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9 Counsel for Petitioner, XX XXX XXXX

10
11 IN THE UNITED STATES DISTRICT COURT
12 FOR THE EASTERN DISTRICT OF CALIFORNIA

13 XX XXX XXXX,

14)
15) Petitioner,

16) vs.

17) MICHAEL CHERTOFF, Secretary of the
United States Department of Homeland
18) Security; MICHAEL B. MUKASEY,
Attorney General of the United States;
19) NANCY ALCANTAR, San Francisco Field
Office Director, Office of Detention and
20) Removal Operations, U.S. Immigration and
Customs Enforcement; DONNY
21) YOUNGBLOOD, Sheriff of Kern County
Sheriff's Department and Lerdo Pre-Trial
22) Detention Facility,
23)

24) Respondents.
25)

CASE NO.:

Agency No. A36-780-711

**PETITION FOR WRIT OF
HABEAS CORPUS
PURSUANT TO 28 U.S.C. 2241**

26 Petitioner, XX XXX XXXX, petitions this Court for a writ of habeas corpus to remedy
27 his unlawful detention by Respondents, as follows:
28

Introduction

1
2
3 1. During the past four years while the government has sought to deport Mr. XXXX, he
4 has spent a collective thirty-three months in immigration detention. Under Ninth Circuit
5 precedent, prolonged detention has been held unconstitutional and where the detainee is
6 challenging the very notion that he is removable, detention is only permissible where removal
7 is “expeditious.” Mr. XXXX prevailed in one petition for review to the Ninth Circuit, and his
8 case is pending in the Ninth Circuit again on a second petition for review on the same legal
9 issue. Mr. XXXX, a lawful permanent resident, pled no contest to violating Calif. Veh. Code
10 § 10851(a) (driving or taking of vehicle without consent of owner). The government’s
11 evidence from Mr. XXXX’s immigration proceeding does not establish that his conviction
12 qualifies as an aggravated felony, and Mr. XXXX is therefore neither removable nor subject to
13 mandatory detention under the immigration statutes. Because the circumstances of his case are
14 virtually indistinguishable from those in *United States v. Vidal*, 504 F.3d 1072 (9th Cir. 2007)
15 (en banc) (prior conviction under Calif. Veh. Code § 10851(a) did not qualify as aggravated
16 felony under categorical or modified categorical approaches) and *Penuliar v. Mukasey*, ___
17 F.3d___, 2008 WL 1792649 (9th Cir., April 22, 2008) (reaffirming *Vidal*), there is no
18 significant likelihood of Mr. XXXX’s removal from this country in the reasonably foreseeable
19 future. In fact, it is quite likely that Mr. XXXX will ultimately prevail in his immigration
20 proceeding, avoid removal altogether, and retain his status as a lawful permanent resident.
21 This Court therefore should order his immediate release from immigration custody.
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1 **Custody**

2 2. Petitioner is in the physical custody of Respondents and the Department of
3 Homeland Security (DHS), United States Immigration and Customs Enforcement (ICE).
4 Petitioner is detained at the Lerdo Pre-Trial Detention Facility in Kern County, Bakersfield,
5 California. Petitioner is under the direct control of Respondents and their agents.
6

7 **Jurisdiction**

8
9 3. This action arises under the Constitution of the United States and the
10 Immigration and Nationality Act (INA), 8 U.S.C. § 1101 et seq., and the Administrative
11 Procedure Act (“APA”), 5 U.S.C. § 701, et seq.
12

13 4. This Court has jurisdiction under 28 U.S.C. § 2241; Art. I, § 9, cl. 2 of the
14 United States Constitution (Suspension Clause) and 28 U.S.C. § 1331, as Petitioner is
15 presently in custody under color of authority of the United States, and such custody is in
16 violation of the Constitution, laws, or treaties of the United States. This Court may grant
17 relief pursuant to 28 U.S.C. § 2241, 5 U.S.C. § 702, and the All Writs Act, 28 U.S.C. §
18 1651.
19

20 **Venue**

21 5. Pursuant to *Braden v. 30th Judicial Circuit Court of Kentucky*, 410 U.S. 484,
22 493-500 (1973), venue lies in the United States District Court for the Eastern District of
23 California, the judicial district where Petitioner currently is in custody.
24

25 **Parties**

26 6. Petitioner, XX XXX XXXX, is a native and citizen of the Philippines, and is a
27 lawful permanent resident of the United States. During the pendency of immigration removal
28 proceedings against him, he has spent collectively over thirty-three months in custody,
Petition for Writ of Habeas Corpus

1 including a period of over seven months commencing in August 2007 and continuing to the
2 present time.

