**IN THE UNITED STATES DISTRICT COURT**

**aFOR THE DISTRICT OF MINNESOTA**

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| **NAME,**  Petitioner,  v.  **Matthew G. WHITAKER,**  Acting U.S. Attorney General, et al.,    Respondents. | Civil No.: 18-cv-\_\_\_\_\_\_\_\_\_  **PETITIONER’S REPLY TO**  **RESPONDENTS’ RESPONSE TO HABEAS PETITION** |

Petitioner NAME hereby submits this Reply Brief in response to Respondents’ Response [Docket No. 8]. Petitioner has now been detained for over 17 months as his removal proceedings progress, after twice being granted relief from removal. Petitioner continues to be detained despite having been granted withholding of removal on September 28, 2018, while DHS pursues an appeal [Docket No. 9-1, Exhibits 14 and 15]. Petitioner has not received a bond hearing before an Immigration Judge. Petitioner’s detention has been, and continues to be, unconstitutionally prolonged and unreasonable, as the purposes for civil detention are not met where he has been granted relief from removal. There is no definite endpoint to Petitioner’s detention that Respondents can point to, only the putative “end of proceedings,” which could be in one month from now, one year from now, or even longer [Docket No. 8 at 3].

**FACTUAL AND PROCEDURAL BACKGROUND**

Petitioner entered the United States on June 26, 1999, as a refugee. Docket No. 9 at ¶ 4. He later adjusted his status to that of a lawful permanent resident retroactive to that date. *Id.* Respondents cite Petitioner’s “long criminal history” [Docket No. 8 at 4] and “frequent negative interactions with law enforcement” [Docket No. 9 at ¶ 5], but the only criminal charges for which he has been convicted are possession of a controlled substance (“Khat”) [*Id.* at ¶ 9] and “Fraud-Employment of Runners” [*Id.* at ¶ 13]. The remainder of the alleged arrests and offenses either were dismissed or resulted in petty traffic citations or violations, and nevertheless have no relevance for immigration purposes. *Id.* at ¶¶ 6–14. Petitioner was ordered removed to Somalia *in absentia* on January 10, 2012, based on his conviction for a controlled substance offense, but successfully reopened his immigration case on July 25, 2016. *Id.* at ¶¶ 16–17. DHS filed new charges of removability on June 14, 2017, alleging a conviction for an aggravated felony, which were rejected by the Immigration Judge on December 18, 2017. *Id.* at ¶¶ 18–19. The Immigration Judge granted Petitioner’s applications for cancellation of removal, asylum, and withholding of removal on December 18, 2017. *Id.* at ¶ 22.

DHS appealed the grants of relief to the Board of Immigration Appeals. *Id.* at ¶ 23. On May 31, 2018, five months after the IJ’s decision, the BIA vacated the IJ’s discretionary grant of cancellation of removal, preferring DHS’s weighing of equities over the IJ’s. *Id.* at ¶ 24; Docket No. 9-1 at 8. The BIA also vacated and remanded the grants of asylum and withholding. Docket No. 9 at ¶ 24.

On remand, the IJ again granted Petitioner’s application for withholding of removal on September 28, 2018, after indicating that she would grant relief on August 23, 2018.[[1]](#footnote-2) *Id.* at ¶ 25. DHS again appealed the grant of relief to the BIA. That appeal is still pending before the BIA.

Petitioner has been detained by Respondents since June 6, 2017. Of the 535 days he has been detained, 220 days have been with a then-valid order granting relief in hand. There is no set date for the BIA to issue its decision, but it took 164 days to issue its previous decision in Petitioner’s case; with that timeframe as a benchmark, Petitioner can expect a decision around March 11, 2019, in 108 days. Assuming that conclusively ended his case, Petitioner would be detained for a total of 643 days, or 21 months. But even if the BIA affirms the IJ’s decision, the case will likely be remanded to the Immigration Court for DHS to update background checks, further extending his time in detention, and another adverse decision from the BIA could restart proceedings from the beginning, resulting in months more in detention. If Petitioner’s grant of withholding is affirmed, Respondents could decide unilaterally to continue detaining him for months more under 8 C.F.R. § 241.4(b)(3). In other words, there is no fixed end date in sight, and detention is likely to continue for months, if not longer.

