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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Jerod Emmanuel McCulloch,

Petitioner,

vs.

Katrina Kane,

Respondent.

No. CV 07-2274-PHX-JWS (ECV)

REPORT AND RECOMMENDATION

TO THE HONORABLE JOHN W. SEDWICK, UNITED STATES DISTRICT JUDGE:

Pending before the court is Petitioner's *pro se* Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2241. Doc. #1.

FACTUAL AND PROCEDURAL BACKGROUND

Petitioner, who is a native and citizen of Belize, entered the United States on August 7, 1980, pursuant to an immigrant visa. Doc. #15, Exh. 1. Following convictions for attempted aggravated assault in 1995 and possession of narcotic drugs in 2000, the former Immigration and Naturalization Service filed a Notice to Appear against Petitioner on January 30, 2002, alleging that he was subject to removal from the United States based on the drug conviction. Doc. #15, Exh. 2, 5, 7. On November 7, 2006, an additional charge of revmovability was added based on the aggravated assault conviction. Doc. #15, Exh. 8. Petitioner was transferred to the custody of Immigration and Customs Enforcement (ICE) on

1 October 2, 2006, after completing his prison sentences. Doc. #15, Exh. 10, Doc. #1 at 4. He
2 has been detained by ICE since that date.

3 On January 17, 2007, an Immigration Judge (IJ) ordered Petitioner to be removed
4 from the United States to Belize. Doc. #15, Exh. 15. In addition, the IJ denied Petitioner's
5 requests for cancellation of removal and relief under the former § 212(c) of the Immigration
6 and Naturalization Act. Id. Petitioner then filed a timely appeal to the Board of Immigration
7 Appeals (BIA). Doc. #15, Exh. 16. On May 9, 2007, the BIA dismissed the appeal. Doc.
8 #15, Exh. 17.

9 On May 31, 2007, Petitioner filed a Petition for Review and a request for stay of
10 removal in the Ninth Circuit Court of Appeals. Doc. #15, Exh 18, 19. On the same day, the
11 Court granted the stay pending resolution of the petition for review and set a briefing
12 schedule. Doc. #15, Exh. 20. As of this date, the case remains pending before the Court of
13 Appeals.

14 Petitioner filed his *pro se* Petition for Writ of Habeas Corpus in this court on
15 November 20, 2007. Doc. #1. Petitioner alleges that his continuous detention since October
16 2006 is unconstitutional. Id. at 4. He asks the court to either grant supervised release or
17 order Respondent to hold a bond hearing.

18 On February 4, 2008, Respondent filed a Response in Opposition to Petition for Writ
19 of Habeas Corpus, in which she argues that Petitioner's continued detention is lawful and
20 mandatory under 8 U.S.C. § 1226. Doc. #15 at 4. Petitioner filed a reply on February 22,
21 2008. Doc. #16.

22 On September 17, 2008, this court directed Respondent to file an amended response
23 to the petition in light of two recent Ninth Circuit cases, Casas-Castrillon v. DHS, 535 F.3d
24 942 (9th Cir. 2008) and Prieto-Romero v. Clark, 534 F.3d 1053 (9th Cir. 2008). Respondents
25 filed an Amended Response to Petition for Writ of Habeas Corpus on October 10, 2008.
26 Doc. #19. Petitioner then filed a reply to the amended response on October 21. Doc. #20.

1 either release Petitioner or provide a bond hearing within 60 days. The court will further
2 recommend that the request to hold the case in abeyance be denied.

3 **IT IS THEREFORE RECOMMENDED:**

4 That the Petition for Writ of Habeas Corpus (Doc. #1) be **granted** as follows:

5 That the District Court Judge order Respondent to release Petitioner, unless within 60
6 days of the District Court's Order, Respondent provides a hearing to Petitioner before an
7 Immigration Judge with the power to grant him bail unless Respondent establishes that he
8 is a flight risk or will be a danger to the community; and

9 That Respondent's request in her amended response (Doc. #19) to hold the case in
10 abeyance be **denied**;

11 This recommendation is not an order that is immediately appealable to the Ninth
12 Circuit Court of Appeals. Any notice of appeal pursuant to Rule 4(a)(1), Federal Rules of
13 Appellate Procedure, should not be filed until entry of the district court's judgment. The
14 parties shall have ten days from the date of service of a copy of this recommendation within
15 which to file specific written objections with the Court. See, 28 U.S.C. § 636(b)(1); Fed. R.
16 Civ. P. 6(a), 6(b) and 72. Thereafter, the parties have ten days within which to file a
17 response to the objections. Failure to timely file objections to the Magistrate Judge's Report
18 and Recommendation may result in the acceptance of the Report and Recommendation by
19 the district court without further review. See United States v. Reyna-Tapia, 328 F.3d 1114,
20 1121 (9th Cir. 2003). Failure to timely file objections to any factual determinations of the
21 Magistrate Judge will be considered a waiver of a party's right to appellate review of the
22 findings of fact in an order of judgement entered pursuant to the Magistrate Judge's
23 recommendation. See Fed. R. Civ. P. 72.

24 DATED this 30th day of October, 2008.

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28 Edward C. Voss
United States Magistrate Judge