No. 00-750

In the Supreme Court of the United States

IMMIGRATION AND NATURALIZATION SERVICE, ET AL.,
PETITIONERS

v.

SOUNBOON SRIMENAGSAM

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

SETH P. WAXMAN
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Section 1231(a)(1) of Title 8 of the United States Code provides that when an alien has been ordered removed from the United States, the Attorney General shall remove the alien within 90 days. Section 1231(a)(2) requires the detention during the 90-day removal period of aliens who have been found removable based on a conviction for an aggravated felony. Section 1231(a)(6) then provides, in relevant part, that an alien who is removable for having committed an aggravated felony 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)(6) (Supp. IV 1998). The question presented is:

Whether the Attorney General is authorized to continue to detain an alien beyond the 90-day removal period under 8 U.S.C. 1231(a)(6) (Supp. IV 1998) if the alien cannot be removed immediately from the country but the Attorney General has determined that the alien would pose a risk of flight or danger to the community if released and the alien's custody is subject to periodic administrative review.

PARTIES TO THE PROCEEDINGS

Petitioners are the Immigration and Naturalization Service (INS), the Attorney General of the United States, and the INS District Director in Seattle, Washington. The INS was named by respondent as a defendant in his habeas corpus petition and the district court ordered that the petition be served on the Attorney General and the INS District Director as well. The INS was identified as the appellant in the court of appeals. Respondent is Sounboon Srimenagsam, who brought the instant petition for a writ of habeas corpus in the district court and was appellee in the court of appeals.

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SOUNBOON SRIMENAGSAM

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the Immigration and Naturalization Service and the other petitioners, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The order of the court of appeals (App., *infra*, 1a) is unreported. The orders of the district court granting the petition for writ of habeas corpus (App., *infra*, 4a-5a) and denying the motion for relief from, or to alter or amend, the order (App., *infra*, 2a-3a) are unreported. The report and recommendation of the magistrate judge that was adopted by the district court (App., *infra*, 6a-16a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 11, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 1231(a) of Title 8 of the United States Code provides in relevant part:

> **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").
>
> * * * * *
>
> **(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.

* * * * *

(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).

8 U.S.C. 1231(a) (Supp. IV 1998).

STATEMENT

1. a. Respondent is native and citizen of Laos who entered this country as a refugee on November 4, 1985. App., *infra*, 8a; Administrative Record L22 (A.R.). He adjusted his status to lawful permanent resident in September 1991. App., *infra*, 8a.

On November 11, 1994, respondent was convicted in state court of first degree robbery while armed with a deadly weapon. App., *infra*, 8a; A.R. L13. Respondent, while armed with a gun, broke into a private residence along with two other men. The three men threatened to kill the occupants of the home and forced them to surrender their money and valuables. App., *infra*, 8a. Respondent was sentenced to 55 months' imprisonment. *Ibid.*

b. On April 30, 1997, the Immigration and Naturalization Service (INS) served respondent with a notice to appear for removal proceedings, charging respondent with being subject to removal under 8 U.S.C. 1227(a)(2)(C) (Supp. IV 1998), as an alien convicted of using, possessing, or carrying a firearm, and under 8 U.S.C. 1227(a)(2)(A)(iii) (Supp. IV 1998), as an alien convicted of an "aggravated felony," which includes a crime of violence for which the term of imprisonment imposed was one year or more, see 8 U.S.C. 1101(a)(43) (1994 & Supp. IV 1998). A.R. L22-L23. On June 9, 1997, upon completion of his state term of imprisonment, respondent was transferred to the custody of the INS, pursuant to a previously lodged detainer. App., *infra*, 8a-9a.