**ARGUMENT**

Respondents argue that detention under 8 U.S.C. § 1226(c)—the statute governing Petitioner’s detention—is constitutional. In support of this argument, they cite a few outlier decisions from other districts and barely acknowledge the decisions of this Court.[[2]](#footnote-3) In *Muse v. Sessions*, Judge Schiltz recognized that § 1226(c) detention may become unconstitutionally prolonged or unreasonable. No. 18-cv-0054-PJS-LIB, 2018 WL 4466052, at \*3 (D. Minn. Sept. 18, 2018). Judge Schiltz did not come to this conclusion alone; rather, he “follow[ed] the lead of virtually every court that has addressed the issue following *Jennings*—including two judges of this District.” *Id.* (citing *Mohamed v. Sec’y, Dep’t of Homeland Sec.*, No. 17-cv-5055-DWF-DTS, 2018 WL 2392205, at \*5 (D. Minn. Mar. 26, 2018), *Report and Recommendation adopted*, 2018 WL 2390132 (D. Minn. May 25, 2018); *Tindi v. Sec’y, Dep’t of Homeland Sec.*, No. 17-CV-3663-DSD-DTS, 2018 WL 704314, at \*3 (D. Minn. Feb. 5, 2018). Indeed, despite other courts—including the circuit court decisions Respondents dismiss—relying on statutory avoidance to limit the length of detention under § 1226(c), this Court was one of few, if any, that has consistently approached the analysis squarely on constitutional due process terms over the years. *See Bah v. Cangemi*, 489 F. Supp. 2d 905 (D. Minn. 2007); *Moallin v. Cangemi*, 427 F. Supp. 2d 908 (D. Minn. 2006).

In *Muse*, Judge Schiltz found the reasonableness analysis of *Reid v. Donelan*, 819 F.3d 486 (1st Cir. 2016), *withdrawn*, No. 14-1270, 2018 WL 4000993 (1st Cir. May 11, 2018), to be the most consistent with due process, and Petitioner does not disagree. Judge Schiltz’s framework thus included the following factors: “(1) the total length of detention to date; (2) the likely duration of future detention; (3) the conditions of detention; (4) delays of the removal proceedings caused by the detainee; (5) delays of the removal proceedings caused by the government; and (6) the likelihood that the removal proceedings will result in a final order of removal.” *Muse*, 2018 WL 4466052, at \*3.

The decision in *Muse* has since been cited in decisions around the country. *See Alexis v. Sessions*, No. H-18-1923, 2018 WL 5921017 (S.D. Tex. Nov. 13, 2018) (relying on *Muse*); *Hechavarria v. Sessions*, No. 15-cv-1058, 2018 WL 5776421 (W.D.N.Y. Nov. 2, 2018) (collecting cases); *Gonzalez v. Bonnar*, No. 18-cv-5321-JSC, 2018 WL 4849684 (N.D. Cal. Oct. 4, 2018) (same); *see also* Report & Recommendation, *Duop v. Sec’y, Dep’t of Homeland Sec.*, No. 18-cv-1645-NEB-HB, 2018 WL 5849477 (D. Minn. Sept. 28, 2018) (following *Muse*, *Mohamed*, and *Tindi*), *adopted as modified*, 2018 WL 5847244 (D. Minn. Nov. 8, 2018) (denying release where petitioner’s order of removal became final and authority for detention changed to § 1231). The *Mohamed* decision has similarly been cited in various districts. *See Portillo v. Hott*, 322 F. Supp. 3d 698, 707 (E.D. Va. 2018). Moreover, the decisions from this District are in line with dozens upon dozens of post-*Jennings* decisions around the country, while only a small fraction of cases since then support Respondents’ position. Importantly, nearly every time the government has put forward the same arguments Respondents make here, they have been rejected by this Court and most other courts.

