed an Application for Cancellation of Removal for Certain Permanent Residents ("Cancellation Application") and DHS corrected certain allegations. *Id.* ¶¶ 11, 13; *see also* ECF 1 ¶ 16. Almost immediately thereafter, Petitioner appeared before the Immigration Judge and the case was reset to August 2024. Ex. 1 ¶ 12. Petitioner admitted DHS's amended allegations in August 2024 and appeared for a merits hearing in September 2024. *Id.* ¶¶ 14-15. *See also* Ex. 2. At the merits hearing, Petitioner requested a continuance to resolve a pending criminal charge that could affect his eligibility for cancellation of removal. *Id.* ¶ 15.

More continuances followed. When Petitioner appeared before the Immigration Judge in October 2024, his criminal matter remained pending, so the case was reset to November 2024. *Id.* ¶ 16. When Petitioner appeared in November 2024, the Immigration Judge was advised that the

criminal matter was scheduled for the following week. *Id.* ¶ 17. When Petitioner appeared in December 2024 for another scheduled merits hearing, the case was reset to allow him to submit evidence of rehabilitation. *Id.* ¶ 18. In February 2025, the Immigration Judge held a hearing on the merits of Petitioner's Cancellation Application. *Id.* ¶ 19. At the conclusion of the hearing, the Immigration Judge granted the application. *Id.*; *see also* ECF 1 ¶ 17. In March 2025, DHS timely appealed the Immigration Judge's decision to the Board of Immigration Appeals ("BIA"). Ex. 1 ¶¶ 19-20; *see also* ECF 1 ¶ 18. A briefing schedule was set in October 2025, and the administrative appeal remains pending. Ex. 1 ¶¶ 21-22.

The allegations against Petitioner have determined the availability of any bond hearing or POCR. Because the charge against Petitioner is that he is removable under 8 U.S.C. § 1227(a)(2)(A)(ii), he is subject to mandatory custody and ineligible for bond under 8 U.S.C. § 1226(c)(1)(B). Ex. 1 ¶¶ 23, 26. And because an appeal is pending in Petitioner's administrative proceedings, there is neither a final order of removal nor a final order on his Cancellation Application. *Id.* ¶¶ 24-25. As a result, the POCR process under regulations such as 8 C.F.R. §§ 241.4 and 241.13 does not apply.

ARGUMENT

To obtain habeas corpus relief, Petitioner must demonstrate that "[h]e is in custody in violation of the Constitution or laws or treaties of the United States[.]" 28 U.S.C. § 2241(c)(3). "In evaluating the district court's denial of a habeas corpus petition," the Tenth Circuit reviews "legal conclusions de novo and factual findings for clear error." *Kikumura v. Hood*, 467 F.3d 1257, 1258 (10th Cir. 2006) (citation modified).

I. Claim three under 8 U.S.C. § 1231(a)(6) should be denied because there is no final order of removal

Petitioner asserts claim three in the alternative. He asks the Court to hold that if 8 U.S.C. § 1231(a)(6) applies, his detention has become unreasonably prolonged without "adequate process." ECF 1 ¶¶ 26-27, 36-37. Section 1231(a)(6), as the Supreme Court has interpreted it in *Zadvydas*, governs detention of certain inadmissible aliens who have been "ordered removed." 8 U.S.C. § 1231(a)(6); *see Zadvydas*, 533 U.S. 678. Upon the entry of a final removal order, "the Government ordinarily secures the alien's removal during a subsequent 90-day statutory 'removal period,' during which time the alien normally is held in custody." *Zadvydas*, 533 U.S. at 682. If the alien is not removed during this 90-day period, § 1231(a)(6) "authorizes further detention." *Id.* *Zadvydas* held that a six month period of detention is presumptively reasonable. *Id.* at 701. "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.* The presumption does not mean that "every alien not removed must be released after six months," but instead that the alien may be held in confinement until "it has been determined that there is no significant likelihood of removal in the reasonably foreseeable future." *Id.*

Zadvydas and § 1231(a)(6) do not apply to Petitioner because he is not subject to a final order of removal – he has not been "ordered removed." *See* 8 U.S.C. § 1231(a)(6) (addressing detention of certain inadmissible aliens "ordered removed"); *see also id.* § 1231(a)(1)(A) (referencing "when an alien is ordered removed"); *id.* § 1231(a)(1)(B) (noting that the earliest point at which the removal period may begin is "[t]he date the order of removal becomes administratively final"). A removal order has not yet been issued by an Immigration Judge in this case, let alone become final. *See supra* Statement of Facts ("SOF"). Rather, an Immigration Judge has issued a cancellation of removal order. *See id.* But that order is not final because it is being

appealed by DHS. *See* 8 C.F.R. § 1003.6(a) ("[T]he decision in any proceeding under this chapter from which an appeal to the Board may be taken shall not be executed during the time allowed for the filing of an appeal unless a waiver of the right to appeal is filed, nor shall such decision be executed while an appeal is pending or while a case is before the Board by way of certification."); *id.* § 1003.39 ("Except when certified to the Board, the decision of the Immigration Judge becomes final upon waiver of appeal or upon expiration of the time to appeal if no appeal is taken whichever occurs first."). Because Petitioner is not subject to a final order of removal, any procedures available under § 1231(a)(6) and *Zadvydas* do not apply...

