05-2700-pr

To Be Argued By:
JOHN B. HUGHES

==========

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 05-2700-pr

RAFIU AJADI ABIMBOLA,
Petitioner-Appellant,

-vs-

MICHAEL CHERTOFF, Dept Of Homeland Security, ALBERTO GONZALES, Atty Gen, US, MICHAEL GARCIA, Sec, Immigration & Customs Enforcement, EDUARDO AGUIRRE JR., Field Dir for CT, Immigration & Customs Enforcement, CRAIG ROBINSON, Field Dir for AL, Immigration & Customs Enforcement, FRANK MONIN, Dir, Immigration & Customs Enforcement,
Respondent-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF CONNECTICUT

==========

BRIEF FOR RESPONDENTS

==========

KEVIN J. O'CONNOR
United States Attorney
District of Connecticut

JOHN B. HUGHES
WILLIAM J. NARDINI
Assistant United States Attorneys

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

PURSUANT TO "BLUE BOOK" RULE 10.7, THE GOVERNMENT'S CITATION OF CASES DOES NOT INCLUDE "CERTIORARI DENIED" DISPOSITIONS THAT ARE MORE THAN TWO YEARS OLD.

STATUTES

RULES

OTHER AUTHORITIES

STATEMENT OF JURISDICTION

The United States District Court for the District of Connecticut (Kravitz, J.) exercised subject matter jurisdiction over the petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241 and entered a ruling dismissing the petition on March 8, 2005. The petitioner filed a motion for reconsideration on March 21, 2005, and a judgment was entered on May 26, 2005. The petitioner filed a timely notice of appeal on May 31, 2005. On October 17, 2005, the district court denied the motion for reconsideration. The petitioner then filed an amended notice of appeal on October 25, 2005. *See* Fed. R. App. 4(a). This Court has appellate jurisdiction pursuant to 28 U.S.C. §§ 1291 and 2253(a).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

Whether Abimbola's detention, as a criminal alien subject to an administratively final order of removal, comports with the Due Process Clause, where his removal remains reasonably foreseeable; where his present detention has been subject to periodic custody reviews; and where delays in his removal are attributable to his own motions to stay removal in connection with cases he has filed in multiple districts and multiple circuits.

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 05-2700-pr

RAFIU AJADI ABIMBOLA,

Petitioner-Appellant,

-vs-

MICHAEL CHERTOFF,[1] Dept Of Homeland Security, ALBERTO GONZALES, Atty Gen, US, MICHAEL GARCIA, Sec, Immigration & Customs Enforcement, EDUARDO AGUIRRE JR., Field Dir for CT, Immigration & Customs Enforcement, CRAIG ROBINSON, Field Dir for AL, Immigration & Customs Enforcement, FRANK MONIN, Dir, Immigration & Customs Enforcement,

Respondent-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR RESPONDENTS

[1] Pursuant to Rule 43(c)(2) of the Federal Rules of Appellate Procedure, Michael Chertoff, Secretary of the Department of Homeland Security and Alberto Gonzales, Attorney General of the United States have been substituted as Respondents in this matter.

Preliminary Statement

Rafiu Abimbola, a citizen of Nigeria, arrived in the United States in July 1991 as a visitor and became a legal permanent resident in 1994. By the end of 1997, Abimbola was convicted of both federal and state criminal charges. After serving sentences for these offenses, Abimbola was taken into immigration custody in June 2000. Deportation proceedings, as they were then called, were initiated in Hartford, Connecticut, but Abimbola was soon transferred to Oakdale, Louisiana, where the administrative immigration proceedings were completed. On June 22, 2001, an Immigration Judge ordered Abimbola removed from the United States based on his criminal conduct, and the Board of Immigration Appeals ("BIA") affirmed on February 12, 2002.

Abimbola unsuccessfully claimed in the § 2241 proceedings below that his continued detention pending removal violates due process principles. Yet, as the district court aptly observed, Abimbola's never-ending litigation amounts to a "self-inflicted wound" by which he has prevented his own timely removal, and protracted his detention. Since the time of his June 2001 removal order, Abimbola has filed a flurry of pleadings challenging his underlying convictions, the removal order, and his detention. As outlined in greater detail below, Abimbola's litigation has included multiple petitions for habeas corpus in several different district courts, and numerous petitions for review in two circuit courts of appeals. First, he filed two petitions for review in the Second Circuit and a petition for a writ of habeas corpus in the Eastern District of New York, challenging the BIA's decision that he was

an aggravated felon. One of those petitions for review was dismissed, and another was eventually transferred to the Fifth Circuit, where it also was dismissed.

Abimbola filed another petition for review in the Fifth Circuit, along with a motion to stay removal, but then withdrew the petition two weeks later. The habeas petition filed in the Eastern District of New York was denied by the district court. Abimbola took an appeal, but this Court affirmed the district court's denial of relief in August 2004. The United States Supreme Court eventually denied certiorari on November 28, 2005.

If that were the extent of Abimbola's filings, it would be fair to say that he pursued all available remedies regarding his final order of removal. However, the above is just the tip of the litigation iceberg which Abimbola has placed in the path of his removal to his native Nigeria. There have been a number of other habeas petitions filed by Abimbola in districts where he was not detained, and petitions for review filed in this circuit, where his removal proceedings were not completed. In each of those cases, there is a pattern of motions for reconsideration, motions for rehearing, motions to set aside the judgment, motions to stay the mandate and most importantly motions for a stay of removal.[2]

---

[2] In an Order dated November 23, 2005, denying Abimbola's motion for release from custody, this Court instructed the government to identify each of the 28 U.S.C. § 2241 petitions filed by Abimbola since the Board of Immigration Appeals issued the final order of removal, and to (continued...)

As set forth in greater detail below, there is nothing unconstitutional about Abimbola's continued detention. There is a significant likelihood that he will be removed to Nigeria in the reasonably foreseeable future, since this Court has already rejected his challenge to his removal order. Any delays in his removal are attributable to his own efforts to obtain stays, either through formal court orders or by filing pleadings (including yet another petition for review still pending before this Court) that trigger removal forbearance policies. Moreover, a series of periodic custody reviews performed by the immigration authorities ensure that he is being detained because he poses a risk of flight (as evidenced by his criminal conviction for failure to appear), as well as a danger to the community (as evidenced by his criminal convictions for bank fraud and larceny). For all these reasons, the judgment of the district court should be affirmed.

---

[2] (...continued)
clarify the stays of removal that have been in place and lifted during that time. The government has attempted to do so in the Statement of Facts, *infra*, based on known cases and those available from on-line resources. In addition to habeas petitions under § 2241, there have also been a number of petitions for review in which a motion for stay was sought and/or obtained. These are included in the discussion. A time line, captioned "Chronology of Cases Filed and Motions for Stay Entered, Denied and Terminated," is set forth in the Government Appendix at 252 and attempts to graphically demonstrate when either a formal stay or forbearance agreement was in effect.

Statement of the Case

On May 24, 2004, Abimbola filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241 in the United States District Court for the District of Connecticut (Mark R. Kravitz, J.), seeking to be released from the custody of the Department of Homeland Security. (GA2).

On March 8, 2005, the district court denied the petition without prejudice in light of the fact that Abimbola's own actions in seeking judicial stays of his removal (and not moving to dissolve them) were the reason for his continued detention and the respondents' failure to remove him sooner. (GA 5, 10-16). Judgment was filed and entered on May 26, 2005. (GA 5-6, 9). Abimbola filed a timely notice of appeal on May 31, 2005. (GA 6, 27-29).

In the meantime, Abimbola had filed a motion for reconsideration on March 21, 2005. (GA 5). On October 17, 2005, the district court denied that motion. (GA 7, 17-22). Abimbola filed an amended notice of appeal on October 25, 2005. (GA 7-8, 30-32).

Statement of Facts

A. Abimbola's Entry into the United States, His Convictions, Removal Proceedings and Multiple Litigations

Petitioner Rafiu Abimbola, a native and citizen of Nigeria, was admitted to the United States in July 1991. He became a lawful permanent resident in 1994. He claims to be married to a United States citizen with whom he has

had two children. (Petition ¶ 5, Petitioner's Appendix ("PA") Item #11).[3]

In February 1997, Abimbola pleaded guilty to bank fraud, in violation of 18 U.S.C. § 1344, in the United States District Court for the Eastern District of New York. He was sentenced to serve 21 months in prison. Abimbola appealed that conviction, but the appeal was dismissed on grounds of waiver. *See Abimbola v. Ashcroft*, 378 F.3d 173, 174 n.2 (2d Cir. 2004). Abimbola collaterally attacked his conviction pursuant to 28 U.S.C. § 2255 in the Eastern District of New York (04CV1518), but was denied relief as well as a certificate of appealability on June 17, 2005. (GA 139). He has filed a notice of appeal in that matter with this Court (05-3119), together with papers moving for a certificate of appealability. (GA 140-141).

In November 1997, Abimbola entered an *Alford* plea to larceny in the third degree, in violation of Conn. Gen. Stat.

---

[3] Petitioner-Appellant Abimbola refers to an appendix in his Appellant's Brief, but he did not serve a copy on the respondents, indicating in a cover letter that he believed copies of all the documents were already in the possession of respondents' counsel. Although the respondents do not have a copy of the Petitioner's Appendix ("PA"), the respondents will cite that Appendix at various points of this brief, where the document to which Abimbola is referring is clear from context. Based on Abimbola's references to his Appendix, it appears that it does not not include a copy of the district court docket entries or notice of appeal, and therefore does not comply with this Court's rules. *See* Fed. R. App. P. 30(a)(1)(A) and Second Circuit Local Rule 30(d). Acccordingly, the Government Appendix ("GA") includes these omitted documents.

§ 53a-124, in Norwalk, Connecticut Superior Court. For that offense, as well as the offense of failure to appear, Abimbola was sentenced on May 7, 1999, to a term of one year. (GA 185-187).

