

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN**

FRANCISCO ROMAN MORALES TORRES,
Petitioner,

v.

Case No. 20-cv-0624

SHERIFF DALE J. SCHMIDT, et al.,
Respondents.

ORDER

Petitioner Francisco Morales Torres, who is currently being detained by Immigrations and Customs Enforcement (ICE) at Dodge County Detention Facility, filed an “Emergency Petition for Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2241 and Complaint for Injunctive Relief.” He claims that the conditions of his detention are constitutionally deficient because they put him at risk of contracting COVID-19, and that his prolonged detention violates the Due Process Clause. He seeks immediate release from detention or, alternatively, a bond hearing.

I. BACKGROUND

Petitioner is a Mexican national and has lived in the United States since around 2007. He is gay and has a history of serious mental health concerns. He entered the United States without inspection as a teenager and was twice granted Deferred Action for Childhood Arrivals (DACA). His DACA status expired in 2017 and he did not renew it. In 2018, Petitioner was convicted of battery and possession of a stolen vehicle in the Circuit Court of Cook County, Illinois. Following these convictions, on September 4, 2018, Petitioner was taken into ICE custody and charged as removable. He was held without bond and subject to mandatory detention due to his previous criminal convictions

pursuant to 8 U.S.C. § 1226(c)(1)(A). He has been detained at Dodge County Detention Center since that time.

The petitioner's case has progressed slowly. In October 2018, he requested and received a 24-day continuance so that he might prepare his case. In November 2018, he admitted the grounds for removal with which he'd been charged and filed an application for asylum. A final hearing on the asylum application was set for January 3, 2019. Petitioner then moved for a continuance of the hearing so that he might obtain a psychological evaluation. The continuance was granted and the final hearing was held on March 12, 2019. On April 22, 2019, the immigration judge issued a written decision granting the application for asylum, based on petitioner's fear of persecution in Mexico based on his sexual orientation and his mental health.

DHS appealed the grant of asylum to the Board of Immigration Appeals (BIA). On October 4, 2019, the BIA sustained the appeal and remanded the case to the immigration judge for consideration of additional protection under the Convention Against Torture (CAT). Petitioner appealed the denial of asylum to the Seventh Circuit, but briefing in that case will not commence until the CAT claim is resolved.

On February 10, 2020, the immigration judge granted the petitioner protection under the CAT. DHS appealed that decision to the BIA on March 10, 2020. The BIA has not yet issued a briefing schedule for the appeal.

On March 11, 2020, the World Health Organization declared a world pandemic due to a novel coronavirus and the disease it causes, COVID-19. COVID-19 causes fever, cough, and shortness of breath, and can result in serious illness or death. The CDC has identified certain underlying medical conditions which increase the risk of serious illness,

including lung, heart, kidney and liver conditions, diabetes, and immunocompromise. See citations at ECF No. 1, ¶ 27, n.21. The COVID-19 spreads via respiratory droplets among people who are in close contact with each other. It may also be spread by contact with contaminated surfaces or objects. As there is no vaccine for COVID-19, the primary means of preventing the spread of the virus are to avoid close contact with others and to practice careful hygiene and sanitation.

Jails, prisons and detention centers are congregate environments where people live in close proximity, and which therefore present unique challenges in preventing the spread of infectious disease. Some jails and prisons nationwide have seen significant outbreaks of COVID-19 and, in some locations, officials are releasing individuals from custody so as to reduce the population in their facilities and thus limit the spread of the virus.

As of April 30, 2020 there were no confirmed or suspected cases of COVID-19 at the Dodge County Detention Center. The petitioner complains that cleaning in the residential units is left to the detainees. He also complains that the detainees have been given few cleaning supplies and no protective gear, and that protocols at the facility have not changed in response to COVID-19. He alleges that social distancing is not possible in his housing unit, as more than 50 people live there and they share common facilities including tables, showers, and phones. He reports that he does not feel safe. In a sworn statement submitted in support of the response to the petition, Jail Administrator Anthony Brugger contests these allegations and asserts that various measures have been taken to limit and screen entrants to the facility, to improve sanitation at the facility, and to establish protocols for identifying and isolating symptomatic or exposed detainees.

Brugger also indicates that the current detainee population at the facility is roughly 50% of capacity.

II. ANALYSIS

The Petitioner contends that his protracted detention violates his due process rights. A federal court may grant habeas relief to a detainee who “is in custody in violation of the Constitution or laws or treaties of the United States.” 28 U.S.C. § 2441(c)(3). Under the Due Process Clause of the Fifth Amendment, the government may not deprive any person of liberty without due process of law, and it is “well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings.” *Denmore v. Kim*, 538 U.S. 510, 517 (2003).

