

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION**

DAVIER ERASTI KESSELL,

Petitioner,

Case No. 2:26-cv-01685-SPC-NPM

v.

UNITED STATES DEPARTMENT
OF HOMELAND SECURITY,
IMMIGRATION AND CUSTOMS
ENFORCEMENT,

Respondent.

**FEDERAL RESPONDENT'S OPPOSITION TO
PETITION FOR A WRIT OF HABEAS CORPUS UNDER 28 U.S.C. § 2241**

Petitioner Davier Erasti Kessell, proceeding pro se, seeks a writ of habeas, pursuant to 28 U.S.C. § 2241, on the grounds that his prolonged detention is unlawful and violates due process. (Doc. 1.) His Petition should be denied because it is premature. His continued detention is therefore lawful. In addition, to the extent Petitioner seeks relief on the grounds of inadequate medical care, the Petition is also due to be denied because a petition for a writ of habeas corpus is not the proper vehicle to challenge conditions of confinement.

BACKGROUND

Petitioner is a 37-year-old male citizen and national of Cuba who entered the United States in 2009¹ as the child of a refugee. (Ex. A, Petitioner's Form I-213, pp. 1, 2.) According to his Form I-213, on January 19, 2024, Petitioner was convicted of multiple offenses, including amphetamine trafficking. (Ex. A, p. 2.) On October 1, 2025, a Notice to Appear was issued, charging Petitioner as removable pursuant to Section 237(a)(2)(B)(i) of the Immigration and Nationality Act on grounds that, following admission, he was convicted of a violation of a federal or state law or regulation relating to a controlled substance, other than a single offense involving possession of thirty grams or less of marijuana for personal use. (Ex. B, Notice to Appear.)

The Notice to Appear was served on Petitioner on November 14, 2025, thereby placing him in removal proceedings. (*Id.* at 2.) On March 11, 2026, Petitioner was ordered removed to Cuba, and the order became administratively final the same day, as both the government and Petitioner waived appeal. (Ex. C, Removal Order). Petitioner is currently detained at Florida Soft-Sided Facility-South. (Ex. D, Detention Order.) As of May 18, 2026—the date Petitioner filed the instant Petition—he had been in post-removal order detention for 68 days.

¹ Both Petitioner's Form I-213 (Ex. A) and Notice to Appear (Ex. B) state that Petitioner entered the United States in 2011. However, agency counsel has represented to the undersigned that Petitioner's date of entry was amended orally on the record during immigration proceedings to reflect that he entered the United States in 2009.

CERTIFIED HABEAS RETURN

ICE is detaining Petitioner under the detention provisions of 8 U.S.C. § 1231(a). *See* 28 U.S.C. § 2243 (stating “[t]he person to whom the writ or order is directed shall make a return certifying the true cause of the detention.”). Petitioner bears the burden to prove his custody violates federal law. *Whitfield v. U.S. Sec’y of State*, 853 F. App’x 327, 329 (11th Cir. 2021).

ARGUMENT

I. **Petitioner’s Detention Claim is Premature under *Zadvydas***

First, the Petition should be denied because it is premature. In *Zadvydas v. Davis*, the Supreme Court held that detention **following** a final removal order is presumptively reasonable for six months. 533 U.S. 678, 701 (2001). Here, Petitioner was ordered removed on March 11, 2026, and waived his right to appeal. (Ex. C.) As such, his removal order became administratively final the same day. *See Johnson v. Guzman Chavez*, 594 U.S. 523, 534–535 (2021). Detention for the first ninety days following an administratively final removal order is statutorily required. 8 U.S.C. § 1231(a)(2). Under *Zadvydas*, the constitutional upper limit of post-removal order detention is six months. Petitioner argues that he has been detained for more than 180 days in violation of this constitutional limit in *Zadvydas*; however, in making this argument, he has mistakenly counted his *pre*-removal order detention time. The relevant time period for stating a *Zadvydas* claim is the time spent in detention between

the date a detainee's removal order becomes administratively final and the date that a petitioner files a petition for habeas relief under 28 U.S.C. § 2241. *Akinwale v. Ashcroft*, 287 F.3d 1050, 1052 (11th Cir. 2002) (stating that “in order to state a claim under *Zadvydas* the alien . . . must show post-removal order detention in excess of six months” and that “[t]his six month period . . . must have expired at the time [the petitioner's] § 2241 petition was filed in order to state a claim under *Zadvydas*”). Here, Petitioner was detained on March 11, 2026, and the instant Petition was filed on May 18, 2026. As of May 18, 2026—the relevant date as confirmed by the Eleventh Circuit—Petitioner he had been in detention *following* his removal order for sixty-eight days. Consequently, his detention falls significantly short of the six-month—or 180-day—presumptively reasonable length of post-removal order detention set forth in *Zadvydas*. To be sure, here, Petitioner's length of detention following removal is still within the statutorily *mandated* ninety-day post-removal period. 8 U.S.C. § 1231(a)(2).

