UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

Johnson	:	
	:	
v.	:	**No. 3:03cv96(JBA)**
	:	
INS	:	

Ruling on Petition for Writ of Habeas Corpus [Doc. #1]

On January 13, 2003, Devon Johnson filed a petition for writ of habeas corpus under 28 U.S.C. § 2241, challenging the legality of the state conviction on which his deportable status is predicated and asking the Court "to overturn the [Board of Immigration Appeals ("BIA")] and the Immigration Judge decision and grant me immediate relief from I.N.S. custody without prejudice to the status that I previously enjoyed." [Doc. #1] at 2. Johnson attaches a BIA order of affirmance dismissing Johnson's appeal and the Government advises that Johnson is scheduled to be deported to Jamaica, see [Doc. #2]. The petition is therefore construed as a challenge to a final order of deportation. See INS v. St. Cyr, 533 U.S. 289, 314 (2001) (district courts have jurisdiction under § 2241 to review some challenges to final orders of deportation). Because Johnson cannot use § 2241 to collaterally challenge his state conviction, the petition is denied.

I. Background

In his petition, Johnson details the circumstances leading to his imminent deportation: after being arrested by the New Haven Police Department on June 22, 1999 and charged with Risk of Injury to a Minor and Assault in the Third Degree, he was sentenced on October 25, 1999 to three years incarceration, sentence suspended, with three years probation.[1] On October 18, 2000 he was ordered to serve eighteen months incarceration for violating his probation. After serving this sentence, he was taken into custody by the INS. Following a hearing held on May 1, 2002, Johnson was ordered deported. Johnson appealed to the Board of Immigration Appeals, which affirmed on December 24, 2002 in a per curiam opinion that appears to be addressed primarily to the question of whether the criminal activity prohibited by the statute under which Johnson was convicted, Conn. Gen. Stat. 53a-61, is a crime of violence under 18 U.S.C. § 16(a) and therefore an aggravated felony under 8 U.S.C. § 1101(a)(43)(F). See Matter of Johnson, A35-816-288 (BIA 2002)

[1]Johnson does not state whether he entered a plea of guilty or was found guilty after a trial. Inasmuch as he recounts the fact of his sentence, however, it is clear that some finding of guilt entered.

(attached as exhibit to [Doc. #1]).[2]

Johnson's petition claims that his underlying state conviction was unlawful because it was allegedly based on a false police report and that his deportation is unconstitutional as a result:

> At the hearing on 5/1/02, the I.N.S. trial attorney Mr. Bingham stated from the Police Report that I knock out my common law wife Beverly Hinds teeth. This statement made me aware that the Police Report is false. Photographs and a Medical report will show as proof that the allegation against me is false. A copy of Beverly Hinds Dental Record is attached.

[Doc. 1] at 1.[3]

II. Analysis

From Johnson's petition and the decision of the Board of Immigration Appeals in Johnson's case, it is apparent that the basis for Johnson's deportation is the INS determination that he is an aggravated felon subject to removal under 8 U.S.C. § 1227(a)(2)(A)(iii). His petition does not address the BIA's determination that his conviction was for a "crime of

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[2]The BIA's per curiam opinion cites Matter of Martin, 23 I&N Dec. 491 (BIA 2002), which addressed the issue of whether Conn. Gen. Stat. § 53a-61 is a crime of violence.

[3]Johnson has attached what appears to be the billing summary for patient Beverly Hinds at Yale New Haven Hospital's Department of Dentistry, which shows no treatment in 1999.

violence" under 18 U.S.C. § 16(a) and hence an "aggravated felony" under 8 U.S.C. § 1101(a)(43)(F) (2000).

The question of whether Johnson was "convicted" of an aggravated felony is answered by reference to 8 U.S.C. § 1101(a)(48), which defines the term "conviction":

> (A) The term "conviction" means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where – (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.
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> (B) Any reference to a term of imprisonment or a sentence with respect to an offense is deemed to include the period of incarceration or confinement ordered by a court of law regardless of any suspension of the imposition or execution of that imprisonment or sentence in whole or in part.

8 U.S.C. § 1101(a)(48).

Johnson's petition shows that a finding of guilt entered, see supra note 1, and that a sentence of incarceration (suspended) and probation was ordered. The facts as alleged in the petition show that: (1) either "a formal judgment of guilt of the alien entered by a court," 8 U.S.C. § 1101(a)(48)(A), or "a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt," 8 U.S.C. § 1101(a)(48)(A)(i), and (2) "the judge . . .

ordered some form of punishment, penalty, or restraint on [his] liberty to be imposed," 8 U.S.C. § 1101(a)(48)(A)(ii). Johnson plainly stands "convicted" of the crime, even though he is currently collaterally challenging the underlying state conviction.[4] Moreover, Johnson's conviction qualifies as a conviction even under the pre-§ 1101(a)(48) "finality" test of Montilla v. INS, 926 F.2d 162, 164 (2d Cir. 1991) and Marino v. INS, 537 F.2d 686, 691-692 (2d Cir. 1976), as it is claimed only to be subject to pending, not successful, collateral attack under 28 U.S.C. § 2254.[5]

In short, given the undisputed fact of a conviction, this § 2241 petition cannot be used to challenge Johnson's underlying state conviction, nor can Johnson litigate in this petition the consequences of any possible future determination of invalidity of the state conviction. E.g., Contreras v.

