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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JOSE DE JESUS CRUZ ESPARZA,)	
)	CASE NO. C14-1083-RSM-MAT
Petitioner,)	
)	
v.)	
)	ORDER DIRECTING PARTIES TO
JEH JOHNSON, et al.,)	FILE SUPPLEMENTAL BRIEFING
)	
Respondents.)	
_____)	

14 This is a habeas corpus action pursuant to 28 U.S.C. § 2241. Petitioner is a native and
15 citizen of Mexico. (Dkt. 1.) In July 2013, U.S. Immigrations and Customs Enforcement
16 (“ICE”) reinstated a prior order of removal. (*Id.*) After an asylum officer found petitioner’s
17 fear of return to Mexico reasonable, an Immigration Judge (“IJ”) denied his applications for
18 withholding of removal and protection under the Convention Against Torture. (*Id.*)
19 Petitioner appealed this decision to the Board of Immigration Appeals (“BIA”), and the appeal
20 remains pending. (*Id.*)

21 Petitioner entered immigration detention at the Northwest Detention Center on July 30,
22 2013. (*Id.*) On July 14, 2014, petitioner filed the instant habeas petition through counsel,

ORDER DIRECTING PARTIES
TO FILE SUPPLEMENTAL BRIEFING
PAGE -1

01 seeking an individualized bond hearing before an IJ or, in the alternative, release “from
02 [Department of Homeland Security] custody, either without bond or with bond in a reasonable
03 amount to be determined by this Court.” (*Id.* at 10.) On August 11, 2014, petitioner was
04 released from the Northwest Detention Center under an order of supervision. (Dkt. 7-1.) The
05 conditions of petitioner’s release under the order of supervision include reporting to ICE as
06 requested for identification or for removal; successfully participating in an Alternative to
07 Detention Program (“ADP”), which involves reporting for orientation in the Intensive
08 Supervision Appearance Program (“ISAP”) and wearing an electronic monitoring device;
09 notifying ICE before traveling outside of the State of Washington; and not committing any
10 crimes. (*Id.*)

11 Respondents have moved to dismiss petitioner’s habeas petition, arguing that his release
12 rendered his petition moot. (Dkt. 7.) Petitioner has opposed the motion to dismiss. (Dkt. 8.)
13 He maintains that his petition is not moot because ICE could revoke his release at any time and
14 because his release is subject to a number of conditions, including electronic monitoring. (*Id.*)
15 Petitioner asks the Court to grant his habeas petition and order that he be released from the
16 electronic monitoring program. (*Id.*) In reply, respondents argue that, as a practical matter,
17 petitioner’s release would only be revoked if he violated his order of supervision or to
18 effectuate his removal. (Dkt. 9.)

19 There are a number of issues that are either inadequately addressed by the parties or not
20 discussed at all. The parties do not discuss the statutory authority for petitioner’s detention
21 and release. “Where an alien falls within this statutory scheme can affect whether his
22 detention is mandatory or discretionary, as well as the kind of review process available to him if

01 he wishes to contest the necessity of his detention.” *Prieto-Romero v. Clark*, 534 F.3d 1053,
02 1057 (9th Cir. 2008). Without the benefit of the parties’ briefing, it appears that petitioner was
03 detained and released pursuant to 8 U.S.C. § 1226. This is because although petitioner is
04 subject to a reinstated order of removal, his withholding-only proceedings are ongoing. *See*
05 *Mendoza v. Asher*, No. C14-0811, Dkt. 14 at 2-3 (W.D. Wash. Sept. 16, 2014) (alien subject to
06 a reinstated order of removal is detained pursuant to § 1226(a) while his application for
07 withholding of removal is pending); *Pierre v. Sabol*, No. 1:11-CV-2184, 2012 WL 1658293, at
08 *4 (M.D. Pa. May 11, 2012) (same); *Uttecht v. Napolitano*, No. 8:12CV347, 2012 WL
09 5386618, at *1-*2 (D. Neb. Nov. 1, 2012) (same); *Castillo v. ICE Field Office Director*, 907 F.
10 Supp. 2d 1235, 1341 (W.D. Wash. 2012) (same). This conclusion informs the Court’s
11 discussion below.

