UNITED STATES OF AMERICA
DISTRICT OF MAINE

KHAMPHANH CHANTHANOUNSY,	)	
	)	
v.	)	Civil No. 02-71-P-C
	)	
CUMBERLAND COUNTY SHERIFF,	)	
	)	
Respondent	)	

RECOMMENDED DECISION ON 28 U.S.C. § 2241 PETITION SEEKING A BAILING HEARING

Khamphanh Chanthanounsy, a citizen of Laos and a lawful permanent resident of the United States, petitions pro se for relief pursuant to 28 U.S.C. § 2241. (Docket No. 1.) Currently detained in the Cumberland County Jail, Chanthanounsy asserts that he has been detained for more than two years while he awaits the determination of his appeal from his removal order, an appeal that is now pending before the United States Immigration Board. The United States has responded to the motion. (Docket No. 5.)[1] For the following reasons I now recommend that the Court **GRANT** habeas relief unless the United States provides Chanthanounsy with an immediate bail hearing.

Chanthanounsy's Immigration History

The United States provides the following factual summary of Chanthanounsy's history in the United States as it relates to his immigration status. Chanthanounsy entered the United States legally in 1978 at Los Angeles, California; he became a lawful permanent resident of the United States on September 27, 1981, at the age of twenty-six.

[1] Chanthanounsy filed this petition listing the Cumberland County Sheriff as the defendant/respondent. Chanthanounsy is being detained at the Cumberland County Jail by the United States Government. I ordered the United States to answer. In it response, the Assistant United States Attorney did not raise any issues relating to the name of the respondent.

In January of 1991 Chanthanounsy was convicted of a felony in Connecticut, the crime of risk of injury to a minor child, for which he received a five-year split sentence. In August of 1996 Chanthanounsy was convicted in Vermont on three felony counts for the sale of cocaine. He was sentenced to a minimum term of four years and a maximum term of eight years on each count, the sentences to run concurrently.

On May 15, 1997, Chanthanounsy was served in a Vermont prison by the United States Immigration and Naturalization Service (INS) with a notice to appear in removal proceedings. On April 5, 2000, Chanthanounsy was released into INS custody on a warrant under 8 U.S.C. § 1226(c), a statute, set forth below, that mandated that Chanthanounsy was not eligible for release on bond.

On August 23, 2000, on the heels of four hearings held in April, May,[2] and August 2000, a United States immigration judge ordered Chanthanounsy removed from the United States. However, when the INS commenced efforts to enforce the removal order sometime in February 2001, it realized that the removal order was dated April 19, 2000, (the date of his first hearing) rather than August 23, 2000. The order was also flawed in that it did not bear a check-off showing that Chanthanounsy had been ordered removed and it did not name a country of removal. An immigration judge granted the United States' motion to correct the order on March 23, 2001.

On February 13, 2001, Chanthanounsy was served with a notice that his ninety-day removal period had tolled. A deportation officer met with him on February 21, 2001, at which time Chanthanounsy asserted that the removal order was not final because he

[2] The United States' response indicates that there were two April hearings; however the deportation officer's affidavit it relies on for these dates indicates that the second of the four hearings was held May 3, 2000. The transcript for this hearing bears no date, though the three others are dated. (Compare U.S. Resp. Ex. 4-B with id. Exs. 4-A, 4-C, 4-B.)

had filed a timely appeal. Chanthanounsy gave the officer a copy of the appeal which was dated August 23, 2000. On March 19, 2001, this officer was directed by INS counsel to clarify the actions that Chanthanounsy had taken with respect to his appeal. On April 26, 2001, district counsel for the INS filed a service transmittal of Chanthanounsy's notice of appeal with the BIA. The INS sought clarification as to whether a timely appeal was filed or whether there is a final order of removal.

