UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PAUL LAWRENCE,	:	
Petitioner,	:	00 Civ. 2154 (AJP)
-against-	:	OPINION AND ORDER
IMMIGRATION AND NATURALIZATION SERVICE,	:	
Respondent.	:	

ANDREW J. PECK, United States Magistrate Judge:

Petitioner Paul Lawrence's petition for a writ of habeas corpus, pursuant to 28 U.S.C. § 2241, against the Immigration and Naturalization Service ("INS") asserts three claims: that (1) the mandatory detention provision in the Immigration and Nationality Act of 1952 ("INA") violates his right to due process (Dkt. No. 1: Pet. ¶¶ 9(a), 10(a)); (2) he is eligible for § 212(c) relief from removal because he committed and was convicted of the crimes that form the basis for his removal before INA § 212(c) relief was eliminated (Pet. ¶¶ 9(b), 10(b)); and (3) he is not removable because he derived United States citizenship when his father became a U.S. citizen (Pet. ¶¶ 9(c), 10(c)).[1/]

[1/] By letter to the Court dated March 16, 2001, Lawrence's attorney, Jesse M. Siegel, withdrew without prejudice Lawrence's derivative citizenship claim, preserving his right to amend his petition if the Board of Immigration Appeals ("BIA") were to deny (continued...)

The parties agreed to decision of this action by a Magistrate Judge pursuant to 28 U.S.C. § 636(c). (Dkt. No. 14.) For the reasons set forth below, Lawrence's petition is denied.

FACTS

Background

In May 1971, Lawrence came to the United States from Jamaica at the age of seven as a permanent resident alien. (See Dkt. No. 11: INS Return Ex. A: Certified Administrative Record ["R."] at 35: IJ 8/23/99 Oral Decision; R. 48: 5/27/99 Removal Hearing Tr.; R. 27: Immigrant Visa & Alien Registration.)

In 1986, Lawrence pled guilty to attempted criminal possession of a controlled substance (cocaine) and was sentenced to five years probation. (R. 36, 62-68.) In June 1995, Lawrence was convicted by a jury for sale of a controlled substance (cocaine) and sentenced to four-and-a-half to nine years imprisonment. (R. 35, 69-77.)

The INS Removal Proceedings

Based on Lawrence's 1986 and 1995 convictions, the INS instituted removal proceedings against Lawrence in March 1999 pursuant to 8 U.S.C. § 1227(a)(2)(A)(iii) and § 1227(a)(2)(B)(i), providing for removal of aliens convicted of certain drug crimes. (See R. 92-94: INS Notice to Appear in Removal Proceedings.) At Lawrence's initial removal hearing on May 27, 1999, the Immigration Judge ("IJ") informed Lawrence that he had "a right to an

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[1/](...continued)
his pending agency appeal of that issue. (Dkt. No. 26; see also Dkt. No. 28: 3/1/01 Conf. Tr. at 9-20.) As of the date of this Opinion, Lawrence has not sought to reinstate the withdrawn claim.

attorney" but that the INS could not provide one. (R. 42: 5/27/99 Removal Hearing Tr.) The IJ adjourned the hearing until August 20, 1999 so that Lawrence could obtain counsel. (R. 44-45.) At the August 20, 1999 removal hearing, Lawrence was represented by Rev. Robert Vitaglione, a credited representative. (R. 46-48: 8/20/99 Removal Hearing Tr.) Through his representative, Lawrence conceded the 1986 and 1995 narcotics convictions (Tr. 48-49) and sought relief from removal under INA § 212(c), 8 U.S.C. § 1182(c) (repealed 1996), which provided for discretionary relief from removal for aliens in the United States for seven years or more. (R. 50: 8/23/99 Removal Hearing Tr.)