As in *Muse*, the *Reid* factors favor Petitioner. *Muse*, 2018 WL 4466052, at \*4. In fact, when compared to *Muse*—which Respondents attempt to distinguish—Petitioner is in an even better position for release. Docket No. 8 at 27–29. The total length of detention favors Petitioner. In *Muse*, the petitioner was detained roughly one month *after* Petitioner, and the decision came down more than two months ago; Petitioner, then, has been in detention more than three months longer at this point than Mr. Muse at the time of Judge Schiltz’s decision. Second, the likely duration of future detention additionally favors Petitioner. Just as in *Muse*, Petitioner was granted cancellation of removal, but that grant was vacated on discretionary grounds by the BIA. However, Petitioner here again was granted relief by the IJ, while Mr. Muse was denied relief just a few days before his case was argued before Judge Schiltz; Mr. Muse’s own appeal is also pending before the BIA, but at least has been briefed at this time. Third, the conditions of detention are identical for both Mr. Muse and Petitioner, as they have been detained at the same ICE facilities in Minnesota at various times. Fourth, Petitioner, just like Mr. Muse, requested continuances to adequately present his case; Judge Schiltz did not find Mr. Muse’s continuances to undermine his due process claims, and the instant Petitioner’s continuances similarly were not dilatory or in bad faith.[[3]](#footnote-4) Fifth, Petitioner’s case does not differ meaningfully from *Muse*, and Judge Schiltz did not find delays caused by the government. Finally, Petitioner’s position is much stronger than Mr. Muse’s on the likelihood that the removal proceedings will result in a final order of removal. While Mr. Muse had recently lost before the IJ, here, Petitioner was granted relief a second time and DHS appealed. Respondents may speculate about the result of that appeal, the outcome of the first appeal does not guarantee the same result this time; however, Petitioner is aware that Respondent Whitaker oversees the Executive Office for Immigration Reform, including the BIA, but hopes that Respondents are limited to speculation only regarding the outcome, as any work to prejudge the outcome of the appeal, other than on its merits, would be grossly unlawful.

None of the other “differences” Respondents point to between Petitioner’s case and *Muse* are relevant to the analysis of constitutionality. While it may be true that Petitioner has a significant criminal record and “no proven track record” of rehabilitation, that does not make indefinite detention more constitutional; instead, those are factors to be considered at a bond hearing.[[4]](#footnote-5) Similarly, consideration of the length of sentence was expressly rejected by Judge Schiltz in *Muse*. 2018 WL 4466052, at \*3 n.3 (“The Court cannot understand why the length of a sentence imposed on an alien years ago . . . has any bearing on whether the alien’s current civil detention by the federal government under § 1226(c) is constitutional.”).

Thus, under the analysis adopted by this Court and others, as well as under Respondents’ attempts to distinguish Petitioner’s case from *Muse*, the facts of this case militate in favor of Petitioner.

Finally, under the sixth *Reid*/*Muse* factor, Petitioner’s current grant of relief should be emphasized again. However, this Court—nor apparently any others—has not squarely addressed the central problem here: that the government is detaining noncitizens who have been granted relief, pending the government’s own appeal. To heighten this issue, it appears that this occurs only in the realm of immigration detention, and, at that, is a relatively recent phenomenon.[[5]](#footnote-6) Detention after grants of relief certainly should be even less reasonable, but Petitioner submits that such detention may independently be unconstitutional, as no purpose identified by Congress or the courts for detention is satisfied where the noncitizen has won their case. If this were a criminal case, the government would not be able to continue detaining a defendant who was acquitted or had the case dismissed, while the government appealed and hoped that the defendant could be prosecuted again; immigration and criminal detention differ in important ways, but in this regard detention should be prohibited in the immigration courts just as it is in the criminal courts. *See Jones v. United States*, 463 U.S. 354, 368 (1983) (limiting detention following acquittal by reason of insanity); *Jackson v. Indiana*, 406 U.S. 715, 738 (1972) (limiting period of detention to determine whether a defendant will become fit to stand trial in the foreseeable future); *Otero v. Dart*, 306 F.R.D. 197 (N.D. Ill. 2014) (granting class certification for challenge to detention for an unreasonable time following acquittal).