Almost a year later, on March 30, 2002, the deportation officer returned the administrative file to counsel with a memorandum, an affidavit, and other evidence indicating what had occurred vis-à-vis the notice of appeal; the officer reached the conclusion that the appeal had been sent to a prior address and was not received by the Board of Immigration Appeals (BIA). This officer indicated that his office did not consider the removal order final and that it would suspend post-order custody review proceedings. On May 31, 2002, the BIA requested a service brief on the appeal, inaccurately stating that the appeal was filed by INS.

Also worth noting is the fact that the Laotian Embassy was contacted by the INS in February of 2001 in order to obtain travel documents needed for removal. On March 5, 2001, the Laotian Embassy denied the request, indicating that there was no record on Chanthanounsy in their files and refusing to recognize Chanthanounsy as a Laotian citizen. The deportation officer responsible for Chanthanounsy's case states that it is "unlikely that travel documents will be issued in the foreseeable future." (U.S. Resp. Ex. 1 ¶ 12.)

Discussion

With respect to the detention of criminal aliens, on September 30, 1996, Congress reformed the immigration laws to expedite the removal of criminal aliens. Patel v. Zemski, 275 F.3d 299, 304-05 (3d Cir. 2001) (citing S. Rep. No. 104-249, at 2 (1996)). Towards this end it provided that:

> 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 (sic) 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.

8 USCA § 1226(c)(1) (footnote omitted).[3]

The United States Supreme Court decided Zadvydas v. Davis, 533 U.S. 678 (2001) in its 2000 term. Zadvydas addressed detention of aliens for which a final order of removal had issued. The majority concluded that construing the applicable statute, 8 U.S.C. § 1231(a), to allow "an indefinite, perhaps permanent, deprivation of human liberty," id. at 692, "would raise a serious constitutional problem" under the Fifth

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[3] This provision does provide for release for certain aliens:
> 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.

8 U.S.C. § 1226(c)(2). With his criminal record Chanthanounsy is subject to mandatory detention under § 1226(c)(1) and the release provision of subsection (2) is inapplicable.

Amendment's Due Process Clause, id. at 691. Zadvydas distinguished § 1231(a) from § 1226(c) stating that "the statute before us applies not only to terrorists and criminals, but also to ordinary visa violators; and, more importantly, post- removal-period detention, unlike detention pending a determination of removability or during the subsequent 90-day removal period, has no obvious termination point." Id. at 697 (internal cross-reference omitted). The Court, "for the sake of uniform administration in the federal courts," recognized a six-month period as presumptively within reason with respect to aliens subject to a final removal order. Id. at 701.[4]

As the United States points out, because Chanthanounsy's removal proceedings are still pending this case is in a different posture than Zadvydas, the proceedings in this case are still not final and Chanthanounsy is subject to mandatory detention under § 1226(c)(1).

As the First Circuit has not decided this question, the United States recommends the pre-Zadvydas Seventh Circuit case, Parra v. Perryman, 172 F.3d 954, 958 (7th Cir. 1999), in which the panel upheld the detention provision of § 1226(c). In a decision authored by Judge Easterbrook, the panel used sweeping language in upholding the constitutionality of indefinite detention pursuant to § 1226(c).[5] It described § 1226(c) as "plainly is within the power of Congress," id. at 958, and then reasoned that though once bail was possible for the alien so detained:

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[4] Zadvydas is a much more complicated decision than this one paragraph suggests, of course. However, there is no need to parse Zadvydas here since the cases I rely on below address the implications of Zadvydas for aliens subject to § 1226(c) detention. For a thoroughgoing discussion of Zadvydas and constitutional analysis of the rights of aliens see David A. Martin, Graduated Application of Constitutional Protections for Aliens: The Real Meaning of *Zadvydas v. Davis*, 2001 Sup. Ct. Rev. 47 (2001).

[5] Parra involved an alien that was taken into INS custody on December 7, 1998, and the Seventh Circuit's decision issued on March 24, 1999. Nowhere does the panel discuss the length of detention, past or prospective.

