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

DEAN MCKENZIE	:	CIVIL ACTION
	:	
	:	
v.	:	
	:	
	:	
INS	:	NO. 04-1001

MEMORANDUM

Padova, J. **February 23, 2005**

Presently before the Court is Dean McKenzie's *pro se* Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 and other relief. On December 30, 2004, Chief Magistrate Judge M. Faith Angell filed a Report and Recommendation recommending that the Court treat the Petition as a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2241 and deny the Petition in its entirety. On January 20, 2005, Petitioner filed timely Objections to the Report and Recommendation. For the reasons that follow, the Court overrules Petitioner's Objections, adopts the Report and Recommendation as amplified by this Memorandum, and denies the Petition in its entirety.

I. BACKGROUND

On or about October 30, 1980, Petitioner Dean McKenzie, a native and citizen of Jamaica, legally entered the United States as an immigrant. (Gov't Ex. 4.) On or about October 1, 1991, after a jury trial in the Philadelphia Court of Common Pleas, Petitioner was convicted of three counts of aggravated assault and one count of possession of an instrument of crime. (Gov't Ex. 5.) On or

about February 11, 1992, Petitioner was sentenced to serve a total prison term of eleven to twenty-five years. (Id.) Petitioner was released on parole from state custody in or about September 2001. (Gov't Resp. at 3.)

On or about September 19, 2003, the Executive Office of Immigration Review served Petitioner with a Notice to Appear in Removal Proceedings ("NTA"). (Gov't Ex. 6.) The NTA charged Petitioner with being subject to removal pursuant to §§ 237(a)(2)(A)(iii) and 237(a)(2)(C) of the Immigration and Nationality Act ("INA"), 8 U.S.C. §§ 1227(a)(2)(A)(iii), 1227(a)(2)(C).[1] (Id.) Petitioner was thereafter taken into custody by federal immigration agents and detained at the York County Prison in York, Pennsylvania. A hearing on the removal charges was held before an Immigration Judge on December 11, 2003. (Gov't Ex. 7.) The Immigration Judge denied Petitioner's applications for asylum, withholding of removal, and Convention Against Torture relief and ordered him to be removed from the United States to Jamaica. (Id.) At the conclusion of the removal hearing, Petitioner waived his right to appeal the decision of the Immigration Judge. (Id.)

[1] Section 237(a)(2)(A)(iii) of the INA provides that "[a]ny alien who is convicted of an aggravated felony at any time after admission is deportable." 8 U.S.C. § 1227(a)(2)(A)(iii). Section 237(a)(2)(C) of the INA provides that "[a]ny alien who at any time after admission is convicted of . . . possessing . . . any weapon . . . in violation of any law is deportable." 8 U.S.C. § 1227(a)(2)(C).

On December 10, 2003, Petitioner filed a *pro se* Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2241 in this Court. The matter was docketed as Civil Action No. 03-6638. This Court appointed counsel to represent Petitioner in Civil Action No. 03-6638, and counsel thereafter filed an Amended Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 on Petitioner's behalf. In the Amended Petition, which names the Commonwealth of Pennsylvania, Pennsylvania Acting Attorney General Gerald Pappert, and Philadelphia District Attorney Lynn M. Abraham as Respondents, Petitioner challenges the validity of his 1991 state conviction under Brady v. Maryland, 373 U.S. 83 (1963). By order dated March 3, 2004, this Court referred Civil Action No. 03-6638 to Chief Magistrate Judge M. Faith Angell for a Report and Recommendation. In her Report and Recommendation, which was filed on October 27, 2004, the Magistrate Judge observed that Petitioner had previously (and unsuccessfully) sought federal habeas relief from his 1991 state conviction. The Magistrate Judge recommended that Civil Action No. 03-6638 be transferred to the United States Court of Appeals for the Third Circuit ("Third Circuit") so that Petitioner could move the Third Circuit for an order authorizing this Court to consider Petitioner's "second" habeas petition. See 28 U.S.C. § 2244(b)(3)(A) ("Before a second or successive application permitted by this section is filed in the district court, the applicant shall move the appropriate court of appeals for an order authorizing the

district court to consider the application."). By order dated December 1, 2004, this Court adopted the Report and Recommendation and transferred Civil Action No. 03-6638 to the Third Circuit. On January 24, 2005, the Third Circuit denied Petitioner's application to file a second habeas petition alleging a Brady claim.

