

APPENDIX

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1. Court's Opinion and Order from the Fifth Circuit Court of Appeals.

22-10260

Mr. David Wekesa
#A098 061 746
Prairieland Detention Center
1209 Sunflower Lane
Alvarado, TX 76009

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE,
Suite 115
NEW ORLEANS, LA 70130

November 22, 2022

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW

Regarding: Fifth Circuit Statement on Petitions for Rehearing
or Rehearing En Banc

No. 22-10260 Wekesa v. United States Attorney
USDC No. 6:21-CV-46

Enclosed is a copy of the court's decision. The court has entered judgment under **FED. R. APP. P. 36**. (However, the opinion may yet contain typographical or printing errors which are subject to correction.)

FED. R. APP. P. 39 through **41**, and **5TH CIR. R. 35**, **39**, and **41** govern costs, rehearings, and mandates. **5TH CIR. R. 35 and 40 require you to attach to your petition for panel rehearing or rehearing en banc an unmarked copy of the court's opinion or order.** Please read carefully the Internal Operating Procedures (IOP's) following **FED. R. APP. P. 40** and **5TH CIR. R. 35** for a discussion of when a rehearing may be appropriate, the legal standards applied and sanctions which may be imposed if you make a nonmeritorious petition for rehearing en banc.

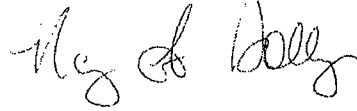
Direct Criminal Appeals. **5TH CIR. R. 41** provides that a motion for a stay of mandate under **FED. R. APP. P. 41** will not be granted simply upon request. The petition must set forth good cause for a stay or clearly demonstrate that a substantial question will be presented to the Supreme Court. Otherwise, this court may deny the motion and issue the mandate immediately.

Pro Se Cases. If you were unsuccessful in the district court and/or on appeal, and are considering filing a petition for certiorari in the United States Supreme Court, you do not need to file a motion for stay of mandate under **FED. R. APP. P. 41**. The issuance of the mandate does not affect the time, or your right, to file with the Supreme Court.

Court Appointed Counsel. Court appointed counsel is responsible for filing petition(s) for rehearing(s) (panel and/or en banc) and writ(s) of certiorari to the U.S. Supreme Court, unless relieved of your obligation by court order. If it is your intention to file a motion to withdraw as counsel, you should notify your client promptly, **and advise them of the time limits for filing for rehearing and certiorari.** Additionally, you **MUST** confirm that this information was given to your client, within the body of your motion to withdraw as counsel.

Sincerely,

LYLE W. CAYCE, Clerk

A handwritten signature in cursive script, appearing to read "Lyle W. Cayce".

By: _____
Nancy F. Dolly, Deputy Clerk

Enclosure(s)

Ms. Ann Elizabeth Cruce-Haag
Mr. David Wekesa

United States Court of Appeals
for the Fifth Circuit

United States Court of Appeals
Fifth Circuit

FILED

November 22, 2022

Lyle W. Cayce
Clerk

No. 22-10260
Summary Calendar

DAVID WEKESA,

Petitioner—Appellant,

versus

UNITED STATES ATTORNEY; UNITED STATES DEPARTMENT OF
HOMELAND SECURITY; IMMIGRATION AND CUSTOMS
ENFORCEMENT; WARDEN, EDEN DETENTION CENTER,

Respondents—Appellees.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 6:21-CV-46

Before SMITH, DENNIS, and SOUTHWICK, *Circuit Judges.*

LESLIE H. SOUTHWICK, *Circuit Judge*:*

David Wekesa appeals the district court's dismissal of his 28 U.S.C. § 2241 petition challenging his continued detention pursuant to 8 U.S.C. § 1226(c). He has also filed a motion for an emergency temporary restraining

* Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

order. Wekesa argues that, while originally lawful, his continued detention without an individualized bond hearing violates his due process rights.

A district court has subject matter jurisdiction to hear an alien's Section 2241 petition challenging the lawfulness of his or her detention. *See Demore v. Kim*, 538 U.S. 510, 517 (2003). In the context of a Section 2241 petition, this court reviews the district court's determinations of law *de novo* and its findings of facts for clear error. *Tran v. Mukasey*, 515 F.3d 478, 481 (5th Cir. 2008).

Section 1226(c) provides that the Attorney General shall detain aliens who are inadmissible or removable based on having committed certain criminal offenses. § 1226(c)(1). Any alien detained under Section 1226(c)(1) may be released only if the alien's release is necessary for witness-protection purposes, and (2) the Attorney General is satisfied that the alien does not pose a danger to persons or property and that the alien is likely to appear for scheduled proceedings. § 1226(c)(2). In *Jennings v. Rodriguez*, 138 S. Ct. 830, 846 (2018), the Supreme Court stated that the language of the statute "reinforces the conclusion that aliens detained under its authority are not entitled to be released under any circumstances other than those expressly recognized by the statute." The Court held that "§ 1226(c) mandates detention of any alien falling within its scope and that detention may end prior to the conclusion of removal proceedings 'only if' the alien is released for witness-protection purposes." *Id.* at 847.

Because Wekesa does not meet the statutory requirements for release under Section 1226(c)(2), the district court did not err by denying Wekesa's Section 2241 petition. His motion for an emergency temporary restraining order is also denied.

AFFIRMED; MOTION DENIED.

