

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

SHEIK JAVED MOHAMED,	:	
Petitioner,	:	
	:	
-vs-	:	Civ. No. 3:02cv55 (PCD)
	:	
JOHN ASHCROFT, Attorney General of	:	
the United States, <i>et al.</i> ,	:	
Respondents.	:	

RULING ON PETITION FOR WRIT OF HABEAS CORPUS

Petitioner, appearing *pro se*,¹ seeks a writ of habeas corpus pursuant to 28 U.S.C. § 2241 claiming that his continued detention by respondents violates his constitutional rights guaranteed by the Fifth, Sixth and Eighth Amendments. For the reasons set forth herein, the petition for writ of habeas corpus is denied.²

I. BACKGROUND

Petitioner is a citizen of Guyana admitted to the United States on March 31, 1993. On January 7, 1999, petitioner was convicted of the sale of a hallucinogenic or narcotic in violation of CONN. GEN. STAT. § 21a-277(a) and was sentenced to two years' imprisonment.

On January 19, 2000, the Immigration and Naturalization Service (INS) notified him that he was subject to deportation pursuant to § 237(a)(2)(A)(iii) of the Immigration and Nationality Act

¹ Petitioner submits his petition *pro se*. As such, his petition will be construed broadly and interpreted as raising the strongest arguments suggested therein. *See Cruz v. Gomez*, 202 F.3d 593, 597 (2d Cir. 2000). Inartful pleading is an insufficient basis on which to refuse review or improperly limit review of his claims. *See Haines v. Kerner*, 404 U.S. 519, 92 S. Ct. 594, 30 L. Ed. 2d 652 (1972).

² Petitioner filed a motion for reconsideration and a motion for emergency stay. These motions are restatements of the original petition. Any novel arguments presented therein are deemed incorporated into the petition and are discussed in the present ruling.

(INA), 8 U.S.C. § 1227(a)(2)(A)(iii), for conviction of an aggravated felony involving narcotics trafficking. On October 27, 2000, petitioner was taken into INS custody. On December 4, 2000, petitioner was ordered removed. Petitioner did not appeal the order, allegedly because his attorney did not forward him a copy of the Immigration Judge's decision.³ Petitioner is presently detained in Oakdale Federal Detention Center, Oakdale, Louisiana, awaiting removal.

II. DISCUSSION

Respondents argue that (1) this Court lacks jurisdiction by which to order the relief requested, (2) this Court lacks subject matter jurisdiction because of petitioner's failure to exhaust administrative remedies, (3) petitioner's due process claim based on the retroactive application of §§ 212(c) and 212(h) are without merit, and (4) petitioner's continued detention comports with the requirements of *Zadvydas v. Davis*, 533 U.S. 678, 683, 121 S. Ct. 2491, 150 L. Ed. 2d 653 (2001). Each argument will be addressed in turn.

A. Authority to Order Habeas Relief

The question presented is which, if any, of the named respondents, specifically John Ashcroft, Attorney General of the United States, James Zigler, Commissioner of the INS, Christine Davis, District Director for the INS in New Orleans, Louisiana and Nancy Hooks, Officer in Charge of Oakdale Federal Detention Center, are subject to the jurisdiction of this Court. Defendant argues that the only properly designated custodian is Christine Davis and, as she has no contact with Connecticut, there is no basis for jurisdiction over her.⁴

³ The order became final upon petitioner's failure to file a notice of appeal of the IJ's order to the BIA within the prescribed thirty-day time limit. *See* 8 C.F.R. §§ 3.38, 3.39.

⁴ Petitioner has provided an insufficient factual basis on which to establish personal jurisdiction over respondents Christine Davis or Nancy Hooks. *See Henderson v. INS*, 157 F.3d 106,123 (2d

The government's position unduly narrows the availability of the writ of habeas corpus. A writ of habeas corpus is directed to the custodian of the petitioner. *See Braden v. Thirtieth Judicial Court of Kentucky*, 410 U.S. 484, 494-95, 93 S. Ct. 1123 (1973) ("The writ of habeas corpus does not act upon the prisoner who seeks relief, but upon the person who holds him in what is alleged to be unlawful custody.") Courts should not be quick to restrict the availability of the writ premised on territorial restrictions.