While Abimbola was serving that state sentence at the Bridgeport Correctional Center, the Hartford Office of the Immigration and Naturalization Service (now Immigration and Customs Enforcement ("ICE")) issued a Notice to Appear, a Warrant for Arrest of Alien, and a Notice of Custody Determination. Abimbola was charged with being removable from the United States as an aggravated felon. Pursuant to § 236(c) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1226(c), which provides for mandatory detention of aggravated felons during the pendency of removal proceedings, Abimbola was immediately detained upon his release from state custody in June 2000. (GA 188-193).

Abimbola's removal proceedings began in Hartford, Connecticut, but within a matter of days he was transferred to Oakdale, Louisiana (GA 192) where the proceedings were concluded. (PA Item #11, Petition ¶ 10 and 11). During the removal proceedings, Abimbola argued that the Connecticut third-degree larceny conviction should not be construed as an aggravated felony. On June 22, 2001, the Immigration Judge ("IJ") rejected that claim, and found Abimbola removable as an aggravated felon. (GA 213, 215). The IJ also denied Abimbola's applications for asylum, withholding of removal and relief under the United Nations Convention Against Torture ("CAT"). (GA 226). Abimbola appealed the IJ's decision to the Board of Immigration Appeals ("BIA"). On February 12, 2002, the

BIA dismissed Abimbola's appeal, agreeing with the IJ that Abimbola had been convicted of an aggravated felony, and that he was not eligible for any other form of relief. *See* 378 F.3d at 175-76.

1. The First and Second Eastern District of New York Habeas Petitions, 01CV4702 and 01CV5568 (NG), and the Appeal to the Second Circuit, 02-2632

Prior to the decision of the BIA, however, Abimbola filed two matters in the United States District Court for the Eastern District of New York. On July 16, 2001, Abimbola filed a "Motion for Emergency Stay of Deportation Pending Exhaustion of All Remedies" which was docketed as a Petition for Writ of Habeas Corpus, 01CV4702(NG). That case was assigned to the Hon. Nina Gershon. (GA 44, 231-245). The application for a stay of deportation was promptly denied on August 1, 2001 (GA 44, 246), judgment was entered (GA 247), and the case was closed. (GA 44). Seven months later, on March 4, 2002, Judge Gershon granted a stay of deportation in 01CV4702 (GA 248), which continued until November 30, 2004. (GA 45, 249).

On August 16, 2001, Abimbola filed a second habeas petition under 28 U.S.C. § 2241 in the Eastern District of New York challenging his detention, the removal proceedings, and his order of removal. (GA 46). The central issue was whether Abimbola's Connecticut conviction for larceny in the third degree was an aggravated felony. Abimbola also asserted a challenge to his detention under INA § 236(c), which was dismissed as

moot, and a challenge to his detention under INA § 241(a), which was dismissed as premature. *See Abimbola v. Ashcroft*, 01CV5568(NG), 2002 WL 2003186 (E.D.N.Y. August 28, 2002). (PA Item #11, Petition ¶ 12). Judge Gershon denied the habeas petition and lifted the stay of removal it had imposed pending the outcome of the habeas petition. *Abimbola v. Ashcroft*, 01CV5568(NG), 2002 WL 2003186 (E.D.N.Y. Aug. 28, 2002). At that time, however, Judge Gershon did not lift the stay she had imposed in 01CV4702 in March 2002.

Abimbola appealed Judge Gershon's decision, and this Court affirmed on August 5, 2004. *Abimbola v. Ashcroft*, 02-2632, 378 F.3d 173 (2d Cir. 2004). The factual background section of this Court's opinion indicates that Abimbola was initially served with a Notice to Appear based on both his federal and state convictions. The INS sought removal pursuant to INA § 237(a)(2)(A)(iii), 8 U.S.C. § 1227(a)(2)(A)(iii), for an aggravated felony conviction as defined by INA § 101(a)(43)(G), 8 U.S.C. § 1101(a)(43)(G). Although the original charge only included the federal conviction, the Notice to Appear was amended by adding the Connecticut third-degree larceny conviction. (GA 188, 213). At the removal hearing in Oakdale, Louisiana, the INS withdrew the charge of removability based on the federal conviction, because that conviction was still on direct appeal at the time. (GA 188, 199, 213). That appeal was subsequently dismissed.[4]

---

[4] As noted above, the direct appeal of the federal conviction was dismissed on September 10, 2003. Abimbola then filed a motion to vacate under 28 U.S.C. § 2255, which (continued...)

United States v. Ajadi, 97-1325 (2d Cir. Sept. 10, 2003) (GA 67).

In affirming the decision of Judge Gershon, this Court held that third-degree larceny under Connecticut law is an aggravated felony under the INA. This Court also found that Abimbola's other claims were either without merit or outside this Court's jurisdiction. *Abimbola v. Ashcroft*, 378 F.3d 173 (2d Cir. 2004). From that decision, Abimbola sought a petition for rehearing (GA 93 9/21/04), which was denied on March 17, 2005 (GA 94), and a petition for certiorari (GA 96, 5/23/05), which was denied on November 28, 2005. (GA 96, 12/6/05 and GA 154). *See also* Second Circuit Docket Sheet 02-2632. (GA 81-97).

2. The Prior District of Connecticut Habeas Petitions, 3:02CV1825 (RNC), 3:01CV1800 (DJS)

Shortly after Judge Gershon denied Abimbola's § 2241 petition in the Eastern District of New York on August 28, 2002, and while that matter was on appeal, Abimbola also filed a petition for habeas corpus in the District of Connecticut in October 2002. *Abimbola v. Ashcroft*, 3:02CV1825(RNC). That case was assigned to the Hon. Robert N. Chatigny. (GA 41-43). After initially entering an order to show cause, and a stay of removal (GA 171-

---

[4] (...continued)
was denied. He has filed a notice of appeal from that decision, which remains pending. The docket does not reflect the issuance of a certificate of appealability by this Court. (Docket Number 05-3119). (GA 138-141).

172), Judge Chatigny then *sua sponte* entered a ruling noting that a previous petition for writ of mandamus and a stay of removal – which had been construed as a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241 – had also been filed by Abimbola in Connecticut under the name *Rafiu Abimbola Ajadi v. Connecticut Superior Court* 3:01CV1800(DJS), and had been assigned to the Hon. Dominic J. Squatrito. Judge Chatigny explained that the previous petition had been dismissed without prejudice because it should have been filed in the Western District of Louisiana, since Abimbola was in custody in Oakdale, Louisiana. Accordingly, on October 21, 2002, Judge Chatigny lifted the stay that he had previously ordered, and dismissed the § 2241 petition without prejudice. *See Abimbola v. Ashcroft*, 3:02CV1825 (RNC), October 21, 2002, Ruling and Order. (GA 173).

Thereafter, Abimbola filed a motion for extension of time to file a motion to alter or amend the judgment and other relief. On November 1, 2002, Judge Chatigny entered an endorsement order denying the request because any motion to alter or amend the judgment would be futile. For the same reasons, Judge Chatigny also denied the request for a stay pending the filing of a motion for reconsideration. The court noted that Abimbola's claims had already been rejected on the merits by Judge Gershon, in *Abimbola v. Ashcroft*, 01CV5568(NG), and that he had similarly been denied a stay in that case. The court noted that Abimbola could appeal the Eastern District of New York ruling, "which he reportedly has done," but he could not re-litigate those claims in Connecticut. Moreover, Judge Chatigny noted that any new claims had to be filed in Louisiana where Abimbola was in custody. *See*

Abimbola v. Ashcroft, 3:02CV1825, November 1, 2002, Endorsement Order. (GA 174).

In addition to denying the motion for extension of time, Judge Chatigny also denied the Motion to Alter or Amend Judgment itself for the reasons set forth in the endorsed ruling of November 1, 2002. *See Abimbola v. Ashcroft*, 3:02CV1825, November 13, 2002, Endorsement Order. (GA 175).

On November 19, 2002, Judge Chatigny eventually transferred the case to Judge Gershon in the Eastern District of New York. He did so in response to yet another motion filed by Abimbola – styled a motion for leave to supplement the motion to alter or amend the judgment – which the court treated as a motion to reopen. Judge Chatigny granted the motion but ruled that the pending petition (3:02CV1825) should simply be transferred to Judge Gershon who had familiarity with the case and to avoid the appearance of forum shopping. No stay was ordered pending the transfer because Abimbola had not shown that there was any substantial possibility that he would succeed on the merits. *See Abimbola v. Ashcroft*, 3:02CV1825, November 19, 2003 Ruling and Order. (GA 176-177).

3. The Third Eastern District of New York Habeas Petition, 02CV6474 (NG), and Two Appeals to the Second Circuit, 04-4387 and 05-0359

When the District of Connecticut habeas proceeding, 3:02CV1825, was transferred to Judge Gershon in the

Eastern District of New York, it was assigned docket number 02CV6474(NG). (GA 57-61). Judge Gershon issued some preliminary orders, and Abimbola appealed those to the Second Circuit, where his case was assigned docket number 04-4387. (GA 116-121). Abimbola filed a motion for stay of removal, but this Court dismissed the appeal *sua sponte* on September 30, 2004, and then denied the motion for stay as moot on October 25, 2004. *See* Second Circuit Docket Sheet 04-4387. (GA 119). The matter went back to Judge Gershon, who eventually dismissed the § 2241 petition and denied reconsideration. Abimbola again took an appeal to the Second Circuit which was assigned docket number 05-0359. (GA 126).