On March 8, 2004, while Civil Action No. 03-6638 was still pending before the Magistrate Judge, Petitioner commenced the instant action by filing a *pro se* Petition for Writ of Habeas Corpus against the United States Immigration and Customs Enforcement ("ICE").[2] On March 18, 2004, Petitioner resubmitted the instant Petition on a current § 2254 form provided by the Clerk of Court. In the instant Petition, Petitioner alleges that he is unlawfully being detained by ICE at the York County Prison. Petitioner raises the following grounds for relief in his Petition:

(1) The prosecution failed to disclose exculpatory evidence in connection with Petitioner's 1991 trial in the Philadelphia Court of Common Pleas, in violation of Brady v. Maryland, 373 U.S. 83 (1963);

(2) ICE has deprived Petitioner of necessary medical

[2] The Court notes that, effective March 1, 2003, the Immigration and Naturalization Service ceased to exist as an independent agency within the Department of Justice, and its functions were transferred to the newly formed United States Department of Homeland Security ("DHS"). ICE, a subordinate agency within DHS, assumed the enforcement functions of INS. Accordingly, although INS is the named Respondent in the caption, the Court refers to Respondent as ICE.

treatment for an injury to his eye, in violation of the Eighth Amendment to the United States Constitution;

(3) In taking Petitioner into custody, ICE agents negligently left his niece unattended in his home; and

(4) Petitioner's continued detention by ICE violates his constitutional rights under Zadvydas v. Davis, 533 U.S. 678 (2001).

Petitioner seeks immediate release from ICE custody, as well as $160,000,000 in money damages for ICE's alleged failure to provide necessary medical treatment for his left eye injury. By letter to the Court dated June 13, 2004, Petitioner also seeks a declaration that he is a derivative citizen of the United States. (Gov't Ex. 3.)

On March 23, 2004, the Court referred this case to Chief Magistrate Judge Angell for a Report and Recommendation. On December 30, 2004, the Magistrate Judge filed a Report and Recommendation recommending that the Court construe the instant Petition as a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2241 and deny the Petition without an evidentiary hearing. More specifically, the Magistrate Judge recommended that the Court deny Petitioner's Zadvydas claim on the merits and dismiss Petitioner's derivative citizenship claim for lack of jurisdiction. The Magistrate Judge did not explicitly address Petitioner's remaining claims in her Report and Recommendation. On January 20,

2005, Petitioner filed timely Objections to the Report and Recommendation.[3]

II. LEGAL STANDARD

Where a habeas petition has been referred to a magistrate judge for a Report and Recommendation, the district court "shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made . . . [The Court] may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate." 28 U.S.C. § 636(b).

Except as otherwise limited by statute, federal district courts have jurisdiction under 28 U.S.C. § 2241 to review "questions of constitutional and statutory law" raised in habeas

[3] To the extent that Petitioner objects to the Magistrate Judge's failure to analyze his remaining claims in her Report and Recommendation, the Court summarily overrules his objections. Petitioner's Brady claim, which challenges the validity of the state convictions that provided the basis for the Immigration Judge's removal order, cannot be pursued in a habeas proceeding against ICE. See Drakes v. I.N.S., 330 F.3d 600 (3d Cir. 2003). In any event, the Third Circuit has denied Petitioner's application to file a second habeas petition alleging an identical Brady claim under 28 U.S.C. § 2254. Furthermore, Petitioner's Eighth Amendment claim against ICE for deprivation of medical care, which appears to be brought pursuant to the Federal Tort Claims Act ("FTCA"), is not actionable under the FTCA. See F.D.I.C. v. Meyer, 510 U.S. 471, 478 (1994) (holding that constitutional tort claims are not cognizable under FTCA). Finally, Petitioner's claim that he should be released from ICE custody because ICE agents negligently left his niece unattended at his home is legally frivolous. Accordingly, the Court's analysis is hereinafter limited to Petitioner's unreasonable detention and derivative citizenship claims against ICE, which the Court construes as claims for habeas relief pursuant to 28 U.S.C. § 2241.

petitions filed by aliens subject to removal. Bahktriger v. Elwood, 360 F.3d 414, 424 (3d Cir. 2004).