The applicable legal framework concerning post-removal order detention is set forth in 8 U.S.C. § 1231 and the U.S. Supreme Court's *Zadvydas* decision. After a final removal order, an alien must be removed within ninety days—this is referred to as the removal period. 8 U.S.C. § 1231(a)(1); *see also Zadvydas*, 533 U.S. at 683. During the removal period, the alien *must* be detained. 8 U.S.C. § 1231(a)(2); *Zadvydas*, 533 U.S. at 683. An alien, however, can be detained beyond that removal period. 8 U.S.C. §§ 1231(a)(1)(C), (a)(6); *Zadvydas*, 533 U.S. at 683. This is called a “post-removal”

period. *Guzman Chavez*, 594 U.S. at 528–29.

There is no statutory limit on how long ICE can detain an alien during the post-removal period. *Johnson v. Arteaga-Martinez*, 596 U.S. 573, 579 (2022). Nevertheless, due to constitutional concerns, the U.S. Supreme Court has interpreted the post-removal period to allow extended detention only for “a period reasonably necessary to bring about that alien’s removal from the United States.” *Zadvydas*, 533 U.S. at 689. In all, a reasonable length of detention “is presumptively six months.” *Guzman Chavez*, 594 U.S. at 529. “This six-month period . . . must have expired *at the time [Petitioner’s] § 2241 petition was filed* in order to state a claim under *Zadvydas*.” *Akinwale*, 287 F.3d at 1052 (emphasis added).

If the presumptively reasonable period expires without removal, then a burden-shifting framework comes into play regarding the “significant likelihood of removal in the reasonably foreseeable future.” *Zadvydas*, 533 U.S. at 701. If an alien “provides good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future,” the government must either rebut that showing or release the alien. *Id.* But before that six-month period expires, any habeas challenge to the detention itself is premature. *E.g.*, *Akinwale*, 287 F.3d at 1051–52; *Song v. U.S. Att’y Gen.*, 516 F. App’x 894, 899 (11th Cir. 2013); *Gozo v. Napolitano*, 309 F. App’x 344, 346 (11th Cir. 2009). At bottom, “until the six-month *Zadvydas* period concludes, detention is presumptively reasonable, and any due process claim is not ripe.” *Al Ellary v. Noem*, Case No. 2:26-cv-112-KCD-DNF, 2026 WL 548048, at *1 (M.D. Fla.

Feb. 27, 2026).

Here, Petitioner filed the present Petition before the expiration of six months in detention following his order of removal. (*Compare* Doc. 1, *with* Ex. C.) As previously stated, it is only *after* six months of detention following a removal order that the parties can engage in *Zadvydas* burden-shifting related to the “significant likelihood of removal in the reasonably foreseeable future.” *Zadvydas*, 533 U.S. at 701 (stating that the inquiry is “[a]fter this 6-month period”); *Al Ellary*, 2026 WL 548048, at *1–2 (denying petition when alien had not been detained for six months). Before that time limit runs, neither *Zadvydas* nor any other binding precedent permits a challenge based on reasonable foreseeability of removal. *See Akinwale*, 287 F.3d at 1051–52. Accordingly, the Petition should be denied as premature.

II. Petitioner Improperly Raise Challenges to the Conditions of his Confinement in his Habeas Petition

The Petition also raises issues regarding Petitioner’s access to medical care and services. (Doc. 1, p. 7.) However, “Petitioner’s § 2241 petition is not the appropriate vehicle for raising an inadequate medical care claim, as such a claim challenges the conditions of confinement, not the fact or duration of that confinement.” *Vaz v. Skinner*, 634 F. App’x 778, 781 (11th Cir. 2015). “And, in any event, even if Petitioner established a constitutional violation, he would not be entitled to the relief he seeks because release from imprisonment is not an available remedy for a conditions-of-

confinement claim.” *Id.* Accordingly, the Petition should be denied to the extent it seeks release on grounds of inadequate access to medical care.

CONCLUSION

For the foregoing reasons, Federal Respondents respectfully request that the Petition for a Writ of Habeas Corpus under 28 U.S.C. 2241 (Doc. 1) be denied.

CERTIFICATE OF SERVICE

I hereby certify that on May 28, 2026, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system and that, on or about May 29, 2026, I will serve the forgoing document and notice of electronic filing on Petitioner at the address listed for him on the docket.

/s/ Somadina Sullins

SOMADINA SULLINS

Assistant United States Attorney