UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

Torres	:	
	:	
v.	:	**No. 3:03cv177(JBA)**
	:	
INS	:	

Ruling and Order

Petitioner Pedro Torres is a prisoner presently confined at the Enfield Correctional Institution who was voted to parole by the Connecticut Board of Parole eighteen months ago, yet remains incarcerated. He commenced this action against the INS (which is now the Bureau of Immigration and Customs Enforcement), asserting that the Supreme Court's decision in Zadvydas v. Davis, 533 U.S. 678 (2001), entitles him to release. Respondent opposes the petition, claiming that Torres "has no absolute right to be released from state custody or to be immediately deported by the INS." Response to Order to Show Cause [Doc. #6] ("Govt's Response") at 3.[1]

Pending before the Court are the original petition (denominated "Motion for Contempt," but construed by the Court as a petition for writ of habeas corpus under 28 U.S.C. § 2241), and

[1]The Government also argues that Torres is not "in custody" for purposes of 28 U.S.C. § 2241. However, Torres is subject to a final order of removal, which the Second Circuit has recently clarified is "sufficient, by itself, to establish the requisite custody" for § 2241 purposes. Simmonds v. INS, 326 F.3d 351, 354 (2d Cir. 2003) (decided after the Government's response was filed).

a motion to amend [Doc. #9], which seeks to join several state officials: the Commissioner of Correction, the warden of the Enfield Correctional Institution, and the chair of the Connecticut Board of Parole.

For the reasons set out below, the Court concludes that an evidentiary hearing is required on the petition to determine whether – but for the INS detainer – Torres would be otherwise released on parole. Further, counsel will be appointed for pro se Petitioner Torres and, inasmuch as addition of the proposed state defendants may be necessary to provide any relief should the claims in the petition be proven, the motion to amend will be granted.

I. Factual Background[2]

Torres is a citizen and native of the Dominican Republic who arrived in the United States at or near San Juan, Puerto Rico, in 1988. On February 18, 1993, he was convicted of possession of narcotics with intent to sell, in violation of Conn. Gen. Stat. §21a-278(b), and was sentenced to a term of incarceration that will expire on August 12, 2006. His estimated release date is August 2005.

The INS commenced removal proceedings against Torres and, on May 9, 1996, ordered him deported to the Dominican Republic on

[2]The following facts are undisputed.

the basis of his conviction, which the INS concluded constituted an aggravated felony. On January 28, 1997, the INS filed a detainer against Torres with Connecticut state prison officials, which reads:

> It is requested that you . . . [a]ccept this notice as a detainer. This is for notification purposes only and does not limit your discretion in any decision affecting the offender's classification, work and quarters assignments or other treatment which he would otherwise receive. * * * Notify this office of the time of release at least 30 days prior to release or as much in advance as possible. * * *

Detainer [Doc. #6 Ex. D].

On January 12, 2002, the Connecticut Board of Parole voted Torres to parole. The corresponding "Conditions of Parole" are dated October 16, 2001, and signed by Torres and an official of the Board. The document contains thirteen enumerated conditions, the first twelve of which relate to the manner in which Torres as parolee is expected to conduct himself while outside of prison, including requirements that he report to his parole officer; seek, obtain, and maintain employment during the parole term; notify the parole officer prior to changes in place of residence; refrain from possessing or controlling firearms or other weapons; and refrain from leaving Connecticut without permission of the parole officer. The thirteenth enumerated condition provides:

> You are paroled to your immigration detainer. In the event that this detainer is not effected or you are released from this detainer prior to the expiration of your Connecticut sentence then you will be released to a full parole program in the state of Connecticut.

> You are required to participate in an outpatient addictive treatment program. You must follow the instructions of the program staff as to your course of treatment and may not make any changes without the express permission of the program staff and your parole officer. Upon successful completion of this program, you will be required to submit to random urinalysis for the balance of your parole term.
>
> Failure to comply with these conditions may result in the revocation of your parole, as well as the forfeiture of any or all good time.

Conditions of Parole [Doc. #6 Ex. E] (emphasis omitted).

Despite being voted to parole and despite the fact that the INS detainer provides only that it is "for notification purposes only" and requests that the INS receive advance notice of Torres' release, Torres remains incarcerated.

II. The Petition and the Government's Response

Torres filed his petition on January 28, 2003, naming only the INS as respondent and asserting that he is being held unlawfully despite his vote to parole and that the INS is not making timely efforts to effect his removal. On February 3, 2003, the Court ordered the INS to show cause why the relief prayed for in the petition should not be granted.

The Government's response filed February 25, 2003 begins by noting that under the section of the Immigration and Nationality Act ("INA") governing removal of aggravated felons such as Torres (INA § 238, 8 U.S.C. § 1228), the INS has no obligation to remove an alien prior to his release from state custody:

> Nothing in this section shall be construed as requiring the Attorney General to effect the removal of any alien sentenced to actual incarceration, before release from the penitentiary or correctional institution where such alien is confined.