III. DISCUSSION

A. Immediate-Custodian and Territorial-Jurisdiction Rules

As an initial matter, the Court notes that in "core habeas petitions," i.e., petitions challenging present physical confinement, "the proper respondent is the warden of the facility where the prisoner is being held" (immediate-custodian rule) and "jurisdiction lies in only one district: the district of confinement" (territorial-jurisdiction rule). Rumsfeld v. Padilla, --- U.S. ---, 124 S.Ct. 2711, 2718, 2722 (2004);[4] see also Deng v. Garcia, Civ. A. No. 04-2032, 2005 WL 94643, at *2-*3 (E.D.N.Y. Jan. 15, 2005) (holding that § 2241 petition seeking release from continued detention by immigration authorities is a "core habeas petition" subject to immediate-custodian and territorial-jurisdiction rules). Because Petitioner is currently being detained in the York County Prison in York, Pennsylvania, the proper respondent in this case is the warden of the York County

[4] In Padilla, the Supreme Court noted that Congress has created two "explicit exceptions" to the territorial-jurisdiction rule in habeas cases. First, 28 U.S.C. § 2241(d) provides for concurrent jurisdiction over petitions filed by state prisoners in the district of confinement and the district of conviction. 28 U.S.C. § 2241(d). Second, 28 U.S.C. § 2255 authorizes federal prisoners to collaterally attack a federal sentence in the court that imposed the challenged sentence, even where the prisoner is confined in another district. 28 U.S.C. § 2255. Neither exception is applicable in the present case.

Prison. The Court further notes that the York County Prison is located in the Middle District of Pennsylvania. See Yang v. Reno, 925 F. Supp. 320, 325 (M.D. Pa. 1996). However, "[b]ecause the immediate-custodian and territorial-jurisdiction rules are like personal jurisdiction or venue rules, objections to the filing of petitions based on those grounds can be waived by the Government." Padilla, 124 S.Ct. at 2728 (Kennedy, J., concurring); accord Moore v. Olson, 368 F.3d 757, 759-60 (7th Cir. 2004). The Government has not objected to the instant Petition on the basis of the immediate-custodian and territorial-jurisdiction rules. The Court concludes, therefore, that the Government has waived any such objections.

B. Zadvydas Claim

Petitioner argues that his continued detention by ICE officials violates his constitutional rights under the Supreme Court's decision in Zadvydas v. Davis, 533 U.S. 678 (2001). In response, the Government argues, and the Magistrate Judge agreed, that ICE's continued detention of Petitioner fully comports with the due process protections afforded to removable aliens under Zadvydas.

Under the current immigration statutory scheme, the Attorney General has ninety (90) days after a removal order becomes administratively final to remove the alien from the United States. 8 U.S.C. § 1231(a)(1)(B)(i). Once the 90-day removal period has expired, the Attorney General has discretion to continue to detain

removable aliens pursuant to 8 U.S.C. § 1231(a)(6). In Zadvydas, the Supreme Court held that § 1231(a)(6) does not authorize the Attorney General to detain a removable alien indefinitely beyond the 90-day removal period. 533 U.S. at 699. The Court held that continued detention of a removable alien amounts to a due process violation where "the detention in question exceeds a period reasonably necessary to secure removal." Id. The Court held that a 6-month period of detention is presumptively reasonable. Id. at 701. In order to prove that detention beyond the six-month period is unreasonable, the alien must provide "good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future." Id. This burden is generally satisfied where: (1) no country will accept the detainee; (2) the detainee's country of origin refuses to issue travel documents for the detainee; (3) there is no removal agreement between the country of origin and the United States; or (4) there is no definitive answer from the country of origin after several months as to whether it will issue travel documents for the detainee. Nma v. Ridge, 286 F. Supp. 2d 469, 475 (E.D. Pa. 2003). If the alien adequately demonstrates that there is no significant likelihood of removal in the reasonably foreseeable future, then "the Government must respond with evidence sufficient to rebut that showing." Zadvydas, 533 U.S. at 701.

