UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

ROBERT M. GRANT, Petitioner	:	
	:	PRISONER
v.	:	NO. 3:05CV1756(MRK)
THERESA LANTZ, Respondent	:	

RULING AND ORDER

Petitioner Robert M. Grant, proceeding *pro se*, has filed this petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 challenging the 1988 state court larceny convictions that ultimately led to his deportation from the United States. For the reasons explained below, Mr. Grant's petition for writ of habeas corpus [doc. #1] is DISMISSED for lack of subject matter jurisdiction.

I.

On September 28, 1988, in the Connecticut Superior Court for the Judicial District of Hartford-New Britain at Hartford, Mr. Grant pled guilty to one count of attempt to commit larceny in the second degree and one count of larceny in the third degree. On the basis of these pleas, a judge sentenced Mr. Grant to two concurrent terms of imprisonment of two and one-half years. *See Grant v. Commissioner of Correction*, 87 Conn. App. 814, 815 (Conn. App. Ct. 2005), *cert. denied*, 274 Conn. 918 (2005). On November 13, 1989, a jury in the Connecticut Superior Court for the Judicial District of Hartford-New Britain convicted Mr. Grant of being an accessory to murder. Accordingly, on January 11, 1990, a judge sentenced Mr. Grant to twenty-five years of imprisonment. *See Grant v. Commissioner of Correction*, 86 Conn. App. 392, 394 (Conn. App. Ct. 2004), *cert. denied*, 273 Conn. 903 (2005). In 1993, the Bureau of Immigration and Customs Enforcement ordered Mr. Grant deported based on his larceny convictions. *See* Petitioner's Response to Order [doc. #10] at 3. Mr.

Grant was discharged from his twenty-five year state sentence for accessory to murder on October 21, 2005, and subsequently taken into custody by the Department of Homeland Security and held at a Connecticut prison facility pending deportation. *Id.* at n1.

On November 16, 2005, Mr. Grant filed this action challenging his 1988 state court larceny convictions. On December 21, 2005, Mr. Grant filed another habeas petition challenging the order of removal that had been entered based on those larceny convictions, but in February 2006 he withdrew that petition in order to remove any obstacles to his speedy deportation. *See Grant v. Department of Homeland Security*, No. 3:05cv1937 (MRK). Frustrated with the pace of the removal process, Mr. Grant then filed a third habeas petition seeking to compel the Department of Homeland Security to complete his deportation with all due haste. *See Grant v. Department of Homeland Security*, No. 3:06cv366 (MRK). That petition was dismissed as moot on May 23, 2006, after the Government informed the Court that Mr. Grant had been lawfully removed to Jamaica. *See id.*

II.

Mr. Grant brings the present action pursuant to 28 U.S.C. § 2254 (a), challenging a pair of state court larceny convictions, which entered against him in 1988 on the basis of a guilty plea, and which led to imposition of two concurrent two and one-half year sentences. Mr. Grant alleges that the 1988 state court convictions are illegal because he was denied effective assistance of counsel. *See* Petition for Writ of Habeas Corpus [doc. #1] at 5.

"The first showing a [section] 2254 petitioner must make is that he is 'in custody pursuant to the judgment of a State court.'" *Lackawanna County District Attorney v. Coss*, 532 U.S. 394, 401 (2001) (quoting 28 U.S.C. § 2254(a)). The Supreme Court has interpreted this language to require that the "petitioner be 'in custody' *under the conviction or sentence under attack* at the time his petition is filed," *Maleng v. Cook*, 490 U.S. 488, 490-91 (1989) (emphasis added), or in custody

under a consecutive sentence imposed at the same time as the conviction or sentence under attack, *see Garlotte v. Fordice*, 515 U.S. 39, 41 (1995).

Mr. Grant commenced this action on November 8, 2005, the day he presumably handed his petition to prison officials for mailing. The convictions that he challenges were entered in 1988 and led to the imposition of concurrent two and one-half year sentences. At the time of filing this petition, Mr. Grant was no longer in custody of the State of Connecticut on any state conviction, but rather in custody of the Department of Homeland Security in a Connecticut facility pending deportation. *See* Petitioner's Response to Order [doc. #10] at 3, n1. In response to an order directing Mr. Grant to explain his theory of how he remained in custody on the 1988 charges at the time of filing this petition, Mr. Grant acknowledged that his sentence pursuant to the 1988 convictions expired on or about December 1989, *see* Petitioner's Response to Order [doc. #10] at 3, but advanced two theories for why he nonetheless satisfied the "in custody" prerequisite for challenging a state court conviction in federal court: first, because he was serving consecutive rather than concurrent convictions; and second because the order of removal under which he was detained was a collateral consequence of the state court convictions challenged.