On July 16, 1997, an immigration judge found respondent subject to removal as charged and ordered him removed to Laos. A.R. L24. The immigration judge noted that respondent had not made an application for relief from removal. *Ibid.* On January 21, 1999, the Board of Immigration Appeals, sitting en banc, entered a decision holding that respondent was ineligible for withholding of removal under 8 U.S.C. 1251(b)(3)(B)(ii) (Supp. II 1996), which bars the granting of that relief to an alien who, "having been convicted by a final judgment of a particularly serious crime is a danger to the community of the United States." The Board concluded, based on an individualized examination of the nature of respondent's conviction, the sentence imposed, and the underlying circumstances and facts, that respondent's conviction was for a "particularly serious crime," within the meaning of Section 1251(b)(3)(B)(ii). A.R. L33-L45. The Board emphasized certain aggravating circumstances of the crime, including that one of the victims in the home was a child, that the vulnerability of one of the adult female victims "was exacerbated by being seized [by the robbers] while in the shower," and that all of the victims were confronted violently by respondent and his companions and placed in fear for their safety. A.R. L43. The Board found that respondent therefore constituted a danger to the community and concluded that he was ineligible for withholding of removal as well as for cancellation of removal. A.R. L44. Because respondent did not establish eligibility for any form of relief from removal, the Board dismissed the appeal, *ibid.*, rendering respondent's removal order final.

c. The INS was unable to effectuate respondent's removal within the 90-day removal period following finalization of his removal order. See 8 U.S.C.

1231(a)(1)(A) (Supp. IV 1998). By letter dated March 30, 1999, the Laotian government declined a request from the INS for travel documents for respondent. App., *infra*, 9a. On April 22, 1999, the INS informed respondent that, because of the delays encountered by the INS in making arrangements for his removal, the INS would consider releasing him from custody and would afford him an interview and opportunity to submit written evidence that he would not pose a danger to the community or a flight risk if released. A.R. L49. In response to the notice, respondent indicated that he did not have any written materials to submit and, when he was interviewed on May 12, 1999, respondent stated that he had no statement to make. A.R. L52. In addition to reviewing respondent's criminal and institutional history, the INS review noted that respondent had left the State shortly after the armed robbery and was not arrested until more than two years later on an outstanding warrant. *Ibid.* On June 14, 1999, the INS informed respondent that he would be continued in detention, that his custody status would be reviewed again on December 14, 1999, and that he could request redetermination of his custody status in the interim based on evidence that he would appear for all future immigration proceedings and that his presence in the community would not present a hazard to anyone. A.R. L54. On September 24, 1999, respondent was notified that an INS headquarters panel reviewed his custody status and agreed with the decision to continue him in detention. Letter from INS Ass't District Director (Sept. 24, 1999).

2. a. Meanwhile, respondent filed a petition for a writ of habeas corpus in the United States District Court for the Western District of Washington, challenging his continued confinement as a violation of due process.

App., *infra*, 6a. On October 19, 1999, the district court adopted the report and recommendation of a magistrate judge and granted the respondent's habeas corpus petition. *Id.* at 4a-5a. The court applied the standards set forth in the joint order of five judges of the district court in *Phan* v. *Reno*, 56 F. Supp. 2d 1149 (W.D. Wash. 1999), for evaluating such constitutional challenges to continued detention beyond the initial 90-day removal period. See App., *infra*, 6a-7a. The court first concluded, following the finding of the district court judge in one of the lead cases addressed in *Phan*, that there is no realistic prospect that respondent would be removed to Laos in the foreseeable future. *Id.* at 10a-12a. The court also found that the government had not made a compelling showing that respondent's detention was necessary to further the government's interests in preventing respondent's flight or protecting the public. *Id.* at 12a. The court concluded that respondent's continued detention was excessive in relation to the government's regulatory goals and, therefore, violated his substantive right to due process. *Id.* at 15a. The court declined to remand the case for further consideration under the INS's review procedures, finding that the procedures did not comply with the directives contained in the *Phan* joint order. *Ibid.*

On October 28, 1999, the district court denied the government's motion for relief from the October 20, 1999, order or, alternatively, to alter or amend that order. App., *infra*, 2a-3a. The INS appealed.

b. On April 10, 2000, the Ninth Circuit issued its decision in *Ma* v. *Reno*, 208 F.3d 815, holding that the INS lacked authority as a statutory matter under 8 U.S.C. 1231(a)(6) (Supp. IV 1998) to detain an alien beyond the initial 90-day removal period described in 8 U.S.C. 1231(a)(1)(A) (Supp. IV 1998), notwithstanding

that the Attorney General had continued to detain the alien because he posed a risk to the community, the alien's detention was subject to periodic administrative review, and the country to which the alien was ordered removed (Cambodia) is engaged in ongoing negotiations with the United States concerning a process for the return of its nationals ordered removed by the INS. The Ninth Circuit in *Ma* did not reach the constitutional grounds on which the district court had relied.

c. On August 11, 2000, the court of appeals entered an order summarily affirming the district court's judgment in this case on the basis of its decision in *Ma*. App., *infra*, 1a.