Read literally, the language of § 2241(a) requires nothing more than that the court issuing the writ have jurisdiction over the custodian. So long as the custodian can be reached by service of process, the court can issue a writ 'within its jurisdiction' requiring that the prisoner be brought before the court for a hearing on his claim, or requiring that he be released outright from custody, even if the prisoner himself is confined outside the court's territorial jurisdiction.

Id. at 495. The issue is thus whether the Attorney General is petitioner's custodian. This role has been defined by Congress by way of the immigration laws. "Congress has consistently designated the Attorney General as the legal custodian of" INS detainees. *Henderson v. INS*, 157 F.3d 106,126 (2d Cir. 1998).

Although the Government argues that the only proper respondent to a habeas petition is, in effect, the jailer, *see Yi v. Maugans*, 24 F.3d 500, 507 (3d Cir. 1994), and *Vasquez v. Reno*, 233 F.3d 688, 691 (1st Cir. 2000), such would not comport with the holding of *Braden* denying such a territorial limitation. It is further unlikely, in light of the "extraordinary and pervasive role that the Attorney General plays in immigration matters," his or her "complete charge of the proceedings leading up to the order directing the[] removal [of aliens] from the country," and the "complete discretion to

Cir. 1998) (finding personal jurisdiction over Louisiana District Director based on petitioner's presence in New York and efforts through a detainer to return petitioner to Louisiana). Because respondent John Ashcroft is deemed a custodian over whom this Court has jurisdiction, the question of whether there is jurisdiction over the Commissioner of the INS need not be reached.

decide whether or not removal shall be directed,” *Henderson*, 157 F.3d at 126 (internal quotation marks omitted), that the Attorney General could be considered an unwitting participant in habeas proceedings. The Attorney General is therefore a proper respondent over whom this court has personal jurisdiction.⁵

B. Exhaustion of Administrative Remedies

Generally, an alien is required to exhaust all claims before seeking judicial review of a final order of removal. *See* 8 U.S.C. § 1252(d)(1) (“[a] court may review a final order of removal only if . . . the alien has exhausted all administrative remedies available to the alien as of right”). However, when the issue is of constitutional magnitude and the agency is not empowered to review such claims, exhaustion would not necessarily be required. *See Howell v. INS*, 72 F.3d 288, 291 (2d Cir.1995); *Arango-Aradondo v. INS*, 13 F.3d 610, 614 (2d Cir. 1994); *Xiao v. Barr*, 979 F.2d 151, 154 (9th Cir. 1992). The Board of Immigration Appeals (BIA) does not have jurisdiction to address constitutional claims. *See Rabiou v. INS*, 41 F.3d 879, 882 (2d Cir. 1994). The determination as to whether exhaustion stands as a bar to habeas review of due process claims therefore rests on whether “the administrative forum would provide no real opportunity to present the constitutional issues raised.” *Xiao*, 979 F.2d at 154.

To the extent the present petition questions the propriety of the final order of removal, it appears it is only through the alleged unconstitutionality of the retroactive applications of amendments limiting the availability of §§ 212(c) and 212(h) waivers. Such questions may not be decided by the

⁵ In *Henderson*, there appeared to be no dispute as to whether the Attorney General was subject to the long-arm jurisdiction of New York. *See Henderson*, 157 F.3d at 124 n.19. The Connecticut long-arm statute contains the same language as the New York long-arm statute discussed in *Henderson*, specifically providing for jurisdiction over one who “[t]ransacts any business within the state,” CONN. GEN. STAT. § 52-59b.