Mr. Grant's first contention, that he was serving consecutive sentences and therefore comes within the rule of *Garlotte v. Fordice*, 515 U.S. 39, 41 (1995), is irrelevant, because his own pleadings reflect that he had been discharged from all state sentences at the time of filing this petition, and was in fact in custody of the Department of Homeland Security, albeit in a Connecticut facility, pursuant to an order of removal. *See* Petitioner's Response to Order [doc. #10] at 3, n1 (asserting that Mr. Grant was discharged from his twenty-five year state sentence for accessory to murder on October 21, 2005).[1]

[1] The Court notes that even if Mr. Grant has his dates wrong, and he was still detained on the accessory to murder conviction at the time he filed this petition, his argument would still fail. The

Mr. Grant's alternative argument for how he remained "in custody" on the 1988 convictions at the time of filing this petition in November 2005 is that the order of removal under which he was detained was a collateral consequence of the state court convictions challenged. The problem with Mr. Grant's argument is that it confuses two distinct issues: the "in custody" requirement of the habeas statute on the one hand, and the constitutional requirement of a case-or-controversy on the other. Whether a petitioner's discharge of the sentence associated with the conviction challenged causes a petition to become moot because it no longer presents a case or controversy under Article III, § 2, of the Constitution does indeed turn on the existence of "some concrete and continuing injury other than the now-ended incarceration," i.e., on the existence of "continuing collateral consequences." *Spencer v. Kemna*, 523 U.S. 1, 7 (1998). But this question of Article III mootness is distinct from the question of whether release from prison, or deportation, requires dismissal of a habeas petition for failure to satisfy the "in custody" requirement of the habeas statute. *Id.* As the Second Circuit has explained, the fact that a habeas petition may not be "mooted by deportation

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Connecticut Appellate Court found as a matter of state law that Mr. Grant's sentences on the larceny convictions and the subsequent sentence on the accessory to murder conviction were concurrent not consecutive, because "[t]he mittimus does not state whether the [accessory to murder] sentence was to run concurrent with or consecutive to the petitioner's sentences for the larceny conviction," and "[i]n the absence of a timely designation of the defendant's sentence as concurrent with or consecutive to his prior undischarged term of imprisonment, the common-law rule prevails, and the sentence will be treated as concurrent." *Grant v. Commissioner of Correction*, 87 Conn. App. at 818-19. Mr. Grant argues that the Appellate Court was mistaken and the sentences were actually consecutive because the prison time-sheets show both that the sentence for accessory to murder was imposed and began to run on 1/11/1990, and that he was "discharge[d] of sentence [on 1988 convictions] on 12/26/1989; so both sentences could not have run concurrent." Petitioner's Response to Order [doc. #10] at 7 & exhibits B & C. Whatever the merits of Mr. Grant's argument that the Appellate Court was wrong to designate his sentences concurrent, the facts that he marshals do not support his contention that the sentences were consecutive. At best, Mr. Grant's argument indicates that his sentences were neither concurrent nor consecutive, but entirely independent, the second having been imposed *after* Mr. Grant was discharged from the first and thus not while Mr. Grant was "subject to any undischarged term of imprisonment imposed at a previous time by a court of this state." Conn. Gen. Stat. § 53a-37 (governing designation of sentences as concurrent or consecutive).

because a collateral consequence of that deportation . . . [i]s sufficient to maintain a live case or controversy," does not address the "entirely different issue" of "the statutory requirement that a habeas petitioner be 'in custody' at the time of filing." *United States v. Copeland*, 376 F.3d 61, 69 (2d Cir. 2004). Indeed, the Supreme Court has held that "once the sentence imposed for a conviction has completely expired, the collateral consequences of a conviction are not themselves sufficient to render an individual 'in custody' for the purposes of a habeas attack upon it." *Maleng v. Cook*, 490 U.S. 488, 492 (1989).

Extrapolating from the analysis in *Maleng*, courts have uniformly held that the collateral immigration consequences of a petitioner's conviction are insufficient to satisfy the "in custody" requirement. *See, e.g.*, *Kandiel v. United States*, 964 F.2d 794, 796 (8th Cir. 1992) ("Because [petitioner's] sentence was fully expired by the time he filed his Section 2255 motion and the current deportation proceedings against him are merely a collateral consequence of his conviction, he is not 'in custody' for the purposes of Section 2255."); *United States v. Esogbue*, 357 F.3d 532, 534 (5th Cir. 2004) (finding that a petitioner did not satisfy the "in custody" requirement of Section 2255 even though he was facing the collateral consequence of deportation); *Abimbola v. United States*, 369 F. Supp. 2d 249, 252 (E.D.N.Y. 2005) (collecting cases). Thus, the fact that Mr. Grant was being detained under an order of removal predicated on his 1988 convictions at the time that he filed this petition is not sufficient to satisfy the "in custody" requirement of the habeas statute.