> "[N]ow that [the] possibility [of bail] is so remote, so too is any reason for release pending removal. [The petitioner's] legal right to remain in the United States has come to an end. An alien in [this] position can withdraw his defense of the removal proceeding and return to his native land, thus ending his detention immediately. He has the keys in his pocket. A criminal alien who insists on postponing the inevitable has no constitutional right to remain at large during the ensuing delay, and the United States has a powerful interest in maintaining the detention in order to ensure that removal actually occurs.

Id.

Performing the due process calculus, the Seventh Circuit did not consider factors specific to the case before it but rather drew on generalizations:

> The private interest here is not liberty in the abstract, but liberty in the United States by someone no longer entitled to remain in this country but eligible to live at liberty in his native land; the probability of error is zero when the alien concedes all elements that require removal ...; and the public interest is substantial given the high flight rate of those released on bail.

Id. at 958. "Given the sweeping powers Congress possesses to prescribe the treatment of aliens the constitutionality of § 1226(c) is ordained." Id. (citing Fiallo v. Bell, 430 U.S. 787, 792 (1952) (emphasis added).

I conclude that the post-Zadvydas decisions from the Third, Fourth, Ninth, and Tenth Circuits offer a better analysis of the concerns generated by § 1226(c) in light of the prolonged and indeterminate nature of Chanthanounsy's removal proceedings.

The Third Circuit addressed, in Patel, 275 F.3d 299, Fifth Amendment substantive and procedural due process challenges by a lawful permanent resident to the no-bail hearing construction of § 1226(c); the petitioner was seeking an opportunity for an individualized determination of his risk of flight and/or to danger to the community. Id. at 302, 306. After an immigration judge concluded that his conviction for employing and housing an illegal alien constituted an "aggravated felony" subjecting him to removal

under 8 U.S.C. § 1227(a)(2)(A)(iii), triggering the mandatory detention provision of § 1226(c), the immigration judge denied the petitioner's request for a bond hearing. Id. at 303-04.

The Third Circuit reversed the district court's judgment that was based on a determination that detention without a bail hearing was constitutional. Following the Zadvydas "path" the court distinguished the need to defer to Congress on immigration policies from the responsibility of the court to undertake a "searching review of the procedures used to implement those policies." Id. at 308. Citing Supreme Court precedent, the Panel concluded that the mandatory detention implicated a fundamental liberty right. Id. at 308-09. Observing that the petitioner had been "locked in a prison cell for some eleven months," the Court stated that while detention awaiting the finalization of a removal order was "finite," in contrast to the possibly unending detention at issue in Zadvydas, the pre-finalization detention period is "often lengthy" and noted that in Patel's case it exceeded the time served for the underlying criminal offense, as well as the six-month presumptive period established in Zadvydas. Id. at 309.

Applying a heightened due process scrutiny to determine whether the statute's infringement of rights was narrowly tailored in service of a compelling governmental interest, id. at 310, the Third Circuit concluded that "mandatory detention absent any individualized inquiry is excessive" in relation to the dual interests of, one, ensuring that criminal aliens are available for hearings and deportation and, two, protecting the public from any danger they pose, id. at 311-12. The Panel concluded:

> To deprive these individuals of their fundamental right to freedom furthers no government goal, while generating a considerable cost to the government, the alien, and the alien's family. The goals articulated by the government--to prevent aliens from absconding or endangering the

> community--only justify detention of those individuals who present such a risk.
>
> Obviously, a hearing to evaluate flight risk and danger to the community presents a less restrictive means for the government to achieve its goals. It appears that such a procedure can be implemented with minimal burdens on the government.

