

1  
2  
3  
4  
5  
6  
7  
8 UNITED STATES DISTRICT COURT  
9 SOUTHERN DISTRICT OF CALIFORNIA  
10

11 FRANCISCO C. MENDEZ JIMENEZ,  
12 Petitioner,  
13 v.  
14 DEPARTMENT OF HOMELAND  
15 SECURITY,  
16 Respondent.

Case No.: 17cv73-CAB-KSC

**ORDER DISMISSING PETITION**

17  
18 On January 11, 2017, Petitioner Francisco C. Mendez Jimenez filed a petition for  
19 writ of habeas corpus pursuant to 28 U.S.C. § 2241, challenging his continued detention  
20 in the custody of Respondent. [Doc. No. 1.] On March 24, 2017, Respondent  
21 Department of Homeland Security filed a return to the petition. [Doc. No. 9.] On April  
22 5, 2017, Petitioner filed a reply to the return. [Doc. No. 10.] For the reasons set forth  
23 below, the Petition is **DISMISSED**.

24 STATEMENT OF FACTS

25 Petitioner is a native and citizen of Guatemala who immigrated to the United States  
26 on or about January 12, 2000. [Ex. A, Doc. No. 9-1 at 4.] He is now in removal  
27 proceedings for the second time. The first time, he was charged with deportability on the  
28

1 basis of 2011 and 2013 convictions for grand theft, and on June 4, 2014, the Immigration  
2 Judge (“IJ”) granted him relief from removal. [Exs. B, E, Doc. No. 9-1 at 6-8, 21-23.]

3 On July 30, 2015, Petitioner was convicted of a 2014 assault with force likely to  
4 cause great bodily injury in violation of Calif. Penal Code (CPC) § 245(a)(4) and was  
5 sentenced to three years in prison. [Ex. C, Doc. No. 9-1 at 9-16.] Upon his release from  
6 prison on May 4, 2016, DHS placed him in removal proceedings and charged him with  
7 deportability under 8 U.S.C. § 1227(a)(2)(A)(iii) as an alien convicted of an aggravated  
8 felony as defined by 8 U.S.C. § 1101(a)(43)(F) (crime of violence). [Ex. D, Doc. No. 9-1  
9 at 17-20.] On October 21, 2016, DHS added an additional charge of deportability under  
10 8 U.S.C. §1227(a)(2)(A)(ii) for two or more convictions for crimes involving moral  
11 turpitude, based on the 2015 conviction, plus the 2013 conviction for grand theft of a  
12 person. [Ex. E, Doc. No. 9-1 at 21-23.]

13 On May 20, 2016, Petitioner was afforded a bond redetermination hearing at which  
14 the IJ ruled that his 2015 conviction constituted an aggravated felony and that he was  
15 therefore subject to mandatory detention pursuant to 8 U.S.C. § 1226(c). [Exs. F, G, H,  
16 Doc. No. 9-1 at 24-42.] The IJ ruled that Petitioner’s conviction was substantially similar  
17 to the conviction in *United States v. Grajeda*, 581 F.3d 1186 (9th Cir. 2009), in which the  
18 Ninth Circuit held that a conviction for CPC § 245(a)(1), assault with a deadly weapon or  
19 instrument other than a firearm, was categorically an aggravated felony crime of  
20 violence. [Ex. G, Doc. No. 9-1 at 28-31.] The IJ also noted that Petitioner would become  
21 eligible for a bond redetermination hearing on October 18, 2016, pursuant to *Rodriguez v.*  
22 *Robbins*, 804 F.3d 1060, 1089 (9th Cir. 2015)(“*Rodriguez III*”). [Doc. No. 9-1 at 28.]  
23 Petitioner appealed to BIA which, on October 4, 2016, affirmed the IJ’s ruling. [Ex. I,  
24 Doc. No. 9-1 at 43-47.]

25 On December 28, 2016, Petitioner was afforded a bond hearing pursuant to  
26 *Rodriguez III*, which applies to aliens, like Petitioner, who are held in mandatory  
27 detention for more than six months pending the administrative phase of their removal  
28 proceedings. [Exs. J, K, Doc. No. 9-1 at 48-54.] The IJ applied the appropriate factors

1 and found that DHS had established by clear and convincing evidence that Petitioner was  
2 a danger to the community. [Doc. No. 9-1 at 52-53.] Petitioner appealed from the IJ's  
3 bond decision to the BIA, and the appeal remains pending.

4 Petitioner's next hearing in his removal proceedings is scheduled for April 14,  
5 2017. [Declaration of Caroline Prime, Doc. No. 9-1 at 2, ¶ 3.]

#### 6 DISCUSSION

7 Petitioner challenges the Immigration Judge's (IJ's) December 28, 2016 custody  
8 determination based on his assumption that the IJ denied bond because his 2015  
9 conviction was for an aggravated felony. [Doc. No. 1.] Such a ruling was made by the IJ  
10 in previous bond proceedings, on May 20, 2016, and the Board of Immigration Appeals  
11 (BIA) affirmed the IJ's ruling on October 4, 2016. Those rulings were rendered moot  
12 when Petitioner subsequently became eligible for bond review under *Rodriguez III*.