At the conclusion of the hearing, the IJ held that § 212(c) was repealed by the Antiterrorism and Effective Death Penalty Act ("AEDPA") and the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"). (R. 52-53.) The IJ's Oral Decision further held that "Section 212(c) relief is only available for aliens in deportation proceedings prior to April 24, 1996 [the date of the AEDPA's enactment], and not to aliens in removal proceedings." (R. 36: IJ Oral Decision.)[2/] The IJ ordered Lawrence removed to Jamaica. (R. 36-37, 53.)

The BIA affirmed on March 2, 2000. (R. 2-15: BIA Decision.) Lawrence argued on appeal to the BIA that the AEDPA and IIRIRA provisions eliminating § 212(c) relief should not be applied retroactively since his crimes were committed before 1996. (See R. 3, 16-23.) The BIA held that Lawrence was properly in removal, not deportation or exclusion

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[2/] At the hearing, Lawrence questioned the applicability of the AEDPA/IIRIRA repeal of § 212(c) relief as applied retroactively to his pre-1996 convictions. (See R. 55-57.)

proceedings, and that the "application of the terms of IIRIRA to cases begun after the effective date of IIRIRA does not constitute retroactive application of the Act." (R. 3 & n.1.)[3/]

Lawrence's Present § 2241 Habeas Petition

Lawrence's pro se habeas corpus petition pursuant to 28 U.S.C. § 2241 was received by this Court's Pro Se Office on March 14, 2000. (Dkt. No. 1: Pet. at 1.) In his petition, Lawrence asserts, inter alia, that he "seeks relief from deportation . . . [because] when he committed the crime, for which he became deportable, Sec. 212(c) relief was available" (Pet. ¶ 10(b)), and that his mandatory detention pending disposition of his § 212(c) claim violates his Fifth Amendment right to due process (Pet. ¶¶ 9(a), 10(a)).

On March 22, 2000, in order to preserve the Court's jurisdiction, Chief Judge Mukasey stayed Lawrence's removal. (Dkt. No. 2: 3/22/00 Order.)

On August 4, 2000, the case was referred to this Court (see Dkt. No. 4), and the parties thereafter consented to disposition of the petition by a Magistrate Judge pursuant to 28 U.S.C. § 636(c). (See Dkt. No. 14.) On October 2, 2000, this Court sua sponte appointed counsel for Lawrence under the Criminal Justice Act ("CJA") "[b]ecause of the complex legal issues" raised by Lawrence's § 2241 habeas petition. (Dkt. No. 13: 10/2/00 Order; see also Dkt. No. 16: 10/11/00 Order.) On December 21, 2000, this Court denied the Government's application to vacate the Court's Order appointing counsel for Lawrence pursuant to 28 U.S.C.

[3/] In a concurring and dissenting opinion, Board Member Rosenberg argued that the BIA's "conclusion results in an impermissibly retroactive application of the law" to Lawrence and that he should be eligible to apply for § 212(c) relief. (R. 5-15: BIA Decision, member Rosenberg concurring and dissenting.)

§ 3006A. See Lawrence v. INS, 00 Civ. 2154, 2000 WL 1864040 (S.D.N.Y. Dec. 21, 2000) (Peck, M.J.).

ANALYSIS

I. AEDPA AND IIRIRA DO NOT PRECLUDE FEDERAL COURTS FROM EXERCISING HABEAS JURISDICTION UNDER 28 U.S.C. § 2241 OVER CHALLENGES TO INS REMOVAL DECISIONS THAT RAISE PURE QUESTIONS OF LAW

Less than one month ago, the Supreme Court ruled that neither AEDPA nor IIRIRA repealed general federal habeas jurisdiction under 28 U.S.C. § 2241 to entertain challenges to INS removal decisions raising pure questions of law. INS v. St. Cyr, 121 S. Ct. 2271, 2278-87 (2001). Citing "the lack of a clear, unambiguous, and express statement of congressional intent to preclude judicial consideration on habeas" of pure questions of law, coupled with the substantial constitutional questions such preclusion would raise, the Supreme Court concluded that § 2241 habeas jurisdiction was not repealed by AEDPA and IIRIRA. Id. at 2287. Accordingly, this Court has jurisdiction over Lawrence's § 2241 habeas petition.