Id, at 312. Noting that the district court had "relied exclusively" on Parra, the Panel rejected the reasoning and assumptions of the Seventh Circuit. Id. at 313-14.[6]

In a case the United States Supreme Court has now granted writ of certiorari on, the Ninth Circuit concluded that § 1226(c) is unconstitutional as applied to lawful permanent aliens who had entered the United States. Kim v. Ziglar, 276 F.3d 523, 526-28 (9th Cir. 2002), cert. granted, __ U.S.__, 2002 WL 704365 (June 28, 2002). In Kim the petitioner had been detained for six month without a bail hearing until the district court held that § 1226(c) was facially unconstitutional and ordered a bail hearing. Id. The INS released Kim on a $5000 bond, forestalling the bail hearing and pursuing an appeal. Id. The Ninth Circuit was unprepared to hold based on the record before it that "that detention under the statute would be unconstitutional in all of its possible applications," noting, among other cases, the Zadvydas distinction between aliens who had affected entry and those who have never entered. Id. at 527. The Panel stressed that of "particular relevance" to its case was the fact that "lawful permanent resident aliens have the right to reside permanently in the United States. They retain that right until a final administrative order of removal is entered," id. at 528. It stated: "Until there is a final removal order, [the permanent resident alien's] right to remain in the United States is a matter of law, not grace." Id.

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[6] The Court disposition was cautionary: it stated that the Panel would reverse the denial of the petitioner's habeas petition and order his immediate release "unless the government makes a prompt individualized determination" as to whether the petitioner posed a risk of flight or danger to the community. Id. at 315.

In response to the government assertion that the detention was constitutional in view of Congress' plenary powers vis-à-vis immigration determinations, the Ninth Circuit responded: "The question before us, however, is more specific. It is whether Congress has adopted a constitutionally permissible means of detention and removal of lawful permanent resident aliens." Id. at 529. Taking "guidance from Zadvydas," id., the Panel observed that the Supreme Court has made it clear the Congress' plenary power must be exercised in a manner that does not offend other constitutional provisions, and that aliens are entitled to protection under the Due Process Clause, id. at 530.

Accordingly the Kim Court described its task: "Following Zadvydas, we thus must analyze § 1226(c) to determine whether the government has provided a sufficiently strong 'special justification' to justify civil detention of a lawful permanent resident alien." Id. Of the five justifications that the government offered, the Kim Panel concluded that three immigration policy related reasons were "so general that they amount[ed] to little more than saying that the 'justification' of the statute is to make deportation a priority and to make things better." Id. at 531. It then analyzed the risk of flight and protection of the public justifications. With respect to the risk of flight, it observed that aliens whose removal orders have not yet become final still have reason to appear for INS proceedings as there are still avenues of relief open to them to forestall the removal. Id. at 531-32. The statistic offered by the government, based on 1058 randomly selected aliens, indicated that eighty-nine percent of "nondetained" aliens failed to appear for their removal when ordered to do so. However, the Court pointed out that aliens released on bail were within the "detained" category for purposes of this report. Id. at 532 & n.1.

With respect to the danger to the public justification the Kim Court reflected: "Existing Supreme Court precedents establish that civil detention will be upheld only when it is narrowly tailored to people who pose an unusual and well-defined danger to the public. In such cases the government has had the burden of proving that the particular individual meets the criteria for detention." Id. at 532-33 (emphasis added). The fact that § 1226(c) covers "'actual egregious crimes or conduct of convicted criminals'" "is insufficient to justify a blanket denial of bail, for 'aggravated felonies,' as defined in the statute, are not all 'egregious'; nor do they 'conclusively' establish the people who have committed them are menaces to the public." Id. at 534. It observed:

> Given the range of crimes qualifying as aggravated felonies, the government simply cannot show that § 1226(c) covers only aliens who pose an especially serious danger to the public. Moreover, the fact of a prior conviction alone, without any individualized consideration of the dangerousness of the underlying crime or of the individual's present condition, can be unreliable evidence of dangerousness. Not only may the crime itself have failed to indicate dangerousness; the conviction rendering the alien removable may also have occurred many years ago, and the alien may have led a law-abiding life since that time.

Id.

As did the Third Circuit, the Ninth Circuit rejected the reasoning of the Seventh Circuit in Parra, describing as "entirely wrong" the Parra statement that aliens subject to § 1226(c) "forfeited any legal entitlement to remain in the United States" and noting that it relied on the same faulty statistical interpretation that the Kim Panel rejected Id. at 537. With respect to its disposition, the Panel concluded that Kim was entitled to an individualized bail hearing with "reasonable promptness" to determine if he was a flight risk or a threat to the community. Id. at 539.

