Case No. 22-6716

ORIGINAL

Supreme Court of the United States

October Term, 22"

Wekesa v United States Att`y.

On Writ of certiorari to the

United States Court of Appeals

for the FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

David Wekesa, # 1746,
Prairieland Detention Center,
1209 Sunflower Lane,
Alvarado, Texas, 76009.

QUESTIONS PRESENTED FOR REVIEW

1. Whether due process mandates procedural protections during lengthy periods of mandatory detention under 8 U.S.C. § 1226(c).
2. How long does detention under 8 U.S.C. § 1226(c) need to be before an inquiry into the reasonableness of the detention can be conducted?

LIST OF ALL PARTIES TO THE PROCEEDING

1. David Wekesa, petitioner.

2. Attorney General, respondent.

DIRECTLY RELATED CASES

1. Court: United States District Court for the Northern District of Texas, San Angelo Division

   Case number: 6:21-CV-46

   Case caption: Wekesa v Warden, et. al.

   Judgment date: February, 28, 2022

2. Court: United States Court of Appeals for the Fifth Circuit

   Case number: 22-10260

   Case caption: Wekesa v United States Att`y.

   Judgment date: November 22, 2022

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

CONSTITUTION

OTHERS

CITATIONS

Case: Wekesa v United States Attorney

Reporter: 2022 U.S. App. LEXIS 32359 | 2022 WL 17175818

Citation: Wekesa v. United States Atty., 2022 U.S. App. LEXIS 32359, 2022 WL 17175818 (5th Cir. Tex. November 22, 2022)

Appendix: Page 4

Disposition: District Court judgment affirmed, motion denied.

Case: Wekesa v United States Attorney, et al

United States District Court No. 6:21-CV-46

Reporter: N/A

Citation: N/A

Appendix: N/A

Disposition: Petition for writ of habeas corpus denied.

STATEMENT OF JURISDICTIONAL GROUNDS

This Honorable Court has jurisdiction pursuant to 28 U.S.C. § 1254(1), to review a case in a United States court of appeals sought by petition for writ of certiorari. The statute provides that any party may seek review, and that the petition for certiorari may be sought "after rendition of judgment or decree."

The petitioner is a detainee under the custody of Immigration and Customs Enforcement ("ICE"), pursuant to 8 U.S.C. § 1226(c). The petitioner filed a petition for a writ of habeas corpus in the Northern District of Texas, San Angelo division, in July of 2021. (*See* Appendix). The court denied his petition in February of 2022 and the petitioner appealed. The Fifth Circuit Court of Appeals entered a judgment on the 22nd day of November, 2022, affirming the district court's judgment in a majority decision with one dissent. (Appendix)

A petition for a writ of certiorari to review a judgment in any case, civil or criminal, entered by a state court of last resort or a United States court of appeals (including the United States Court of Appeals for the Armed Forces) is timely when it is filed with the Clerk of this Court within 90 days after entry of the judgment. *See* Supreme Court Rule 13.1. Because the petitioner's petition is timely, this Honorable Court has jurisdiction over his writ.

The petitioner asserts that the appellate court's decision does not address the constitutional issue raised in the petition, but rather relies solely on the statute's text. (Appendix at6). Moreover, other circuits have held that due process implications arise from lengthy detention periods. However, the amount of time that passes before an inquiry into the reasonableness of extended detention periods

varies significantly among the circuit courts. Thus, the Supreme Court needs to intervene and address in the first instance, the question of whether prolonged detention absent procedural protections would implicate due process under the constitution. If the Court so determines, then it should issue guidance so that there is uniformity among lower court decisions. In the petitioner's writ of habeas corpus, he asserted that he had been deprived of the right to due process under the Fifth Amendment of the Constitution because he had been detained for over twenty-eight months without an inquiry as to whether detention was still warranted, or whether other less restrictive options were available to achieve the statute's goal, including bail. Because the petitioner appeals from the appellate court's judgment, the petitioner has exhausted all his remedies.