It is true that, under *Maleng,* a court may construe a Section 2254 petition as "'asserting a challenge to [a present] sentence[], as enhanced by [an] allegedly invalid prior conviction,'" *Lackawanna County District Attorney*, 532 U.S. at 401-02 (quoting *Maleng*, 490 U.S. at 493). By analogy, Mr. Grant might have tried to frame his petition as a challenge to the removal order based on the allegedly invalid state convictions. However, Mr. Grant did not in fact advance such an

argument in the present petition, and the Court declines to construe the petition as a challenge to the order of removal in light of Mr. Grant's withdrawal of a petition expressly styled as such a challenge, *see Grant v. Department of Homeland Security*, No. 3:05cv1937(MRK), and his subsequent petition seeking to compel the deportation that he had previously opposed, *see Grant v. Department of Homeland Security*, No. 3:06cv366 (MRK).

Because Mr. Grant is not "in custody" pursuant to the state convictions that he challenges, the Court does not have jurisdiction to consider his habeas petition, which must therefore be dismissed.

III.

Having concluded that Mr. Grant's non-custodial status precludes habeas relief from the allegedly illegal state convictions, and in view of Mr. Grant's status as a *pro se* petitioner unfamiliar with legal technicalities, it is proper for the Court to consider *sua sponte* whether *coram nobis* relief would be proper. *See, e.g.*, *Kandiel*, 964 F.2d at 796 ("We agree . . . that the district court should have considered whether *coram nobis* relief was proper."). For the reasons explained below, the Court concludes that coram nobis relief is not appropriate in this case.

The Writ of Error Coram Nobis is one of those "ancillary remedies . . . shrouded in ancient lore and mystery." Fed. R. Civ. P. 60 (b) advisory committee's note to the 1946 amendment; *see generally* Daniel R. Coquillette, *The Anglo-American Legal Heritage* 204 (2d ed. Carolina Academic Press 2004). Its modern-day significance lies in the fact that it affords a potential avenue for relief from an illegal conviction *after* a sentence has been served. That is, coram nobis is "a remedy of last resort for petitioners who are no longer in custody pursuant to a criminal conviction." *United States v. Mandanici*, 205 F.3d 519, 524 (2d Cir. 2000) (internal quotation marks omitted); *see generally* 28 James W. Moore, et al., *Moore's Federal Practice*, § 672.02[2][c] (2d ed.1995) (and cases cited

therein); 3 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 592 (3d ed. 2004) (and cases cited therein).

Although a district court may issue a writ of error coram nobis pursuant to the All Writs Act, 28 U.S.C. § 1651(a), coram nobis relief is appropriate only under "extraordinary circumstances," *Foont v. United States*, 93 F.3d 76, 78 (2d Cir. 1996). It is not a substitute for appeal, and relief under the writ is strictly limited to cases in which errors of the most fundamental character have rendered the underlying proceedings invalid. *Mandanici*, 205 F.3d at 524. Thus, to obtain coram nobis relief, a petitioner must overcome a presumption that the challenged proceedings were correct, and demonstrate that: (1) there are circumstances compelling such action to achieve justice, (2) sound reasons exist for failure to seek appropriate earlier relief, and (3) the petitioner continues to suffer legal consequences from his conviction that may be remedied by granting of the writ. *Id.*

Satisfaction of the third element requires a petitioner to identify a "concrete threat" of "serious harm" posed by the continued existence of the allegedly erroneous conviction; purely speculative harms will not suffice. *Fleming v. United States*, 146 F.3d 88, 91 (2d Cir.1998). Here, the Court is unable to identify from the pleadings filed by Mr. Grant to date any concrete threat of serious harm that he continues to suffer as a result of his 1988 state convictions for larceny. It is true that Mr. Grant was deported on the basis of these convictions, but, as previously noted, he has waived his right to invoke deportation as a harm attributable to the convictions through his own actions, namely withdrawing his challenge to the order of removal, *see Grant v. Department of Homeland Security*, No. 3:05cv1937(MRK), and seeking a court order to compel the Department of Homeland Security to hasten his deportation, *see Grant v. Department of Homeland Security*, No. 3:06cv366 (MRK). Therefore, on the basis of the pleadings before it, the Court concludes that coram nobis relief would not be proper.

IV.

For the reasons explained above, the Court concludes that Mr. Grant is no longer in custody pursuant to the September 1988 conviction and sentence challenged in this petition, as required for federal jurisdiction under the habeas statute. Thus, the Court lacks jurisdiction over this action, and the petition [doc. #1] must be DISMISSED. Accordingly, Petitioner's Motion for Contempt and Ruling and Order [doc. #7] is DENIED AS MOOT. In addition, the Court concludes, *sua sponte*, that there are no grounds for coram nobis relief.

Because Mr. Grant has not made a substantial showing of the denial of a constitutional right, a certificate of appealability will not issue. In addition, any appeal taken from this Order would not be taken in good faith. **The Clerk is directed to enter judgment and close this file**.

IT IS SO ORDERED.

/s/ Mark R. Kravitz
United States District Judge

Dated at New Haven, Connecticut: June 1, 2006.