Presented with a constitutional challenge by three § 1226(c) detainees, the Tenth Circuit also concluded that as applied to the three petitioners the § 1226(c) detention without a bail hearing violated their substantive due process rights, relying in part on the reasoning of Zadvydas in rejecting Parra. Hoang v. Comfort, 282 F.3d 1247, 1251, 1255-56 (10th Cir. 2002). The Hoang Panel concluded that the petitioners had a "fundamental liberty interest in freedom from detention pending deportation proceedings that may only be infringed upon in certain limited circumstances." Id. at 1257. Recognizing that Congress had plenary authority over substantive immigration decisions, the Court observed that the exercise of these powers must comport with the Constitution. Id. at 1257-58. The Panel interpreted the statute to be non-punitive, with a dual purpose of assuring removal by preventing fleeing and protecting the community from further criminal acts. Id. at 1258-59. However, the Hoang Court concluded that "[t]he risk of flight posed by some criminal aliens is insufficient to justify the mandatory detention of all aliens who meet the [statute's] criteria," "absent an individualized determination that the alien is in fact a flight risk." Id. at 1260. With respect to the safety of the public the Tenth Circuit stated that the statute's "irrebuttable presumption that all those to whom it applies are dangerous" provided "even less justification for such detention," without an individualized determination. Id. Thus, the Court held that detention without a bail hearing under § 1226(c) violated the petitioning permanent resident aliens' substantive due process rights. Id. at 1261. The Court did not reference a disposition, stating only that it affirmed the district court; it is not clear what relief the district court ordered.

Finally, the Fourth Circuit has just recently sounded-in and has sided with the Third, Ninth and Tenth Circuits on the question of whether § 1226(c)'s mandatory

detention infringed the Constitution but taking a noticeably different track. In Welch v. Ashcroft, __ F.3d __, 2002 WL 1338532 (4th Cir. June 19, 2002) after a foray into history and Supreme Court precedent the Panel rejected the district court's (and the Third and Tenth Circuits') conclusion that the right to be free from restraint pending removal was "so fundamental" as to trigger strict judicial scrutiny of the statute. Id. at *4-6. Applying a "less exacting test to determine whether [§ 1226(c)] comports with substantive due process," the Court inquired whether the detention was "reasonably related to legitimate government interests" and, then, whether it was impermissible pre-adjudication punishment. Id. at *7. Finding the statute on its face non-punitive, the Court then analyzed the two governmental interests – preventing flight and protecting the public – to determine whether it was punitive in effect, though not in intent. Id. at *7-8. Concluding that these purposes supported mandatory detention, Welch then examined whether the detention based on prior criminal conduct was a "reasonable and nonexcessive way to prevent flight and to protect the community." Id. at *8.

The Welch Court rejected the petitioner's facial challenge to the provision, stating: "The mandatory detention pendente lite of apparently deportable aliens does not violate due process under every possible set of circumstances." Id. at *9. Vis-à-vis the as-applied attack, the Panel concluded that Welch's § 1226(c) detention did run afoul of substantive due process. Id. at *9-10. It stated: "Fourteen months of incarceration pendente lite of a longtime resident alien with extensive community ties, with no chance of release and no speedy adjudication rights as in criminal proceedings, together lead us to conclude that the circumstances of Welch's detention constitute punishment without trial." Id. at *9.

In support of this conclusion the Court weighed the governmental interests finding little to support a conclusion that Welch was either a flight risk -- as he had not before sought to elude the INS -- or a danger to the community -- all the evidence being that he was a "credit to his community." Id. at 10-11. The Panel noted that his misdemeanors, one firearm related, were not enough to support an irrebuttable presumption of dangerousness. Id. The Court also made note of that fact that an aggravated felony had been stricken from Welch's record and that he was eligible to apply for cancellation of his removal order. Id. Lastly, the court examined the length of the detention at issue to determine whether it was "excessive," listing several factors that the determination turned on: "the nature of the deprivation; the conditions of confinement; the procedures afforded detainees prior to adjudication; [] the justification for the continued detention; and the actual length of the detention. Id. at * 11 (string citations omitted).