CONSTITUTIONAL, STATUTORY AND RELATED PROVISIONS

8 U.S.C. § 1226(c)

(c) Detention of Criminal Aliens

(1) Custody

The Attorney General shall take into custody any alien who -

(A) is inadmissible by reason of having committed any offense covered in section 212(a)(2),

(B) is deportable by reason of having committed any offense covered in section 237(a)(2)(A)(ii), (A)(iii), (B), (C), or (D),

(C) is deportable under section 237(a)(2)(A)(i) on the basis of an offense for which the alien has been sentence[d] to a term of imprisonment of at least 1 year, or

(D) is inadmissible under section 212(a)(3)(B) or deportable under section 237(a)(4)(B),

when the alien is released, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense.

(2) Release

The Attorney General may release an alien described in paragraph (1) only if the Attorney General decides pursuant to section 3521 of title 18, United States Code, that release of the alien from custody is necessary to provide protection to a witness, a potential witness, a person cooperating with an investigation into major criminal activity, or an immediate family member or

close associate of a witness, potential witness, or person cooperating with such an investigation, and the alien satisfies the Attorney General that the alien will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding. A decision relating to such release shall take place in accordance with a procedure that considers the severity of the offense committed by the alien.

8 U.S.C. § 1226(e)

(e) Judicial Review

The Attorney General's discretionary judgment regarding the application of this section shall not be subject to review. No court may set aside any action or decision by the Attorney General under this section regarding the detention or release of any alien or the grant, revocation, or denial of bond or parole.

CONSTITUTION FOR THE UNITED STATES, AMENDMENT 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

The petitioner was legally admitted into the country. The Department of Homeland Security charged him with being subject to removal from the United States pursuant to Section 237(a)(1)(C)(i) of the Immigration and Nationality Act ("INA"), as having "failed to maintain" or comply with the conditions of "the nonimmigrant status" under which he "was admitted". *Id.* Following a conviction for a crime involving moral turpitude in 2018, the petitioner was taken into custody by Immigration and Customs Enforcement officials in June of 2020.

After a *Joseph* hearing, it was determined that the petitioner was subject to mandatory detention pursuant to U.S.C. § 1226(c). *See Matter of Joseph*, 22 I. & N. Dec. 799 (BIA 1999). Since that initial custody determination, the petitioner has remained in ICE custody. In July 2021, after having been detained for thirteen months, the petitioner filed a petition for a writ of habeas corpus in a federal district court. In a brief single-page order dated February 28, 2022, the district court found that the nineteen-month detention was reasonable and denied the petitioner's writ. That decision was timely appealed to the Fifth Circuit Court of Appeals. The appellate court, in a 2-1 majority opinion, affirmed the district court's order on November 22, 2022. The petitioner has been detained for thirty-three months as of this filing, without any procedural safeguards to determine whether continued detention is warranted. (Appendix at 6-7).

The petitioner seeks certiorari in this court, to determine whether due process under the constitution mandates procedural protections during lengthy

periods of mandatory detention pursuant to 8 U.S.C. § 1226(c). The Court should also determine that if due process mandates procedural protections, then at what point does mandatory detention, absent those procedural safeguards, become unreasonable and violate due process under the Constitution's Fifth Amendment.

Some district courts and circuit appellate courts have determined that due process requires procedural protections. Having so determined, they have applied a case-specific approach in determining when lengthy detention has become unreasonable in the application of 8 U.S.C. § 1226(c). However, the application of that statute has not been uniform among the circuits, necessitating guidance from this Honorable Court. Additionally, the Fifth Circuit maintains that the Constitution allows for extended civil detention without any procedural safeguards, as is the case here.

Because the petitioner has timely filed for a writ of certiorari, having exhausted all other remedies, this Honorable Court's jurisdictional prerequisites have all been met. Moreover, the petitioner in this case is not asking for review of an order of removal; he is not challenging the decision to detain him in the first place or to seek removal; and he is not even challenging any part of the process by which his removability will be determined. Under these circumstances, §1252(b)(9) does not present a jurisdictional bar.