The appeal in 05-0359 raised issues duplicative to those raised earlier in 02-2632. This Court initially entered a temporary stay of removal on March 31, 2005 (GA 129), pending determination of Abimbola's motion for stay of removal. On June 1, 2005, however, this Court denied the motion because Abimbola had failed to satisfy the requirements for a stay, citing *Mohammed v. Reno*, 309 F.3d. 95, 101 (2d Cir. 2002) (holding movant must show likelihood of success on the merits). It was further ordered that the appeal be dismissed because it presented "no arguable meritorious issue for consideration." (GA 129-130). As is his customary practice, Abimbola filed a motion to reconsider that decision on July 8, 2005, which the Court denied on July 22, 2005. (GA 130). Abimbola then filed a motion to stay the mandate and to reconsider the decision *en banc* on August 2, 2005. This Court entered an order on August 19, 2005, denying the motion

to stay the mandate and denying the motion to reconsider and/or petition for rehearing *en banc*. (GA 131).[5]

4. Petitions for Review in Courts of Appeals

While Abimbola was filing petitions for writ of habeas corpus both in the Eastern District of New York and in the District of Connecticut, he also filed three petitions for review with the Second Circuit from decisions of the Board of Immigration Appeals.

a. Second Circuit Petition for Review, 02-4055

In the first petition for review, Second Circuit docket number 02-4055, docketed on February 25, 2002, Abimbola sought a stay of removal. According to the docket sheet, this Court entered an order on July 17, 2002, granting both a stay of removal and the respondents' motion to transfer venue to the Court of Appeals for the Fifth Circuit. This Court noted that venue was improper in

---

[5] To summarize, the habeas petition filed in Connecticut assigned to Judge Chatigny with docket number 3:02CV1825 was transferred to the Eastern District of New York and assigned to Judge Gershon with docket number 1:02CV6474 which was appealed prematurely and assigned docket number 04-4387 and, after remand and dismissal, was appealed again and assigned docket number 05-0359. An order denying a petition for rehearing was entered on July 22, 2005, and Abimbola failed to timely file a motion for extension of time to file a petition for writ of certiorari. See Letter from Supreme Court of the United States, Office of the Clerk, dated November 21, 2005. (GA 181).

New York because Abimbola's removal proceedings were completed in Oakdale, Louisiana, citing 8 U.S.C. § 1252(b)(2). *See* Docket Sheet, Second Circuit Petition for Review, 02-4055. (GA 98, 101).

Abimbola sought a stay of the issuance of the mandate on the transfer order, which was granted on February 25, 2003, pending decision on a petition for certiorari to the Supreme Court. (GA 102). On October 8, 2003, this Court entered an order to show cause why it should not vacate the February 23, 2003, order staying the issuance of the mandate on the order to transfer. Absent a response, the Clerk was to enter an order vacating the February 23, 2003, order and issue the mandate (to transfer the petition for review) forthwith. (GA 103, 169). Although no response was ever filed, the Court did not issue the mandate, according to the docket sheet, until September 20, 2004. (GA 103).

Even though the mandate on the transfer order did not issue until September 2004, the petition for review in 02-4055 was, in fact, transferred to the Fifth Circuit where it was docketed on August 7, 2002. (GA 149, 150). The transfer order itself (as opposed to the docket entry) contained no stay of deportation. *See* July 17, 2002, Second Circuit Transfer Order to Fifth Circuit. (GA 168). Although it does appear that the petition for review in 02-4055 was transferred to the Fifth Circuit in July/August 2002, there is no explanation for why this Court continued to enter orders regarding that petition for review, including a stay of the issuance of the mandate and the October 8, 2003 Order to Show Cause, well after the petition had already been transferred. The Fifth Circuit subsequently

denied the petition for review for lack of jurisdiction, denied the motion for stay of deportation, and denied the motion for rehearing *Abimbola v Ashcroft*, 02-60652 (5th Cir. Sept. 24, 2002) (GA 170).

b. Second Circuit Petition for Review, 02-4551

Despite the rulings and proceedings in 02-4055, Abimbola filed a second petition for review in the Second Circuit on October 3, 2002, docketed as 02-4551. (GA 104). Abimbola again moved for a stay of removal both on October 3, 2002, and again on November 26, 2002 (GA 106, 107), even though it appeared from the docket sheet in 02-4055 that he had received a stay of removal from the Second Circuit on July 17, 2002. Abimbola apparently knew what this Court did not know: His previous petition for review and request for a stay had been dismissed by the Fifth Circuit in September 2002 after the transfer from the Second Circuit. Respondents filed a similar motion to transfer the venue of petition 02-4551 on January 9, 2003 (GA 107). Abimbola filed several requests for a continued stay of removal on January 30, 2003, and March 3, 2003. (GA 108). On April 18, 2003, this Court issued an order dismissing the second petition for review (02-4551) for improper venue. The Court also denied the stay motion as moot. (GA 109). Subsequent motions by Abimbola to stay the issuance of the mandate, to seek rehearing *en banc,* and to recall the mandate were all denied. It appears that 02-4551 was finally disposed of on August 25, 2004. *See* Docket Sheet, Second Circuit Petition for Review 02-4551. (GA 111).

c. Second Circuit Petition for Review 05-3344

The most recent matter filed by Abimbola in this Court is a petition for review challenging a decision by the BIA denying his motion to reopen. This petition was filed on June 30, 2005, along with a motion for stay of removal. The docket sheet reflects that on July 25, 2005, Abimbola also filed a motion to hold the petition for review in abeyance. Both motions are apparently still pending decision. *See* Second Circuit Docket Sheet in *Abimbola v. Gonzales*, 05-3344. (GA 142).

5. The Most Recent District of Connecticut Petition for Writ of Habeas Corpus, 3:04CV856 (MRK), and the Current Second Circuit Appeal, 05-2700

Despite the repeated admonitions of several courts that Abimbola should file his challenges in the Western District of Louisiana, *see Ajadi v. Connecticut Superior Court*, 3:01CV1800 (DJS) (D. Conn. Oct. 30, 2001); *Abimbola v. Ashcroft*, 3:02CV1825 (RNC) (D. Conn. Nov. 1, 2002); *Abimbola v. Ashcroft*, 02-4055 (2d Cir. July 17, 2002); *Abimbola v. Ashcroft*, 02-4551 (2d Cir. Apr. 8, 2003), Abimbola filed the present petition on May 25, 2004, in the District of Connecticut. It was assigned to the Hon. Mark R. Kravitz. Shortly thereafter, on June 28, 2004, the Supreme Court ruled that a habeas petitioner's claims should, absent exceptional circumstances, proceed only in the place of his confinement. *Rumsfeld v. Padilla*, 542 U.S. 426 (2004). The holding in that case leads to the conclusion that the only proper respondent in a § 2241

habeas proceeding is the individual who has actual physical custody of the petitioner and that the proceeding should be filed where there is personal jurisdiction over such respondent. Although Abimbola was detained outside Connecticut, in the custody of the Field Director of the New Orleans District of the Department of Homeland Security and physically located in Alabama, the district court assumed, without deciding, it had subject matter jurisdiction, citing *Rumsfeld* and other cases for the proposition that it was a question of personal jurisdiction or venue rather than subject matter jurisdiction. *Abimbola v. Ridge*, 3:04CV856 (MRK), Ruling at 2 n.1, March 7, 2005 (GA 11).

In his original petition in 3:04CV856 (MRK), Abimbola asserted that he should be released from custody because his removal was not reasonably foreseeable and that his continued detention was therefore no longer authorized under *Zadvydas v. Davis*, 533 U.S. 678 (2001). (PA, Item 11, Petition ¶ 20). In the Argument section of his petition, Abimbola conceded that this Court had issued a stay of removal, although he did not articulate in which particular case or proceeding that occurred.[6] In support of

---

[6] The Second Circuit issued a Stay of Removal in 02-2632 on April 25, 2003. (*See* Docket Sheet, Second Circuit Appeal 02-2632. (GA 86). From the docket sheet it also appeared that the Second Circuit issued a stay of removal on July 17, 2002, in petition for review 02-4055. *See* Docket Sheet, Second Circuit Petition for Review, 02-4055. (GA 101). Only later was it learned by ICE that the order of transfer for that petition for review to the Fifth Circuit actually denied the (continued...)

his *Zadvydas* claim, Abimbola further alleged that subsequent to his removal order becoming final in February 2002, no post-order custody review was conducted by ICE until August 2003. Abimbola further alleged that the August 2003 custody review deemed him to be a flight risk but did not discuss the "reasonable foreseeability" of his removal. (PA Item #11, Petition at ¶ 16). The petition also alleged that from August 2003 until the filing of this current petition in May 2004, no further custody review was conducted by ICE. (PA Item # 11, Petition ¶ 17). Abimbola further alleged that ICE had previously taken the position in April 2003 that he was ineligible for a custody review because he had been granted a stay of removal by the Second Circuit. (PA Item #11, Petition ¶ 18). Moreover, Abimbola suggested that there was an eight-month period between August 2002 and April 2003 when the final removal order had not been subject to a stay. (PA Item #11, Petition ¶ 18).

Finally, Abimbola alleged that he had been advised by the Nigerian consulate that they would not issue a travel document for his removal because "he did not have any family in Nigeria and will likely become a public charge." (PA Item #11, Petition ¶ 19). There was no documentation to support this allegation attached to the original petition filed in May 2004, but Abimbola later produced a letter dated July 8, 2004, purportedly from the Nigerian Consulate, which stated that it would not issue a travel document "because you do not have any family ties in Nigeria. Also, the consulate does not usually issue travel

---

[6] (...continued)
motion for stay of removal.

documents when there is evidence of a pending case in court." (GA 228). Abimbola has never explained how he was advised in May 2004 when the letter is dated July 8, 2004. Nor has he explained why one of the reasons set forth in his petition (the likelihood of his becoming a public charge) does not appear in the letter, and vice versa why one of the reasons in the letter (the pendency of court challenges) does not appear in his petition.

On March 8, 2005, Judge Kravitz denied the habeas petition without prejudice in light of the fact that Abimbola's own actions in seeking judicial stays of his removal (and not moving to dissolve them) were the reason for his continued detention and the respondents' inability to remove him sooner. *Abimbola v. Ridge*, 3:04CV856 (MRK) 2005 WL 588769 (D. Conn. Mar. 8, 2005). ("Ruling") (GA 10, 15). Judge Kravitz noted that "Abimbola's *Zadvydas* claim has been unduly complicated and hindered" by the numerous habeas petitions and petitions for review which he has filed. (GA 12). Moreover, the court also noted that Abimbola had sought "motions to stay his removal, motions for reconsideration of district court rulings, appeals from district court rulings, motions for rehearing, motions for rehearing *en banc*, and petitions for writ of certiorari" in some or all of these petitions. (GA 13).