Welch described the actual length as "a cornerstone of the inquiry," Id. (citing Zadvydas, 533 U.S. at 698-99). "The short maximum duration of most pretrial detention statutes is significant. See, e.g., Martin [v. United States] , 467 U.S. [253,] 270 [(1984)](17 days); United States v. Edwards, 430 A.2d 1321 (D.C.App.1981) (en banc) (60 days). Long pretrial detentions are generally upheld only where the detainee's own aggressive procedural tactics are the chief cause of the delay." Id. at *12.

Though they cite several factors one paragraph seems to be the basis for the Panel's conclusion that the petitioner was entitled to habeas relief because his detention constituted punishment without the benefit of trial:

> Welch enjoys the benefit of no deadline by which actual removal must be accomplished following a final removal order, and removal may

> prove entirely impracticable. The Zadvydas Court stresses repeatedly that postorder detention may be "indefinite, perhaps permanent." Id. Welch's detention pending a final removal order is similarly indefinite. Like the postorder detention in Zadvydas, Welch's detention features a clearly identifiable event marking completion of the detention period (i.e., issuance of a final order), but no clearly identifiable deadline by which that event must take place. Also, like the aliens in Zadvydas, Welch is not himself the cause of the delay in completion.

Id. at *12 (footnote omitted). Welch had already been detained fourteen months according to the Fourth Circuit. The Court noted, "Welch, a prima facie deportable alien, does not present as compelling a case for either mandatory or discretionary detention as the aliens in Zadvydas, who were convicted felons already subject to final removal orders" Id. The Fourth Circuit affirmed the district court's order requiring a bail hearing. Id. at *2, 13.

Like the other Circuits, the Welch Court declined to follow Parra, emphasizing Zadvydas' recognition that "the plenary power doctrine is largely inapplicable to aliens who have already entered the United States, even after becoming subject to a final removal order." Id. at *9 -10. Circuit Judge Williams wrote a separate concurrence to "further illuminate the extent to which" Zadvydas should guide the resolution of the case. Id. at *13-19. Williams was concerned with the analytical framework to be used in these cases, rejecting the fundamental rights approach of the Third Circuit's Patel and the Tenth Circuit's Hoang. Id. at *14. Finding it more in tune with Zadvydas, Judge Williams favored the Ninth Circuit's approach in Kim that weighed the "special justification" of the government against the petitioner's constitutionally protected liberty interest. Id. at 15.

Williams suggested implementing the six-month model, propounded for 8 U.S.C. § 1231(a)(6) in Zadvydas, with the following treatment of § 1226(c)-based habeas petitions:

> I believe the best approach is for the habeas court to evaluate whether the lawful permanent resident has met his burden of establishing in the habeas petition that he has been detained for at least six months and "that there is no significant likelihood" of being subject to a final order of removal "in the reasonably foreseeable future." Absent a response from the Government establishing on its face that the Government has a special justification for the alien's continued detention, the Government would then have the opportunity at a bail hearing before an immigration judge to introduce evidence demonstrating that the alien's continued detention is warranted and is neither arbitrary nor capricious. Accordingly, upon finding that an alien has been held for more than six months, that the alien is not likely to be subject to a final order of deportation in the reasonably foreseeable future, and that additional facts are needed to determine whether the special justification standard has been met, the habeas court should grant a conditional writ of habeas corpus releasing the alien unless the INS provides the alien with a bail hearing before an immigration judge to determine whether continued detention is necessary.

Id. at 18 (footnotes omitted).

