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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

DUNG NGUYEN,)	1:11-cv-00086-SKO-HC
)	
Petitioner,)	ORDER GRANTING RESPONDENT'S
)	MOTION TO DISMISS THE PETITION AS
)	MOOT (DOCS. 10, 1)
v.)	
)	ORDER DISMISSING PETITION AND
ERIC H. HOLDER, et al.,)	DIRECTING THE CLERK TO CLOSE THE
)	CASE
Respondents.)	
)	
)	

At the time the petition was filed, Petitioner alleged that he was detained by the United States Bureau of Immigration and Customs Enforcement ("ICE") and was proceeding with a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241. Pursuant to 28 U.S.C. § 636(c)(1), the parties have consented to the jurisdiction of the United States Magistrate Judge to conduct all further proceedings in the case, including the entry of final judgment, by manifesting their consent in writings signed by the parties or their representatives and filed by Petitioner on January 26, 2011, and on behalf of Respondent on January 28, 2011. Pending before the Court is Respondent's motion to dismiss

1 the petition for lack of jurisdiction, filed on April 8, 2011.
2 The twenty-one-day period for filing opposition pursuant to Local
3 Rule 230(1) has passed, but Petitioner has not filed any
4 opposition to the motion to dismiss.

5 I. Background

6 Petitioner alleged that he is a native of Viet Nam who was
7 ordered deported to Viet Nam and who had been unlawfully and
8 indefinitely detained at the Kern County Jail, Lerdo Bakersfield
9 Facility, after having been ordered removed from the United
10 States on October 14, 2008, and having been in custody since
11 August 6, 2010. (Pet. 2-3.) Petitioner alleged that he was
12 neither awaiting trial nor serving a sentence on any state or
13 federal criminal case. (Pet. 3.) He argued that pursuant to
14 Zadvydas v. Davis, 533 U.S. 678, 690, 699-700 (2001), he was
15 entitled to relief because there was no significant likelihood
16 that removal would occur in the reasonably foreseeable future.
17 (Pet. 3.) Petitioner contended that his continued, indefinite
18 detention under 8 U.S.C. § 1231(a)(6) exceeded Respondent's
19 statutory authority to detain him and violated the Due Process
20 Clause of the Fifth Amendment. (Pet. 4.) Petitioner sought
21 release from custody under reasonable conditions of supervision.
22 (Pet. 5.)

23 Respondent submitted in connection with the motion to
24 dismiss an order of supervision dated April 6, 2011, and signed
25 by Erik S. Bonnar, Deputy Field Officer Director of ICE in
26 Bakersfield, California. The order reflects that after
27 Petitioner was ordered removed on August 14, 2008, ICE failed to
28 effect Petitioner's deportation or removal. Petitioner was

1 ordered released under supervision on April 6, 2011, under
2 conditions stated in the order of supervision. (Doc. 10-1.)

3 Further, the Court notes that the docket reflects that the
4 motion to dismiss was served on Petitioner at an address in San
5 Jose, the city where Petitioner was ordered to report to federal
6 probation authorities within forty-eight (48) hours of release.
7 (Doc. 10-1.)

8 II. Proceeding by a Motion to Dismiss

9 Title 28 U.S.C. § 2241 provides that writs of habeas corpus
10 may be granted by a district court within its jurisdiction only
11 to a prisoner whose custody is within enumerated categories,
12 including but not limited to custody under the authority of the
13 United States or custody in violation of the constitution, laws,
14 or treaties of the United States. 28 U.S.C. § 2241(a), (c) (1)
15 and (3).

16 A district court must award a writ of habeas corpus or issue
17 an order to show cause why it should not be granted unless it
18 appears from the application that the applicant is not entitled
19 thereto. 28 U.S.C. § 2243. Rule 4 of the Rules Governing
20 Section 2254 Cases in the United States District Courts (Habeas
21 Rules) is applicable to proceedings brought pursuant to § 2241.
22 Habeas Rule 1(b). Habeas Rule 4 permits the filing of "an
23 answer, motion, or other response," and thus it authorizes the
24 filing of a motion in lieu of an answer in response to a
25 petition. Rule 4, Advisory Committee Notes, 1976 Adoption and
26 2004 Amendments. This gives the Court the flexibility and
27 discretion initially to forego an answer in the interest of
28 screening out frivolous applications and eliminating the burden

1 that would be placed on a respondent by ordering an unnecessary
2 answer. Advisory Committee Notes, 1976 Adoption. Rule 4 confers
3 upon the Court broad discretion to take "other action the judge
4 may order," including authorizing a respondent to make a motion
5 to dismiss based upon information furnished by respondent, which
6 may show that a petitioner's claims suffer a procedural or
7 jurisdictional infirmity, such as res judicata, failure to
8 exhaust state remedies, or absence of custody. Id.