Likewise, §1226(e) does not bar this Honorable Court from considering the petitioner's claims. Although §1226(e) precludes a noncitizen from "challeng[ing] a 'discretionary judgment' by the Attorney General or a 'decision' that the Attorney

General has made regarding his detention or release", *Demore v. Kim*, 538 U. S. 510, 516, 123 S. Ct. 1708, 155 L. Ed. 2d 724 (2003), it does not preclude "challenges [to] the statutory framework that permits [the noncitizen's] detention without bail." *Id.*, at 517, 123 S. Ct. 1708, 155 L. Ed. 2d 724.

The petitioner mounts that second type of challenge here. He challenges the extent of the Government's detention authority under the "statutory framework" as a whole, and the constitutionality of the entire statutory scheme under the Fifth Amendment's Due Process clause. Because the extent of the Government's detention authority is not a matter of "discretionary judgment," "action," or "decision," his challenge to "the statutory framework that permits his detention without bail," *ibid.*, falls outside of the scope of §1226(e). Thus, this Honorable Court may consider the merits of his claims.

ARGUMENT

The issue presented in this petition is whether due process requires procedural protections during lengthy periods of mandatory detention. Because the petitioner is *pro se*, he respectfully requests that this Honorable Court review his pleadings under a less stringent standard than those drafted by attorneys, and construe his pleadings liberally including making all reasonable inferences which can be drawn from them. *See Haines v. Kerner*, 404 U.S. 519, 520-21, 92 S. Ct. 594, 30 L. Ed. 2d 652 (1972) (explaining the lower standard for *pro se* pleadings).

Section 1226(e) - which states that "the Attorney General's discretionary judgment regarding the application of this section shall not be subject to review" and that "[n]o court may set aside any action or decision by the Attorney General under this section regarding the detention or release of any alien" - does not deprive the federal courts of jurisdiction to grant habeas relief to noncitizens challenging their detention under § 1226(c). The petitioner does not challenge a "discretionary judgment" by the Attorney General or a "decision" that the Attorney General has made regarding his detention or release. On the contrary, the petitioner challenges the statutory framework that permits his prolonged detention without bail. This was the issue before the district court and the court of appeals. (*See* Appendix) Section 1226(e) contains no explicit provision barring habeas review. *See e.g. Webster v. Doe*, 486 U.S. 592, 603, 100 L. Ed. 2d 632, 108 S. Ct. 2047. (Where Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear.).

The INA is codified at 8 U.S.C. § 1101 et seq. The Act gives the government discretion to "issue a warrant for the arrest and detention of [a noncitizen] 'pending a decision on whether the [noncitizen] is to be removed from the United States.'" *Jennings v. Rodriguez*, 138 S. Ct. 830, 837, 200 L. Ed. 2d 123 (2018) (citing 8 U.S.C. § 1226(a)). Further, the government "may release [a noncitizen] on bond of at least $1,500 ... or conditional parole", except those detained pursuant to § 1226(c). *See* 8 U.S.C. § 1226(a)(2). Section 1226(c) states that the government "shall take into custody any [noncitizen] who is inadmissible by reason of having committed any offense covered in section 1182(a)(2) of this title ... when the [noncitizen] is released." 8 U.S.C. § 1226(c)(1)(A).

Although the Act permits release on bond under certain circumstances, those convicted of any crime covered in section 1182(a)(2) are removed from eligibility for bond. *Id.* at § 1226(c)(2). This policy cannot be disturbed by any court unless there is a question of constitutional infringement. To be clear, "civil detention for any purpose constitutes a significant deprivation of liberty." *Addington v. Texas*, 441 U.S. 418, 425, 99 S. Ct. 1804, 60 L. Ed. 2d 323 (1979) (finding unreasonable civil detention of mentally disabled person violated Fifth Amendment due process). This includes civil detention of noncitizens. *See Reno v. Flores*, 507 U.S. 292, 306, 113 S. Ct. 1439, 123 L. Ed. 2d 1 (1993).