Disposition

I conclude that applying any or all of the standards articulated by the Third, Fourth, Ninth, or Tenth Circuits and comparing the facts of Chanthanounsy's detention to those petitioners, Chanthanounsy's is a situation that calls for habeas relief. Perhaps, the United States Supreme Court determination in Kim will help elucidate the proper inquiry, clarifying if a fundamental right is at issue or whether there is a lesser liberty interest at stake attended by a more flexible standard of review. In the interim it strikes me that the three part inquiry suggested by Judge Williams makes sense.

Chanthanounsy has been detained for over two years and has no way of determining when his appeal will be determined. As recent as May of this year the BIA was yet requesting briefs. His deportation officer indicates that he has little hope in

securing the necessary papers from the Laotian authorities and removal may never be achieved. It does not appear that Chanthanounsy was anything but assiduous in attempting to lodge his appeal of his removal order; the fact that the notice was sent to a former address could be attributable to a factor that is no fault of his own. Certainly Chanthanounsy holds no responsibility for the errors in his original order or the long delays since.

Thus, Judge Williams's first two factors have been met. Chanthanounsy has been detained for at least six months and there is no significant likelihood of his being subject to a final, implementable order of removal in the reasonably foreseeable future.

Based on these pleadings there is no defensible way for me to determine if Chanthanounsy is a particular risk of flight or a danger to the community, governmental interests that the Third, Fourth, Ninth, and Tenth Circuits agree are key to determining whether he is entitled to habeas relief. In fact, in practicality, these are fact specific inquiries that are better left for a bail hearing. The government's "special justification" for continued detention does not leap from any pleading filed to date. On the other hand, the nature of Chanthanounsy's convictions and circumstances may suggest that he poses a substantial danger to the community and/or is a flight risk.[7]

Therefore, I recommend that the Court follow Judge William's recommendation which is in line with the less specific dispositions of the Third and Ninth Circuits. I recommend that the Court grant a conditional writ of habeas corpus releasing Chanthanounsy unless the INS provides him with a reasonably prompt bail hearing

[7] Zadvydas, one of two petitioners considered by the Supreme Court in its Zadvydas decision, was entitled to a hearing according to the Court, though he had a criminal history that included drug distribution, armed robbery, and burglary, and he had absconded for long stretches of time while on bail for criminal and immigration proceedings. 533 U.S. at 684.

before an immigration judge to determine whether continued detention is necessary. In light of the over two years of detention that Chanthanounsy has already suffered without a hearing, I recommend that the government be required to conduct the hearing immediately and under no circumstance later than thirty days from the date this Court enters its order.

Conclusion

For the reasons stated above, I recommend that the Court **GRANT** a **CONDITIONAL WRIT OF HABEAS CORPUS** releasing Chanthanounsy unless the INS provides him with a bail hearing before an immigration judge immediately, and under no circumstance later than thirty days from the date of this Court's order becomes final.

NOTICE

> A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which *de novo* review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.
>
> Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

July 9, 2002.

_____

Margaret J. Kravchuk
U.S. Magistrate Judge

BANGOR ADMIN

U.S. District Court
District of Maine (Portland)

CIVIL DOCKET FOR CASE #: 02-CV-71

CHANTHANOUNSY v. CUMBERLAND SHERIFF, et al Filed: 03/29/02
Assigned to: JUDGE GENE CARTER
Demand: $0,000 Nature of Suit: 530
Lead Docket: None Jurisdiction: Federal Question
Dkt# in other court: None

Cause: 28:2241 Petition for Writ of Habeas Corpus (Federal)

KHAMPHANH CHANTHANOUNSY plaintiff	KHAMPHANH CHANTHANOUNSY [COR LD NTC] [PRO SE] CUMBERLAND COUNTY JAIL 50 COUNTY WAY PORTLAND, ME 04102
v.	
SHERIFF, CUMBERLAND COUNTY defendant	JAMES MCCARTHY 945-0373 [COR LD NTC] U.S. ATTORNEY'S OFFICE P.O. BOX 2460 BANGOR, ME 04402-2460 945-0344