> From the convoluted record before the Court, at least one fact is clear: Mr. Abimbola has sought and/or received numerous judicial stays of his removal throughout his four years of filing petitions with the various courts mentioned above, and in so doing, he has single-handedly created a

> considerable degree of uncertainty as to the existence and duration of judicial stays of his removal at any given moment in time.

(GA 13).

The Court also found that because ICE believed that a court-ordered stay of removal remained in effect, Abimbola was not removed even though the Nigerian Embassy was willing to issue travel documents. *Id.* After citing a number of similar cases, the district court succinctly stated: "There is, therefore, a simple response to Mr. Abimbola's complaints regarding his continued detention pending removal: A self-inflicted wound cannot be grounds for his *Zadvydas* claim." (GA 14).

Abimbola filed a motion for reconsideration on March 21, 2005, but the court entered judgment on May 26, 2005. (GA 9). Abimbola filed a timely notice of appeal on May 31, 2005. (GA 6).

On October 17, 2005, the court denied the motion for reconsideration. In doing so, the court again rejected Abimbola's claim that he was being detained pursuant to INA § 236(c) rather than INA § 241(a). The court observed that even if it were to accept Abimbola's argument that a stay of removal has the effect of maintaining an alien in custody under § 236(c) until the court issuing the stay reaches a final decision, such a final decision had in fact been issued when the Second Circuit affirmed the denial of his habeas challenge in 02-2632. The district court also addressed Abimbola's second argument for reconsideration based on *Zadvyda*s, that the

court had misconstrued his claim as one of delay in removal rather than continued detention. In rejecting this claim, the district court noted that either way, it was a question of whether detention is statutorily authorized. The court repeated its conclusion that Abimbola had not satisfied the *Zadvydas* requirement to "provide good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future." (GA 21). The reason for this conclusion was that "Abimbola's continued detention was in large part attributable to litigation that is under his own control and in any event time-limited, rather than to a more permanent obstacle like the lack of a repatriation agreement in *Zadvydas*." (GA 22).

Although Abimbola then filed an amended notice of appeal on October 25, 2005 (GA 30), he also filed a "Motion for Further Reconsideration" with the district court on November 7, 2005. On November 14, 2005, the district court denied that motion. (GA 23-26). In doing so, the court discussed the Second Circuit's "forbearance policy." Abimbola asked the district court to revisit its earlier conclusion that he was not presently detained pursuant to § 236(c). Specifically, he argued that because he had filed another petition for review, his removal was again stayed by operation of the Second Circuit forbearance policy, which provides that ICE will abstain from removing an alien who has filed a petition for review of a decision of the BIA and has requested a stay, unless and until the Second Circuit denies that stay request.[7] The

---

[7] *See* Memorandum For Chambers and Staff, Revised, (continued...)

district court ultimately did not decide the question of whether the forbearance policy was equivalent to a binding stay of removal for purposes of triggering § 241(a)(1)(B)(ii), since Abimbola had previously taken the opposite position, that no stays were in effect. (GA 25).

On August 25, 2005, while his motions for reconsideration were pending in the district court, Abimbola also filed a Motion for Release from Custody with this Court in the instant appeal, docketed as 05-2700. This Court denied that motion on November 23, 2005. (GA 132, 135, 137).

B. Documentary Submissions

In addition to the facts and chronology of cases set forth above, there are two categories of documents which have a bearing on the issues presented by Abimbola on this appeal. In the first category are the Nigerian travel documents and related requests and correspondence. In the second category are the Custody Review Notices and Decisions from ICE. Each category is summarized below.

1. The Nigerian Travel Documents

Abimbola contends that his removal is "not reasonably foreseeable" because, during his detention, the Nigerian Consulate in New York declined to issue a travel

---

[7] (...continued)
September 5, 1995. Subj: Motions for Stay of INS Deportation Orders. (GA 185).

document on the grounds that he did not have family ties in Nigeria and he had pending cases in court. During the course of the instant proceedings before the district court, Abimbola submitted a copy of what purports to be a July 8, 2004, letter from the Nigerian Consulate. (GA 228). He did not produce a copy of the letter which he wrote to the Consulate.

Through its direct dealings with the Nigerian government, however, ICE had learned that travel documents for Abimbola could be forthcoming if needed. Previously, the same Nigerian Consulate had issued an Emergency Travel Certificate on October 9, 2002, authorizing Abimbola to travel to Lagos, Nigeria within one week of the date of issuance. (GA 227). A few months after the July 2004 letter proffered by Abimbola, the Nigerian Embassy in Washington, D.C., informed ICE Headquarters that they were prepared to issue another travel document for Abimbola. The Declaration of Deportation Officer Dean Hoth, made under penalty of perjury pursuant to 28 U.S.C. § 1746(2), indicates that he was so informed by ICE on September 17, 2004. (GA 252). The district court accepted this representation. (GA 13-14). In March 2005, following a custody review in October 2004, another request for a travel document was made to the Nigerian Consulate. (GA 229). In the request, the ICE Field Director advised that the travel document issued in 2002 had expired and the appeal pending in the Second Circuit had been dismissed. Although there has apparently been no response from the Nigerian Consulate, ICE still believes Abimbola's removal is reasonably foreseeable and that ICE should be afforded the opportunity to carry out the removal once it is determined

that there is no stay of removal currently in effect. At present, the only stay known to respondents is pursuant to the forbearance policy in effect under the Second Circuit's agreement with the Southern District of New York, due to Abimbola's most recent petition for review (of the BIA's denial of his motion to reopen) in 05-3344. (GA 144, 184).

2. The Custody Review Documents

In connection with Abimbola's due process claim, he challenges the custody reviews which he has periodically received as being contrary to the regulations, 8 C.F.R. § 241.4, and no more than rubberstamp denials. *See* Appellant's Brief at 40-45.

The regulations at 28 C.F.R. § 241.4 set forth the procedures which must be followed for the continued detention of inadmissible, criminal and other aliens beyond the 90-day removal period set forth in INA § 241(a)(1). There is a specific provision which requires the government to give an alien 30 days' notice of an upcoming record review so that the alien can submit information in writing supporting his release. 8 C.F.R. § 241.4(h)(2). The information submitted should pertain to the factors set out in 8 C.F.R. § 241.4(f), which ICE then considers in making a continued custody decision. While the record is not developed on the issue of prior notice for the earlier custody reviews, it is conceded by Abimbola that the more recent reviews, namely those completed on October 27, 2004, and November 25, 2005 (GA 208, 212), were conducted after he received appropriate notice and submitted extensive responsive documentation. Copies of Abimbola's lengthy submission of documents were

attached to his Declaration and Letter filed in support of his Motion for Release from Custody, which was denied by this Court on November 23, 2005. (GA 137).

In April 2003, ICE notified Abimbola that he was ineligible for a custody review until this Court lifted its stay of removal. (GA 202). Nevertheless, a custody review was conducted in August 2003 (while the stay was still in effect), but a decision was made to continue Abimbola's detention. August 7, 2003, Decision to Continue Detention.[8] (GA 203). In that decision, ICE found that Abimbola was an aggravated felon, and that his conviction for failure to appear made him a flight risk. (GA 203).

Subsequent to the August 2003 custody review, Abimbola has received at least two additional reviews. The Decision to Continue Detention Following File Review, dated October 27, 2004, (GA 207-208) was made after due notice was provided to Abimbola on August 18, 2004, and Abimbola submitted a six-page letter dated September 13, 2004, with numerous attachments supporting his request to be released from custody. (GA 135). The October 2004 decision to continue detention provided that petitioner was to remain in ICE custody

---

[8] The August 2003 Decision to Continue Detention refers to Abimbola's conviction for failure to appear in New York. Abimbola correctly notes in his Appellant's Brief at 13 that he was not convicted of failure to appear in New York. That conviction was in Connecticut along with his conviction for larceny in the third degree. *See* State of Connecticut, Superior Court Information and Mittimus (GA 185-187).

pending his removal because he had been convicted of an aggravated felony and was found to be a threat to public safety and a flight risk. Reference was also made to the fact that a mandate had not issued in two cases, 02-2632 and 04-4387, and that it appeared that a stay of removal remained in effect. (GA 207).

The following year, Abimbola received another Notice to Alien of File Custody Review indicating he would receive a file custody review on or about September 30, 2005. (GA 209). On September 30, 2005, Abimbola submitted a response to the Notice, which is a nine-page letter with attachments wherein he challenges the legitimacy of the reviews and argues why he is not a flight risk or a danger to the community. (GA 136). The most recent Decision to Continue Detention, issued on November 25, 2005, states that pending litigation by Abimbola prevents his removal to Nigeria, and that upon completion of his cases with the courts, a travel document is likely to issue. It also notes that Abimbola remains a threat to the public's welfare and a significant flight risk. Abimbola was served with a copy of this decision on December 7, 2005. (GA 211-212).

SUMMARY OF ARGUMENT

Contrary to Abimbola's argument, he is presently being detained under the authority of INA § 241(a). In August 2004, this Court ruled that Abimbola had indeed been convicted of an aggravated felony and was therefore removable. In affirming the district court's denial of habeas relief, this Court entered an order on the docket expressly recognizing that its order triggered the 90-day removal period set forth in INA § 241(a). Although Abimbola has managed to prevent his timely removal through a pattern of motions for reconsideration, petitions for rehearing, petitions for certiorari, and by instituting new proceedings in multiple courts, some of which have prompted formal stays of removal or triggered forbearance policies, it cannot be that such litigious practices can negate the statutory authority for his detention.

In any event, regardless of whether Abimbola's detention is presently authorized by INA § 236(c) or INA § 241(a), his continued detention does not violate the Due Process Clause.

