IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
COLUMBUS DIVISION

J.N.C.G.,	:	
	:	
Petitioner,	:	
	:	
v.	:	CASE NO. 4:20-CV-62-MSH
	:	28 U.S.C. § 2241
Warden, STEWART DETENTION CENTER, *et al.*,	:	
	:	
	:	
Respondents.	:	

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ORDER

Pending before the Court is Petitioner's application for a writ of habeas corpus pursuant to 28 U.S.C. § 2241 (ECF No. 1). For the reasons explained below, Petitioner's application is granted in part and denied in part.

BACKGROUND

Petitioner is a native and citizen of [redacted] who has lived in the United States since [redacted] 2001, when he entered the country as a lawful permanent resident at the age of [redacted]. Resp'ts' Ex. A, at 1, 4, ECF No. 13-2. His conduct in this country has not been exemplary. In 2012 and 2013, he was convicted of [redacted], and in [redacted] 2017, the Department of Homeland Security ("DHS") served him with a Notice to Appear ("NTA"), charging him with removability based on these convictions. Bretz Decl. ¶¶ 30, 32, 34, ECF No. 13-1; Resp'ts' Ex. A, at 3; Resp'ts' Ex. B, at 3, ECF No. 13-3. He was held in United States Immigration and Customs Enforcement ("ICE") custody until [redacted] 2017, when an immigration judge ("IJ")

cancelled his removal. Bretz Decl. ¶¶ 35-36; Resp'ts' Ex. C, at 1, ECF No. 13-4.

On [redacted] 2018, Petitioner was convicted in Virginia of [redacted]. Bretz Decl. ¶ 37. He received a sentence of twelve months imprisonment on the [redacted] charge and a twelve-month suspended sentence on the [redacted] charge. Resp'ts' Ex. A, at 6. On [redacted] 2019, he was convicted in Virginia of [redacted], and [redacted]. Bretz Decl. ¶ 38; Resp'ts' Ex. A, at 5-6; Pet. Ex. A, at 2, ECF No. 1-8. He was sentenced to a total of approximately ten years in prison, but he did not serve any time for the convictions.[1] Resp's' Ex. A. at 5-6; Pet. Ex. A, at 2. On April 3, 2019, DHS issued a second NTA charging Petitioner with removability. Resp'ts' Ex. D, ECF No. 13-5. He was taken into ICE custody on [redacted] 2019, and has remained in their custody since then. Bretz Decl. ¶ 40. His detention is mandatory under 8 U.S.C. 1226(c).

On [redacted] 2019, an IJ ordered Petitioner's removal under 8 U.S.C. § 1227(a)(2)(A)(ii) due to two convictions for crimes involving moral turpitude ("CIMT"). Pet. Ex. D, at 11, ECF No. 1-11. The two crimes identified by the IJ as CIMTs were (1) [redacted] 2018, Virginia conviction [redacted], and (2) the [redacted] 2019,

[1] In his original petition, Petitioner asserted he served twelve months and five days on the state charges. Pet. ¶ 62, ECF No. 1. In their response, Respondents contended Petitioner served no time, but was taken into ICE custody instead. Resp'ts' Resp. to Pet. 10, ECF No. 13. At oral argument, Petitioner's counsel stated she had determined that his incarceration was for other charges.

Virginia conviction [redacted]. *Id.* at 2, 11. The IJ rejected DHS's argument that the [redacted] 2019, conviction [redacted] also constituted a CIMT. *Id.* at 4-6. On [redacted] 2019, Petitioner appealed to the Board of Immigration Appeals ("BIA"). Pet. Ex. E, at 1, ECF No. 1-12. He did not challenge the [redacted] conviction's characterization as a CIMT, but he did challenge the [redacted] conviction. Pet. Ex. G, at 5 n.1, 8-27, ECF No. 1-14. DHS did not cross-appeal, but in its response brief, it argued that both [redacted] *and* [redacted] were CIMTs. Pet. Ex. H, at 8-14, ECF No. 1-15. On October 24, 2019, Petitioner filed a statement of new legal authorities, attaching the BIA decision in [redacted], which concluded that a Virginia conviction for [redacted] did not constitute a CIMT. Pet. Ex. J, at 4, 6-7, ECF No. 1-17. On May 4, 2020, DHS filed a motion to expedite decision with the BIA. Resp'ts' Ex. G, at 1, ECF No. 13-8. On June 9, 2020, Petitioner also filed a motion to expedite. Pet'r's Reply Ex. A, at 3-4, ECF No. 17-1. Nevertheless, the BIA has still not issued a ruling.