In this case, Petitioner's removal order became

administratively final on December 11, 2003, the date on which Petitioner waived his right to appeal the Immigration Judge's removal order. See 8 C.F.R. § 1003.39 ("Except when certified by the Board, the decision of the Immigration Judge becomes final upon waiver of appeal or upon expiration of the time to appeal if no appeal is taken[,] whichever occurs first."). On the same date, this Court entered an order in Civil Action No. 03-6638 enjoining the Government from removing Petitioner during the pendency of that action. By order dated March 9, 2004, this Court enjoined the Government from removing Petitioner during the pendency of the instant action. Both orders presently remain in effect. Thus, although Petitioner has been detained by ICE for over one year since his removal order became administratively final, ICE has been enjoined from removing Petitioner during his entire period of detention as he pursues relief in this Court. See Mandarino v. Ashcroft, 318 F. Supp. 2d 13, 18 (D. Conn. 2003) (rejecting Zadvydas claim where "much of the delay [in removing the petitioner] . . . is attributable to legal proceedings commenced by petitioner in an effort to prevent his removal, [and] there is no evidence that his protracted detention is attributable to the actions of the government."). Moreover, even assuming that the removal injunctions entered by this Court do not toll the running of the presumptively reasonable 6-month detention period, Petitioner has failed to provide any reason to believe that there

is no significant likelihood of his removal in the reasonably foreseeable future. To the contrary, it appears that the Government intends to promptly remove Petitioner once the instant litigation is resolved. The Government has represented to the Court that the United States continues to have a repatriation agreement with Jamaica, and that, upon entry of an order by this Court vacating the removal injunctions, the Government will immediately apply for travel documents for Petitioner. As the Court concludes that Petitioner's continued detention by ICE fully comports with the due process protections afforded to removable aliens under Zadvydas, Petitioner's objections to the Magistrate Judge's Report and Recommendation are overruled in this respect.

C. Derivative Citizenship

Petitioner seeks a declaration that he has derived United States citizenship from his stepfather. In response, the Government argues, and the Magistrate Judge agreed, that this Court lacks jurisdiction over Petitioner's derivative citizenship claim.

There are two avenues by which an alien may seek judicial review of a derivative citizenship claim. First, "where an individual is subject to removal proceedings, and a claim of derivative citizenship had been denied [in the removal proceedings], that individual may seek judicial review of the claim only before the appropriate court of appeals, not a district court." Henriquez v. Ashcroft, 269 F. Supp. 2d 106, 108 (E.D.N.Y.

2003) (citing 8 U.S.C. § 1252(b)(5)); see also Rivera-Martinez v. Ashcroft, 389 F.3d 207, 208-10 (1st Cir. 2004) (holding that alien cannot pursue derivative citizenship claim in § 2241 habeas proceedings because § 1252(b) establishes specific statutory review process for such claims). Second, an alien may file an Application for Certificate of Citizenship ("Form N-600") with the United States Customs and Immigration Services ("CIS"). 8 C.F.R. § 341.1. If the application is denied, the applicant may appeal the decision to the Administrative Appeals Unit ("AAU"). 8 C.F.R. § 322.5(b). In certain circumstances, an applicant whose appeal is denied by the AAU is entitled to bring an action in federal district court seeking a declaratory judgment of citizenship. See 8 U.S.C. § 1503(a) (permitting "persons within the United States" to seek declaratory judgment of citizenship in federal district court unless "such person's status as a national of the United States (1) arose by reason of, or in connection with, any removal proceeding . . . or (2) is in issue in any such removal proceeding."). "Under either scenario - raising the citizenship claim in removal proceedings or filing an N–600 application with the [CIS] for a declaration of citizenship – [§ 1252(d)(1) of the INA] requires that all available administrative remedies be exhausted before seeking judicial review." Ewers v. Immigration & Naturalization Serv., Civ. A. No. 03-104, 2003 WL 2002763, at *2 (D. Conn. Feb. 28, 2003). The exhaustion requirement of § 1252(d)(1) is