First, to the extent that Abimbola seeks to invoke the rule of *Zadvydas v. Davis*, 533 U.S. 678 (2001), that post-removal-order detention pursuant to INA § 241(a) is valid only if there is a "significant likelihood of removal in the reasonably foreseeable future," the Government has made such a showing here. On August 5, 2004, this Court affirmed a district court's denial of habeas relief; held that Abimbola was removable as an aggravated felon; and stated that his 90-day removal period was commencing upon issuance of the Court's decision. Although Abimbola

has filed three petitions for review in this Court, two of those petitions were ultimately dismissed, and only one (filed in June 2005) awaits adjudication. There is every reason to believe that Abimbola can be promptly returned to his native Nigeria at the conclusion of that litigation; the district court here accepted the representation by the government that the Nigerian Consulate has informed ICE that it is prepared to issue a travel document for Abimbola's return.

To the extent that judicial review of Abimbola's removal order has been (and may continue to be) protracted, such delays are entirely of his own making. As the district court properly observed, Abimbola's pattern of filing motions for reconsideration, petitions for rehearing, motions to stay removal, motions to stay the mandate, and petitions for certiorari, have generated considerable uncertainty about the existence of court-ordered stays. Thus, the prolongation of Abimbola's court proceedings – and hence his detention – is a "self-inflicted wound" which cannot provide him with a basis for challenging the detention itself.

Moreover, this Court should reject Abimbola's claim that his present detention violates due process on the ground that the government failed to remove him during several months in 2002-2003 which were allegedly "unencumbered" by stay orders. A careful examination of the docket sheets reveals that there was, in fact, a formal stay of removal in effect during this period in the Eastern District of New York. Moreover, Abimbola had pending cases during this period which triggered the removal forbearance policy in effect in this Court and the Supreme

Court. And even if no formal or informal stays had been in place at the time, any challenge to Abimbola's 2002-2003 detention pursuant to INA § 236(c) became moot when this Court ruled in August 2004 that he is removable as an aggravated felon, and thereby shifted authority for his detention to INA § 241(a).

Second, Abimbola's present detention is fully justified by the two purposes of detaining criminal aliens which are served by both INA § 236(c) and § 241(a): to ensure the aliens' presence for removal, and to protect the community from dangers they pose. In this regard, ICE has provided Abimbola with periodic custody reviews since 2003. In the last two custody reviews – which form the basis for his present detention – Abimbola was undisputedly provided with advance notice and an opportunity to be heard by making written submissions. As a result of these custody reviews, the immigration authorities have reasonably determined that Abimbola remains a flight risk (based on his prior conviction for failure to appear) and that he poses a danger to the community (based on his prior convictions for larceny and bank fraud).

ARGUMENT

I. ABIMBOLA'S DETENTION COMPORTS WITH DUE PROCESS

A. Relevant Facts

The relevant facts are set forth in the Statement of the Facts above.

B. Governing Law and Standard of Review

Different portions of the Immigration and Nationality Act ("INA") provide statutory authority for detaining removable aliens, at different stages of removal proceedings. Three such provisions are relevant here: § 236(c) (applicable during the pendency of removal proceedings before the agency and the courts), § 241(a)(1)(B) (applicable during a 90-day "removal period" triggered by certain events rendering a removal order final), and § 241(a)(6) (applicable after expiration of the 90-day removal period).

1. Custody under § 236(c)

Section 236(c) of the INA was enacted in 1996 as part of a revised statutory framework designed to place specified categories of criminal aliens – those convicted of serious crimes, including aggravated felonies – on an expedited track for removal from the United States. It provides as follows:

> The Attorney General *shall* take into custody any alien who –
> . . . .
>
> (B) is deportable by reason of having committed any offense covered in section 1227(a)(2)(A)(ii), (A)(iii), (B), (C), or (D) of this title,
> . . . .

8 U.S.C. § 1226(c) (emphasis added). This statute thus mandates detention of an alien who has committed an aggravated felony under § 1227(a)(2)(A)(iii). Detention under this provision is mandatory even before a final order of removal has been entered. In addition to mandatory detention during removal proceedings, discretionary relief from removal is barred.[9] These provisions, which expedite the removal proceedings of certain criminal aliens, were designed to minimize the amount of time aliens subject to INA § 236(c) are detained without bond.

The regulations implementing INA § 236 establish three layers of administrative review over an alien's custody during removal proceedings. The alien initially receives an automatic custody review by the INS District

---

[9] *See* 8 U.S.C. § 1158(b)(2)(A)(ii), (B)(i) (alien convicted of aggravated felony ineligible for asylum); 8 U.S.C. § 1229b(a)(3) (alien convicted of aggravated felony ineligible for discretionary cancellation of removal); 8 U.S.C. § 1182(h) (lawful permanent resident who is convicted of aggravated felony ineligible for discretionary waiver of inadmissibility under 8 U.S.C. § 1182(a), in order to adjust status back to that of lawful permanent resident).

Director and, if the decision is unfavorable, the alien may seek redetermination before an IJ and then appeal to the BIA. *See* 8 C.F.R. §§ 1003.1(b)(7), 1003.19(a), (f), 236.1(d)(1)-(3) (2005). In criminal alien cases, a detained alien may seek review by an IJ and the BIA of whether he actually falls within a category of criminal aliens subject to mandatory detention. *See* 8 C.F.R. §§ 1003.1(b)(7), 1003.19(h)(2)(ii), 236.1(d)(1) & (3)(i) (2005); *In re Joseph*, Interim Decision No. 3398, 1999 WL 339053 (BIA May 28, 1999); *see also Demore v. Kim*, 538 U.S. 510, 514 n.3 (2003) (discussing *Joseph* hearing).

The leading case interpreting the provisions of § 236(c) is *Demore v. Kim*, 538 U.S. 510 (2003), which upheld the constitutionality of mandatory detention of criminal aliens during the pendency of their removal proceedings. Writing for a majority of the Court, Chief Justice Rehnquist outlined the "Court's longstanding view that the Government may constitutionally detain deportable aliens during the limited period necessary for their removal proceedings . . . ." 538 U.S. at 526. The Court pointed out that detention pending removal proceedings "necessarily serves the purpose of preventing deportable criminal aliens from fleeing prior to or during their removal proceedings, thus increasing the chance that, if ordered removed, the aliens will be successfully removed." *Id.* at 528. Removal proceedings, as the Court observed, have a "definite termination point." *Id.* at 529.

Although the Court cited statistics suggesting that most § 236(c) detentions lasted an average of 47 days (where the alien is removed after a hearing before an IJ), or an additional four months (where the alien appeals to the

BIA), it also noted that the period could run longer. For example, the respondent in *Demore* had been detained six months before obtaining habeas relief, but the Court pointed out that the "respondent himself had requested a continuance of his removal hearing." *Id.* at 530. Dismissing the respondent's claim that prolongation of detention might deter aliens from pursuing appeal, the Court explained that "'the legal system . . . is replete with situations requiring the making of difficult judgments as to which course to follow . . . .'" *Id.* at 530 n.14 (quoting *McGautha v. California*, 402 U.S. 183, 213 (1971) (internal quotation marks omitted)).

In a concurring opinion, Justice Kennedy suggested that an individualized determination as to risk of flight and dangerousness might be necessary "[w]ere there to be an unreasonable delay by the INS in pursuing and completing deportation proceedings." *Id.* at 532. That would be required, in order to assure that detention was actually aimed "to facilitate deportation, or to protect against risk of flight or dangerousness," and not "to incarcerate for other reasons." *Id.*

2. Custody under § 241(a)

Section 241(a) of he INA provides that:

(a) Detention, release, and removal of aliens ordered removed

(1) Removal Period

(A) In general

Except as otherwise provided in this section, when an alien is ordered removed, the Attorney General shall remove the alien from the United States within a period of 90 days (in this section referred to as the "removal period").

(B) Beginning of Period

The removal period begins on the latest of the following:

(i) The date the order of removal becomes administratively final.

(ii) If the removal order is judicially reviewed and if a court orders a stay of the removal of the alien, the date of the court's final order.

(iii) If the alien is detained or confined (except under an immigration process), the date the alien is released from detention or confinement.

. . . .

(2) Detention

During the removal period, the Attorney General shall detain the alien. Under no circumstances during the removal period

> shall the Attorney General release an alien who has been found . . . deportable under section 1227(a)(2) or 1227(a)(4)(B).
>
> .
>
> **(6) Inadmissible or criminal aliens**
>
> An alien ordered removed who is . . . removable under section . . . . 1227(a)(2) . . . . of this title or who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, may be detained beyond the removal period and, if released, shall be subject to the terms of supervision in paragraph 3.

8 U.S.C. § 1231(a).

Section 241(a)(2) thus provides for *mandatory* detention during a 90-day "removal period" of an alien who faces a final order of deportation, based on his commission of an aggravated felony. After that 90-day removal period lapses, § 241(a)(6) authorizes *discretionary* detention under certain circumstances. This period is triggered by the latest of 3 events, two of which are relevant here: (i) the issuance of an administratively final order of removal, or (ii) the issuance of a final order by a court that judicially reviews that removal order (if the court ordered a stay of that alien's removal). Suspension of the period is authorized by INA § 241(a)(1)(C), 8 U.S.C. § 1231(a)(1)(C), in cases where delay is attributable to certain of the alien's own actions, and detention after expiration of the removal period is authorized by INA § 241(a)(6), 8 U.S.C. § 1231(a)(6).

In the leading case interpreting the provisions of § 241(a), *Zadvydas v. Davis*, 533 U.S. 678 (2001), the Supreme Court had to reconcile the broad authorization of § 241(a)(6) to detain certain criminal aliens with the Due Process Clause of the Fifth Amendment. In *Zadvydas*, the Court was faced with a situation in which the immigration authorities had been unable to negotiate the repatriation of two removable aliens to their native countries. The 90-day removal period had lapsed; the aliens were being held pursuant to INA § 241(a)(6); and the absence of any prospect for the aliens' repatriation raised the question of whether INA § 241(a)(6) authorized their "indefinite and potentially permanent" detention. 533 U.S. at 696. The Supreme Court interpreted § 241(a)(6) to require that an alien's post-removal-order detention not "exceed[] a period reasonably necessary to secure removal." 533 U.S. at 699. "[F]or the sake of uniform administration in the federal courts," the Court held that once a final order of removal is issued, the DHS is presumptively permitted to hold an alien in confinement up to six months pursuant to § 241(a)(6) in order to effectuate the alien's removal from the United States. 533 U.S. at 701.

