United States District Court
Western District of Texas
El Paso Division

Yurisbey Diaz Petitioner, v. Warden of El Paso East Montana Facility, *et al.*, Respondents.	No. 3:26-CV-225-LS

Federal[1] Respondents' Response in Opposition to Petitioner's Writ of Habeas Corpus

Respondents submit this response per this Court's Order dated January 30, 2026. ECF No. 2. In his petition for writ of habeas corpus under 28 U.S.C. § 2241, Petitioner, seeks release from civil immigration detention, claiming that his detention violates humanitarian and constitutional principles. *See* ECF No. 1 at ¶6. Petitioner's claims lack merit, and this petition should be denied.

Despite his argument that there is no basis for his continued detention, Petitioner is an citizen of Cuba, with an arrest history that includes larceny, burglary, obstructing justice, intimidation and final order removal dated February 21, 2003, which mandates his detention. ECF No. 1 at ¶23; *see also* Ex. A (ERO Declaration) ¶6; *see also* 1231(a)(6); *Zadvydas v. Davis*, 533 U.S. 678, 701 (2001). Petitioner argues his continued detention violates the immigration statutes his substantive and procedural rights under the Constitution's Fifth Amendment. ECF No. 1 at ¶33-79. These arguments are insufficient reason to believe that removal is unlikely in the foreseeable future, which means the burden of proof does not shift to ICE to show the likelihood

[1] The named warden in this action is not a federal employee. The Department of Justice does not represent him in this action. The Federal Respondents are lawfully detaining Petitioner on a mandatory basis and have direct authority under Title 8 over custody decisions in his case.

of removal. *See Andrade v. Gonzales*, 459 F.3d 538, 543–44 (5th Cir. 2006); *Gonzalez v. Gills*, No. 20-60547, 2022 WL 1056099 at 1 (5th Cir. Apr. 8, 2022). Even if the burden has so shifted, Respondents can show that removal , in fact, likely in the reasonably foreseeable future.

Additionally, the only current impediments to Petitioner's removal stem from his failures to comply, and his choice to pursue additional litigation at the Board of Immigration Appeals. *See* Exh. A (ERO Declaration) at ¶¶8-15.

I. Facts and Procedural History

Petitioner is a native and citizen of Cuba. Exh. A (ERO Declaration) at ¶3. Petitioner was admitted to the United States as a legal permanent resident but subsequently placed into removal proceedings as an alien convicted of two or more crimes involving moral turpitude. *Id.* at ¶3. Petitioner's removal order became final on February 21, 2003. *Id.* at ¶4. Since being removed Petitioner has multiple stints of immigration detention and supervision because of his multiple arrests. *Id.* at ¶¶5,6. Each time Petitioner was released because repatriation was not feasible. *Id.* On July 22, 2025, ERO took custody of Petitioner to effectuate removal. *Id.* at ¶7. Beginning on August 26, 2025 ERO began the process of repatriating Petitioner under the Cuba Venezuela Nicaragua and Haiti (CVNH) agreement. *Id.* at ¶8-11. Petitioner refused to comply and after months of work, on January 31, 2026, Petitioner was designated as a CVNH failure to comply. *Id.* at ¶ 12. On February 4, 2026, ERO was removed from the CVNH mission because the BIA had granted a stay of removal pending a Motion to Reopen. *Id.* at ¶13. On February 13, 2026, ERO served Petitioner with a Notice of Revocation of Release. *Id.* at ¶14; *See* also Exh. B (Notice of Revocation). ERO will resume removal efforts once the BIA dismisses the Motion to Reopen or lifts the stay. *Id.* at ¶15.

II. Detention Is Lawful Under 8 U.S.C. §1231(a)(6).

Petitioner's detention is lawful. The authority to detain aliens after the entry of a final order of removal is set forth in 8 U.S.C. § 1231(a). That statute affords ICE a 90-day mandatory detention period within which to remove the alien from the United States following the entry of the final order. 8 U.S.C. § 1231(a)(2). The 90-day removal period begins on the **latest** of three dates: the date (1) the order becomes "administratively final," (2) **a court issues a final order in a stay of removal,** or (3) the alien is released from non-immigration custody. 8 U.S.C. § 1231(a)(1)(B).

Not all removals can be accomplished in 90 days, and certain aliens may be detained beyond the 90-day removal period. *See Zadvydas*, 533 U.S. at 701. 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 presents a flight risk or other risk to the community. *Id.*; *see also* 8 U.S.C. § 1231(a)(1)(C); (a)(6). 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.

a. There Is No Good Reason to Believe That Removal is Unlikely in the Reasonably Foreseeable Future.

Petitioner cannot show "good reason" to believe that removal is unlikely in the reasonably foreseeable future. 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 v. Gonzales*, 459 F.3d 538, 543–44 (5th Cir. 2006); *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.*

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 removal order has been final since February 21, 2003. Exh. A at ¶ 14; *see* 8 C.F.R. § 241.1; 1241.1(a). Petitioner, nonetheless, urges this Court to order that his continued detention pending removal is contrary to his substantive and procedural rights under the Fifth,. ECF No. 1 at¶¶ 39-52. ICE has made significant process CVNH removal process, and only Petitioner's failure to comply and recent litigation stands in the way. *See* Exh. A. **Petitioner fails to consider or address his failures to comply, litigation, or that detention during the first 90 days is mandated by statute, and said clock restarted upon the entry of the stay by the BIA. Thus this petition is premature. 8 U.S.C. § 1231(a)(2).**

Beyond these conclusory allegations, Petitioner fails to allege any reason, much less a "good reason," to believe that there is no significant likelihood of removal in the foreseeable future. These claims are wholly insufficient under *Zadvydas*. *See Nogales v. Dept. of Homeland Sec.*, No. 21-10236, 2022 WL 851738 at *1 (5th Cir. Mar. 22, 2022) (citing *Rice v. Gonzalez*, 985 F.3d 1069, 1070 (5th Cir. 2021)); *Akbar v. Barr*, SA-20-CV-01132-FB, 2021 WL 1345530 (W.D. Tex. Mar. 5, 2021); *see also Andrade*, 459 F.3d at 543–44; *Boroky v. Holder*, No. 3:14-CV-2040-L-BK, 2014 WL 6809180, at *3 (N.D. Tex. Dec. 3, 2014).