Because a "statute permitting indefinite detention of [a noncitizen] would raise a significant constitutional problem," the *Zadvydas* Court read an implicit limitation into an immigration statute that, on its face, mandated indefinite

detention. *Zadvydas v. Davis*, 533 U. S. 678, 693, 121 S. Ct. 2491, 150 L. Ed. 2d 653 (2001) at 699 ("[O]nce removal is no longer reasonably foreseeable, continued detention is no longer authorized by statute."). But seventeen years later, the Supreme Court retreated from its earlier reasoning in *Zadvydas*. In *Jennings*, the court rejected the notion proffered by the Ninth Circuit that due process statutorily required a bond hearing every six months to justify continued detention under § 1226(c). *Jennings v. Rodriguez*, 138 S. Ct. 830, 200 L. Ed. 2d 123 (2018). However, the *Jennings* Court declined to reach the merits of the Fifth Amendment due process challenge to mandatory detention under § 1226(c). *Id.* at 846. Instead, it relied on earlier decisions that suggested that detention duration ranged from one to six months, leading the Supreme Court to conclude that mandatory detention under § 1226(c) did not have an implied limit. *Id.*; *see also Demore v. Kim*, 538 U.S. 510, 529, 123 S. Ct. 1708, 155 L. Ed. 2d 724 (2003) (finding that noncitizens detained under § 1226(c) were detained for a median time of 30 days and if the decision was appealed to the BIA, an average time of four months) and *Zadvydas*, 533 U.S. at 697 (finding that an implicit limit on indefinite detention for noncitizens subject to final removal orders after a six-month period of confinement were due an individualized bond hearing).

Under the due process clause of the Fifth Amendment, noncitizens possess a substantive due process right to liberty during deportation proceedings. The Fifth Amendment provides, "No person shall . . . be deprived of life, liberty or property, without due process of law." U.S. Const. amend. V. The term used to define those

entitled to protection under the due process clause, i.e., "person," does not differentiate between citizens and noncitizens, but is broad and inclusive. *Zadvydas v. Davis*, 533 U. S. 678, 693, 121 S. Ct. 2491, 150 L. Ed. 2d 653 (2001) ("once an alien enters the country," he is entitled to due process in his removal proceedings because "the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent"). However, this is a narrow right and judicial review of alleged interference with the right by the federal government is limited.

Liberty under law is not confined to mere freedom from bodily restraint; it extends to full range of conduct which an individual is free to pursue, and it cannot be restricted except for proper governmental objective. *Bolling v Sharpe*, 347 US 497, 98 L Ed 884, 74 S Ct 693, 53 Ohio Ops 331 (1954). Even though governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when end can be more narrowly achieved; breadth of legislative abridgment must be reviewed in light of less drastic means for achieving same basic purpose. *Shelton v Tucker*, 364 US 479, 5 L Ed 2d 231, 81 S Ct 247 (1960); *Aptheker v Secretary of State*, 378 US 500, 12 L Ed 2d 992, 84 S Ct 1659 (1964).

Freedom from imprisonment, government custody, detention, or other forms of physical restraint lies at heart of liberty that due process clause of Federal Constitution's Fifth Amendment protects; government detention violates that clause unless detention is ordered: (1) in proceeding with adequate procedural

protections, or (2) in certain special and narrow nonpunitive circumstances, where special justification-such as harm-threatening mental illness-outweighs an individual's constitutionally protected interest in avoiding physical restraint. *Zadvydas v Davis*, 533 US 678, 121 S Ct 2491, 150 L Ed 2d 653, 2001 CDOS 5455 (2001).

1226(c) provides for mandatory detention of, among others, noncitizens who were convicted of certain crimes. However, the Supreme Court has held that for detention to be consistent with the Due Process Clause, it must be only for the "brief period necessary" required to complete removal proceedings. *Demore v. Kim*, 538 U.S. 510, 513, 123 S. Ct. 1708, 155 L. Ed. 2d 724 (2003). However, constitutional concerns arise when detention ceases to be brief. *See Zadvydas v. Davis*, 533 U.S. 678, 690, 121 S. Ct. 2491, 150 L. Ed. 2d 653 (2001) (holding that "[a] statute permitting indefinite detention of [a noncitizen] would raise a serious constitutional problem").