9 The Supreme Court has characterized as erroneous the view
10 that a Rule 12(b)(6) motion is appropriate in a habeas corpus
11 proceeding. See, Browder v. Director, Ill. Dept. of Corrections,
12 434 U.S. 257, 269 n. 14 (1978). However, in light of the broad
13 language of Rule 4, it has been held in this circuit that motions
14 to dismiss are appropriate in cases that proceed pursuant to 28
15 U.S.C. § 2254 and present issues of failure to exhaust state
16 remedies, O'Bremski v. Maas, 915 F.2d 418, 420 (9th Cir. 1990) (a
17 motion to dismiss for failure to raise any issue of federal law,
18 which was based on the insufficiency of the facts as alleged in
19 the petition to justify relief as a matter of law, was evaluated
20 under Rule 4); White v. Lewis, 874 F.2d 599, 602-03 (9th Cir.
21 1989) (procedural default in state court); Hillery v. Pulley, 533
22 F.Supp. 1189, 1194 n.12 (E.D.Cal. 1982) (a motion to dismiss for
23 failure to exhaust state remedies is appropriately considered
24 after receipt of evidence pursuant to Rule 7(a) to clarify
25 whether or not the possible defect, not apparent on the face of
26 the petition, might preclude a hearing on the merits, and after
27 the trial court has determined that summary dismissal is
28 inappropriate).

1 Here, Respondent's motion to dismiss is based on mootness.
2 Respondent's motion is similar in procedural posture to a motion
3 to dismiss for failure to exhaust state remedies or for state
4 procedural default. Further, the motion is unopposed; in the
5 context of the facts alleged in the petition and reflected in
6 Respondent's moving papers, the motion does not raise material
7 factual disputes. Finally, Respondent has not yet filed a formal
8 answer.

9 The Court therefore exercises its discretion to review
10 Respondent's motion pursuant to its authority under Habeas Rule
11 4.

12 III. Analysis

13 Title 28 U.S.C. § 2241 confers habeas corpus jurisdiction
14 upon the Court to hear this case. Zadvydas v. Davis, 533 U.S.
15 678, 687-88.

16 However, where a Court is without power to grant the relief
17 requested, then the case is moot. Picrin-Peron v. Rison, 930
18 F.2d 774, 775 (9th Cir. 1991) (petition for habeas corpus seeking
19 release from allegedly unlawful, indefinite detention was moot
20 where the government paroled the petitioner). Where a petitioner
21 who seeks release has been released under circumstances where
22 there is no reasonable likelihood that the alleged wrong will
23 recur, the petition is moot and will be dismissed. Picrin-Peron
24 v. Rison, 930 F.2d 773, 776.

25 The release sought by Petitioner was release from the
26 custody of the ICE under reasonable conditions of supervision.
27 (Pet. 5.) Respondent has demonstrated that Petitioner has been
28

1 released from ICE custody under reasonable conditions.¹

2 Federal courts lack jurisdiction to decide cases that are
3 moot because the courts' constitutional authority extends to only
4 actual cases or controversies. Iron Arrow Honor Society v.
5 Heckler, 464 U.S. 67, 70-71 (1983). Article III requires a case
6 or controversy in which a litigant has a personal stake in the
7 outcome of the suit throughout all stages of federal judicial
8 proceedings and has suffered some actual injury that can be
9 redressed by a favorable judicial decision. Id. A petition for
10 writ of habeas corpus becomes moot when it no longer presents a
11 case or controversy under Article III, § 2 of the Constitution.
12 Wilson v. Terhune, 319 F.3d 477, 479 (9th Cir. 2003).

13 A petition for writ of habeas corpus is moot where a
14 petitioner's claim for relief cannot be redressed by a favorable
15 decision of the court issuing a writ of habeas corpus. Burnett
16 v. Lampert, 432 F.3d 996, 1000-01 (9th Cir. 2005) (quoting
17 Spencer v. Kemna, 523 U.S. 1, 7 (1998)). Mootness is
18 jurisdictional. See, Cole v. Oroville Union High School
19 District, 228 F.3d 1092, 1098-99 (9th Cir. 2000). Thus, a moot
20 petition must be dismissed because nothing remains before the
21 Court to be remedied. Spencer v. Kemna, 523 U.S. 1, 18 (1998).

22 The Court concludes that the petition is moot and must be
23 dismissed.

24 IV. Disposition

25 Accordingly, it is ORDERED that:

26 _____
27 ¹ Petitioner was ordered to provide cooperation and information, appear
28 upon ICE's request for identification, deportation or removal, and medical
examination, and to report periodically at ICE and federal probation offices.
(Doc. 10-1.)

1 1) Respondent's motion to dismiss the petition as moot is
2 GRANTED; and

3 2) The petition for writ of habeas corpus is DISMISSED as
4 moot; and

5 3) The Clerk is DIRECTED to close the action because this
6 order terminates the action in its entirety.

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8 IT IS SO ORDERED.

9 **Dated: May 31, 2011**

/s/ Sheila K. Oberto
UNITED STATES MAGISTRATE JUDGE

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