ARGUMENT

This case presents the question whether the Attorney General is authorized to continue to detain an alien beyond the initial 90-day removal period under 8 U.S.C. 1231(a)(6) (Supp. IV 1998) if the alien cannot be removed immediately from the United States but the Attorney General has determined that the alien would pose a risk of flight or danger to the community if released and the alien's custody is subject to periodic administrative review. The court of appeals summarily affirmed the judgment of the district court in light of its holding in *Ma* v. *Reno*, 208 F.3d 815 (9th Cir. 2000), that the INS lacks such authority. On October 10, 2000, this Court granted the petition for a writ of certiorari in *Reno* v. *Ma*, 121 S. Ct. 297, to review that decision of the Ninth Circuit. On the same date, the Court also granted the petition for a writ of certiorari in *Zadvydas* v. *Underdown*, 121 S. Ct. 297, to review a decision of the Fifth Circuit (185 F.3d 279 (1999)) that rejected a constitutional challenge to continued detention under Section 1231(a)(6), without questioning the statutory

authority of the Attorney General to detain an alien in such circumstances. Because the question presented in this case is already before the Court in *Ma* and *Zadvydas*, the petition for a writ of certiorari should be held pending the Court's decisions in those cases.

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's decisions in *Reno* v. *Ma*, No. 00-38, and *Zadvydas* v. *Underdown*, No. 99-7791, and then be disposed of as appropriate in light of the decisions in those cases.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

NOVEMBER 2000

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 00-35007

DC# CV-99-673-TSZ, WASHINGTON (SEATTLE)

SOUNBOON SRIMENAGSAM,
PETITIONER-APPELLEE

v.

UNITED STATES IMMIGRATION AND
NATURALIZATION SERVICE,
RESPONDENT-APPELLANT

[Filed: Aug. 11, 2000]

ORDER

Before: WALLACE, SCHROEDER and THOMAS, Circuit Judges

Appellant's request to hold this case in abeyance is denied. A review of the record and appellant's response to the June 15, 2000 order to show cause shows that the questions raised in this appeal are so insubstantial as not to require further argument. *See United States v. Hooten*, 693 F.2d 857 (9th Cir. 1982) (per curiam). Accordingly, we summarily affirm the district court's judgment. *See Ma v. Reno*, 208 F.3d 815 (9th Cir. 2000), *petition for cert. filed*, 69 U.S.L.W. ___ (U.S. July 5, 2000) (No. 00-38).

All pending motions are denied as moot.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

No. C99-673Z
INS No. A27 741 966

SOUNBOON SRIMEUANGSAM, PETITIONER

v.

JANET RENO, ATTORNEY GENERAL, ET AL.,
RESPONDENTS

[Filed: Oct. 28, 1999]

ORDER

This matter comes before the Court upon Respondents' motion for relief from order, or alternatively, to alter or amend this Court's order, dated October 20, 1999. The Court has reviewed Respondents' motion docket no. 23, Petitioner's opposition, docket no. 24 and Respondents' reply, docket no. 26. The Court treats Respondents' pleadings as objections to the Report and Recommendation of the Honorable John L. Weinberg, docket no. 21, which found "there is no realistic chance that the government will effectuate petitioner's deportation to Laos" and that "petitioner's continued detention violates his substantive due process rights as a matter of law." Report and Recommendation, docket no. 21, at 8. In addition, the Magistrate Judge found that even if the Court were to balance the govern-

ment's interest in detention against the dangerousness and flight risk presented, "the balance still tips sharply in favor of petitioner's release." Report and Recommendation, docket no. 21 at 8-9. The Court adopted these findings in the order of October 20, 1999.

