UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

Kirk TALBOT,	:	
petitioner	:	
	:	
v.	:	**No. 3:04cv00653 (JBA)**
	:	
John Ashcroft, Department	:	
of Immigration and	:	
Naturalization,[1]	:	
respondent.	:	

Ruling on Petition for Emergency Writ of Habeus Corpus Pursuant to 28 U.S.C. § 2241[2] **[Doc. #1] and Motion for Ex Parte Relief and/or Restraining Order [Doc. # 2]**

Kirk Talbot asks this Court to stay an order of removal entered on April 7, 2004 by an immigration judge in Louisiana[3] until such time as the Connecticut State courts rule on his pending habeas petition. The state habeas petition seeks to vacate the conviction on which the removal order is based on the grounds that Talbot was deprived of effective assistance of counsel because his counsel did not advise him of the immigration consequences of a guilty plea. For the reasons set forth below, Talbot's petition [Doc. #1] and motion for ex parte relief and/or

[1] On March 1, 2003, the INS was abolished and its functions transferred to three bureaus within the Department of Homeland Security. The enforcement functions of the INS were transferred to the Bureau of Immigration and Customs Enforcement ("BICE").

[2] Talbot states that his petition is brought under 28 U.S.C. § 2255. However, as Talbot is in the custody of BICE and the conviction supporting his removal was entered in state court, the Court construes his petition as one brought pursuant to 28 U.S.C. § 2241.

[3] Talbot does not mention whether he has appealed or will be appealing the IJ's order.

restraining order [Doc. #2] are DENIED.

I. Factual Background Set Forth in Petitioner's Papers

Petitioner pled guilty in state court to a narcotics offense and was sentenced to a term of incarceration. Petitioner filed a state habeas petition seeking to have his conviction vacated on the grounds that his counsel did not inform him of the immigration consequences of his guilty plea and therefore rendered ineffective assistance. Upon discharge by the Connecticut Department of Correction, the petitioner was placed in the custody of the BICE. BICE moved petitioner to Oakdale, Louisiana, and, on April 7, 2004, an immigration judge entered an order of removal on the basis of petitioner's narcotics conviction. Petitioner awaits an interview with the Jamaican Embassy in Miami, Florida. As of the present, no date has been set for any evidentiary hearing on petitioner's pending state habeas petition.

II. Discussion

Petitioner does not identify the exact provision of the immigration laws supporting the IJ's order of removal. However, petitioner's acknowledgment that he pled guilty to a narcotics offense suggests the operative provision to have been 8 U.S.C. § 1227(a)(2)(A)(iii)(aggravated felony) or 8 U.S.C. §

1227(a)(2)(B)(i)(conviction of a violation of controlled substance law). A conviction for either offense renders an alien deportable, and whether Talbot was so convicted 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.
>
> (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). Talbot explicitly states that he pled guilty and that, as a result, he was incarcerated. Thus, Talbot plainly stands "convicted" of a deportable offense notwithstanding that he is currently collaterally challenging that conviction. The question thus becomes when a conviction may be used for removal purposes. The statutory language makes no exception for any subsequent direct or collateral challenge to the conviction, and focuses on the existence and nature of the conviction at the time the final order of removal is entered. This interpretation comports with closely analogous Supreme Court precedent, "...we have held that if, by the time of sentencing under the [Armed Career Criminals Act], 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. U.S., 532 U.S. 374, 382 (2001)(citing Custis v. U.S., 511 U.S. 485, 497 (1994)), a holding that supported the Ninth Circuit's conclusion that "[u]ntil [an alien] has overturned his conviction in a collateral action against the state, the INS may rely on it as a lawful basis for detention and deportation," Contreras v. Schiltgen, 122 F.3d 30, 33 (9th Cir. 1997) rehearing granted, 151 F.3d 906 (9th Cir. 1998). See also Broomes v. Ashcroft, 358 F.3d 1251, 1255 (10th Cir. 2004); Drakes v. INS, 330 F.3d 600 (3rd Cir. 2003); Plummer v. Ashcroft, 258 F.Supp.2d 43, 45-46 (D. Conn. 2003); Johnson v. INS, 3:03CV96, 2003 WL 151381 (D. Conn. Jan. 21, 2003). Petitioner would also find no support that his deportation should be stayed pending disposition of his pending state habeas petition in the Second Circuit's Marino v. INS, 537 F.2d 686 (2d Cir. 1976), which preceded the current 8 U.S.C. § 1101(a)(48) and held that an alien was not deemed to have been convicted under the immigration laws "unless and until direct appellate review of the conviction (as contrasted with collateral attack) has been exhausted or waived." Id. at 691-92; see also Montilla v. INS, 926 F.2d 162, 164-65 (2d Cir. 1991). Accordingly, the fact that Talbot has a collateral attack on the conviction supporting his removal pending does not provide a

basis for staying BICE enforcement of the immigration laws.

III. Conclusion

For the foregoing reasons, Talbot's petition [Doc. #1] and motion for ex parte injunctive relief and/or restraining order [Doc. #2] are DENIED. 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 23rd day of April, 2004.