

FILED

United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

June 11, 2013

FOR THE TENTH CIRCUIT

Elisabeth A. Shumaker
Clerk of Court

In re:

SERGIO MATA AGUILAR,

Petitioner.

No. 13-2105
(D.C. No. 2:12-CV-01253-WJ-SMV)
(D. N.M.)

ORDER

Before **GORSUCH, EBEL, and HOLMES**, Circuit Judges.

This matter is before us on petitioner’s application for a writ of mandamus and his motion to proceed in forma pauperis (ifp). Petitioner seeks an order of this court directing the district court to consider and decide his habeas petition filed under 28 U.S.C. § 2241. He maintains that he is being unlawfully detained by federal authorities pending the completion of his removal proceedings. *See* 8 U.S.C. § 1226(a) (providing “an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States”); *Ochieng v. Mukasey*, 520 F.3d 1110, 1115 (10th Cir. 2008) (holding alien may challenge detention through § 2241 habeas corpus proceeding). Petitioner also requests that this court issue a stay of his removal. We construe this request as seeking a stay of removal pending our determination of the petition for a writ of mandamus.

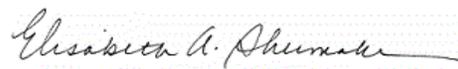
The district court's docket reflects that petitioner filed his habeas petition on December 3, 2012. The court referred the petition to a magistrate judge, who ordered the government to file a response. After one extension of time, the government filed a motion to dismiss the petition as unripe on January 25, 2013, and petitioner filed a reply on February 11, 2013. On June 5, 2013, the magistrate judge ordered the government to submit a status report no later than June 14, 2013, regarding the status of petitioner's removal proceedings.

“[A] writ of mandamus is a drastic remedy, and is to be invoked only in extraordinary circumstances.” *In re Cooper Tire & Rubber Co.*, 568 F.3d 1180, 1186 (10th Cir. 2009) (quotation omitted). “For mandamus to issue, there must be a clear right to the relief sought, a plainly defined and peremptory duty on the part of [the district court] to do the action in question, and no other adequate remedy available.” *Johnson v. Rogers*, 917 F.2d 1283, 1285 (10th Cir. 1990).

In *Johnson*, this court held that a district court's fourteen-month delay in deciding a habeas case “for no reason other than docket congestion” warranted mandamus relief. *Id.* In contrast, petitioner's habeas petition has been pending for only six months and has been at issue for only four months. Moreover, the magistrate judge has recently ordered the government to file a status report. We conclude that the extraordinary remedy of mandamus is not warranted at this time. Accordingly, the petition for a writ of mandamus is denied. We also deny, as moot,

petitioner's request for a stay of removal. Petitioner's motion for leave to proceed ifp in this matter is granted.

Entered for the Court

A handwritten signature in cursive script, reading "Elisabeth A. Shumaker", is written over a light blue dotted rectangular background.

ELISABETH A. SHUMAKER, Clerk