3
4 7. Respondent Michael Chertoff is the Secretary of the Department of Homeland
5 Security. He is responsible for the implementation and enforcement of the Immigration and
6 Nationality Act (INA) and oversees U.S. Immigration and Customs Enforcement (ICE). Mr.
7 Chertoff has ultimate custodial authority over Petitioner.
8

9 8. Respondent Michael B. Mukasey is the Attorney General of the United States.
10 He is responsible for the implementation and enforcement of the INA, and oversees the
11 Executive Office for Immigration Review (EOIR), which is comprised of the Office of the
12 Immigration Judge and the Board of Immigration Appeals (BIA or “Board”), the office which
13 ordered Petitioner deported.
14

15 9. Respondent Nancy Alcantar is the Director of the San Francisco Field Office of
16 Detention and Removal Operations, U.S. Immigration and Customs Enforcement, Department
17 of Homeland Security. As such, Respondent Alcantar is Petitioner’s legal custodian, charged
18 with the responsibility of determining whether Mr. XXXX will be detained in ICE custody or
19 released pending the conclusion of immigration removal proceedings.
20

21 10. Respondent Donny Youngblood is the Sheriff of Kern County, California, and is
22 in charge of the Lerdo Pre-Trial Detention Facility. As such, he is also Petitioner’s immediate
23 custodian.
24

25 **Factual Allegations**

26 11. Petitioner XX XXX XXXX (“Petitioner” or “Mr. XXXX”) is a forty-three
27 year-old native and citizen of the Philippines, who immigrated to the United States in 1980 at
28 the age of fifteen. He is a lawful permanent resident with extensive family ties in this country.

1 His entire family lives in the United States, and they are all United States Citizens, including
2 his two minor children.

3
4 12. On February 18, 1999, in the Superior Court of the State of California, County
5 of Solano, Mr. XXXX pled no contest to violating Calif. Veh. Code § 10851(a), driving or
6 taking a vehicle not his own, without consent of the owner (hereafter “section 10851(a)”). He
7 was later sentenced to two years in prison for this conviction.

8
9 13. On April 15, 2003, the Immigration and Naturalization Service issued a Notice
10 to Appear (NTA), alleging that Mr. XXXX was subject to removal from the United States for
11 having been convicted of an aggravated felony for his conviction for California Vehicle Code
12 §10851(a).

13
14 14. The government served the NTA on Mr. XXXX on February 24, 2004. At the
15 time Mr. XXXX was already in the custody of the immigration authorities at the Eloy
16 Detention Facility in Eloy, Arizona.

17
18 15. On May 11, 2004, the Immigration Judge (IJ) sustained the allegations in the
19 NTA and ordered Mr. XXXX removed from the United States.

20
21 16. Mr. XXXX appealed the IJ’s decision. On September 28, 2004, the Board of
22 Immigration Appeals (BIA) granted a summary affirmance, without opinion, of the IJ’s
23 decision.

24
25 17. Mr. XXXX filed a petition for review of the BIA decision in the United States
26 Court of Appeals for the Ninth Circuit (Ninth Circuit), and the Court assigned it Case No. 04-
27 75440 (hereafter the “first petition for review”). On March 15, 2006, the Ninth Circuit
28 granted the petition for review and remanded the case to the BIA, citing its recent decision in
Penuliar v. Gonzales, 435 F.3d 961, 969-70 (9th Cir. 2006) that Calif. Veh. Code § 10851 is

1 not an aggravated felony under the INA “in circumstances indistinguishable from XXXX’s
2 case.” *XXXX v. Gonzales*, 2006 WL 679907 (9th Cir., Mar. 15, 2006) (unpublished
3 disposition).
4

5 18. On May 1, 2006, the government filed a petition for panel rehearing in the
6 Ninth Circuit in Case No. 04-75440. Owing in part to the fact that the court held this petition
7 in abeyance pending the determination of two different cases in the United States Supreme
8 Court, the Ninth Circuit did not adjudicate the government’s petition for panel rehearing until
9 October 2007.
10

