

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

WALTER ROY DURAN : CIVIL ACTION
v. :
IMMIGRATION AND :
NATURALIZATION SERVICE, et al. : NO. 01-4252

MEMORANDUM

ROBERT F. KELLY, J.

SEPTEMBER 28, 2001

Petitioner Walter Roy Duran (“Duran”) is a citizen of El Salvador. He first came to the United States sometime in the 1970's, and thereafter was convicted in Federal Court for alien smuggling (8 U.S.C. § 1326) and assaulting a federal officer (18 U.S.C. § 111). In an Exhibit attached to his petition, there is a recital that Duran “adjusted his status to lawful permanent on February 28, 1995.” See First Exhibit to Petition, p. 2, ¶ 2.

This is Duran’s third petition for habeas corpus. He filed two habeas corpus petitions in the Middle District of Pennsylvania, the first of which (M.D. Pa. No. 99cv0948) was dismissed as moot. The second petition, challenging his detention, was filed after his removal order became final, and that petition was transferred to this Court on April 27, 2001. This Court denied the second petition on August 7, 2001 with the following statement:

“In this case, the Court finds that the Petitioner Duran has affirmatively frustrated the ability of the INS to execute its removal order, by telling his consulate that he does not

wish to return and that there is an appeal pending. He then petitioned this Court to direct his release, alleging that his removal is impossible. Because Duran's conduct has caused the El Salvador consulate to delay issuing the necessary travel documents, he is the cause of his own detention. He can gain his release simply by cooperating and departing the United States. His detention, therefore, is not excessive."

On August 21, 2001, Duran filed his third habeas corpus petition in which he argues that the Immigration laws are impermissibly retroactive and thus violate due process. There is no reason why this argument could not have been included in his second petition. Duran knew that he was being deported for convictions that took place prior to the 1996 Amendments to the Immigration and Naturalization Act ("INA"). The retroactivity argument is a logical corollary to Duran's argument against post-order detention, and could have been included in that petition. The Supreme Court has made it clear that the abuse-of-the-writ doctrine, where a Court refuses to entertain a second or subsequent petition because it raises new claims which should have been raised previously, applies to § 2241 petitions. See McCleskey v. Zant, 499 U.S. 467, 483-84 (1991).

A second or subsequent § 2241 petition which raises a new claim, which could have been raised in the earlier petition, should be dismissed as abusive under § 2244(a), absent a showing of either cause and prejudice or a fundamental miscarriage of justice. George v. Perrill, 62 F.3d 333, 334-35 (10th Cir. 1995).

The present petition is another attempt by Duran to extend his stay in this

country through piecemeal litigation. This is precisely the piecemeal litigation proscribed by the abuse-of-the-writ doctrine.

Even if it was not proscribed by the abuse-of-the-writ doctrine, Duran's petition has no merit. He contends that both the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA") are unconstitutional, because they are impermissibly retroactive. INS v. St. Cyr, 121 S.Ct. 2271 (2001).

St. Cyr involved aliens who pled guilty to criminal offenses prior to 1996. The aliens were lawful permanent residents when they were convicted. Before the effective date of the AEDPA and the IIRIRA, § 212 (c) of the Immigration and Naturalization Act ("INA") was interpreted to give the Attorney General broad discretion to waive deportation of resident aliens. The large class of aliens eligible for § 212 (c) relief was reduced in 1996 by § 401 of AEDPA, which identified a broad set of offenses for which convictions would preclude such relief, and by IIRIRA, which repealed § 212 (c) and replaced it with a new section excluding from the class anyone "convicted of an aggravated felony." 8 U.S.C. 1229 (b)(a)(3). St. Cyr was a lawful, permanent, United States resident when he pled guilty to a criminal charge that made him deportable. He would have been eligible for a waiver of deportation under the Immigration Law in effect when he was convicted, but his removal proceedings were commenced after AEDPA's and IIRIRA's effective dates. The case held that the new restrictions did not apply to

removal proceedings brought against an alien who pled guilty to a deportable crime before their enactment.

Duran would not qualify for a § 212 (c) waiver even if it were available at the present time. The § 212 (c) was available only to those with seven years of “unrelinquished domicile.” In this Circuit, an alien who entered illegally, such as Duran, cannot establish the requisite intent to remain lawfully in the United States for purposes of a § 212 (c) waiver. Morrel v. INS, 90 F.3d 833, 838 (3rd Cir. 1996), rev’d on other grounds, 144 F.3d 248 (1998).

Duran was admitted for lawful permanent residence in 1995. Because Duran was never eligible for the waiver at any time prior to its repeal, he had no expectation of a waiver, and St. Cyr has no application to him. I, therefore, find that the petition should be dismissed for abuse-of-the-writ and for failure to state a claim.

I, therefore, enter the following Order.

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O R D E R

AND NOW, this day of , 2001, upon consideration of
Petitioner's Motion for Habeas Corpus and the Government's Response thereto, it is
hereby

ORDERED that the Motion is DENIED. This case is CLOSED.

BY THE COURT:

ROBERT F. KELLY, J.