Petitioner filed his application for habeas relief (ECF No. 1) on April 3, 2020. Petitioner contends his detention has become unreasonably prolonged in violation of the Fifth Amendment Due Process Clause. Pet. ¶¶ 78-82, ECF No. 1. As relief, he requests the Court order his release or, in the alternative, order Respondents to provide him with an individualized bond hearing at which the Government bears the burden of proving his continued detention is justified. *Id.* at p. 26. Respondents filed a comprehensive response (ECF No. 13) to the petition on June 12, 2020. Petitioner submitted a reply brief (ECF No. 17) on June 19, 2020. The Court heard oral argument on June 24, 2020, and subsequently

1. Exhaustion

Respondents contend Petitioner failed to exhaust his administrative remedies by requesting a *Joseph* hearing, referring to *In re Joseph*, 22 I. & N. Dec. 799 (BIA 1999). Resp'ts' Suppl. Br. 4-6. In a *Joseph* hearing, a § 1226(c) detainee "may avoid mandatory detention by demonstrating that he is not an alien, that he was not convicted of the predicate crime, or that the [Immigration and Naturalization Service ("INS")] is otherwise substantially unlikely to establish that the detainee is in fact subject to mandatory detention." *Demore*, 538 U.S. at 514 n.3 (2003). Respondents assert that prior to filing his habeas application, Petitioner should have first requested a *Joseph* hearing before an IJ and then appealed an adverse decision to the BIA. Resp'ts' Suppl. Br. 5.

"While Section 2241 does not include a statutory exhaustion requirement, courts have generally required exhaustion as a prudential matter." *Hossain v. Barr*, No. 6:19-cv-06389-MAT, 2019 WL 5964678, at *3 (W.D.N.Y. Nov. 13, 2019) (internal quotation marks omitted); *see also Douglas v. Gonzalez*, No. 8:06-cv-890-T-30TGW, 2006 WL 5159196, at *2 (M.D. Fla. June 12, 2006) (requiring petitioner to await outcome of BIA appeal prior to seeking habeas relief). However, since exhaustion is not statutorily required, the Court has some discretion in its application. *McCarthy v. Madigan*, 503 U.S. 140, 144 (1992), *superseded by statute on other grounds as recognized in Porter v. Nussle*, 534 U.S. 516, 524 (2002). Moreover, Respondents' exhaustion argument is a red herring.

Petitioner raised the issue of whether his [redacted] conviction qualifies as a CIMT—thus subjecting him to §1226(c) mandatory detention—before an IJ and is now waiting for the BIA to rule on his appeal of the IJ's adverse ruling. Requiring him to make

the identical argument before an IJ in a *Joseph* hearing and then appeal the inevitable adverse ruling would be duplicative. Moreover, he does not ask this Court to determine whether he has been properly classified as a § 1226(c) detainee; he admits that if his [redacted] conviction qualifies as CIMT, then he is subject to mandatory detention. Pet'r's Suppl. Br. 2, ECF No. 18. Instead, he challenges the constitutionality of the length of his detention while he awaits the BIA's ruling on his appeal. The Court will not require Petitioner to remain detained while awaiting the BIA's ruling before allowing him to raise a constitutional challenge to the length of that detention, as such a requirement would verge on Orwellian. True, if the BIA overrules the IJ's ruling, then, presumably, Petitioner will no longer be subject to mandatory detention and could possibly be released from custody. However, such reasoning applies to most, if not all, appeals to the BIA. If exhaustion were applied in the manner suggested by Respondents, pre-final-order-of-removal aliens would never be able to raise a due process challenge to the length of their detention because conceivably any favorable administrative ruling could result in their release. But, as discussed below, due process places constraints on prolonged detention of § 1226(c) detainees. Thus, the Court finds that Petitioner's claims are not barred for failure to exhaust administrative remedies.

2. § 1226(c) and Demore

Respondents contend the Court need look no further than *Demore* and the particular facts of Petitioner's case to find his continued § 1226(c) detention is constitutional. Resp'ts' Resp. to Pet. 6-8; Resp'ts' Suppl. Br. 1-4. In *Demore*, the Supreme Court addressed a due process challenge to mandatory detention under § 1226(c). 538 U.S. at

519. Finally, more than 20% of deportable criminal aliens who were released did not appear for their removal hearings. *Id.*

After discussing this background, the Court observed that "[i]n the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens." *Id.* at 521 (quoting *Mathews v. Diaz*, 426 U.S. 67, 79-80, (1976)). Further, the Court noted that it had long "recognized detention during deportation proceedings as a constitutionally valid aspect of the deportation process." *Id.* at 523. "Such detention," the Court stated, "necessarily serves the purpose of preventing deportable criminal aliens from fleeing prior to or during their removal proceedings, thus increasing the chance that, if ordered removed, the aliens will be successfully removed." *Id.* at 528. Thus, the Court held that "[d]etention during removal proceedings is a constitutionally permissible part of that process." *Id.* at 531.