**CONCLUSION**

For these reasons, and the reasons stated in the Petition, the Court should GRANT the Petition for Writ of Habeas Corpus and order Petitioner’s immediate release or, in the alternative, a bond hearing which places the burden of proof on the government.

DATED: November 23, 2018 Respectfully submitted,

/s *John Bruning*

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1. As noted in the Petition, the IJ issued a written order because of DHS’s unequivocal intent to appeal any grant of relief. [↑](#footnote-ref-2)
2. Petitioner is troubled by the Respondents’ overt criticisms of the *Muse* decision, especially in light of comments made by President Trump and his administration in recent days. *See* Michael Burke, “Trump Dispute with Roberts Spills Over Into Thanksgiving,” The Hill (Nov. 22, 2018), https://thehill.com/homenews/administration/418004-trump-dispute-with-roberts-spills-over-into-thanksgiving; Bob Carlson, ABA President, “Being Thankful for Judicial Independence,” Am. Bar Ass’n (Nov. 21, 2018), https://www.americanbar.org/news/abanews/aba-news-archives/2018/11/statement-of-bob-carlson--aba-president-re--being-thankful-for-j/ (“Disagreeing with a court’s decision is everyone’s right, but when government officials question a court’s motives, mock its legitimacy or threaten retaliation due to an unfavorable ruling, they intend to erode the court’s standing and hinder the courts from performing their constitutional duties.”). [↑](#footnote-ref-3)
3. Petitioner points out that the same claims Respondents make here—that the “one continuance” Petitioner sought and the delay by the Immigration Court justify indefinite detention [Docket No. 8 at 28]—were also made by Respondents in Mr. Muse’s case, and properly rejected by the Court. [↑](#footnote-ref-4)
4. The Guantanamo line of cases firmly establishes that, no matter what an individual has done or is accused of doing, that does not cut off due process review of their detention. *See Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *see also Zadvydas v. Davis*, 533 U.S. 678, 684 (2001) (discussing Zadvydas’ “long criminal record, involving drug crimes, attempted robbery, attempted burglary, and theft. He has a history of flight, from both criminal and deportation proceedings.”). [↑](#footnote-ref-5)
5. The Ninth Circuit tangentially addressed this over a decade ago in *Nadarajah v. Gonzales*, 443 F.3d 1069 (9th Cir. 2006), but that decision was not enough to limit the government’s actions now. Just last month, immigration attorneys uncovered a memorandum from the DHS Principal Legal Advisor to all DHS attorneys, directing the agency to appeal in virtually every case involving a detained noncitizen or noncitizen with a criminal record. Tracy Short, Principal Legal Advisor, ICE, Guidance to OPLA Attorneys Regarding the Implementation of the President’s Executive Orders and the Secretary’s Directives on Immigration Enforcement at 7 (Aug. 15, 2017), available at https://www.aila.org/infonet/ice-guidance-opla-immigration-enforcement (“In particular, appeal should be reserved in cases involving detained aliens [and] criminal aliens . . . absent clear statutory or precedential basis for not appealing, or a determination that the facts of the individual case may adversely impact . . . the overall development of the law.”). Even where “no legally viable basis for appeal exists,” the memo gives attorneys the option to appeal. *Id.* Locally, this has resulted in a significant number of noncitizens—particularly Somalis and other Africans and Middle Easterners—subject to § 1226(c) who have had relief granted having their detention prolonged as DHS pursues appeals. A number of attorneys now have been told by DHS counsel that they will appeal any grant of relief, regardless of the merits. *See* Petition, *Ali v. Sessions*, 18-cv-2617-DSD-LIB (D. Minn. Sept. 7, 2018), ECF No. 1 at 7, ¶ 31. [↑](#footnote-ref-6)