Due process is that which comports with the deepest notions of what is fair and right and just. *Solesbee v. Balkcom*, 339 U.S. 9, 16, 94 L. Ed. 604, 70 S. Ct. 457 (1950) (Frankfurter, J., dissenting). Due process requires the recognition that, at a certain point which may differ case by case, the burden to a noncitizen's liberty outweighs a mere presumption that the noncitizen will flee and or is dangerous. At this tipping point, the Government can no longer defend the detention against claims that it is arbitrary or capricious by presuming flight and dangerousness: more is needed to justify the detention as necessary to achieve the goals of the

statute. Section 1226(c) implicitly authorizes detention for a reasonable amount of time, after which the authorities must make an individualized inquiry into whether detention is still necessary to fulfill the statute's purpose of ensuring that a noncitizen attends removal proceedings and that his release will not pose a danger to the community. Absent this individualized inquiry, prolonged detention runs afoul of Due Process.

Ultimately, the goals of the statute must be weighed against the personal costs to a noncitizen's liberty. District courts in the country have adopted a fact-based inquiry when determining whether detention is unreasonable. *See* e.g. *M.D.F. v. Johnson*, 20-CV-0829, 2020 U.S. Dist. LEXIS 227595 (N.D. Tex. Dec. 3, 2020). In assessing due process challenges to 1226(c) detentions, courts have considered several factors such as those articulated in *German-Santos* to determine when continued detention becomes unreasonable and the Executive Branch's implementation of 1226(c) becomes unconstitutional unless a bond hearing is provided. *See German Santos v. Warden Pike Cty. Corr. Facility*, 965 F.3d 203, 209 (3d Cir. 2020); *see also M.D.F.*, supra.

Under that framework, noncitizens detained under 1226(c) are entitled to a bond hearing once their detention becomes unreasonable. *Id.* In *German-Santos*, four non-exhaustive factors are considered in assessing whether a noncitizen's detention has become unreasonable. Those four factors are: (1) the duration of the alien's detention; (2) whether the alien's detention is likely to continue; (3) the reasons for any delay; and (4) whether the conditions under which the alien is

confined are "meaningfully different from criminal punishment." *Id.* at 211.

Many courts have held that Fifth Amendment Due Process limits unreasonable detention under § 1226(c), and when the particular facts establish that the detention has become unreasonable, the Due Process clause affords the detainee an individualized bond hearing. *German Santos*, 965 F.3d at 210 ("due process affords [noncitizens] detained under § 1226(c) a bond hearing once detention becomes unreasonable"). The Fifth Circuit disagrees, arguing that "the statutory requirements for release under Section 1226(c)(2)" must be met before a determination into the unreasonableness of detention is conducted, regardless of the length of detention. (Appendix at 5). Thus, the question before this Honorable Court is, does the Constitution allow prolonged detention absent procedural protections? If not, when does prolonged detention absent those procedural protections become unreasonable?

The Supreme Court has found that detention of up to five or six months is not unreasonable on its face. *Demore*, 538 U.S. at 529-30. However, in an as-applied challenge, the longer the detention, the more unreasonable it seems. The Supreme Court did not set a bright-line rule justifying detention under § 1226(c) after a certain number of months. Instead, it has applied a traditional due process balancing test of factors. *See, e.g., Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976) (noting that the "flexible" nature of due process is best protected by a balancing test); *Addington*, 441 U.S. 418, 425, 99 S. Ct. 1804, 60 L. Ed. 2d 323 (balancing an individual's interest "in not being involuntarily confined

indefinitely" against state interests in the context of a civil commitment proceeding).