jurisdictional. Duvall v. Elwood, 336 F.3d 228, 234 (3d Cir. 2003).

In this case, Petitioner did not raise his derivative citizenship claim in his removal proceedings. Even if Petitioner had properly raised his derivative citizenship claim in his removal proceedings and fully exhausted his administrative remedies in this respect, the appropriate forum for seeking judicial review would be the Third Circuit, not this Court. Moreover, Petitioner has not yet sought a certificate of citizenship by filing a Form N–600 application with the CIS.[5] As the Court lacks jurisdiction over his derivative citizenship claim, Petitioner's objections to the Magistrate Judge's Report and Recommendation are overruled in this respect.

IV. CONCLUSION

For the foregoing reasons, the Court overrules Petitioner's objections, adopts the Report and Recommendation of the Magistrate

[5] The Court notes that Petitioner's removal from the United States will not preclude him from pursuing a Form N–600 application. See Garcia-Izquierdo v. Gartner, Civ. A. No. 04-7377, 2004 WL 2093515, at *2 n.1 (S.D.N.Y. Sept. 17, 2004) ("A person residing abroad may apply for a declaration of citizenship by submitting an N–600, and a final removal order has no bearing on an alien's ability to apply for a certificate of citizenship.") (internal citations omitted). After exhausting all available administrative remedies with respect to the Form N-600 application, "any person who is not within the United States . . . may make application to a diplomatic or consular officer of the United States in the foreign country in which he is residing for a certificate of identity of the purpose of traveling to a port of entry in the United States and applying for admission." 8 U.S.C. § 1503(b).

Judge as amplified by this Memorandum, and denies the instant Petition in its entirety.

An appropriate Order follows.

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

DEAN MCKENZIE	:	CIVIL ACTION
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v.	:	
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INS	:	NO. 04-1001

O R D E R

AND NOW, this 23rd day of February, 2005, upon careful and independent consideration of Petitioner Dean McKenzie's Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2241[1] and other relief (Doc. No. 3), all attendant and responsive briefing, and after the review of the Report and Recommendation of Chief United States Magistrate Judge M. Faith Angell, and in consideration of Petitioner's Objections to the Magistrate Judge's Report and Recommendation (Doc. No. 16), and the Record before the Court, **IT IS HEREBY ORDERED** that:

1. Petitioner's Objections to the Report and Recommendation (Doc. No. 16) are **OVERRULED**;
2. The Report and Recommendation is **APPROVED** and **ADOPTED** as amplified by the accompanying Memorandum;
3. The Petition for Writ of Habeas Corpus pursuant to 28

[1] The Petition is styled as a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254. As discussed in the accompanying Memorandum, however, to the extent that Petitioner seeks habeas relief in his Petition, the Court construes the Petition as a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2241.

U.S.C. § 2241 and other relief is **DENIED**;[2]

4. The Court's Order enjoining the United States from removing Petitioner from the United States (Doc. No. 2) is hereby **VACATED**; and

5. The Clerk of Court shall **CLOSE** this case for statistical purposes.

BY THE COURT:

_____
John R. Padova, J.

[2] The Court need not determine whether there is any basis for issuance of a certificate of appealability pursuant to 28 U.S.C. § 2253(c). See United States v. Cepero, 224 F.3d 256, 265-66 (3d Cir. 2000) ("[F]ederal prisoner appeals from § 2241 proceedings . . . are not governed by 2253's certificate of appealability requirement.").