12 A central issue that must be decided in ruling on respondent’s motion to dismiss is
13 whether the Court can grant petitioner effective relief. *See, e.g., Cox v. McCarthy*, 829 F.2d
14 800, 805 (9th Cir. 1987); *Enrico’s, Inc. v. Rice*, 730 F.2d 1250, 1254 (9th Cir. 1984).
15 Petitioner’s requests for relief have shifted over the course of this litigation. In his habeas
16 petition, petitioner requested a bond hearing before an IJ or release from the Northwest
17 Detention Center, either with or without a bond. (Dkt. 1 at 10.) After he was released from
18 detention, he asked for an order releasing him from the ISAP electronic monitoring program.
19 (Dkt. 8 at 7.) Given petitioner’s new request for release from ISAP, it is unclear whether he is
20 still seeking the original relief requested.

21 In addition, there are issues with all of the forms of relief petitioner raises. First, the
22 Court cannot effectively order petitioner released from detention when he has already been

01 released. And although petitioner complains about the conditions of his release and maintains
02 that he has not been given all of the relief requested, the Court does not have jurisdiction to
03 affect the terms of his order of supervision. *See* 8 U.S.C. § 1226(e) (“The Attorney General’s
04 discretionary judgment regarding the application of this section shall not be subject to review.
05 No court may set aside any action or decision by the Attorney General under this section
06 regarding the detention or release of any alien or the grant, revocation, or denial of bond or
07 parole.”); *see also* *Nguyen v. B.I. Inc.*, 435 F. Supp. 2d 1109, 1114-16 (D. Or. 2006) (ISAP
08 program is within ICE’s authority and does not violate petitioners’ constitutional rights).

09 Second, it makes little sense to grant petitioner a bond hearing while he is out of
10 detention, and petitioner has cited no case ordering such a remedy. Thus, as a practical matter,
11 petitioner would not receive a bond hearing unless his order of supervision is revoked. *See*
12 *Centeno-Ortiz v. Culley*, No. 11-cv-1970, 2012 WL 170123, at *9 (S.D. Cal. Jan. 19, 2012)
13 (conditionally granting petitioner’s habeas petition so that if his “current parole is revoked and
14 he is taken back into DHS custody as an ‘arriving alien’ subject to mandatory detention, and
15 provided the Government does not have some other independent statutory basis to detain him,
16 the Government shall provide Petitioner with an individualized bond hearing before an
17 immigration judge, where the Government will have the burden of establishing that Petitioner
18 should not be released because he is either a flight risk or will be a danger to the community”).

19 The parties also fail to fully develop the record regarding respondents’ ability to revoke
20 petitioner’s release on supervision. Without citing any authority, petitioner asserts that
21 respondents may detain him at any time. It appears that petitioner’s assertion is based on §
22 1226(b), which provides that “[t]he Attorney General at any time may revoke a bond or parole

01 authorized under subsection (a) of this section, rearrest the alien under the original warrant, and
02 detain the alien.” Respondents argue that, as a matter of practice, they will only re-detain
03 petitioner under two conditions: violation of the conditions of his order of supervisions, or to
04 effectuate his removal. (Dkt. 9 at 3 n.2.) Respondents do not support this argument with
05 citation to any authority or evidence in the record.