Demore v. Kim, 538 U.S. 510, 123 S. Ct. 1708, 155 L. Ed. 2d 724 (2003), is distinguishable because the noncitizen in that case argued that the Government may not detain him even for the brief period necessary for his removal proceedings. *Id.* at 522. Relying on *Zadvydas*, Kim argued that § 1226(c) is unconstitutional on its face. *Id.* at 526. The Court held that *Zadvydas* was not controlling and that a brief detention under § 1226(c) does not violate due process. The Court distinguished *Zadvydas* in two respects. 538 U.S. at 527-29. First, *Zadvydas* involved detention following a final order of removal, and not "detention of deportable criminal aliens pending their removal proceedings." *Id.* at 527-8. Second, the detention period in *Zadvydas* was "indefinite" and "potentially permanent" whereas detention under § 1226(c) "is of a much shorter duration." *Id.*

Demore relies on a crucial fact: that detention under § 1226(c) is often brief and finite. The Court's emphasis on the anticipated limited duration of the detention period under § 1226(c) is unmistakable. The Court explained: "Under § 1226(c), not only does detention have a definite termination point, in the majority of cases it lasts for less than the 90 days we considered presumptively valid in *Zadvydas*." 538 U.S. at 529. Further, detention under § 1226(c) "lasts roughly a month and a half in the vast majority of cases in which it is invoked, and about five months in the. . .cases in which the alien chooses to appeal." *Id.* at 530.

Contemplating these statistics, the Court held that, consistent with due

process, criminal noncitizens may be "detained for the brief period necessary for their removal proceedings," without answering the question of "how brief" such a detention must be. *Id.* at 513. Thus, the Supreme Court did not reach the constitutional question of how long detention must be before violating a noncitizen's due process rights, which is the question the petitioner asks this Honorable Court to consider.

Although 1226(c) does not contain an implicit limitation on the length of detention, it violates due process if such detention is prolonged without any procedural protections. Indeed, the statute was enacted for the sole purpose of ensuring that noncitizens show up for their removal proceedings and that they do not pose a danger to the American community. Based on *Demore*, Congress understood that detention was brief, after which the removal period began, which was also limited to 90 days. It is implausible to conclude that Congress would have found lengthy detention periods, in excess of 700 days, without any procedural safeguards in place to be lawful.

In other words, 8 USCS § 1226(c) implicitly authorizes detention for a reasonable amount of time, after which the Due Process Clause requires individualized inquiry into whether detention is still necessary to fulfill the statute's goal of ensuring that the noncitizen attends removal proceedings and that the noncitizen's release will not pose danger to community. This comports with other circuits which have held that an as-applied inquiry is necessary after removal proceedings extend beyond a brief period. However, this "brief period" varies per

circuit. For example, *Leslie v AG* of the United States 678 F.3d 265 (2012, CA3 Pa) (almost four years); *Ly v. Hansen*, 351 F.3d 263, 270 (6th Cir. 2003) (eighteen months); *Portillo v. Hott*, 322 F. Supp. 3d 698, 707 (E.D. Va. 2018) (14 months); *Doe v. Garland*, 2023 U.S. Dist. LEXIS 4312 (N.D. Cal. January 10, 2023) (twenty-eight months); *Haughton v. Crawford*, No. 116CV634LMBIDD, 2016 U.S. Dist. LEXIS 140104, 2016 WL 5899285, at *9 (E.D. Va. Oct. 7, 2016) (12 months unreasonable); *Lett v. Decker*, 346 F. Supp. 3d 379, 387 (S.D.N.Y. 2018) (ten months unreasonable);

In summation, the Fifth Circuit is of the opinion that detention of any period of time (in this case upwards of twenty-eight months) does not infringe upon one's constitutional rights. Other circuits have concluded, based on specific case facts, that at some point, civil detention becomes unreasonable and infringes upon one's constitutional rights. The Supreme Court held in *Zadvydas* that six months was unreasonable. Based on the significant parity on the length of time detention lasts before an inquiry into unreasonableness is conducted, guidance from this Honorable Court is needed.

CONCLUSION

Because the constitutional claim raised in this case has not been addressed by this Honorable Court, the petitioner respectfully prays that this honorable Court grant the writ.

Respectfully submitted,

David

David Wekesa

Dated this 16th Day of January, 2022.

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