II. IIRIRA MAY BE APPLIED RETROACTIVELY, PRECLUDING § 212(c) RELIEF FROM REMOVAL, WHERE THE ALIEN'S PRE-IIRIRA CONVICTION CAME AFTER TRIAL AS OPPOSED TO A GUILTY PLEA

Prior to IIRIRA's effective date in April 1997, INA § 212(c) provided the Attorney General with broad discretion to waive deportation in certain cases. See INS v. St. Cyr, 121 S. Ct. 2271, 2275 (2001) ("St. Cyr II"). After IIRIRA's enactment, the Second Circuit held that

although relief under former INA § 212(c) was repealed (by IIRIRA section 304(b)),[4/] § 212(c) relief remained available to aliens in removal proceedings who entered guilty or nolo contendere pleas prior to IIRIRA's September 30, 1996 enactment. St. Cyr v. INS, 229 F.3d 406, 418 (2d Cir. 2000) ("St. Cyr I"). The Second Circuit specifically held that the AEDPA and IIRIRA's elimination of discretionary § 212(c) relief would not be retroactively applied to pre-enactment guilty or nolo contendere pleas, but stated that it would apply to other pre-enactment convictions after trial:

> The INS's warning against "an absurd superprospective result" is also unfounded. We do not rule today that application of the 1996 amendments to pre-enactment convictions has an impermissible retroactive effect. Rather, we hold that AEDPA § 440(d) and IIRIRA § 304 do not apply to pre-enactment guilty pleas or pleas of nolo contendere because such an application would upset reasonable, settled expectations and change the legal effect of prior conduct. Our ruling affects the narrow class of cases where an alien pled guilty to a criminal offense that qualifies as a removable crime. Discretionary relief as amended by AEDPA § 440(d) still applies to all aliens with convictions pre-dating its enactment and to all guilty pleas entered after its effective date. Likewise, cancellation of removal still applies to all aliens with convictions pre-dating IIRIRA and to all guilty pleas entered by aliens to deportable crimes after it took effect.

St. Cyr I, 229 F.3d at 420-21.

In June 2001, the Supreme Court affirmed the Second Circuit's St. Cyr I decision. St. Cyr II, 121 S. Ct. at 2293. The Supreme Court held 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

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[4/] IIRIRA § 304(b), 110 Stat. 3009-597, repealed § 212(c) relief, and replaced it with 8 U.S.C. § 1229(b), which allows the Attorney General to cancel the removal of a deportable alien if, inter alia, the alien "has not been convicted of any aggravated felony." 8 U.S.C. § 1229b(a)(3).

their plea under the law then in effect." St. Cyr II, 121 S. Ct. at 2274. Applying the familiar test of Landgraf v. USI Film Prods., 511 U.S. 244, 114 S. Ct. 1483 (1994), the Supreme Court in St. Cyr II first found, as had the Second Circuit, that IIRIRA and its legislative history did not unambiguously indicate that the repeal of § 212(c) discretionary relief should apply retroactively. St. Cyr II, 121 S. Ct. at 2287-93, aff'g, St. Cyr I, 229 F.3d at 412-16. The Supreme Court, as had the Second Circuit, proceeded to the "second step of Landgraf's retroactivity analysis," that is, whether the statute if applied retroactively "'attaches a new disability, in respect to transactions or considerations already past.'" St. Cyr II, 121 S. Ct. at 2290-91; see also St. Cyr I, 229 F.3d at 417. The Supreme Court found, as had the Second Circuit, that applying IIRIRA's elimination of § 212(c) discretionary relief to those who pleaded guilty before IIRIRA's enactment would upset settled expectations:

> IIRIRA's elimination of any possibility of § 212(c) relief for people who entered into plea agreements with the expectation that they would be eligible for such relief clearly "'attaches a new disability, in respect to transactions or considerations already past.'" Landgraf, 511 U.S. at 269, 114 S. Ct. 1483. Plea agreements involve a quid pro quo between a criminal defendant and the government. In exchange for some perceived benefit, defendants waive several of their constitutional rights (including the right to a trial) and grant the government numerous "tangible benefits, such as promptly imposed punishment without the expenditure of prosecutorial resources." There can be little doubt that, as a general matter, alien defendants considering whether to enter into a plea agreement are acutely aware of the immigration consequences of their convictions. Given the frequency with which § 212(c) relief was granted in the years leading up to AEDPA and IIRIRA, preserving the possibility of such relief would have been one of the principal benefits sought by defendants deciding whether to accept a plea offer or instead to proceed to trial.
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> . . .
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> The potential for unfairness in the retroactive application of IIRIRA § 304(b) to people like Jdeonwo and St. Cyr is significant and manifest. Relying upon

> settled practice, the advice of counsel, and perhaps even assurances in open court that the entry of the plea would not foreclose § 212(c) relief, a great number of defendants in Udeonwo's and St. Cyr's position agreed to plead guilty. Now that prosecutors have received the benefit of these plea agreements, agreements that were likely facilitated by the aliens' belief in their continued eligibility for § 212(c) relief, it would surely be contrary to "familiar considerations of fair notice, reasonable reliance, and settled expectations," Landgraf, 511 U.S. at 270, 114 S. Ct. 1483, to hold that IIRIRA's and subsequent restrictions deprive them of any possibility of such relief.
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> Finally, the fact that § 212(c) relief is discretionary does not affect the propriety of our conclusion. There is a clear difference, for the purposes of retroactivity analysis, between facing possible deportation and facing certain deportation. Prior to AEDPA and IIRIRA, aliens like St. Cyr had a significant likelihood of receiving § 212(c) relief. Because respondent, and other aliens like him, almost certainly relied upon that likelihood in deciding whether to forgo their right to a trial, the elimination of any possibility of § 212(c) relief by IIRIRA has an obvious and severe retroactive effect.
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> We find nothing in IIRIRA unmistakably indicating that Congress considered the question whether to apply its repeal of § 212(c) retroactively to such aliens. We therefore hold that § 212(c) relief remains available for aliens, like respondent, 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.

St. Cyr II, 121 S. Ct. 2291-93 (citations & fns. omitted, emphasis added).

Here, the INS had ordered Lawrence removed because of his 1986 conviction based on his guilty plea, and his June 1995 conviction after trial for sale of a controlled substance (cocaine). Both convictions predate the effective dates of the AEDPA and IIRIRA. Were Lawrence's removal ordered solely because of his 1986 guilty plea conviction, he would be entitled to § 212(c) discretionary relief under St. Cyr. However, Lawrence's 1995

conviction after trial for sale of cocaine provides the INS sufficient basis to order Lawrence's removal and to deny § 212(c) discretionary relief.[5/]

The issue, therefore, is whether after St. Cyr, IIRIRA's elimination of § 212(c) relief applies where the petitioner's pre-IIRIRA conviction came after trial, as opposed to a guilty plea. Lawrence's counsel argues that IIRIRA's elimination of § 212(c) relief is just as impermissibly retroactive when applied to pre-IIRIRA convictions after trial as to such convictions pursuant to a guilty plea. (See Dkt. No. 20: Lawrence 12/12/00 Br. at 15-18; Dkt. No. 28: 3/1/01 Conf. Tr. at 5-7.) Lawrence's counsel, Mr. Siegel, argued that:

> [T]he question is, does St. Cyr bar retroactive application as to somebody who has at least one conviction that was obtained after a jury trial as opposed to a plea or not? I think it should be extended to cover that situation. However, I don't believe that that's a specific situation that's addressed by St. Cyr.
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> I think that the specific situation [St. Cyr I] is addressing is somebody who did plead guilty, and the case says that in that particular situation it would be an impermissible retroactive application. But I don't think it precludes the argument that the same reason could apply to a different situation. . . .[T]he law has to apprise people of the consequences of their actions and they have to make decisions about whether to conform their actions to the law based on the law at the time they make their actions. . . .
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> [A]t a time when a person decides to plead guilty or go to trial there is a whole range of issues that arise in their heads about whether to go to trial. And one of the things is, what's the worst that can happen to me after I go to trial? And if the worst that happens is the person can be deported but, on the other hand, has the opportunity to apply for discretionary relief, the person may think, well,

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[5/] An alien is deportable upon conviction for any "aggravated felony," Anti-Drug Abuse Act of 1988, 102 Stat. 4469-4470, § 1227(a)(2)(A)(iii), without regard to when the offense was committed. 8 U.S.C. § 1227(a)(2)(A)(iii). "Aggravated felony" includes a drug trafficking crime. 8 U.S.C. § 1101(a)(43)(B).

> I'll take the chance of going to trial. It can enter into a person's reasoning in the same way that it can enter into the person's reasoning in deciding to plead guilty.

(3/1/01 Conf. Tr. at 5-7.)

In fact, however, not only is it implicit in St. Cyr I and II that IIRIRA's elimination of § 212(c) discretionary relief can apply to pre-IIRIRA convictions after trials, but the Second Circuit's St. Cyr I decision was quite explicit that its reasoning did not apply to pre-IIRIRA convictions after trial. The Second Circuit began its retroactivity analysis as follows:

> We conclude that AEDPA § 440(d) and IIRIRA § 304 as applied to a guilty or nolo contendere plea that pre-dates the statutes' enactment has an impermissible retroactive effect. In so holding, we follow the reasoning of the Fourth Circuit in Tasios v. Reno [204 F.3d 544 (4th Cir. 2000),] that such an application of the bar to relief would upset settled expectations and change the legal effect of prior conduct.
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> As an initial matter, we note that it is difficult to argue that barring eligibility for discretionary relief on the basis of pre-enactment criminal conduct – as opposed to a plea going to the guilt of a deportable crime – constitutes an impermissible retroactive application of a statute. Indeed, we agree that,
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> > It would border on the absurd to argue that these aliens might have decided not to commit drug crimes, or might have resisted conviction more vigorously, had they known that if they were not only imprisoned but also, when their prison term ended, ordered deported, they could not ask for a discretionary waiver of deportation.
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> Jurado-Gutierrez [v. Greene], 190 F.3d [1135] at 1150-51 [(10th Cir. 1999)] (quoting LaGuerre [v. Reno,] 164 F.3d [1035] at 1041 [(7th Cir. 1998)]). Thus, we conclude that the bar to discretionary relief applies regardless of whether a legal permanent alien's underlying criminal conduct pre-dated the AEDPA or IIRIRA.
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> However, in Hughes Aircraft, the Supreme Court conducted a retroactivity analysis that was not focused solely on the petitioner's primary conduct, but also on the relevant secondary conduct. See 520 U.S. at 947-48. Furthermore, "it is the conviction, not the underlying criminal act, that triggers the disqualification from § 212(c) relief." Mattis, 212 F.3d at 37. Thus, in

> considering whether the changes to the availability of discretionary relief would alter the legal effect of conduct that predates the AEDPA and IIRIRA's enactment, our analysis focuses on the decision to enter a guilty plea to a crime – not on the criminal conduct – that qualifies the alien for removal under the immigration laws.

St. Cyr I, 229 F.3d at 418 (emphasis added). After further discussing the expectations of one who pleads guilty, the Second Circuit concluded:

> The INS's warning against "an absurd superprospective result" is also unfounded. We do not rule today that application of the 1996 amendments to pre-enactment convictions has an impermissible retroactive effect. Rather, we hold that AEDPA § 440(d) and IIRIRA § 304 do not apply to pre-enactment guilty pleas or pleas of nolo contendere because such an application would upset reasonable, settled expectations and change the legal effect of prior conduct. Our ruling affects the narrow class of cases where an alien pled guilty to a criminal offense that qualifies as a removable crime.