Immigration Judge or BIA, thus petitioner need not present the same before filing a petition for habeas corpus.⁶

C. Retroactive Application of §§ 212(c) and 212(h)

Petitioner argues that he is entitled to an order remanding his case to the IJ for consideration of waiver of removal pursuant to § 212(c) and § 212(h) because of an unconstitutional retroactive application of amendments limiting the availability of such waivers to his case. This argument is without merit.⁷

Petitioner's allegation addresses the retroactive effect of the amendments repealing § 212(c) waivers and eliminating the possibility for § 212(h) waivers for crimes involving drug trafficking through § 440(d) of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 (enacted on April 24, 1996), and §§ 304(a) and 348 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009-597 (enacted on September 30, 1996). The permanent provisions of the IIRIRA went into

⁶ In his reply to respondents' brief, petitioner argues that the crime for which he was ordered deported is not an aggravated felony. This claim, at best, is an alleged due process violation premised entirely upon a misinterpretation of a statute, specifically whether a state criminal conviction constitutes a crime involving drug trafficking. The BIA was well within its jurisdiction to resolve the alleged misinterpretation and has frequently done so. *See, e.g., Aguirre v. INS*, 79 F.3d 315, 316 (2d Cir. 1996). Petitioner will not be permitted to forego the exhaustion requirement by placing a constitutional label on a matter of statutory interpretation, as such a practice would render the exhaustion requirement nugatory.

⁷ There is no indication that petitioner actually sought a waiver of removal through either § 212(c) or § 212(h), nor any evidence that he declined to do so because the change in laws made it a futile endeavor. Petitioner alleges only that "[t]he INS initiated removal proceedings against petitioner and he was order[ed] to be remove[d] from the United States by an Immigration Judge in Oakdale, Louisiana, on Sept. 11, 2000, of which he *did not make an appeal.*" (Emphasis in original).

effect on April 1, 1997. *See* IIRIRA § 309(c)(1)(A). AEDPA went into effect when enacted. *See Domond v. United States INS*, 244 F.3d 81, 83 (2d Cir. 2001)

Petitioner's argument is similar to that addressed in *INS v. St. Cyr*, 533 U.S. 289, 121 S. Ct. 2271, 150 L. Ed. 2d 347 (2001), with one important distinction. *St. Cyr* involved the retroactive application of the IIRIRA provision repealing § 212(c) to those who entered into plea bargains with the understanding that waiver was probable. *See id.* at 297. The Supreme Court ruled that “§ 212(c) relief remains available for aliens . . . whose convictions were obtained through plea agreements and who, notwithstanding those convictions, would have been eligible for § 212(c) relief at the time of their plea under the law then in effect.” *Id.* at 326. Its holding is inapposite as petitioner points to no event, either in his conviction or in his removal proceedings, that took place before either act went into effect. *See Domond*, 244 F.3d at 85-86 (conviction is relevant date for purposes of analyzing retroactive effect of amendment).

Petitioner was convicted on January 3, 1999, well after the changes enacted by AEDPA and the IIRIRA went into effect on April 24, 1996 and April 1, 1997, respectively. There thus can be no due process violation resulting from the retroactive application of the amendments to petitioner as all proceedings relevant to the order of removal, including his criminal conviction and removal hearing, transpired after the amendments went into effect.⁸

⁸ If petitioner's argument is construed as an attack on the constitutionality of the amendments, he is without standing to make such an argument. In order to establish standing, petitioner must demonstrate injury in fact, which entails an invasion of a legally protected interest which affects him in a personal and individual way. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 2136, 119 L. Ed. 2d 351 (1992). His entitlement to waiver and the classes of crimes constituting an aggravated felony were firmly in place at the time of his conviction. He thus cannot demonstrate an injury personal to him as a consequence of the various amendments and thus lacks standing to raise a due process violation resulting from the amendments. *See Galindo-Del Valle v. Attorney General*, 213 F.3d 594, 598-99 (11th Cir. 2000).

D. Continued Detention

Petitioner argues that his continued detention violates his Fifth Amendment right to due process of the law.⁹ Respondent replies that petitioner's native country accepts deportees, thus delays are attributable to a backlog resulting from Guayana's initial refusal to accept removed nationals which has only recently retracted its refusal.