Nothing presented by the government in their motion to alter or amend alters the well reasoned Report and Recommendation of the Magistrate Judge. There exists no realistic chance that petitioner can be deported to Laos within the reasonable future and no balancing of the government's regulatory interests is required. *Phan v. Reno*, 56 F. Supp.2d 1149, 1156 (W.D. Wash. 1999). Further, even if a balancing of interests were required, continued detention of petitioner would violate his substantive due process rights under the facts of this case.

Accordingly, the Court DENIES Respondents' motion for relief from order, or, alternatively, to alter or amend this Courts order of October 20, 1999.

IT IS SO ORDERED.

DATED this 28th day of October, 1999.

/s/ THOMAS S. ZILLY
THOMAS S. ZILLY
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

Case No. C99-673Z

SOMBOON SRIMEUANGSAM, PETITIONER

v.

JANET RENO, ATTORNEY GENERAL, ET AL.,
RESPONDENT

[Filed: Oct. 19, 1999]

ORDER GRANTING PETITION FOR WRIT OF HABEAS CORPUS

The court, having reviewed the Petition for Habeas Corpus, the government's Status Report and Recommendation, the various supplements, responses, replies and related exhibits submitted by both parties, the Report and Recommendation of the Hon. John L. Weinberg, United States Magistrate Judge, and the remaining record, does hereby find and Order:

(1) The court adopts the Report and Recommendation;

(2) The court finds petitioner's continued detention violates his substantive due process rights as a matter of law;

(3) Petitioner's Petition for Writ of Habeas Corpus (docket 3) is GRANTED;

(4) Petitioner shall be released from INS custody, effective immediately, on conditions set by the INS;

(5) Such conditions may include those set forth in 8 C.F.R. § 241.5(a); and

(6) The Clerk is directed to send copies of this Order to counsel for both parties and to the Hon. John L. Weinberg.

Dated this 19th day of October, 1999.

/s/ THOMAS S. ZILLY
THOMAS S. ZILLY
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

Case No. C99-673Z

SOMBOON SRIMEUANGSAM, PETITIONER

v.

JANET RENO, ATTORNEY GENERAL, ET AL.,
RESPONDENTS

[Filed: Oct. 5, 1999]

This Petition is one of over one hundred § 2241 petitions filed in this court. These petitions raise the same common legal issues: whether detention by respondents ("INS") of aliens who have been ordered deported to countries that refuse to receive them violates the aliens' substantive and procedural due process rights under the Fifth Amendment to the United States Constitution. On July 9, 1999, this court decided, in its Joint Order, the common legal issues presented in five "lead" cases. *See Phan v. Reno*, Nos. C98-234Z, C99-151L, C99-177C, C99-185R, C99-341WD, 1999 WL 521980 (W.D. Wash. July 9, 1999).[1] In the Joint Order, the court constructed a procedural frame-

[1] Hereinafter referred to as the "Joint Order."

work for review and analysis of each petitioner's substantive and procedural claims. By separate orders, the U.S. District Judges who participated in the Joint Order applied the appropriate due process framework to each of their respective "lead" cases to determine whether continued detention violated each petitioner's constitutional rights.

This case has been referred to the undersigned U.S. Magistrate Judge, pursuant to Title 28 U.S.C. § 636(b)(1), Local Magistrates' Rules MJR 3 and MJR 4, and Federal Rule of Civil Procedure 72. (*See* docket 1.) This court has now carefully reviewed the Petition, the government's Status Report and Recommendation, the various supplements, responses, replies and related exhibits submitted by both parties, the administrative "A-file" relating to petitioner, and the remaining record. In issuing this Report and Recommendation, the court has applied the framework set forth in the Joint Order to the facts of this case and does hereby incorporate, by reference, the Joint Order, governing issues common to all petitioners. In so doing, I have found there is no realistic chance that the government will effectuate petitioner's deportation to Laos in the foreseeable future. I therefore recommend the court find petitioner's continued detention violates his substantive due process rights as a matter of law. Even if the court balances the government's interest in detention against the dangerousness and flight risk presented by release, I still recommend the court find the balance tips sharply in favor of petitioner's release.