INA § 238(a)(3)(B), 8 U.S.C. § 1228(a)(3)(B). Next, the Government asserts that petitioner's status of being "voted to parole" confers "no absolute right to be released from state custody" because "all stipulations in the parole agreement [must be] satisfied." Govt's Response at 6 and n.3.[3] Finally, the Government asserts that parole for those who have final orders of deportation means only that they are available for removal if the INS chooses to effect such removal:

> The undersigned [Assistant United States Attorney] represents based on his conversations with the Connecticut Parole Board, Interstate Compact Office, that petitioner's parole only means that he is ready to be deported if and when the INS decides to effectuate his removal order, not that petitioner is to be immediately released from state custody.

Govt's Response at 6. The footnote to this "representation" reads:

> In the event that petitioner is not taken into custody by the INS or petitioner is released from the INS detainer prior to the expiration of his state sentence, then petitioner would be released into a full parole

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[3]All of the parole conditions save the thirteenth ("You are paroled to your immigration detainer") contemplate Torres living outside of prison, such as the requirements that he, inter alia, allow his parole officer to visit his residence and participate in an outpatient treatment program. No explanation is given of how a parolee "satisfies" the condition of being "paroled to your immigration detainer," other than by agreeing to be taken into custody and removed if the INS chooses to do so.

> program in the State of Connecticut. (See Exhibit E) If petitioner's state sentence expires before the INS takes him into custody, then the Department of Correction will notify the INS that petitioner is set to be discharged from state custody.

Govt's Response at 6 n.6.[4]

From these three propositions (that Torres has no right to be deported prior to expiration of state sentence, his "vote to parole" confers no right to release absent satisfaction of all stipulations in the parole agreement, and that parole for Torres because of the detainer is not really parole), the Government concludes that (a) Torres cannot establish a clear right to be released from state custody or to be immediately deported, and (b) because there is no plainly defined duty by the INS to do so, petitioner's motion for contempt should be denied. Govt's Response at 7. Although the Government asserts that "[i]n the event that petitioner is not taken into custody by the INS . . . then petitioner would be released into a full parole program in the State of Connecticut," Govt's Response at 6 n.6, no explanation is given as to why Torres (who has not been "taken into custody by the INS" even eighteen months after first being voted to parole) has not therefore been "released into a full parole program in the State of Connecticut."

Following the Government's response, Torres made three

[4]The cited Exhibit E is the "Conditions of Parole" sheet signed by Torres and the Board, described supra at 3-4.

subsequent filings: a "traverse" [Doc. #7], a "supplemental traverse" [Doc. #8] and a motion to amend [Doc. #9]. In these filings, he clarifies that he claims no right to immediate deportation or deportation prior to serving his state sentence. He asserts, rather, that by virtue of his vote to parole, "[p]etitioner has done his required time"[5] and that "18 months past due date (parole over to detainer) represents a due process violation,"[6] asserting that he must be either deported or paroled, not confined indefinitely. In the motion to amend, he seeks to file an Amended Petition that adds the state defendants and prays for, inter alia, the following relief:

> 1. Order the INS to take petitioner into custody.
>
> 2. Order the State of Connecticut Commissioner of Corrections, the Warden at Enfield Correctional [Institution], and the Board of Parole to release petitioner immediately to his detainer - or release him.
>
> 3. Release petitioner.

Proposed Amended Petition (attached to motion to amend [Doc. #9]).

The Government has not responded to these subsequent filings, including the motion to amend.

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[5]Traverse at 3.

[6]Supplemental Traverse at 4.

III. Merits of the Petition

Torres bases his claim on Zadvydas, in which the Supreme Court concluded that the removal provisions of INA § 241, 8 U.S.C. § 1231, contain an implicit "reasonableness" limitation of the detention period that limits such period to that reasonably necessary to effect the alien's removal. 533 U.S. 699-701. The removal period at issue both here and in Zadvydas "begins on the latest of the following": the date the removal order becomes final, the date of a court's final order following a stay of removal, or the date the alien "is released from detention or confinement." INA § 241(a)(1)(B), 8 U.S.C. § 1231(a)(1)(B) (emphasis added). Because Torres' removal order was issued before he was released from custody and that order has never been stayed, his removal period is measured from the last eventuality, date of release from custody.

The question presented by the petition is whether being voted to parole on January 12, 2002 constituted "release[] . . . from confinement" within the meaning of INA § 241(a)(1)(B)(iii), 8 U.S.C. § 1231(a)(1)(B)(iii), thus triggering the beginning of the ninety day removal period and corresponding safeguards established in Zadvydas, or whether Torres has yet to be released from state custody, notwithstanding being voted to parole. If the former is true, the eighteen months that have now passed since Torres was voted to parole would potentially warrant

release from confinement and corresponding imposition of "the various forms of supervised release [conditions] that are appropriate in the circumstances." Zadvydas, 533 U.S. at 700. If the converse is correct, petitioner's removal period has not yet begun and he has no entitlement to relief.