Petitioner cannot meet his burden to establish no significant likelihood of removal in the reasonably foreseeable future. *See Thanh v. Johnson*, No. EP-15-CV-403-PRM, 2016 WL 5171779, at *4 (W.D. Tex. Mar. 11, 2016) (denying habeas relief where government was taking affirmative steps to obtain Vietnamese travel documents). The burden of proof, therefore, does not shift to Respondents to prove that removal is likely.

In other words, until the a country refuses to accept Petitioner, or the Motion to Reopen is granted there is no reason to believe that they is unlikely to accept him for removal. *Id.*

As such, removal is likely in the reasonably foreseeable future, and his continued detention is lawful. The only impediment at this time is Petitioner's failure to comply and his current litigation at the BIA. *See* Exh. A (ERO Declaration). Petitioner's substantive due process claim fails and should be denied.

b. ICE Has Afforded Petitioner Procedural Due Process.

To establish a procedural due process violation, Petitioner must show that he was deprived of liberty without adequate safeguards. *See Mathews v. Eldridge*, 424 U.S. 319, 332 (1976); *Daniels v. Williams*, 474 U.S. 327, 331 (1986). The Fifth Circuit has not provided guidance to lower courts, post-*Arteaga-Martinez*, on the appropriate standard for reviewing a procedural due process claim alleged by an alien detained under § 1231, but the Fourth Circuit, post-*Arteaga-Martinez*, used the *Zadvydas* framework to analyze a post-order-custody alien's due process claims. *See Linares v. Collins*, 1:25-CV-00584-RP-DH, ECF No. 14 at 10–14 (W.D. Tex. Aug. 12, 2025) (discussing *Johnson v. Arteaga-Martinez*, 596 U.S. 573 (2022) and *Castaneda v. Perry*, 95 F.4th 750, 760 (4th Cir. 2024)). To the extent this Court finds that any additional analysis is required beyond the constitutional analysis outlined in *Jennings* and *Thuraiissigiam*, *supra*, this Court may look to *Zadvydas* to review the procedural claim at issue here. *Id.*

Additionally, 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). Even if the Court were to find a procedural due process violation here, the **remedy 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).

Petitioner has received the maximum process afforded by Congress under the statutes, to include placement in "removal proceedings before an immigration judge". Such process included notice and an opportunity to be heard, and the opportunity for judicial review through the appellate court. This process addresses constitutional concerns that were identified in *Zadvydas*, allowing the alien notice and opportunity to be heard regarding continued detention pending removal. Additionally, Petitioner was eventually served with his notice of revocation of release. *See* Exh. B (Notice). Although this process was late it was done and thus satisfies the remedy of substitute process.

First, the basis of Petitioner's argument – that his supervision revocation on civil immigration grounds was unlawful – is not cognizable in this habeas petition, which vests jurisdiction in this Court **solely** to review the legal propriety of Petitioner's **current detention**. The question is not whether his detention was unlawful in the past. "[T]he great and central office of the writ of habeas corpus is to test the **legality of the prisoner's current detention [emphasis added]**." *Walker v. Wainwright*, 390 U.S. 335, 336, (1968).

In habeas, the Court does not review all possible previous errors, it asks only whether the confinement is justified. *See Lane v. Williams*, 455 U.S. 624, 631, (1982) (explaining that where detainment or its consequences have expired, a habeas petition is moot); *Preiser v. Rodriguez*, 411 U.S. 475, 489 (1973) (distinguishing between backward-looking remedies and habeas); *Lindh v. Murphy*, 521 U.S. 320, 342, (contrasting backward-looking actions like damages with "the writ of habeas corpus is prospective in nature," and it **"does not compensate for past wrongful incarceration ..[emphasis added]..**") (Scalia, J., dissenting). Whatever the circumstances and

facts before now, they are thus irrelevant to resolution of the legality of the current detention. Current detention is justified pursuant to 8 U.S.C 1231(a)(2). Also as addressed above, Petitioner has yet to address how the removal clock has not even started because of the BIA stay.

Additionally, any claims arising from the length of detention based on Petitioners 'choice to continue to litigate matters in removal proceedings should be dismissed. See Linares v. Collins, 1:25-CV-00584-RP-DH, ECF No. 14 at 15 (W.D. Tex. Aug. 12, 2025) (collecting cases and finding that aliens cannot assert viable due process claims when their detention is caused by their own plight, because delay due to litigation activity does not render detention indefinite).

Petitioner's procedural due process claim, like his substantive one, should be denied.

III. Conclusion

Petitioner's continued detention is mandatory under 8 U.S.C. § 1231(a)(6), detention here would be considered lawful. The stay from the BIA has also stayed the removal period clock. As such, the burden has not shifted to ICE to show removal is foreseeable. Even if the burden had shifted, ICE could establish that removal is foreseeable, and that the only impediment thus far is Petitioner's failure to comply and the BIA stay. Petitioner's continued detention, therefore, is comports with the law and with due process. Additionally, the Petition is the proper vehicle to litigate revocation errors.

Detention is not unreasonably prolonged, nor is it in violation of the INA or the Constitution. Accordingly, the Court should deny this petition.

Respectfully submitted,

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