Citing the legislative history outlined in *Demore* and the purposes served by § 1226(c), Respondents ask the Court to find that the continued detention of Petitioner does not violate due process. Resp'ts' Suppl. Br. 2. They cite his criminal history—particularly his 2018 conviction for [redacted] following the IJ's 2017 cancellation of removal—to argue that he is "exactly the type of individual that concerned Congress when enacting § 1226(c)."[2] *Id.* In essence, Respondents contend *Demore* provides the only framework the Court needs to analyze Petitioner's claim, and they cite no case law other

[2] To the extent Respondents suggest that the Court should consider Petitioner's entire criminal history in finding that he is the sort of individual Congress envisioned in mandating detention under § 1226(c)—as opposed to only those crimes subjecting him to mandatory detention under this section—the Court disagrees.

Petitioner's favor. He has now been detained for over 16 months. This is well beyond the one-year presumptively unreasonable period identified in *Sopo*. 825 F.3d at 1217.

The second factor is an evaluation of why removal proceedings have been protracted. *Id.* at 1218. Again, this factor weighs heavily in Petitioner's favor. Petitioner appealed to the BIA nearly a year ago, filed his initial brief on October 11, 2019, and submitted his supplemental brief on October 24, 2019. Pet. Ex. E, at 2; Pet. Ex. G, at 28; Pet. Ex. J, at 4. DHS filed its brief, which was two weeks overdue, on October 31, 2020. Pet. Ex. H, at 15. The BIA has still not rendered a decision despite both parties having moved for an expedited decision. Resp'ts' Ex. G, at 1; Pet'r's Reply Ex. A, at 3-4. Moreover, based on the BIA decision concluding that a Virginia conviction for [redacted] did not constitute a CIMT, Petitioner has—at the very least—pursued a good faith, non-frivolous argument. Thus, it does not appear that Petitioner is in any way to blame for the delay, and instead, the blame rests entirely on the Government. *See Sopo*, 825 F.3d at 1218 ("Errors by the immigration court or the BIA that cause unnecessary delay are also relevant."); *see also Martinez v. Clark*, No. C18-1669-RAJ-MAT, 2019 WL 5968089, at *10 (W.D. Wash. May 23, 2019) (attributing delay caused by crowded immigration court docket to the government); *Chikerema v. Lowe*, No. 1:18-CV-1031, 2019 WL 3928930, at *8-9 (M.D. Pa. May 2, 2019) (attributing BIA delay to the government); *Sajous v. Decker*, No. 18-CV-2447 (AJN), 2018 WL 2357266, at *11 (S.D.N.Y. May 23, 2018) (rejecting ICE's argument that delay by the immigration court should not be attributable to it and noting that "where the fault is attributable to some entity other than the alien, the factor will weigh in favor of concluding that continued detention without a bond hearing is

unreasonable").

The third factor is whether removal will be possible once the removal order becomes final. *Sopo*, 825 F.3d at 1218. At oral argument, Respondents' counsel represented to the Court that there would be no impediment to Petitioner's removal to [redacted] once a removal order became final, and Petitioners have not challenged this assertion.[4] Thus, this factor weighs in Respondents' favor.

The fourth factor is "whether the alien's civil immigration detention exceeds the time the alien spent in prison for the crime that rendered him removable." *Id.* As previously discussed, it appears Petitioner was not actually detained for the crimes subjecting him to § 1226(c) mandatory detention. Respondents contend the Court should look at his total sentence—11 years in prison—as opposed to his actual period of confinement. Resp'ts' Resp. to Pet. 10. However, they cite no law to support this, and *Sopo*, itself, referred to "the time the alien spent in prison for the crime that rendered him removable." *Sopo*, 825 F.3d at 1218. Thus, this factor weighs in Petitioner's favor.

Fifth, and finally, neither party disputes that Petitioner's current place of confinement—Stewart Detention Center—is not meaningfully different from a prison.

Both parties direct the Court to *Sopo's* admonition that its "list of factors is not exhaustive," and point to other factors they believe should be considered. *Id.* Petitioner

[4] Petitioner asserts this factor is similar to another consideration mentioned in *Sopo*: whether removal proceedings will conclude in the reasonably foreseeable future. Pet. ¶ 56; *Sopo*, 825 F.3d at 1218. The Court disagrees that they address the same concern. Whether removal proceedings will conclude in the reasonably foreseeable future is unknown. If the BIA rules in Petitioner's favor, they could obviously conclude quite soon. Otherwise, Petitioner indicates he may appeal. Pet. ¶ 59.