United States immigration law authorizes the government to detain certain aliens pending resolution of removal proceedings. 8 U.S.C. § 1226; *Jennings v. Rodriguez*, 138 S.Ct. 830, 848 (2018). While the Attorney General has discretion to release some such aliens on bond or conditional parole, detention under § 1226(c) during removal proceedings is mandatory for aliens with certain sorts of criminal record, including the Petitioner in this case. In *Denmore v. Kim*, 538 U.S. 510 (2003), the Supreme Court upheld the facial constitutionality of prolonged detention under § 1226. In *Jennings*, the Supreme Court declined to read into the statute a right to a bail hearing for individuals whose detention was prolonged to more than six months so as to avoid due process concerns, but it left open the possibility of as-applied challenges to mandatory detentions under the statute.

Thus, when the length or conditions of detention raise due process concerns, courts in this circuit and across the country require the government to prove that continued

detention of the alien is necessary to protect against flight or dangerousness, and grant habeas relief to the detainee if the government cannot make this showing. *Denmore*, 538 U.S. at 532-33 (Kennedy, J., concurring).

Courts in this district have considered a non-exhaustive list of factors when determining whether continued detention without a bond hearing is unconstitutional: “(1) the total length of detention to date, including whether the immigration detention exceeds the time the alien spent in prison for the crime that allegedly renders him removable; (2) the likely duration of future detention; (3) the conditions of detention, including whether the facility for civil immigration detention is meaningfully different from a penal institution for criminal detention; (4) whether delays in the removal proceedings were caused by the detainee or the government; and (5) the likelihood that the removal proceedings will result in a final order of removal, including whether the alien has asserted colorable defenses to removal.” *Vargas v. Beth*, 378 F. Supp. 3d 716, 727 (E.D. Wis. 2008); *Morales Torres v. Schmidt*, No. 19-C-929, 2019 WL 3574929 at * 3 (E.D. Wis., August 6, 2019).

Based on uncontested facts in the briefing, these factors clearly weigh in favor of the Petitioner. He has been in detention more than 18 months, with no date certain—nor even a rough time frame—for BIA resolution of DHS’ appeal of the order granting petitioner relief from removal under the CAT. See *Perez v. Decker*, No. 18-CV-5279, 2018 WL 3991497, at *5–6 (S.D.N.Y. Aug. 20, 2018) (detention longer than nine months “has surpassed the rough six-month threshold at which detentions become less and less reasonable”); *Ahmad v. Whitaker*, No. C18-287-JLR-BAT, 2018 WL 6928540, *6 (W.D. Wash. Dec. 4, 2018) (detention of nearly a year entitled alien to bond hearing). He is detained in a county jail, such that the conditions of his detention are no different from

criminal detention. Also salient to the “conditions of detention” factor is the COVID-19 pandemic and the special risks it poses in congregate settings like detention centers. Though I express no opinion as to whether Dodge County Detention Center’s handling of the pandemic amounts to a standalone constitutional violation, I do find that the risks associated with the pandemic weigh against the reasonableness of continuing to detain the petitioner without a hearing, especially in light of the other factors. Further, the detainee is only minimally responsible for the delay in resolution of his case. He requested two continuances early on so as to prepare for the litigation, and he proceeded on multiple theories which have given rise to separate appeals, but the greater part of the delay must be attributed to DHS’ decision to appeal twice and the time required by the immigration judge and the BIA to decide the applications and appeals. Finally, the petitioner has a colorable defense to removal, as evidenced by the immigration judge’s grant of relief under the CAT. I conclude, therefore, that continued detention of the petitioner without a bond hearing is unreasonable, and due process requires that the government prove continued detention is necessary to prevent Petitioner from flight or danger to the community.

Petitioner also seeks a declaration that the conditions of his detention in light of the COVID-19 pandemic violate his substantive due process rights; he seeks immediate release from detention on those grounds. I will dismiss this claim without prejudice, for two reasons. First, though this claim for relief is based on assertions that Dodge County Detention Center has failed to take appropriate steps to protect detainees from COVID-19, Petitioner’s reply brief makes no substantive response to Jail Administrator Brugger’s declaration regarding measures taken to prevent introduction of the virus and provide for

detainees reasonable safety at the facility. Second, were petitioner to prevail on this claim, the bond hearing I have ordered would constitute sufficient relief.

III. CONCLUSION

For the reasons above, **IT IS ORDERED** that Francisco Morales Torres' petition for a writ of habeas corpus (ECF No. 1) is **GRANTED IN PART AND DENIED IN PART.**

IT IS FURTHER ORDERED that an individualized bond hearing for Morales Torres shall be held before the appropriate officer or immigration judge within seven days of this order.

IT IS FURTHER ORDERED that this action be and hereby is **DISMISSED.** The Clerk of Court shall enter judgment accordingly.

Dated at Milwaukee, Wisconsin, this 5th day of May, 2020.

s/Lynn Adelman _____
LYNN ADELMAN
District Judge