Accordingly, the court should GRANT the Petition for Writ of Habeas Corpus and order petitioner released immediately, on conditions to be set by the INS.

Such conditions may include those set forth in 8 C.F.R. § 241.5(a).

FACTUAL BACKGROUND

Somboon Srimeuangsam is a 41-year-old native and citizen of Laos. (Administrative Record, Left Side, at page 12 - hereinafter designated as "AR L-12.") Photographs of petitioner appear at AR R-58 and L-12. He entered this country initially as a refugee. There is some conflict in the record as to the year he entered, but it appears to have been 1985. (AR L-19, 35, 51, and 113.) He became a lawful permanent resident in September 1991. (AR L-50 and 71.)

During a substantial portion of his time in this country, he lived in Fresno, California. (AR L-138.) As of 1994, his wife and two children – from whom he was separated – lived in Fresno. (AR R-52.) He has also lived for short periods in Alaska, in Bellevue and Pasco Washington, and in Massachusetts. (AR R-51-53.)

Petitioner has only one known criminal conviction: for robbery in the first degree, in King County Washington in November 1994. (AR L-126-132.) The various versions of the offense appear in the presentence report, at AR R-50-51. Petitioner and two other men broke into a home, demanding that the occupants give them all of their money and valuables, and threatening to kill them. Petitioner had a handgun. He was sentenced to 55 months of imprisonment, has served his sentence, and would now be released on state supervision but for his INS confinement.

After he completed his sentence, the INS took custody of him when its detainer was executed on June 9,

1997. He was ordered deported, and that order became final when it was affirmed on appeal January 21, 1999. (AR L-51.) Although the INS requested Laos to issue travel documents, Laos refused to do so, by letter of March 30, 1999. AR L-48. Petitioner remained in INS custody. The INS did a custody review, but denied release most recently on June 14, 1999. (AR L-53-54.) He has been in continuous INS custody since June 1997. At the time he filed his petition in this court, he was confined at the Federal Detention Center at Sea-Tac. There is no evidence of any disciplinary problems during his detention (the record affirmatively so indicates as to the period of time he was incarcerated at the Yakima County Jail). (AR L-77.)

DUE PROCESS ANALYSIS

As stated above, by Order of July 9, 1999,the court resolved the common issues presented by the indefinite detention cases. First, the court found it had jurisdiction to consider the constitutionality of a petitioner's challenge to his detention, in the context of a § 2241 petition. Second, the court held a petitioner need not exhaust administrative remedies before seeking a writ of habeas corpus pursuant to § 2241. Finally, the court set forth a due process framework to be applied in all pending indefinite detention cases.

The court's Joint Order is now the law of this case. *See United States v. Alexander*, 106 F.3d 874, 876 (9th Cir. 1997) (stating that under the "law of the case" doctrine, "a court is generally precluded from reconsidering an issue that has already been decided by the same court, or a higher court in the identical case[]") (citing *Thomas v. Bible*, 983 F.2d 152, 154 (9th Cir. 1999)). Accordingly, I have not re-visited any of the above

issues, even though a significant portion of the INS' Status Report and Recommendation is dedicated to its "disagreements" with the Joint Order.[2]

With regard to the proper procedural framework, the Joint Order states that the critical inquiry is whether an alien's detention is excessive in relation to the government's legitimate interests in ensuring the removal of an alien ordered deported and in protecting the public from dangerous felons. *See Phan v. Reno*, Nos. C98-234Z, C99-151L, C99-177C, C99-185R, C99-341WD, WL 521980, at *6 (W.D. Wash. July 9, 1999.) The court concluded that:

> Dangerousness and flight risks are thus permissible considerations and may, in certain situations, warrant continued detention, but only if there is a realistic chance that an alien will be deported. Detention by the INS can be lawful only in aid of deportation. Thus, it is "excessive" to detain an alien indefinitely if deportation will never occur.