St. Cyr I, 229 F.3d at 420-21 (emphasis added).[6/]

This Court is bound by the Second Circuit's St. Cyr I decision. Since Lawrence was convicted in 1995 after trial, rather than upon a guilty plea, IIRIRA's elimination of § 212(c) discretionary relief applies to Lawrence. See also Lara-Ruiz v. INS, 241 F.3d 934, 945 (7th Cir. 2001) (no retroactivity issue where petitioner "fully contested the state criminal charges and did not enter a plea of guilty"); United States v. Herrera-Blanco, 232 F.3d 715, 719 (9th Cir. 2000) (Petitioner "pled not guilty and exercised his right to trial by jury. Thus, he does not come within the exception to the retroactive application of [the AEDPA provision limiting § 212(c) relief] for persons who pled guilty or nolo contendere in reliance upon INA § 212(c)."); Bensusan v. Reno, No. 98-7342, 225 F.3d 653 (table), 2000 WL 1058978 at * 1

[6/] Accord, Domond v. United States INS, 244 F.3d 81, 84-86 (2d Cir. 2001) (AEDPA elimination of § 212(c) relief can be applied where crime occurred before AEDPA's effective date but conviction upon guilty plea occurred after effective date.)

(4th Cir. Aug. 2, 2000) (elimination of § 212(c) relief can be applied where petitioner "pleaded not guilty to his charges and was convicted after a finding of guilt by a jury" before enactment of AEDPA).

III. LAWRENCE'S CLAIM THAT HIS MANDATORY DETENTION VIOLATES DUE PROCESS IS MOOT

Because this Court concludes that IIRIRA's elimination of § 212(c) relief can be applied retroactively to Lawrence, thus rendering him subject to immediate removal, the issue of whether the INS's mandatory detention of Lawrence under § 236(c) violates his right to due process is moot, and need not be reached by the Court. See, e.g., Mamedov v. Reno, 00 Civ. 442, 2000 WL 1154329 at * 1 (S.D.N.Y. Aug. 14, 2000) (petition challenging constitutionality of detention under section 236(c) rendered moot when petitioner became subject to immediate removal); see also, e.g., Kourteva v. INS, No. C00-2459, 2001 WL 311242 at * 4 (N.D. Cal. Mar. 27, 2001); Luke v. Reno, No. Civ. A. 01-0061, 2001 WL 641756 at * 3 n.3 (D.N.J. Mar. 26, 2001).

CONCLUSION

For the reasons set forth above, Lawrence's § 2241 habeas petition is denied. The Court's prior stay of removal is lifted effective ten business days after entry of judgment (allowing counsel for Lawrence to seek a further stay of removal from the Second Circuit if his client wishes). Because one could argue that the Second Circuit's statements in St. Cyr I about application of IIRIRA to pre-IIRIRA convictions after trial were dicta, a certificate of appealability is issued limited to the issue of the applicability of IIRIRA's elimination of

§ 212(c) discretionary relief for aliens whose pre-IIRIRA conviction was the result of a trial rather than a guilty plea. See Slack v. McDaniel, 529 U.S. 473, 484, 120 S. Ct. 1595, 1604 (2000)(certificate of appealability should issue where "reasonable jurists could debate whether or, for that matter, agree that the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further"); Lucidore v. New York State Div. of Parole, 209 F.3d 107, 112 (2d Cir.) (certificate of appealability should issue "if the issues involved in a petition are debatable among jurists of reason, could be resolved in a different manner, or are adequate to deserve encouragement to proceed further"), cert. denied, 121 S. Ct. 175 (2000).

SO ORDERED.

DATED: New York, New York
July 20, 2001

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Andrew J. Peck
United States Magistrate Judge

Copies to: Krishna R. Patel, Esq.
Jesse M. Siegel, Esq.