06 Respondents’ ability to revoke petitioner’s release is relevant because the Ninth Circuit
07 has found that a petitioner’s request for a bond hearing is not mooted by his release where the
08 government retains the discretionary authority to terminate the release and where the release
09 was subject to restrictions including electronic monitoring and a curfew. *Rodriguez v. Hayes*,
10 591 F.3d 1105, 1117-18 (9th Cir. 2010); *see also Diouf v. Napolitano*, 634 F.3d 1081, 1084, n.3
11 (9th Cir. 2011) (petitioner’s release on bond did not moot habeas petition seeking bond hearing
12 because government could redetain petitioner and deny him a bond hearing at any time, and
13 government offered no assurance that petitioner would not be redetained); *Nadeem v.*
14 *Crawford*, 465 Fed. Appx. 659, 660 (9th Cir. 2012) (“Nadeem’s release subject to an order of
15 supervision does not render his habeas petition moot where his release may be revoked at any
16 time in an exercise of discretion, *see* 8 C.F.R. § 241.4(1)(2)(i), and is contingent on electronic
17 monitoring, scheduled and unscheduled meetings with a detention officer, and a curfew.”).
18 However, the Ninth Circuit has found that a declaration from the appropriate government
19 official attesting that a petitioner would be redetained only under specific, non-discretionary
20 conditions, rendered his petition moot. *Picrin-Peron v. Rison*, 930 F.2d 773, 776 (9th Cir.
21 1991). In this case, respondents’ assertions that petitioner will be redetained in only two
22 non-discretionary situations, does not satisfy the evidentiary requirements established in

01 *Picrin-Peron. See id.* (government's promise not to redetain petitioner absent specific,
02 non-discretionary conditions was insufficient; however, declaration from appropriate
03 government official satisfied the court that the alleged wrong would not recur).

04 Based on the foregoing, the Court finds and ORDERS as follows:

05 (1) By **October 6, 2014**, petitioner shall file with the Court a statement of the
06 specific relief he is requesting in this habeas action. The statement shall operate as a *complete*
07 substitute for the relief requested in his habeas petition (Dkt. 1) and opposition to respondents'
08 motion to dismiss (Dkt. 8). If he is requesting a bond hearing, he should indicate when such a
09 bond hearing would be appropriate (i.e., immediately upon grant of his habeas petition, only if
10 he is redetained, etc.). The statement should not include any legal argument.

11 (2) By **October 20, 2014**, respondents shall file a supplement to their motion to
12 dismiss that addresses the following:

13 (a) Are there any relevant updates regarding petitioner's administrative
14 proceedings, in particular his withholding-only proceedings and his appeal of his denied
15 request for a bond hearing?

16 (b) What is the statutory basis for respondents' authority to detain and
17 release petitioner? Do respondents concede that, under these provisions, they retain the
18 discretionary authority to revoke petitioner's supervised release? What is the legal and/or
19 evidentiary basis for respondents' assertion that petitioner will be redetained only to effectuate
20 his removal or if he violates his order of supervision? (*See* Dkt. 9 at 3 n.2.)

21 (c) If your responses to (b) above do not address petitioner's detention and
22 release under 8 U.S.C. § 1226(a), assume that this statute and the corresponding regulations

01 apply. Under these provisions, do respondents concede that they retain the discretionary
02 authority to revoke petitioner's supervised release?

03 (d) In light of petitioner's statement of relief filed in response to this Order,
04 are there additional arguments regarding mootness that respondents would like to raise?
05 Respondents should not reiterate arguments already made to the Court, but may set forth new
06 arguments, if appropriate.

07 (e) Is there an administrative procedure for petitioner to contest the terms of
08 his supervised release? If so, has petitioner followed these procedures?

09 (f) Assuming petitioner's habeas petition is not moot, should the Court
10 grant his requested relief?

11 (3) By **November 3, 2014**, petitioner shall file a response to respondents'
12 supplemental brief, which addresses the questions outlined above.

13 (4) Respondents' reply, if any, shall be due **November 7, 2014**.

14 (5) The Clerk is directed to RE-NOTE respondents' motion to dismiss (Dkt. 7) for
15 **November 7, 2014**. The Clerk is further directed to send a copy of this order to the Honorable
16 Ricardo S. Martinez.

17 DATED this 30th day of September, 2014.

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Mary Alice Theiler
Chief United States Magistrate Judge