II. Claim two under 8 U.S.C. § 1226(a) should be denied because Petitioner is subject to mandatory detention and is not entitled to a bond hearing

In claim two, Petitioner alleges that he is entitled to a bond hearing or another form of custody review under 8 U.S.C. § 1226(a). *See* ECF 1 ¶¶ 24-26, 33-35. Section 1226(a) provides that "an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States." Petitioner's attempt to invoke this part of the statute also misses the mark because Petitioner is a criminal alien subject to mandatory detention under § 1226(c). "Congress has required detention (without a bond hearing)" for such aliens. *Olmos v. Holder*, 780 F.3d 1313, 1315 (10th Cir. 2015). 8 U.S.C. § 1226(c)(1)(B) states that the Attorney General "shall" take into custody any alien who "is deportable by reason of having committed any offense covered in section 1227(a)(2)(A)(ii), (A)(iii), (B), (C), or (D) of this title." This means "[t]he Attorney General must detain aliens in Paragraphs 'A' through 'D' without a bond hearing." *Olmos*, 780 F.3d at 1325; *see also Johnson v. Guzman Chavez*, 594 U.S. 523, 527 n.2 (2021) (explaining that aliens "may generally apply for release on bond," but there is an "exception" for "certain criminal aliens" under § 1226(c)).

Petitioner fits this description. Petitioner has not contested that he is removable under 8 U.S.C. § 1227(a)(2)(A)(ii) because of his prior theft offenses, which makes him a criminal alien subject to mandatory detention under 8 U.S.C. § 1226(c). 8 U.S.C. § 1227(a)(2)(A)(ii) defines one category of covered offenses to include, "Any alien who at any time after admission is convicted of two or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial, is deportable." As discussed, Petitioner has been convicted of retail theft at least seven times. *See supra* SOF. Petitioner falls under §§ 1227(a)(2)(A)(ii), which makes his detention mandatory under § 1226(c) pending resolution of his removal proceedings. *See Ogole v. Garland*, No. 24-3198-JWL, 2025 WL 548452, at *3 (D. Kan. Feb. 19, 2025) (rejecting "any claim that petitioner is entitled to a bond hearing," in part because the petitioner's conviction for an offense covered by § 1227 made detention "mandatory").

Petitioner again invokes "DHS regulations [that] provide for custody determinations." ECF ¶ 31. But again, Petitioner is not entitled a POCR under DHS regulations. He acknowledges that there is no final order of removal in this case. He notes that DHS "timely appealed" the Immigration Judge's order cancelling removal. ECF 1 ¶ 18. He correctly acknowledges that "[w]hile DHS's appeal is pending, Petitioner's removal is not final because the IJ granted relief and DHS seeks reversal." *Id.* ¶ 25. He concludes that his detention "is best characterized as pre-final-order[.]" *Id.* ¶ 26. Yet the DHS regulations governing POCRs are premised on a final order of removal. *See, e.g.,* 8 C.F.R. § 241.4(a)(1)-(4) (referring to aliens "ordered removed"); *id.* § 241.13(a) (referring to aliens "who are subject to a final order of removal"). Those regulations do not apply to Petitioner.

III. Claim one should be denied because Petitioner's mandatory detention for criminal offenses under 8 U.S.C. § 1226(c) does not violate the Fifth Amendment

Claim one relies on the due process clause of the Fifth Amendment. Petitioner alleges that he had been detained for more than 19 months overall and more than 11 months since DHS appealed the Immigration Judge's order cancelling removal. ECF 1 ¶¶ 1, 19, 32. Petitioner avers that "[t]here is no end date certain to the BIA appeal process[.]" *Id.* ¶ 23. He asks the Court to release him because his detention has become "unreasonably prolonged" with "no constitutionally adequate custody determination[.]" *Id.* ¶¶ 30-31. Respondents understand this to be a Fifth Amendment "as applied" challenge to mandatory detention.