In reaching this conclusion, the Supreme Court determined that the likelihood that an alien could be removed was the important consideration in his continued detention. *Id.* at 699 (stating that the basic purpose of § 241(a)(6) was to "assur[e] the alien's presence at the moment of removal"). If the six-month period has expired and the alien "provides good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future, the Government must respond with evidence sufficient to rebut that showing." *Id.* The Court

recognized that "as the period of prior postremoval confinement grows, what counts as the 'reasonably foreseeable future' conversely would have to shrink." *Id.* Nevertheless, the Court cautioned that the six-month presumption "*of course, does not mean that every alien not removed must be released after six months. To the contrary, an alien may be held in confinement until it has been determined that there is no significant likelihood of removal in the reasonably foreseeable future*." *Id.* (emphasis added).

As later summarized by this Court:

> In order to save § 241 from unconstitutionality, the Supreme Court held that "once removal is no longer foreseeable, continued detention is no longer authorized by statute." The Court stated that detention is presumptively reasonable for six months following a removal order, and that, after the first six months, detention violates § 241 if (1) an alien demonstrates that there is no significant likelihood of removal in the reasonably foreseeable future and (2) the government is unable to rebut this showing.

Wang v. Ashcroft, 320 F.3d 130, 146 (2d Cir. 2003) (citations and footnotes omitted).

3. Standard of Review

In the absence of factual findings, this Court applies de novo review to a district court's denial of a habeas petition. *See Wang*, 320 F.3d at 139-40; *Kuhali v. Reno*,

266 F.3d 93, 99 (2d Cir. 2001); *Clark v. Stinson*, 214 F.3d 315, 319 (2d Cir. 2000).

C. Discussion

1. Abimbola's Present Custody Is Pursuant to INA § 241(a)

In an apparent attempt to hedge his bets, Abimbola argues that he is entitled to relief under either § 236(c) or § 241(a), albeit for different reasons. *See* Appellant's Brief at 18-19. Abimbola seems to argue that the nature of his detention at any given moment depends on whether there is a stay of removal in effect at the time: If there is a stay of removal in effect, his detention should be considered pre-final-order-of-removal custody pursuant to § 236(c), with the limitations imposed by the Due Process Clause as suggested by Justice Kennedy's concurrence in *Demore v. Kim*. On the other hand, if there is *no* stay of removal in effect, the detention should be considered post-final-order custody under § 241(a), subject to the due process limitations set forth in *Zadvydas v. Davis*. The unspoken consequence of this argument is that the nature of Abimbola's detention is constantly changing as his numerous motions for stay are filed, considered, denied, granted or subject to forbearance agreements. If this were so, it would be an almost impossible situation for ICE to administer. It would not only affect the scheduling and nature of custody reviews but also the ability to request and receive timely travel documents.[10]

---

[10] ICE does not request a travel document unless there is (continued...)

For the reasons discussed in Points 2 and 3 *infra*, Abimbola is not entitled to relief, regardless of whether his present detention is pursuant to § 236(c) or § 241(a). Nevertheless, for the sake of clarity, the Government sets forth why his present detention is under § 241(a).

Abimbola relies on language in this Court's decision in *Wang* for the proposition that he is presently being detained pursuant to § 236(c). Fortunately, neither *Wang* nor the language of the statute require this result. The question addressed in *Wang* was whether the 90-day "removal period" set forth in INA § 241(a)(1), 8 U.S.C. § 1231(a)(1), had commenced. As relevant here, the statute provides that the removal period begins on the latest of the following:

> (i) The date the order of removal becomes administratively final.
>
> (ii) If the removal order is judicially reviewed and if a court orders a stay of the removal of the alien, the date of the court's final order.

---

[10] (...continued)
a reasonable probability that they can utilize it. Foreign embassies do not want to issue travel documents needlessly. If an existing stay of removal is preventing actual removal, a time limited travel document is not requested because it is only putting the embassy through a task that will necessarily need to be repeated. Similarly, a pending motion for stay, a forebearance agreement or a stay of a mandate will affect the ability to obtain a travel document.

. . .

§ 241(a)(1)(B), 8 U.S.C. § 1231(a)(1)(B). In *Wang*, the Court stated that "where a court issues a stay pending its review of an administrative removal order, the alien continues to be detained under § 236 until the Court renders its decision." *Wang*, 320 F.3d at 146.[11] This is in accord with the provision in subsection § 241(a)(1)(B)(ii) quoted above, which dictates when the removal period commences if the final order is judicially reviewed *and* the court orders a stay. The Court described Wang's claim that by filing a habeas petition, he had triggered INA § 241(a)(1)(B)(ii)'s command that the 90-day removal period commence only upon issuance of the eventual court order reviewing the validity of the administrative removal order. As a result, Wang claimed, his detention remained under the authority of § 236(c) rather than § 241(a). The Court expressed skepticism about this claim, but limited itself to observing that even if it were correct, Wang was undoubtedly *"now* subject to detention under § 241" by virtue of the Court's denial of his petition for review. 320 F.3d at 147. As a result, the Court's decision rendered his removal "not merely reasonably foreseeable," but "imminent." *Id.* at 146. Any claim regarding the constitutionality of his detention under § 236(c) had therefore become moot. *Id.* at 147.

---

[11] This statement is arguably dicta, because in *Wang*, the Court had not issued a stay. *Id.* at 147 & n.27 (noting that "Wang's administrative removal order has not been formally stayed," "because the Government agreed not to recommence the removal process until the habeas petition was resolved").

The same is true in Abimbola's case. As in *Wang*, this Court rejected Abimbola's habeas appeal on August 4, 2004. This decision operated to place his detention squarely under the authority of § 241(a) rather than § 236(c). Lest there be any doubt on that score, this Court expressly stated that the 90-day removal period provided in § 241(a)(1) was then commencing. (GA 93) (docket entry on August 4, 2004, stating: "Furthermore, as a result of our decision today in *Abimbola v. Ashcroft*, No. 02-2632 F.3d (2d Cir.) August 4, 2004, the government will have 90 days to remove petitioner, *See* 8 U.S.C. 1231(a).").

Of course, the government was unable to remove Abimbola during the next 90 days, or even up to the present time, because Abimbola filed, *inter alia*, a petition for rehearing which precluded the mandate from issuing until April 26, 2005 (GA 95, 178), and then a petition for writ of certiorari which was denied on November 28, 2005. (GA 154, 96). During this period of time Abimbola was advised by his counsel that he could not be removed because either a mandate had not issued or there was a forbearance agreement in effect. (GA 178, 179). By the time the Supreme Court denied certiorari in 02-2632, Abimbola had filed several other cases – including the habeas proceeding which led to this appeal, and another petition for review (05-3344) in which he also made requests for a stay of removal. (GA 142).

Abimbola's failed attempts to obtain review of this Court's merits decision cannot undo the final nature of that order for purposes of § 241(a). The effectiveness of that determination should not depend on how many motions

for reconsideration, petitions for rehearing and other cases an alien files. While Abimbola has successfully precluded his removal during the removal period, his actions should not have the added consequence of changing the statutory basis for his custody. This Court should adhere to its previous determination that judicial review of Abimbola's final order of removal was completed with its August 4, 2004, decision and that his custody at that time became governed by § 241(a)(1); and hold that his present custody falls under § 241(a)(6).[12]

2. There Is a Significant Likelihood That Abimbola Will Be Removed to Nigeria in the Reasonably Foreseeable Future, and So His Continued Detention Under INA § 241(a) Comports with Due Process

Because, as already noted, this Court has already rejected Abimbola's claim that he is not removable, there is a significant likelihood that he will be removed to Nigeria in the reasonably foreseeable future. *See Wang*, 320 F.3d at 146 (holding that this Court's rejection of habeas relief made Abimbola's removal "not merely reasonably foreseeable," but "imminent"). As the district court here noted, Abimbola's continued detention is not comparable to the situation involve in *Zadvydas*.

---

[12] Moreover, it bears note that although Abimbola has subsequently filed a petition for review in this Court, which remains pending, this Court has not entered a stay in that matter. Absent the entry of a formal stay, the condition set forth in § 241(a)(2)(B)(ii) has not been triggered.

Abimbola's detention is essentially "time-limited" because it is linked to his litigation; it does not face "a more permanent obstacle like the lack of a repatriation agreement in *Zadvydas*." (GA 21). Moreover, the district court accepted the government's representation that the Nigerian Consulate had communicated its willingness to issue travel documents for Abimbola to return. (GA 15). This finding, which cannot be said to be clearly erroneous, further supports the conclusion that Abimbola's removal is likely.

Two particular issues warrant more detailed discussion in this regard. First, it cannot be that obstacles that Abimbola himself places in the way of his own removal – or, as the district court termed it, a "self-inflicted wound" – can negate the conclusion that, consistent with *Wang*, this Court's ruling on the merits of the removal order makes Abimbola's removal sufficiently likely for purposes of *Zadvydas*. Second, Abimbola expends much energy claiming that the government failed to remove him during a period longer than six months that was "unencumbered" by any stays of removal, and that his present detention is therefore illegal. As discussed below, this argument is both factually and legally incorrect.

a. Abimbola's "Self-Inflicted Wound" Cannot Form the Basis for a *Zadvydas* Claim

The underlying reason why Abimbola is still in custody is because he continues to fight his removal. As the Supreme Court observed in *Demore*, however, "the legal system . . . is replete with situations requiring the making

of difficult judgments as to which course to follow." 538 F.3d 530 n.14 (internal quotation marks omitted). Along those lines, several district court decisions have rejected aliens' reliance on *Zadvydas* in situations similar to that of Abimbola. For instance, in *Guner v. Reno*, 2001 WL 940576, *2 (S.D.N.Y. Aug. 20, 2001), *superseded on other grounds*, 2001 WL 940591 (S.D.N.Y. Aug. 20, 2001), the district court (Chin, J.) held that "[h]ere, petitioner has challenged the INS's decision to deport him and to deny him relief under § 212(c). It is these efforts that have prevented INS from deporting him, and there has been no showing that the Government will be unable to remove petitioner within a reasonable period of time after the completion of these proceedings. Accordingly, petitioner's reliance on *Zadvydas* is misplaced." *Id.*

Similarly, in *Copes v. McElroy*, 2001 WL 830673, *6 (S.D.N.Y. July 23, 2001), the district court (Koeltl, J.) held that,

> [i]n this case, the INS has not effected the petitioner's deportation because her deportation has been stayed pending the resolution of her habeas petition challenging her order of deportation. Thus, although the petitioner has been detained for some time, the INS has not yet had a six month period of time to effect her removal as contemplated in *Zadvydas* and for the parties to demonstrate whether there is a significant likelihood of the petitioner's removal in the reasonably foreseeable future. Accordingly, the petitioner's request for release in light of the Supreme Court's decision in *Zadvydas* is denied at this time.