(*See id.*)

The court has already addressed the likelihood that Laos will issue travel documents in the near future to persons in analogous circumstances. In *Sivongxay v.*

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[2] Specifically, I have not addressed the Fifth Circuit Court of Appeals' recent decision in *Zadvydas v. Underdown*, No. 97-31345, 1999 WL 604311, at *14 (5th Cir. Aug. 11, 1999), which holds "the government may detain a resident alien based on either danger to the community or risk of flight while good faith efforts to effectuate the alien's deportation continue and reasonable parole and periodic review procedures are in place."

Reno, one of the "lead cases," the Hon. William L. Dwyer determined:

> The government has an interest in deporting Sivongxay, but the record shows that it is unlikely he will be deported at any time in the foreseeable future. He is a Laotian refugee without a Laotian passport, Laos will not issue travel documents to persons without valid passports, and the INS has not shown that Laos is likely to reverse its position.

Sivongxay v. Reno, No. C99-341WD, 1999 WL 521988, at *7 (W.D. Wash. July 9, 1999). The Court held that Sivongxay's continued, indefinite detention violated his right to substantive due process, and granted his petition for a writ of habeas corpus.

The Court should reach the same result in this case, for the same reasons. I recommend the court find there is no realistic prospect that petitioner will be deported in the foreseeable future to Laos. The INS has shown that negotiations have begun with *Viet Nam* in hopes of changing that country's position on refusing to issue travel documents. While the INS hopes that those negotiations will be successful, and that thereafter Laos and other countries will follow Viet Nam's lead, this offers only the slimmest of reeds of hope for petitioner's case. This court held in both *Huynh v. Reno*, No. C99-177C, 1999 WL 521984, at *4 (W.D. Wash. July 9, 1999) and *Phan v. Smith*, C98-234Z, 1999 WL 521982, at *3 (W.D. Wash. July 9, 1999), that due to the fact that the United States does not have a repatriation agreement with Viet Nam, it is extremely unlikely a petitioner will be deported to Viet Nam in the foreseeable future. Given that holding as to deportations to *Viet Nam*, with whom negotiations are under way, the Court is com-

pelled to reach the same conclusions as to *Laos*, with whom negotiations have not even begun (the INS advises the court, however, that the Department of State has secured authority to enter into negotiations with Laos). Obviously, at this time, it is little more than hope and speculation that Laos will reverse its position – and if so, when it will do so.

Based upon the evidence, there does not appear to be a definitive end to petitioner's detention. Reading the Joint Order literally, this would suggest that the court should not even examine the questions of petitioner's flight risk and dangerousness, as there is no realistic chance that petitioner will be deported. Because detention by the government can be lawful only in aid of deportation, and deportation in this case cannot be effectuated, I recommend the court find (as in *Sivongxay*) that petitioner's continued detention is "excessive" and in violation of his substantive due process rights.

Notwithstanding this determination, the district court might interpret the Joint Order to require a balancing of flight risk and dangerousness. Accordingly, those issues are addressed *infra*.

FLIGHT RISK AND DANGEROUSNESS

Based upon the evidence in the record, the government has not made a compelling showing that detention of petitioner is necessary to foster the government's secondary goals of preventing flight prior to deportation and protecting the public from dangerous felons. *See Phan v. Reno*, Nos. C98-234Z, C99-151L, C99-177C, C99-185R, C99-341WD, 1999 WL 521980, at *5 (W.D. Wash. July 9, 1999).

Flight Risk. The only direct evidence to suggest that petitioner might be a flight risk is that he went to Massachusetts about 15 days after participating in the robbery. He claims he went there because a friend told him there were numerous jobs available. That is not, however, compelling evidence that he is a flight risk. The only other evidence from the INS on flight risk is the citation of general statistics as to the failure of aliens to report as directed for deportation. (*See* docket 12 at 14.) But there are facts specific to petitioner supporting his claim that he is not a flight risk. His estranged wife and his children are in California. A chaplain in Yakima has submitted a letter in his support, offering to have petitioner reside with him and his family. (*See* docket 18, exh. D.) In summary, while the evidence is sparse and somewhat mixed, there is no compelling showing that he would present a serious risk of flight, if released.