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[4]See [Doc. #1] at 1 (referencing Johnson's pending § 2254 petition, Johnson v. Connecticut, 3:02cv2162(SRU) (filed December 9, 2002)).

[5]Given the facts as alleged in the petition, the Court need not consider the consequences under § 1101(a)(48) if Johnson's § 2254 were granted. Cf., e.g., United States v. Campbell, 167 F.3d 94 (2d Cir. 1999) (noting that on its face, "no provision [of 8 U.S.C. § 1101(a)(48)] excepts from this definition a conviction that has been vacated"); but see Sandoval v. INS, 240 F.3d 577 (7th Cir. 2001) (alien not subject to deportation when, after successful collateral attack in the state court, conviction was determined to have resulted from an involuntary plea).

Schiltgen, 122 F.3d 30, 32 (9th Cir. 1997) ("Contreras I"); De Kopilchak v. INS, No. 98 Civ. 7931 RCC JCF, 2000 WL 278074 at *1 (S.D.N.Y. Mar. 14, 2000); Drakes v. INS, 205 F. Supp. 2d 385 (M.D. Pa. 2002); Reyna-Guevara v. Pasquarell, No. Civ. A.SA-02-CA-481-O, 2002 WL 1821619 at *2 (W.D. Tex. July 2, 2002); cf. also Carranza v. INS, 89 F. Supp. 2d 91, 96 (D. Mass. 2000) (reaching same result based on failure to exhaust theory); Taveras-Lopez v. Reno, 127 F. Supp. 2d 598 (M.D. Pa. 2000) (same).

Johnson's petition also raises a constitutional challenge to his impending deportation: "The I.N.S. ignored the fact that my sentence was illegal which is a violation of my United States Fund[a]mental Constitutional Rights." [Doc. #1] at 1. The Supreme Court has rejected constitutional challenges which were based on lack of opportunity to collaterally attack an underlying conviction in situations similar to this. In the closely analogous[6] context of the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e), which provides significant sentencing enhancements based on the existence of certain prior convictions, the U.S. Supreme Court, when presented with a constitutional challenge to the ACCA, held that a defendant

[6]See Contreras v. Schiltgen, 151 F.3d 906, 907-908 (9th Cir. 1998) ("Contreras II") and the discussion infra.

cannot "use the federal sentencing forum to gain review of his state convictions." Custis v. United States, 511 U.S. 485, 497 (1994). The Supreme Court concluded that the simple fact of a prior state conviction is sufficient to support the significant sentencing enhancement provided for by ACCA, without opportunity for the defendant to challenge the validity of that conviction:

> Our system affords a defendant convicted in state court numerous opportunities to challenge the constitutionality of his conviction. He may raise constitutional claims on direct appeal, in postconviction proceedings available under state law, and in a petition for writ of habeas corpus brought pursuant to 28 U.S.C. § 2254 * * * [I]f, by the time of sentencing under the ACCA, a prior conviction has not been set aside on direct or collateral review, that conviction is presumptively valid and may be used to enhance the federal sentence.

Daniels v. United States, 532 U.S. 374, 381-382 (2001) (citing, inter alia, Custis, 511 U.S. at 497).[7]

In Custis, the Supreme Court rejected Custis's claim that "the Constitution requires that [collateral challenges to prior convictions] be allowed," 511 U.S. at 493, noting that "Congress did not prescribe and the Constitution does not

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[7]The sole exception recognized in Custis and Daniels relates to convictions obtained under circumstances where the defendant was totally denied the right to counsel, because a violation of the right recognized in Gideon v. Wainwright, 372 U.S. 335 (1963), is a "jurisdictional" defect. Custis, 511 U.S. at 496; Daniels, 532 U.S. at 378.

require" the "delay and protraction" of reviewing state convictions in a federal forum when those convictions are used to enhance the federal sentence, id. at 497. Based on the reasoning of Custis and Daniels, this Court concludes that § 1101(a)(48) is constitutional. See Contreras I, 122 F.3d at 32-33 (relying on Custis to uphold constitutionality of a deportation proceeding which lacked opportunity for collateral challenge to the underlying state conviction on which deportability was predicated); see also Herrera-Inirio v. INS, 208 F.3d 299 (1st Cir. 2000); cf. United States v. Gutierrez-Cervantez, 132 F.3d 460 (9th Cir. 1997) ("the Constitution requires only that collateral attacks in illegal re-entry after deportation proceedings be allowed on convictions obtained in violation of the right to counsel").

III. Conclusion

For the reasons set out above, the Court concludes that the petition [Doc. #1] must be DENIED. No stay will issue. The Government has advised that Johnson's removal is scheduled for January 25, 2002. See [Doc. #2]. Any application for stay of deportation must be filed in the United States Court of Appeals for the Second Circuit, 40 Foley Square, New York, New York 10007. The Clerk is directed to close this case.

IT IS SO ORDERED.

/s/

Janet Bond Arterton, U.S.D.J.

Dated at New Haven, Connecticut, this 21st day of January, 2003.