Id.; see also Lawrence v. Reno, 2001 WL 812242, *1 (S.D.N.Y. July 18, 2001) (Kaplan, J.) ("[P]etitioner has remained in custody for a lengthy period as a result of his having obtained judicial stays that have blocked his removal from the country. While part of the delay was an unfortunate result of an administrative error that prolonged one of the judicial stays, that affords no basis for releasing petitioner from custody."); *Atkinson v. INS*, 2002 WL 1378206, *2 (E.D. Pa. June 25, 2002) (Waldman, J.) ("Petitioner's removal had been scheduled three times in the six months following that date and on two occasions did not occur because of his own obstructive actions. Petitioner cannot secure release from detention which has been prolonged beyond the ninety-day removal period or presumptively reasonable six-month period because of a judicial stay entered at his request to block his removal pending resolution of a habeas petition.").

The district court in this case made similar findings, noting that "Abimbola's *Zadvydas* claim has been unduly complicated and hindered" by the numerous habeas petitions and petitions for review which he has filed. Moreover, the court also noted that Abimbola has sought "motions to stay his removal, motions for reconsideration of district court rulings, appeals from district court rulings, motions for rehearing, motions for rehearing *en banc*, and petitions for writ of certiorari" in some of these proceedings.

> From the convoluted record before the Court, at least one fact is clear: Mr. Abimbola has sought and/or received numerous judicial stays of his removal throughout his four years of filing

> petitions with the various courts mentioned above, and in so doing, he has single-handedly created a considerable degree of uncertainty as to the existence and duration of judicial stays of his removal at any given moment in time.

(GA 13).

The Court properly found that because ICE believed that a court ordered stay of removal remained in effect he was not being removed even though the Nigerian Embassy was willing to issue travel documents. *Id.* Citing a number of similar cases, the district court succinctly stated: "There is, therefore, a simple response to Mr. Abimbola's complaints regarding his continued detention pending removal: A self-inflicted wound cannot be grounds for his *Zadvydas* claim." (GA 14).

b. Abimbola's Claim That the Government Failed to Remove Him During a Period "Unencumbered" by Stays Which Was Longer Than Six Months Is Factually Incorrect and Legally Unavailing

Abimbola has attempted to transform *Zadvydas*'s admonition that a six-month period of § 241(a) detention (that is, detention after issuance of a final decision judicially reviewing a removal order) is presumptively reasonable, into a claim that he can go back through the total period of his detention and find a period of at least six months when there was no formal stay of removal in effect to justify his release under *Zadvydas*. He suggests that

there was such a period between August 30, 2002 (when Judge Gershon lifted the stay she had previously entered in 02CV5568) and April 25, 2003 (when this Court reimposed a formal stay in the appeal of that case, 02-2632). *See* Appellant's Brief at 36. Abimbola argues that none of the other litigation he has filed has had any bearing on this appeal since none of the other litigation stopped his removal during the period he refers to as the "unencumbered months." *See* Appellant's Brief at 9 n.4.

This argument fails for at least three reasons. First, he overlooks the fact that there was at least one formal stay in effect for the entire period from March 4, 2002, to November 30, 2004. The chart at the end of the Government's Appendix plots out in red those dates on which formal stays (i.e., court-ordered stays) were in effect in various cases, and in blue those dates during which the forbearance policy precluded Abimbola's removal. Although the Government was unaware of it at the time of the district court proceedings here, a closer examination of the docket sheets from Abimbola's many proceedings shows that there was a formal stay of removal in effect in 01CV4702(NG) during what Abimbola refers to as the "unencumbered months" (that is, August 2002 to April 2003). Specifically, Judge Gershon denied a stay of removal in 01CV4702 on August 1, 2001 (GA 44, 246), but thereafter granted a stay in that case on March 4, 2002 (GA45, 248). This stay was not lifted until November 30, 2004. (GA 45, 249). Thus, the so-called unencumbered months were in fact encumbered by a formal stay. Having sought this and other stays to repeatedly frustrate ICE's efforts to remove him from the United States, Abimbola

cannot now be heard to complain that ICE has unduly protracted his detention and removal.

Second, even if there had not been a formal stay in place in 01CV4702(NG), Abimbola's removal was still precluded during what he refers to as the "unencumbered months" by virtue of the forbearance agreements which are used by this Court and the Supreme Court. During these past few years, it is Abimbola who has repeatedly filed motions for reconsideration, petitions for rehearing, motions to stay the mandate, and petitions for certiorari. Although these motions did not immediately lead the Court to issue formal stays in each case, they nonetheless effectively precluded Abimbola's removal. The forbearance policy works because it is a benefit to all concerned: the petitioner who does not have to prove entitlement to a stay, the respondent who does not have to appear in court on short notice, and the court which does not have to schedule every stay motion on a busy docket. Again, the bottom line is that it was Abimbola who filed motions triggering the forbearance policy, and hence it was Abimbola who has been delaying his own removal.

The district court here properly concluded that there was a considerable degree of uncertainty as to the existence and duration of judicial stays which prevented Abimbola's removal at any given moment in time. (GA 13). As an example, in a footnote to its ruling, the district court alluded to the uncertainty as to the existence of a stay during the time period identified by Abimbola (August 2002 to April 2003) by referring to Second Circuit petition for review 02-4055, in which it appeared from the docket sheet that a stay of removal had been

entered on July 17, 2002, and was not vacated until the mandate finally issued on September 20, 2004. As noted in the Statement of Facts above, although this Court continued to enter various orders in the matter and despite the fact that it had not yet issued a mandate, the petition for review had apparently been transferred to the Fifth Circuit without a ruling on the motion for stay of removal. After the transfer, the Fifth Circuit denied the motion for stay of removal and dismissed the petition on September 24, 2002. (GA 170). Abimbola contributed to this uncertainty by filing a motion to stay the mandate with this Court in 02-4055 on February 11, 2003 – after the Fifth Circuit had already dismissed the transferred petition. If Abimbola knew about the Fifth Circuit's dismissal order of September 24, 2002, he never should have filed the motion to stay the mandate in the Second Circuit. If he didn't know about the Fifth Circuit's order of dismissal, his filing of the motion to stay the mandate demonstrates that he wanted the proceeding to remain in the Second Circuit where it would be subject to the Court's forbearance policy.

Whatever Abimbola's knowledge, ICE was under the impression that a stay of removal was in effect. In the April 2003 Notice of Ineligibility for Custody Review, ICE stated that based on its review of the case, a stay of removal appeared to be in effect. (GA 202). In its August 7, 2003, decision after custody review, Abimbola was advised: "The service is prepared to remove you from the United States once the 2nd Circuit Court renders a decision on your petition for review." (GA 203). This statement reflects the understanding by INS (now ICE)

that a pending petition for review was the equivalent of a stay of removal, at least in the Second Circuit.

By October 2004, when ICE conducted another custody review, it again believed that a stay of removal remained in effect because the mandates in 02-2632 and 04-4387 – in which there had been court ordered stays – had not yet issued. (GA 207). The district court here credited this belief and found that it was the reason why Abimbola was not removed, even though the Nigerian Embassy was apparently ready to issue travel documents for his removal. (GA 13).

Uncertainty as to the existence of a stay has also been created by Abimbola's repeated motions for reconsideration and petitions for rehearing, petitions for stay of a mandate and petitions for certiorari in his various cases. For example, the most recent petition for certiorari to the Supreme Court filed by Abimbola (docketed as 05-5809 in the Supreme Court from this Court's docket no. 02-2632) was accompanied by an agreement of the Office of the Solicitor General of the United States not to remove Abimbola pending a decision on the petition. This was explained to Abimbola by his counsel in a letter dated August 18, 2005. (GA 180).

Another example is the most recent petition for review filed by Abimbola in this Court (05-3344), relating to a motion to reopen which was denied by the BIA. A motion for stay of removal remains pending in that case and is subject to the Second Circuit forebearance policy. *See* Second Circuit Docket Sheet 05-3344. (GA 143).

While these more recent examples explain why ICE is not presently able to effect Abimbola's removal to Nigeria, similar situations involving forbearance agreements, pending motions and un-issued mandates have existed in Abimbola's other cases, all preventing ICE from removing him from the United States.

Third, even if there had been six "unencumbered months" in 2002-2003, such a period predated this Court's August 2004 decision upholding Abimbola's final order of removal. As in *Wang*, any hypothetical complaints that Abimbola may have had about his § 236(c) detention became moot upon the issuance of this Court's decision. *See Wang*, 320 F.3d at 147 ("To the extent that Wang previously may have had a cognizable due process argument under § 236, that claim has been rendered moot."). The district court properly held as much here. (GA 11-12 n.2).