Dangerousness. There is no doubt that the incident which led to his felony conviction was serious, and posed a substantial danger to the other persons present. But this incident represents his only known contact with the law. Perhaps most important, petitioner has already served in full the sentence imposed upon him.

In *Ma v. Reno, et al.*, Case No. C99-151L, one of the lead cases, the petitioner and two other gang members were involved in the killing of another gang member. While the jury was unable to reach a verdict on a second degree murder charge, petitioner was convicted of manslaughter in the first degree. Despite the ex-

treme seriousness of this incident and conviction, Judge Lasnik of this court held:

> Even if there were a realistic chance of deporting Ma, the government has not shown a strong interest in continuing his detention based upon his threat to the public or his proclivity to abscond. The government has never suggested he is a flight risk, and it has failed to advance a single reason for its belief that he is a danger to society, beyond the simple fact of his conviction. While the crime of which Ma was convicted is serious, it is not the kind that might justify indefinite detention. The record does not indicate his release with proper parole conditions would endanger the community.

Ma v. Reno, et al., Case No. C99-151L, "Order Granting Writ of Habeas Corpus," docket 52, at 4-5 (footnote omitted). In footnotes supporting the conclusion that petitioner did not pose a substantial danger, the court cited evidence of Ma's relationships with his parents and siblings, employment prospects, and plans to avoid gang relationships and criminal behavior. The court also noted Ma's youth at the time of the offense, the fact that the jury found him less culpable than the government's portrayal, and the relative brevity of the sentence imposed.

The conviction in the present case is significantly less serious than Ma's conviction, which arose from a gang-related killing. Furthermore, the letter from Chaplain Smith and petitioner's own letter provide evidence to support his contention that he will not pose a danger if released. (AR L-121.) If the government's showing of dangerousness in *Ma* was not sufficient to justify indefinite detention, the court should reach the same

conclusion in this case, where petitioner has a less serious criminal history.

Even were the court to conclude that petitioner remains a danger to society, such a finding, alone, is insufficient to justify indefinite detention. *See Kansas v. Hendricks*, 521 U.S. 346, 358 (1997) (holding that "[a] finding of dangerousness, standing alone, is ordinarily not a sufficient ground upon which to justify indefinite involuntary commitment[]").

Thus, in balancing the much diminished government interest in extending petitioner's detention indefinitely against the very narrow likelihood the government will effectuate deportation in the foreseeable future and the very strong constitutional interest at stake, I recommend the court conclude petitioner's detention is excessive in relation to the government's regulatory goals. Consequently, the court should find the government's continued detention of petitioner violates his substantive due process rights as guaranteed by the Fifth Amendment to the United States Constitution.

Because I recommend the court find petitioner's substantive due process rights have been violated, the court need not reach petitioner's procedural due process claim. *See United States v. Salerno*, 481 U.S. 739, 746 (1987). The court, however, is required to address this issue briefly, as the government contends the court should not make a decision as to petitioner's release, but should allow petitioner to make use of the new Immigration and Naturalization Service procedures for review of detention. (*See* docket 13.) I recommend the court find this case should not be remanded because, among other reasons, the new INS procedures do not comply with the directives contained in the Joint Order.

CONCLUSION

Having considered and weighed all the relevant factors, I recommend the court find there is no realistic chance that the government will effectuate petitioner's deportation to Laos. Accordingly, the court should conclude petitioner's continued detention violates his substantive due process rights as a matter of law. Even if the court decides to balance the government's interest in detention against the dangerousness and flight risk presented by release, the balance still tips sharply in favor of petitioner's release. Accordingly, petitioner should be released immediately, on conditions to be set by the INS. Such conditions may include those set forth in 8 C.F.R. § 241.5(a). A proposed order accompanies this Report and Recommendation.[3]

DATED this 5 day of October, 1999.

/s/ JOHN L. WEINBERG
JOHN L. WEINBERG
United States Magistrate Judge

[3] In light of the nature of the case, and the court's direction to expedite it in every way possible, this court has shortened the usual time for objections and other responses to this Report and Recommendation. (*See* cover letter attached to this Report and Recommendation.)