It is well-established that "detention during deportation proceedings [i]s a constitutionally valid aspect of the deportation process." *Demore*, 538 U.S. at 523. The Supreme Court has repeatedly held that detention incident to removal proceedings is constitutional. *See id.*; *see also Reno v. Flores*, 507 U.S. 292, 306 (1993) ("Congress has the authority to detain aliens suspected of entering the country illegally pending their deportation hearings."); *Carlson* v. *Landon*, 342 U.S. 524, 538 (1952) ("Detention is necessarily a part of this deportation procedure."); *Wong Wing*, 163 U.S. at 235 ("We think it clear that detention, or temporary confinement, as part of the means necessary to give effect to the provisions for the exclusion or expulsion of aliens would be valid."). And in *Demore*, the Court squarely rejected a constitutional challenge to § 1226(c), which mandates detention of certain criminal and terrorist aliens pending removal proceedings, without the opportunity for release on bond. The Court affirmed Congress's categorical judgment, holding that "Congress, justifiably concerned that deportable criminal aliens who are not detained continue to engage in crime and fail to appear for their removal hearings in large numbers, may require that persons such as [the lawful permanent resident in that case] be detained for the brief period necessary for their removal proceedings." *Demore*, 538 U.S. at 513. In *Demore*, 538 U.S. 510, an alien was detained during removal proceedings after he committed first-degree burglary and "petty

theft with priors." *Id.* at 513. He filed a habeas petition arguing that his detention under § 1226(c) was unconstitutional, in part because DHS "made no determination that he posed either a danger to society or a flight risk." *Id.* at 514. The Supreme Court ruled in favor of the United States, observing that "detention during deportation proceedings" is "a constitutionally valid aspect of the deportation process." *Id.* at 523, 531. The Supreme Court explained that *Zadvydas* was inapplicable in this context because (1) removal was no longer "practically attainable" for the alien in *Zadvydas* under § 1231(a)(6), whereas § 1226(c) "governs detention of deportable criminal aliens *pending their removal proceedings*," *id.* at 527-28 (emphasis in original); and (2) the detention of the alien in *Zadvydas* under § 1231(a)(6) was "indefinite" and "potentially permanent," whereas detention under § 1226(c) has "a definite termination point" – the end of the petitioner's removal proceedings. *Id.* at 528-30. The Supreme Court noted that detention in *Demore* lasted longer than five months, but that was in part because the alien "himself had requested a continuance of his removal hearing." *Id.* at 530.

It follows that the Constitution does not impose a limitation on mandatory detention under § 1226(c), which by definition extends only as long as it takes for a petitioner's removal proceedings to conclude. Mandatory detention of a criminal alien under § 1226(c) during removal proceedings is constitutional where it continues to "serve its purported immigration purpose." *Demore*, 538 U.S. at 527 (citing *Zadvydas*, 533 U.S. at 690); *see Flores*, 507 U.S. at 306; *Carlson*, 342 U.S. at 540; *Wong Wing*, 163 U.S. at 235- 236; *see also Demore*, 538 U.S. at 532 (Kennedy, J., concurring). As *Demore* itself illustrates, that detention mandate continues to be justified even when the removal proceedings to which the detention is tied become prolonged. For one, criminal aliens often make choices during their removal proceedings that prolong the resolution of his removal proceedings. Here, for example, Petitioner added at least five months to his ongoing

detention by requesting and receiving continuances of his Immigration Judge hearing on his request for cancellation of removal. More fundamentally, the risk that a criminal alien will commit further crimes or otherwise present a danger to the community if released will ordinarily remain constant until removal proceedings are completed.

Finally, Petitioner has not contested that he is removable under 8 U.S.C. § 1227(a)(2)(A)(ii) because of his prior theft offenses, which makes him a criminal alien subject to mandatory detention under 8 U.S.C. § 1226(c). Although he seeks *relief* from removal in his removal proceedings, he "has no right under the basic immigration laws to remain in this country." *Zadvydas*, 533 U.S. at 720 (Kennedy, J., dissenting); *see Demore*, 538 U.S. at 523 n.6 (distinguishing between being "*deportable*" and seeking relief from removal that may mean the alien will not "*ultimately be deported*"). And Petitioner's request for discretionary relief (cancellation of removal) is "manifestly not a matter of right under any circumstances, but rather is in all cases a matter of grace." *Jay* v. *Boyd*, 351 U.S. 345, 354 (1956); see *INS* v. *Yueh-Shaio Yang*, 519 U.S. 26, 30 (1996) (akin to "a judge's power to suspend the execution of a sentence, or the President's to pardon a convict"). A criminal alien pursuing such discretionary relief notwithstanding that he is removable has greatly diminished due process interests in being released into society while that request is being considered.