3. The Periodic Custody Reviews Which Have Been Conducted Satisfy Due Process Requirements

Regardless of whether Abimbola's custody is viewed as falling under § 236(c) or § 241(a), he is presently detained pursuant to periodic custody reviews which satisfy the requirements of due process. Although Abimbola argues that the custody reviews have all been conducted as a response to his challenges to detention in court, what matters is that these reviews have in fact occurred; that his present detention is attributable to those reviews; and that ICE is now on a regular schedule of

annual reviews. 8 C.F.R. § 241.4(h). (GA 203-211).[13] More specifically, the record conclusively demonstrates that Abimbola is presently in custody as a result of reviews (1) of which Abimbola received prior notice (GA 206, 210), (2) in which Abimbola was afforded an opportunity to be heard through written submissions (GA 135), (3) in which ICE considered Abimbola's risk of flight and dangerousness to the community based on his nature of his prior criminal convictions (including failure to appear, larceny, and fraud) (GA 208, 212), and (4) in which ICE considered whether Abimbola's removal was reasonably foreseeable, and properly concluded that it was, absent Abimbola's endless stream of stay requests (GA 212).

All of these conditions comport with Justice Kennedy's suggestion in his concurring opinion in *Demore v. Kim*, that an individualized determination of risk of flight and dangerousness might be necessary when detention is lengthy. 538 U.S. 510 at 532. It cannot be said that ICE's determinations were unreasonable, or unsupported by substantial evidence. Moreover, the district court did not clearly err in accepting the government's representation, offered through a declaration of an ICE official, that the Nigerian Consulate expressed its willingness to issue

---

[13] To the extent that Abimbola is complaining that his detention at some prior time was not pursuant to valid custody reviews, and was therefore in violation of due process, any such claim is now moot in light of the more recent, undoubtedly valid custody reviews. *Cf. Wang*, 320 F.3d at 147 (holding that challenges to prior detention under § 236(c) was moot in light of alien's present detention under § 241(a)).

another travel document for Abimbola in September 2004. (GA 15, 252).

4. The Second Circuit Forbearance Policy Is Currently in Effect in Petition for Review 05-3344 and Presently Precludes Abimbola's Removal

On June 30, 2005, Abimbola filed yet another petition for review with this Court. (GA 142). Along with the petition for review challenging a decision by the BIA denying a motion to reopen, Abimbola also filed a motion for stay of removal. (GA 144). That motion remains pending seven months later, but that is because it is subject to the Second Circuit's forbearance policy. (GA 185).

The forbearance policy provides that the United States Attorney for the Southern District of New York will instruct INS not to remove aliens who are aggravated felons who have filed a motion for stay in connection with an appeal from a BIA ruling until and unless the motion for stay is denied. (GA 185). Abimbola has been found to be an aggravated felon by the Immigration Judge who conducted the removal proceedings; by the BIA which upheld that determination; by Judge Gershon who reviewed the BIA ruling in a habeas proceeding; and by this Court which affirmed the district court ruling in *Abimbola v. Ashcroft,* 02-2632, 378 F.3d at 174. Moreover, the United States Supreme Court denied Abimbola's petition for writ of certiorari on the question. (GA154). But because he has now filed another petition for review (05-3344) raising a different issue (eligibility for INA § 212(c) relief), Abimbola has again obtained the

benefit of the forbearance policy. Having purposely invoked a policy that delays his removal from the United States, Abimbola should not now be heard to complain of delays in his removal to Nigeria.

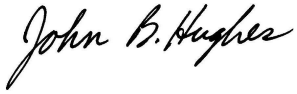
CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Dated: February 23, 2006

Respectfully submitted,

KEVIN J. O'CONNOR
UNITED STATES ATTORNEY
DISTRICT OF CONNECTICUT

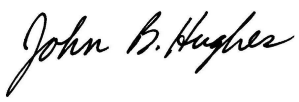


JOHN B. HUGHES
ASSISTANT U.S. ATTORNEY

WILLIAM J. NARDINI
Assistant United States Attorney (of counsel)

CERTIFICATION PER FED. R. APP. P. 32(A)(7)(C)

This is to certify that the foregoing brief complies with the 14,000 word limitation requirement of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 13,769 words, exclusive of the Table of Contents, Table of Authorities, Addendum of Statutes and Rules, and this Certification.



JOHN B. HUGHES
ASSISTANT U.S. ATTORNEY

Addendum

INA § 236, 8 U.S.C. § 1226. Apprehension and detention of aliens

(a) Arrest, detention, and release

On a warrant issued by the Attorney General, an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States. Except as provided in subsection (c) of this section and pending such decision, the Attorney General--

(1) may continue to detain the arrested alien; and

(2) may release the alien on--

(A) bond of at least $1,500 with security approved by, and containing conditions prescribed by, he Attorney General; or

(B) conditional parole; but

(3) may not provide the alien with work authorization (including an "employment authorized" endorsement or other appropriate work permit), unless the alien is lawfully admitted for permanent residence or otherwise would (without regard to removal proceedings) be provided such authorization.

(b) Revocation of bond or parole

The Attorney General at any time may revoke a bond or parole authorized under subsection (a) of this section,

rearrest the alien under the original warrant, and detain the alien.

(c) Detention of criminal aliens

(1) Custody

The Attorney General shall take into custody any alien who--

(A) is inadmissible by reason of having committed any offense covered in section 1182(a)(2) of this title,

(B) is deportable by reason of having committed any offense covered in section 1227(a)(2)(A)(ii), (A)(iii), (B), (C), or (D) of this title,

(C) is deportable under section 1227(a)(2)(A)(i) of this title on the basis of an offense for which the alien has been sentence to a term of imprisonment of at least 1 year, or

(D) is inadmissible under section 1182(a)(3)(B) of this title or deportable under section 1227(a)(4)(B) of this title, when the alien is released, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense.

(2) Release

The Attorney General may release an alien described in paragraph (1) only if the Attorney General decides pursuant to section 3521 of Title 18 that release of the alien from custody is necessary to provide protection to a

witness, a potential witness, a person cooperating with an investigation into major criminal activity, or an immediate family member or close associate of a witness, potential witness, or person cooperating with such an investigation, and the alien satisfies the Attorney General that the alien will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding. A decision relating to such release shall take place in accordance with a procedure that considers the severity of the offense committed by the alien.

. . . .

INA § 241, 8 U.S.C. § 1231. Detention and removal of aliens ordered removed

(a) Detention, release, and removal of aliens ordered removed

(1) Removal period

(A) In general

Except as otherwise provided in this section, when an alien is ordered removed, the Attorney General shall remove the alien from the United States within a period of 90 days (in this section referred to as the "removal period").

(B) Beginning of period

The removal period begins on the latest of the following:

(i) The date the order of removal becomes administratively final.

(ii) If the removal order is judicially reviewed and if a court orders a stay of the removal of the alien, the date of the court's final order.

(iii) If the alien is detained or confined (except under an immigration process), the date the alien is released from detention or confinement.

(C) Suspension of period

The removal period shall be extended beyond a period of 90 days and the alien may remain in detention during such extended period if the alien fails or refuses to make timely application in good faith for travel or other documents necessary to the alien's departure or conspires or acts to prevent the alien's removal subject to an order of removal.

(2) Detention

During the removal period, the Attorney General shall detain the alien. Under no circumstance during the removal period shall the Attorney General release an alien who has been found inadmissible under section 1182(a)(2) or 1182(a)(3)(B) of this title or deportable under section 1227(a)(2) or 1227(a)(4)(B) of this title.

(3) Supervision after 90-day period

If the alien does not leave or is not removed within the removal period, the alien, pending removal, shall be subject to supervision under regulations prescribed by the Attorney General. The regulations shall include provisions requiring the alien--

(A) to appear before an immigration officer periodically for identification;

(B) to submit, if necessary, to a medical and psychiatric examination at the expense of the United States Government;

(C) to give information under oath about the alien's nationality, circumstances, habits, associations, and activities, and other information the Attorney General considers appropriate; and

(D) to obey reasonable written restrictions on the alien's conduct or activities that the Attorney General prescribes for the alien.

(4) Aliens imprisoned, arrested, or on parole, supervised release, or probation

(A) In general

Except as provided in section 259(a) of Title 42 and paragraph (2), the Attorney General may not remove an alien who is sentenced to imprisonment until the alien is released from imprisonment. Parole, supervised release, probation, or possibility of arrest or further imprisonment is not a reason to defer removal.

(B) Exception for removal of nonviolent offenders prior to completion of sentence of imprisonment.

The Attorney General is authorized to remove an alien in accordance with applicable procedures under this chapter

before the alien has completed a sentence of imprisonment--

(i) in the case of an alien in the custody of the Attorney General, if the Attorney General determines that (I) the alien is confined pursuant to a final conviction for a nonviolent offense (other than an offense related to smuggling or harboring of aliens or an offense described in section 1101(a)(43)(B), (C), (E), (I), or (L) of this title and (II) the removal of the alien is appropriate and in the best interest of the United States; or

(ii) in the case of an alien in the custody of a State (or a political subdivision of a State), if the chief State official exercising authority with respect to the incarceration of the alien determines that (I) the alien is confined pursuant to a final conviction for a nonviolent offense (other than an offense described in section 1101(a)(43)(C) or (E) of this title), (II) the removal is appropriate and in the best interest of the State, and (III) submits a written request to the Attorney General that such alien be so removed.

(C) Notice

Any alien removed pursuant to this paragraph shall be notified of the penalties under the laws of the United States relating to the reentry of deported aliens, particularly the expanded penalties for aliens removed under subparagraph (B).

(D) No private right

No cause or claim may be asserted under this paragraph against any official of the United States or of any State to compel the release, removal, or consideration for release or removal of any alien.

(5) Reinstatement of removal orders against aliens illegally reentering

If the Attorney General finds that an alien has reentered the United States illegally after having been removed or having departed voluntarily, under an order of removal, the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed, the alien is not eligible and may not apply for any relief under this chapter, and the alien shall be removed under the prior order at any time after the reentry.

(6) Inadmissible or criminal aliens

An alien ordered removed who is inadmissible under section 1182 of this title, removable under section 1227(a)(1)(C), 1227(a)(2), or 1227(a)(4) of this title or who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, may be detained beyond the removal period and, if released, shall be subject to the terms of supervision in paragraph (3).

. . . .