11 19. On June 14, 2006, the government granted Mr. XXXX’s release from custody
12 on an order of recognizance. At that time, he had been in custody as a civil immigration
13 detainee for over twenty-seven months (since at least February 24, 2004). Mr. XXXX was
14 released to his family residence in Marin County, California, where he lived and worked
15 supporting his family until the government returned him to custody in August 2007.
16

17 20. Despite the fact that Mr. XXXX’s first petition for review remained pending in
18 the Ninth Circuit pursuant to the government’s petition for panel rehearing in that court, the
19 BIA on August 3, 2007, in response to the Ninth Circuit’s earlier order remanding the matter,
20 again ordered Mr. XXXX removed from the United States, contending that a conviction under
21 section 10851(a) is an aggravated felony under the INA.
22

23 21. After the BIA issued this second order of removal, the immigration authorities
24 sent Mr. XXXX an appointment notice, asking him to present himself at an office in San
25 Francisco. When he voluntarily appeared for the appointment, the government revoked Mr.
26 XXXX’s bond and took him back into immigration custody on August 29, 2007. Mr. XXXX
27 has remained in immigration custody continuously since that time.
28

1 22. On September 4, 2007, Mr. XXXX filed a second petition for review in the
2 Ninth Circuit, challenging the BIA’s August 3, 2007, order of removal. The Ninth Circuit
3 assigned Case No. 07-73525 to Mr. XXXX’s second petition for review.
4

5 23. On October 10, 2007, the Ninth Circuit issued its en banc decision in *United*
6 *States v. Vidal*, 504 F.3d 1072 (9th Cir. 2007) (en banc), and held that a conviction under
7 Calif. Veh. Code § 10851(a) did not qualify as an aggravated felony under either the
8 categorical or modified categorical approaches in circumstances virtually indistinguishable
9 from those in Mr. XXXX’s case.
10

11 24. On October 29, 2007, the Ninth Circuit denied the government’s petition for
12 panel rehearing in the first petition for review based on the Ninth Circuit’s rationale in *United*
13 *States v. Vidal*, 504 F.3d 1072 (9th Cir. 2007). The government did not seek further rehearing
14 of Mr. XXXX’s first petition for review in the Ninth Circuit, nor did it seek review of the
15 matter in the United States Supreme Court.
16

17 25. As of March 14, 2008, in the second petition for review proceeding, the Ninth
18 Circuit has granted Mr. XXXX’s motion for a stay of removal while the petition for review is
19 pending. Based on the court’s estimates, a decision in the second petition for review
20 proceeding would not be expected for one to two years after briefing has been completed.
21 Thus, there is no significant likelihood that the second petition for review will be adjudicated
22 in the reasonably foreseeable future.
23

24 26. In *Zadvydas v. Davis*, the Supreme Court held that the government may not
25 detain an alien when there is, “no significant likelihood of removal in the reasonably
26 foreseeable future.” 533 U.S. 678, 699-700 (2001). The Ninth Circuit has since clarified that
27 detention-authorizing statutes are subject to constitutional limitations. *Tijani v. Willis*, 430 F.3d
28

1 1241 (9th Cir. 2005); See also *Nadarajah v. Gonzales*, 443 F.3d 1069 (9th Cir. 2006). Where
2 the non-citizen contests removability, detention is justified only for expeditious proceedings.
3
4 *Tijani*, 430 F.3d 1241 (9th Cir. 2005).

5 27. Moreover, applying *Zadvydas*, the Ninth Circuit has held “after a presumptively
6 reasonable six-month detention, once the alien provides good reason to believe that there is no
7 significant likelihood of removal in the reasonably foreseeable future, the Government must
8 respond with evidence sufficient to rebut that showing.” *Nadarajah*, 443 F.3d at 1078.
9

10 28. After holding Mr. XXXX for more than thirty-three months in detention,
11 including a period of over the past seven months, the government has been unable to remove
12 him to the Philippines or to any other country. The circumstances of Mr. XXXX’s case are
13 virtually indistinguishable from those in *United States v. Vidal*, 504 F.3d 1072 (9th Cir. 2007)
14 (en banc) (prior conviction under Calif. Veh. Code § 10851(a) did not qualify as aggravated
15 felony under categorical or modified categorical approaches) and *Penuliar v. Mukasey*, ___
16 F.3d___, 2008 WL 1792649 (9th Cir. April 22, 2008) (same). There is no significant
17 likelihood of his removal from this country in the reasonably foreseeable future. In fact, it is
18 quite likely that Mr. XXXX will ultimately prevail in his immigration proceeding, avoid
19 removal altogether, and retain his status as a lawful permanent resident. This Court, therefore,
20 should order his immediate release from immigration custody.
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Claims for Relief

