IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ANGELO MARCELUS	:	**CIVIL ACTION**
	:	
v.	:	
	:	
IMMIGRATION AND	:	
NATURALIZATION SERVICE	:	**NO. 01-2587**

MEMORANDUM ORDER

Petitioner is a resident alien and citizen of Haiti.[1] On October 28, 1991 petitioner pled guilty in a Pennsylvania state court to forcible rape of the eleven-year-old daughter of his girlfriend. He was sentenced to four to eight years of imprisonment. The sentence encompassed a mandatory term of imprisonment of no less than five years, before which petitioner was ineligible for parole. He was released from prison in November 1998 after serving eight years.[2]

On April 2, 2000, the INS issued a Notice of Intent to Issue an Administrative Removal Order. Petitioner was then detained by INS agents and has since been in administrative custody. A final order of removal was issued pursuant to 8

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[1] Petitioner was "paroled" into the United States from Haiti. A "paroled" alien is not considered to be "admitted" to the United States but rather remains in the country pending a determination as to whether he will be admitted. See 8 U.S.C. § 1182(d)(5)(A). There is no showing or suggestion that petitioner was ever formally admitted.

[2] Petitioner received credit for time served since November 2, 1990, the date of his arrest and detention.

U.S.C. § 1228(b) on March 12, 2001 based on petitioner's aggravated felony conviction.[3]

Petitioner had applied for a withholding of removal on the ground of fear of persecution, pursuant to 8 U.S.C. § 1231(b)(3). Petitioner asserted that he would be stigmatized in Haiti because of his criminal conviction and likely persecuted because of his membership in a particular social group, that group purportedly consisting of convicted felons. Petitioner also applied for relief under the Convention Against Torture ("CAT"). He asserted that the stigma of his conviction would likely result in persecution which "will amount to torture" and also referred to "persistent political problems and violations of human rights in Haiti."[4] Petitioner was interviewed by an asylum officer. His lawyer participated via telephone. Petitioner's application was denied by the officer who found petitioner's statements to be conclusory and unsupported.

On May 25, 2001, petitioner filed the instant action seeking a writ of habeas corpus pursuant to 28 U.S.C. § 2241.

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[3] Rape is an aggravated felony. See 8 U.S.C. § 1101(a)(43).

[4] The "Convention Against Torture" is the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, art. 3, 23 I.L.M. 1027 (1984), as modified 24 I.L.M. 535 (1985), ratified by the United States Oct. 21, 1994, 34 I.L.M. 590, 591 (1995). "Torture" has been defined as any act constituting an extreme form of cruel and inhuman treatment. See C.F.R. § 208.18(a)(2).

His request for a stay of removal pending resolution of this action was entered by the assigned judge on June 7, 2001.[5]

Petitioner asserts that he was denied due process in his removal proceedings, that his mandatory detention pursuant to 8 U.S.C. § 1231(a)(6) violates his right to due process and that the retroactive application of the statute precluding eligibility for a waiver of removal, 8 U.S.C. § 1228(b)(5), deprives petitioner of due process.[6]

Under the removal procedure for persons like petitioner who never obtained the status of permanent residency and were convicted of an aggravated felony, an alien is given reasonable notice of the charges, the opportunity to be represented by counsel and a reasonable opportunity to inspect the evidence and rebut the charges. See 8 U.S.C. § 1228(b)(4). This comports with due process. See United States v. Benitez-Villafuerte, 186 F.3d 651, 657-58 (5th Cir. 1999), cert. denied, 528 U.S. 1097 (2000); United States v. Brown, 127 F. Supp. 2d 392, 403 (W.D.N.Y. 2000); Hypolite v. Blackman, 57 F. Supp. 2d 128, 133-34 (W.D. Pa. 1999). There is no showing that petitioner was not timely informed of the charge, was denied counsel or denied the

[5] This case was subsequently reassigned to this judge.

[6] Petitioner also states that he was denied equal protection but does not further elaborate and makes no factual averment or showing that any similarly situated alien was treated differently.

opportunity to rebut the charge. There is no showing or suggestion that petitioner had not in fact been convicted of an aggravated felony or that the conviction had been set aside.

After an order of removal is issued, the Attorney General shall remove the alien from the United States within ninety days. See 8 U.S.C. § 1231(a)(1)(A). If removal is stayed to allow for judicial review, the ninety-day period begins to run on the date of the court's final order. See 8 U.S.C. § 1231(a)(1)(B)(ii). The detention of an alien subject to an order of removal for ninety days while the order is effectuated clearly comports with due process. See Zadvydas v. Davis, 121 S. Ct. 2491, 2505 (2001) (adopting presumption of reasonableness of detention for six months to effectuate order of removal). 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. See Ma v. Ashcroft, 257 F.3d 1095, 1104 n.12 (9th Cir. 2001); Michel v. INS, 119 F. Supp. 2d 485, 497-98 (M.D. Pa. 2000). See also Copes v. McElroy, 2001 WL 830673, *6 (S.D.N.Y. July 23, 2001); Lawrence v. Reno, 2001 WL 812242, *1 (S.D.N.Y. July 18, 2001).

Petitioner is correct that § 1228(b)(5) may not be applied retroactively to an alien whose conviction of an

aggravated felony was obtained through a guilty plea and who would have been eligible for a discretionary waiver at the time of the plea. See INS v. St. Cyr, 121 S. Ct. 2271, 2293 (2001). Petitioner, however, served more than five years in prison for an aggravated felony and thus would not be eligible for such a waiver under the law as applied at the time of his guilty plea. See 8 U.S.C. § 1182(c)(1990); St. Cyr, 121 S. Ct. at 2277; Tasios v. Reno, 204 F.3d 544, 547 (4th Cir. 2000).[7]

Petitioner is not entitled to the relief he seeks.

[7] Although petitioner's counsel incorrectly characterized his conviction as one for statutory rape in his request for withholding of removal, the official court records make clear that petitioner was convicted of rape "by forcible compulsion" in violation of 18 Pa. C.S.A. § 3121(1)(1991). As he acknowledged at his plea colloquy, petitioner's sentence encompassed a mandatory term of imprisonment of not less than five years before which he was not eligible for parole. See 42 Pa. C.S.A. § 9718 (1991). The use or threatened use of force is clearly an element of forcible rape which is thus a crime of violence within the meaning of 18 U.S.C. § 16(a) and accordingly an aggravated felony at the time of petitioner's guilty plea. See 8 U.S.C. § 1101(a)(43)(1991). It may be noted that statutory rape of an eleven-year-old by its nature involves a substantial risk of the use of force during commission of the crime and would also be a crime of violence under § 16(b). See United States v. Velazquez-Overa, 100 F.3d 418, 421-22 (5th Cir. 1996); United States v. Reyes-Castro, 13 F.3d 377, 379 (10th Cir. 1993); United States v. Bauer, 990 F.2d 373, 374 & n.2 (8th Cir. 1993).

ACCORDINGLY, this day of January, 2002, upon consideration of petitioner's Petition for a Writ of Habeas Corpus and the government's response thereto, **IT IS HEREBY ORDERED** that said petition is **DENIED** and the above action is **DISMISSED**. **IT IS FURTHER ORDERED** that the order of June 7, 2001 staying removal of petitioner pending resolution of this action is **VACATED**.

BY THE COURT:

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JAY C. WALDMAN, J.