It is beyond question that the indefinite detention of an alien after an order of removal issues raises a serious constitutional question. *See Zadvydas v. Davis*, 533 U.S. 678, 690, 121 S. Ct. 2491, 150 L. Ed. 2d 653 (2001). Detention may be for no longer than "a period reasonably necessary to secure removal," *id.* at 699, and a six-month period of detention is presumed reasonable and consistent with due process, *see id.* at 701. Should the period of detention exceed six months and the alien provide good reason to believe that there is not a significant likelihood of removal in the

⁹ Petitioner also alleges that his right to procedural due process was violated but provides no indication that he has utilized the procedures set forth in 8 C.F.R. § 241.4 for obtaining supervised release. The relevant procedures for detention and supervised release of a § 241 detainee are as follows. The INS has ninety days from the date of a final order of removal to deport an alien. *See* 8 U.S.C. § 1231(a). An alien ordered deported pursuant to 8 U.S.C. § 1227(a)(2) may be detained beyond the mandatory ninety-day period. *See* 8 U.S.C. § 1231(a)(6). Review of detention for the next three months is made by the INS District Director, *see* 8 CFR § 241.4(c)(1), or, on referral by the District Director, by the Headquarters Post-Order Detention Unit (HQPDU), *see* 8 CFR § 241.4(c)(1). HQPDU conducts all reviews after the six-month period following a final order of removal. *See id.* Although petitioner argues that he was denied procedural due process in his continued detention, he nowhere indicates that he was denied access to available procedures or that the procedures themselves are somehow inadequate. "[C]onclusory,' 'vague,' or 'general allegations,'" of conspiracy to deprive a person of constitutional rights, *see Contemporary Mission, Inc. v. United States Postal Service*, 648 F.2d 97, 107 (2d Cir. 1981), are an insufficient basis on which to grant habeas relief. Notwithstanding petitioner's *pro se* status, he must provide some evidence that the procedures in place were inadequate to prevent a deprivation of a liberty or property interest. *See Smalls v. Batista*, 191 F.3d 272, 278 (2d Cir. 1999). An unsupported allegation of a procedural due process violation is not sufficient.

reasonably foreseeable future, then the Government must provide evidence establishing otherwise. *See id.* “[A]s the period of prior post-removal confinement grows, what counts as the ‘reasonably foreseeable future’ conversely would have to shrink.” *Id.*

Petitioner was ordered removed on December 4, 2000. His order of removal thus became final on January 3, 2001. *See* 8 U.S.C. § 1231(a)(1)(B). On September 19, 2001, and March 25, 2002, HQPDU determined that further detention was warranted based on a review of petitioner’s record, consideration of his criminal record, and in the understanding that petitioner’s removal was “foreseeable.” These reviews indicate assessments as to whether supervised release would be appropriate under the circumstances and consideration of whether petitioner would constitute either a danger to the community or a flight risk pursuant to 8 U.S.C. § 1231(a)(6).¹⁰ The evidence submitted sufficiently guards against an “indefinite and potentially permanent” detention without the possibility of supervised release. *Id.* at 696. However, in dismissing this petition hereby, petitioner’s right to reopen this aspect of his petition will be reserved to him in the event of a continued failure of respondent to end his detention and carry out his deportation within sixty (60) days of this order.

¹⁰ Although the INS documents suggest a procedure that determines petitioner’s eligibility for supervised release based on the factors articulated in 8 U.S.C. § 1231(a)(6), there is also some suggestion in the letters that the review is cursory and limited to the inquiry of whether petitioner’s native country would accept his return. The latter situation would raise serious questions as to whether petitioner was being detained in violation of due process by virtue of an unnecessary detention when a less severe measure may be appropriate. In the present case, petitioner was found guilty of a drug offense. If such is his only offense and based entirely on that consideration, it would be difficult to conclude that he would be unsuitable for supervised release absent a finding (1) that he likely would engage in similar conduct if released, or (2) that he would constitute a flight risk.

III. CONCLUSION

The petition for writ of habeas corpus (Doc. 1) is **denied**. Petitioner's motion for reconsideration (Doc. No. 10) and motion for stay (Doc. No. 12) are **denied**. The Clerk shall close the file.

SO ORDERED.

Dated at New Haven, Connecticut, December ____, 2002.

Peter C. Dorsey
United States District Judge