Parole is specifically distinguished from "imprisonment" and is equated with "release" in two separate sections of the INA. First, INA § 241(a)(4)(A), 8 U.S.C. § 1231(a)(4)(A), provides:

> [T]he Attorney General may not remove an alien who is sentenced to imprisonment until the alien is released from imprisonment. Parole, supervised release, probation, or possibility of arrest or further imprisonment is not a reason to defer removal.

Second, INA § 236(c)(1), 8 U.S.C. § 1226(c)(1), provides:

> The Attorney General shall take into custody any alien who . . . is deportable by reason of having committed [an aggravated felony] 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.

Moreover, in Simmonds v. INS, 326 F.3d 351 (2d Cir. 2003), the Second Circuit suggested that parole equals release from confinement for purposes of start of the removal period. Id. at 356 n.4 and 358.

The Government's argument that Torres has no right to be deported prior to expiration of state sentence and that being "voted to parole" confers no right to release absent satisfaction of all stipulations in the parole agreement may be correct, but

begs the question of whether Torres has been released. Further, it appears that Torres' only potentially unsatisfied condition of parole is that he is "paroled to [his] immigration detainer." This "condition" does not specify whether Torres would otherwise remain incarcerated had there been no INS detainer,[7] or whether Torres would otherwise be released on parole had there been no INS detainer.

The Government's third position could hold the answer to the question presented by the petition, but in its present form is insufficient and problematic. In form, it only recites "conversations" between the Office of the United States Attorney and the Connecticut Board of Parole. In substance, it appears to represent that parole for aliens with INS detainers is not actually parole ("petitioner's parole only means that he is ready to be deported if and when the INS decides to effectuate his removal order, not that petitioner is to be immediately released from state custody," Govt's Response at 6). However, the footnote to that statement appears to state the precise contrary ("In the event that petitioner is not taken into custody by the INS . . . then petitioner would be released into a full parole program in the State of Connecticut," Govt's Response at 6 n.3).

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[7] Cf. Duamutef v. INS, No. CV-02-1345(DGT), 2003 WL 21087984 (E.D.N.Y. May 14, 2003) (describing New York State's "conditional parole for deportation only," which allows the INS to remove a state prisoner before the completion of his sentence in cases where the prisoner would not otherwise be granted parole).

Thus, on this record, there is insufficient evidence from which the Court can determine whether, but for the INS detainer, Torres would be released into the full parole program or whether he would remain incarcerated. In order to adjudicate the claim presented in the petition, a hearing is necessary. Both sides may present evidence on the question of the operation of the Connecticut Parole Board as it relates to aliens with INS detainers lodged against them, which will provide the basis for adjudicating the merits of Torres' Zadvydas claim presented in the petition.

IV. Motion to Amend

While Torres is legally in the custody of the INS for § 2241 purposes, see Simmonds, 326 F.3d at 354 (final order of removal is "sufficient, by itself, to establish the requisite custody" for § 2241 purposes), the INS detainer in this case specifically states that it "is for notification purposes only." Apparently recognizing that at least some of the relief he requests (release from incarceration at Enfield Correctional Institution) may require the naming of additional respondents, see, e.g., United States v. Paccione, 964 F.2d 1269, 1275 (2d Cir. 1992) ("[A] court generally may not issue an order against a nonparty"); 11A Charles A. Wright, et al., Federal Practice and Procedure § 2956, at 335 (2d ed. 1995) ("A court ordinarily does not have power to

issue an order against a person who is not a party and over whom it has not acquired in personam jurisdiction"), Torres has moved to amend his petition to include as parties the relevant state officials.

Given the liberal standard for allowing amendments to pleadings, see Fed. R. Civ. P. 15(a), and in light of the fact that state officials will undoubtedly be witnesses at the upcoming hearing in any event, the motion to amend will be granted and the state defendants will be ordered to show cause why the relief prayed for in the petition should not be granted. Inasmuch as Torres has been granted leave to prosecute this petition in forma pauperis under 28 U.S.C. § 1915, service on the state defendants will be promptly effected by the U.S. Marshal.

V. Conclusion

For the reasons set out above,

(1) The motion to amend [Doc. #9] is GRANTED.

(2) The Clerk is directed to docket the Amended Petition (incorrectly captioned "Amended Complaint").

(3) The Marshal is directed to serve by mail a copy of the Petition and Amended Petition, together with a copy of this Ruling and Order, on the state defendants' representative:

Michael E. O'Hare
Supervisory Assistant State's Attorney
Office of the Chief State's Attorney
300 Corporate Place

Rocky Hill, Connecticut 06067

on or before August 4, 2003.

(4) The State Defendants are ORDERED to show cause on or before September 3, 2003 why the relief requested in the Petition and Amended Petition should not be granted.

(5) Counsel will be appointed for Petitioner Torres and a status conference with all counsel will be held on Friday, September 5 at 4pm to set a schedule for discovery and an evidentiary hearing.

IT IS SO ORDERED.

/s/

Janet Bond Arterton, U.S.D.J.

Dated at New Haven, Connecticut, this 30th day of July, 2003.