13 Petitioner was afforded a bond hearing on December 28, 2016, pursuant to *Rodriguez III*,  
14 and the IJ ruled that the Department of Homeland Security (DHS) had met its burden to  
15 show that Petitioner posed a danger to the community and should therefore remain in  
16 custody pending his removal proceedings. Petitioner appealed from that decision to the  
17 BIA, and the appeal remains pending.

18 Petitioner has not made a colorable constitutional claim regarding his current bond  
19 proceedings. *See Singh v. Holder*, 638 F.3d 1196, 1200-01. He argues that his conviction  
20 for CPC § 245(a)(4) does not constitute a crime of violence, but that determination was  
21 made in previous bond proceedings and is not material in his current bond proceedings.  
22 Even if Petitioner were to amend his petition to challenge his previous bond proceedings,  
23 they have been rendered moot by his current bond proceedings in which he is being  
24 considered for release pursuant to *Rodriguez III*.

25 Petitioner also contends that the IJ did not mention or acknowledge his motion for  
26 a bond hearing under *Rodriguez III* [Doc. 1 at 10; Doc. 6], but this is incorrect. [See Doc.  
27 No. 9-1 at 28.] Petitioner also fails to raise any legal or constitutional challenges to the  
28 IJ's application of factors at his *Rodriguez III* bond hearing. *See Matter of Guerra*, 24 I.

1 & N. Dec. 37, 40 (BIA 2006). In the *Rodriguez III* hearing, the IJ ruled that, because of  
2 Petitioner’s entire criminal history, he poses a danger to the community. [Doc. No. 9-1 at  
3 52-54.] In reaching this conclusion, the IJ reasoned as follows:

4           The Record clearly demonstrates that he was convicted under CPC  
5 §245(a)(4) for assault with force likely to cause serious bodily injury in  
6 2014. The probation report submitted also demonstrates that the respondent  
7 has a long criminal history, including convictions for driving under the  
8 influence from 2001, public intoxication and disorderly conduct in 2009,  
9 vandalism in 2011, as well as grand theft under CPC § 487(c) in 2011 and  
10 2013. This criminal history not only demonstrated that the respondent has  
11 continued to violate the law for many years, but also demonstrated an  
12 escalation in the seriousness of the type of crimes he was involved in - from  
13 driving under the influence to theft to assault with force likely to cause great  
14 bodily injury or death.

15 [Doc. No. 9-1 at 53-54.]

16           Furthermore, apart from Petitioner’s failure to state a claim with respect to his  
17 current bond proceedings, there can be no habeas review of an IJ’s factual determinations  
18 and factor-weighting when making bond decisions.

19           The Attorney General’s discretionary judgment regarding the  
20 application of this section shall not be subject to review. No court may set  
21 aside any action or decision by the Attorney General under this section  
22 regarding the detention or release of any alien or the grant, revocation, or  
23 denial of bond or parole.

24 8 U.S.C. § 1226(e). *See also* 8 U.S.C. § 1252(a)(2)(B)(ii) (“no court shall have  
25 jurisdiction to review . . . any other decision or action of the Attorney General ... the  
26 authority for which is specified under this subchapter to be in the discretion of the  
27 Attorney General.”); *INS v. St. Cyr*, 533 U.S. 289, 306 (2001) (“the courts generally [do]  
28 not review factual determinations made by the Executive.”); *Singh v. Ashcroft*, 351 F.3d  
435, 439 (9th Cir. 2003) (“The scope of habeas jurisdiction under 28 U.S.C. § 2241 is  
limited to claims that allege constitutional or statutory error in the removal process”);  
*Gutierrez-Chavez v. INS*, 298 F.3d 824, 827, 829-30 (9th Cir. 2002) (Habeas jurisdiction

1 does not authorize review of “discretionary . . . decisions made by the executive branch  
2 that do not involve violations of the Constitution”).

3 Finally, apart from what the IJ determined in the current bond proceedings, they  
4 are now pending appeal before the BIA. Petitioner’s habeas challenge is therefore  
5 premature. *See Castro Cortez v. INS*, 239 F.3d 1037, 1047 (9th Cir. 2001) (“we require,  
6 as a prudential matter, that habeas petitioners exhaust available judicial and  
7 administrative remedies before seeking relief under § 2241.”). *See also Rojas-Garcia v.*  
8 *Ashcroft*, 399 F.3d 814, 819 (9th Cir. 2003) (“the petitioner must exhaust administrative  
9 remedies before raising the constitutional claims in a habeas petition when those claims  
10 are reviewable by the BIA on appeal, . . . ‘The exhaustion requirement avoids premature  
11 interference with the agency’s processes and helps to compile a full judicial record.’”)  
12 (quoting *Liu v. Waters*, 55 F.3d 421, 424 (9th Cir. 1995)).

13 CONCLUSION

14 For the reasons set forth above, the petition is **DISMISSED**.

15 **IT IS SO ORDERED.**

16 Dated: April 12, 2017



17  
18 Hon. Cathy Ann Bencivengo  
19 United States District Judge  
20  
21  
22  
23  
24  
25  
26  
27  
28