JAMES L. DENNIS, *Circuit Judge*, dissenting:

With respect to my learned colleagues in the majority, I disagree that Wekesa’s prolonged detention—he has been held for almost two-and-a-half years—without a bond hearing does not violate the Fifth Amendment’s guarantee of due process. The authority the majority relies on for its decision, *Jennings v. Rodriguez*, 138 S. Ct. 830, 846–47 (2018), held only that the statute providing the Government’s detention authority, 8 U.S.C. § 1226(c), does not require periodic bond hearings. It expressly left open the question Wekesa raises, which is whether the Constitution does. *See id.* at 851 (“Because the Court of Appeals erroneously concluded that periodic bond hearings are required under the immigration provisions at issue here, it had no occasion to consider respondents’ constitutional arguments . . . Consistent with our role as ‘a court of review, not of first view,’ we do not reach those arguments.”) (internal citation removed); *Rodriguez v. Marin*, 909 F.3d 252, 255 (9th Cir. 2018) (noting on remand that the Supreme Court “declined to reach the constitutional question”). With respect, the majority’s observation that, per *Jennings*, § 1226(c) mandates detention without bail is apropos of nothing Wekesa argues. Neither does *Demore v. Kim*, 538 U.S. 510 (2003), foreclose Wekesa’s claim. That case held only that a “brief period” of detention under § 1226(c)—three months in that case—without a judicial determination of dangerousness or flight risk did not violate the Fifth Amendment. *Id.* at 513. In short, the majority cites no relevant authority, and makes no convincing argument, for its summary rejection of Wekesa’s claim.

I would instead hold that Wekesa’s prolonged detention without a bond hearing implicates due process protections and must be analyzed further. The Fifth Amendment guarantees that all “persons”—citizens and non-citizens alike—shall not be deprived of liberty without due process of law. U.S. CONST. amend V; *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001).

To detain someone without bail is to deprive them of liberty. *Id.* at 690. And to detain someone with no hearing on whether they are eligible for bail is to do without process. I would thus follow the reasoning of the Supreme Court in *Zadvydas* and hold that the Constitution does impose limits on the length of time the Government may detain a noncitizen without a bond hearing. *See id.* at 690 (“A statute permitting indefinite detention of an alien would raise a serious constitutional problem.”).¹ Because the district court here appears to have concluded that the Due Process Clause did not apply to Wekesa’s detention at all,² I would vacate and remand for the court to apply the Fifth Amendment and determine in the first instance whether Wekesa’s prolonged detention violates the Due Process Clause.

I respectfully dissent.

¹ I note that this would also align our circuit with the federal courts, including two of our sister circuits which have addressed the issue. *See German Santos v. Warden Pike Cnty. Corr. Facility*, 965 F.3d 203, 206 (3d Cir. 2020); *Reid v. Donelan*, 17 F.4th 1, 7 (1st Cir. 2021) (“[W]e adhere to the notion that ‘the Due Process Clause imposes some form of ‘reasonableness’ limitation upon the duration of detention’[.]”); *Muse v. Sessions*, 409 F. Supp. 3d 707, 712–15 (D. Minn. 2018).

² The district court’s brief single-page order contained no analysis or independent findings. It simply stated that “based on the facts and the law” in the Government’s brief, Wekesa’s petition was denied. According to that brief, neither the Constitution nor § 1226(c) entitle Wekesa to relief.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
SAN ANGELO DIVISION

DAVID WEKESA,

Petitioner,

v.

U.S. ATTORNEY, *et al.*,

Respondents.

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§
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CIVIL ACTION NO. 6:21-CV-00046-C

ORDER

Petitioner David Wekesa, an immigrant detainee proceeding pro se, filed a Petition for Writ of Habeas Corpus under 28 U.S.C. § 2241, challenging his prolonged mandatory detention in the Eden Detention Center. He seeks release from confinement.

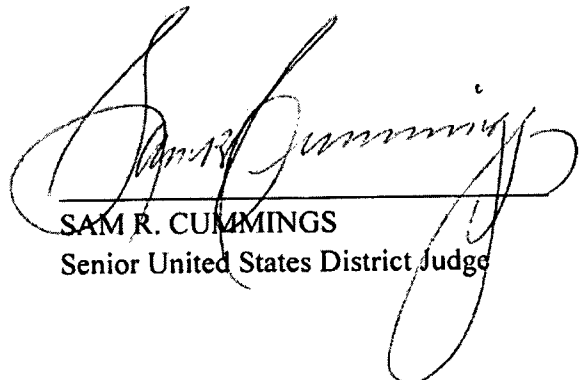
Respondent timely filed a response in opposition to the Petition along with relevant records. Respondent asserts that Petitioner is not entitled to relief. Specifically, Respondent argues Petitioner's continued detention is required because he is subject to mandatory detention under 8 U.S.C. § 1226(c)(1)(A) while his removal proceedings are pending, due to his conviction for a crime involving moral turpitude. Petitioner filed a reply, urging to the Court to find that his mandatory detention has been unconstitutionally prolonged.

The Court has reviewed Petitioner's pleadings, and Respondent's Response, together with the records attached thereto. Based upon the facts and the law set forth in Respondent's Response, the Court finds that Petitioner is not entitled to relief under 28 U.S.C. § 2241.

Accordingly, the Petition is DENIED and DISMISSED with prejudice.

SO ORDERED.

Dated February 28, 2022.


SAM R. CUMMINGS
Senior United States District Judge