Zadvydas does not affect this analysis. *Zadvydas* imposed a six-month presumption as a matter of statutory interpretation – not as a constitutional mandate. 533 U.S. at 699. The justifications for adopting that presumption in *Zadvydas* are absent here because the two cases are "materially different." *Demore*, 538 U.S. at 527. And the Court in *Zadvydas* did not suggest that the Due Process Clause itself imposed a six-month limitation on the duration of mandatory immigration custody as a general matter. Rather, the Court concluded that six months was a

"presumptively reasonable" time during which detention after entry of a final order of removal continued to serve the particular immigration purpose at issue there: to effectuate the final order that the alien be removed. *Zadvydas*, 533 U.S. at 701. And even then, there was no rigid six-month rule or requirement of a bond hearing. The alien could continue to be detained beyond that point, without a bond hearing, if he failed to provide good reason to believe that there was no significant likelihood of removal in the reasonably foreseeable future. *Id.*

At most, the length of a criminal alien's detention under § 1226(c) could prompt further inquiry under the Due Process Clause if the detention became so unusually and extraordinarily prolonged that the detention no longer "serv[ed] its purported immigration purpose." *See Demore*, 538 U.S. at 527; *id.* at 532-533 (Kennedy, J., concurring). "It is unlikely that a petitioner can satisfy this standard absent evidence of government wrongdoing in connection with the removal proceedings, such as actions that unreasonably prolong the removal proceeding or actions taken in bad faith." *Misquitta v. Warden Pine Prairie ICE Processing Ctr.*, 353 F. Supp. 3d 518, 525-26 (W.D. La. 2018) (surveying post-*Jennings* case law). "Where removal proceedings are delayed solely by a party's good faith exercise of its procedural remedies – whether by the petitioner or the government – continued detention is unlikely to trigger due process concerns in most cases because continued detention until completion of the removal proceedings still serves the purpose of the statute." *Id.* at 527. Although it appears the Tenth Circuit has not yet addressed an as-applied due process challenge to an alien's mandatory detention under § 1226(c), it follows from *Demore* that a due process challenge to an alien's prolonged mandatory detention under § 1226(c) pending the resolution of his removal proceedings will not lie unless the alien shows that the circumstances of his case suggest that the purpose of his detention is to incarcerate for some reason unrelated to facilitating his removal or protecting against risk of flight or dangerousness to the community.

Petitioner has not carried his burden of showing bad faith or misconduct by the government in his removal proceedings. His removal proceedings began immediately after he was taken into custody in May 2024. *See supra* SOF. The case was reset several times as DHS corrected parts of the Notice to Appear and Petitioner challenged one or more charges of removability and made other objections. *See id.* Petitioner submitted his Cancellation Application in July 2024 and appeared before the Immigration Judge three times before he requested a continuance of the merits hearing in September 2024. *See id.* The case was continued again in October 2024 and November 2024 because Petitioner's criminal matter remained pending. *See id.* In December 2024, the case was continued to permit Petitioner to file evidence of rehabilitation. *See id.* After holding a hearing in February 2025, the Immigration Judge granted Petitioner's Cancellation Application, and DHS timely appealed in March 2025. *See id.* The BIA set a briefing schedule in October 2025, and the administrative appeal is still pending. *See id.* In sum, although Petitioner has been detained for about 20 months, (1) administrative proceedings have been proceeding apace; (2) those proceedings were continued several times to allow Petitioner to address his criminal matter and to submit evidence; (3) DHS in good faith is pursuing an appeal of the Immigration Court's cancellation order; and (4) if DHS prevails on appeal, the agency at this time is not aware of impediments to final removal, which will provide an end point for detention.

CONCLUSION

For the foregoing reasons, all claims in the habeas petition should be denied.

Respectfully submitted,

RYAN A. KRIEGSHAUSER
United States Attorney
District of Kansas

/s/ Thomas E. Beall
Thomas E. Beall, KS #19929
Assistant United States Attorney
444 SE Quincy, Suite 290
Topeka, Kansas 66683
PH: (785) 295-2850
FX: (785) 295-2853
Email: thomas.beall@usdoj.gov

Attorneys for Respondents

CERTIFICATE OF SERVICE

I hereby certify that on February 5, 2026, (1) the foregoing Response was electronically filed with the clerk of the court by using the CM/ECF system, which will send a notice of electronic filing to all counsel of record; and (2) I caused a copy of the notice of electronic filing, along with a copy of the foregoing to be placed in the United States mail, postage prepaid, addressed to Petitioner:

Duong Thuc Nguyen

FCI - Leavenworth
Inmate Mail/Parcels
PO Box 1000
Leavenworth, KS 66048

s/ Thomas E. Beall
Thomas E. Beall
Assistant United States Attorney