I. STATUTORY VIOLATION

29. Petitioner re-alleges and incorporates by reference paragraphs 1 through 28, above.

30. Respondents' continued detention of Petitioner is unlawful and contravenes 8 U.S.C. § 1231(a), as interpreted by the Supreme Court in *Zadvydas*, and *Clark v. Martinez*, 543 U.S. 371 (2005), and 8 U.S.C. §1226(c) pursuant to the Ninth Circuit holdings in *Tijani* and *Nadarajah*. Petitioner has not been removed and he continues to languish in detention. He has been detained for over thirty-three months, well over the presumptively reasonable period of six months and statutorily permitted ninety-day period for ordinary circumstances. Petitioner's removal to the Philippines or any other country is not significantly likely to occur in the reasonably foreseeable future. Accordingly, Respondents' continued detention of Petitioner is contrary to statute.

II. SUBSTANTIVE DUE PROCESS VIOLATION

31. Petitioner re-alleges and incorporates by reference paragraphs 1 through 30, above.

32. Petitioner's continued detention violates Petitioner's right to substantive due process through a deprivation of the core liberty interest in freedom from bodily restraint.

33. The Due Process Clause of the Fifth Amendment requires that the deprivation of Petitioner's liberty interest be narrowly tailored to serve a compelling government interest. Any interest Respondents have in detaining Petitioner in order to effectuate removal does not justify the indefinite detention of Petitioner, who is not significantly likely to be removed in the reasonably foreseeable future.

1 III. PROCEDURAL DUE PROCESS VIOLATION

2 34. Petitioner re-alleges and incorporates by reference paragraphs 1 through 33,
3 above.

4
5 35. Under the Due Process Clause of the Fifth Amendment, an alien is entitled to a
6 timely and meaningful opportunity to demonstrate that he should not be detained. Petitioner in
7 this case has been denied that opportunity. DHS does not make decisions concerning aliens'
8 custody status in a neutral and impartial manner. The failure of Respondents to provide a
9 neutral decision maker to review the continued custody of Petitioner violates Petitioner's right
10 to procedural due process.
11

12 **Prayer for Relief**

13
14 WHEREFORE, Petitioner prays that the Court grant the following relief:

- 15 (1) Assume jurisdiction over this matter;
- 16 (2) Expedite consideration of this action pursuant to 28 U.S.C. § 1657 because it is
17 an action brought under chapter 153 (habeas corpus) of Title 28;
- 18 (3) Pursuant to 28 U.S.C. § 2243 issue an order directing Respondents to show
19 cause why the writ of habeas corpus should not be granted;
- 20 (4) Grant Petitioner a writ of habeas corpus directing the Respondents to
21 immediately release Petitioner from custody, or in the alternative, order that Petitioner be
22 provided a bail hearing before an Immigration Judge;
- 23 (5) Enjoin Respondents from transferring Petitioner outside of this judicial district
24 pending litigation of this matter or his removal proceedings;
- 25
26
27
28

1 (6) Award Petitioner attorney's fees and costs under the Equal Access to Justice Act
2 (EAJA), as amended, 5 U.S.C. § 504 and 28 U.S.C. § 2412, and on any other basis justified
3 under law; and
4

5 (7) Grant any other and further relief as the Court deems just and proper.
6

7 Dated: April 28, 2008
8

9 */S/ Holly S. Cooper*
10 _____

11 Holly S. Cooper

12 Attorney for Petitioner
13
14

15 **Verification by someone acting on Petitioner's behalf**

16 **pursuant to 28 U.S.C. § 2242**

17 I am submitting this verification on behalf of the Petitioner because I am one of the
18 Petitioner's attorneys. I have discussed with the Petitioner the events described in this
19 Petition. On the basis of those discussions, I hereby verify that the statements made in the
20 attached Petition for Writ of Habeas Corpus are true and correct to the best of my knowledge.
21

22 Dated: April 28, 2008
23

24 */S/ Holly S. Cooper*
25 _____

26 Holly S. Cooper

27 Attorney for Petitioner
28