

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

USAMA SADIK ABDEL-WHAB,	:	CIVIL ACTIONS
	:	
Petitioner,	:	04-5386
	:	
v.	:	05-59
	:	
TOM RIDGE <u>et al</u> ,	:	
	:	
Respondents.	:	
	:	

MEMORANDUM AND ORDER

JOYNER, J.

March 3, 2005

Presently before this Court are two Petitions for Habeas Corpus filed pursuant to 28 U.S.C. § 2241 by Petitioner Usama Sadik Abdel-Whab. In the first, docketed at Civ. No. 04-5386, Petitioner seeks release from detention, adjustment of resident status, and a waiver of inadmissibility under the Immigration and Nationality Act. In the second, docketed at Civ. No. 05-59, Petitioner moves to vacate his convictions for passport fraud under 18 U.S.C. § 1542 and 18 U.S.C. § 1001. For the reasons which follow, both petitions will be dismissed.¹

Facts and Procedural History

¹ In the action at Civ. No. 04-5386, Petitioner has also filed an Amended Motion for Summary Judgment, a Motion for Expedited Decision, a Motion for Additional Relief, a Request for Release or Bail, and a Motion to Submit Exhibits (which is reflected on the docket for Civ. No. 05-59 as well). Counsel for Petitioner has filed a Renewed Motion to Withdraw as Counsel. Because we find that we must dismiss the underlying Petitions For Writ of Habeas Corpus, these additional motions will be dismissed as moot.

Petitioner, a native and citizen of Egypt, entered the United States on January 12, 2000 as a non-immigrant student to attend Saginaw Valley State University in Michigan. Because Petitioner failed to attend the university, removal proceedings were commenced against him on April 25, 2002, pursuant to § 237(a)(1)(C)(i) of the Immigration and Nationality Act, codified at 8 U.S.C. § 1227(a)(1)(C).

On September 5, 2002, Petitioner was convicted of making a false statement in an application for a U.S. passport in violation of 18 U.S.C. § 1542; making and using a forged baptismal certificate in support of his passport application in violation of 18 U.S.C. § 1001; and making a false statement to a federal agent in violation of 18 U.S.C. § 1001. See United States v. Whab, 355 F.3d 155, 157 (2nd Cir. 2004). Judgment was entered against him in the United States District Court for the Southern District of New York, and Petitioner was sentenced to six months' imprisonment and three years' supervised release. See Whab, 355 F.3d at 157. Petitioner was released on bond by order of an Immigration Judge on November 14, 2002, but was subsequently re-arrested and convicted for providing a false social security number on a commercial driver's license application. Upon appeal, Petitioner's convictions for passport fraud were affirmed by the United States Court of Appeals for the

Second Circuit on January 20, 2004.² Wahab, 355 F.3d at 164.

In lieu of removal, Petitioner applied for voluntary departure and adjustment of resident status. However, on January 30, 2004, an Immigration Judge suspended these applications and ordered Petitioner removed for non-compliance with his student visa and for making a false claim of U.S. citizenship. See 8 U.S.C. § 1227(a)(1)(C); 8 U.S.C. § 1227 (a)(3)(D). The Immigration Judge found that, as a result of the fraud convictions, Petitioner could not establish the good moral character required for voluntary departure, and further found that there are no waivers available for a false claim to citizenship. On June 18, 2004, Petitioner's order of removal became final when the Board of Immigration Appeals affirmed the Immigration Judge's decision.

Before Petitioner's order of removal became final, Petitioner moved once again to challenge his sentence and conviction before the United States District Court for the Southern District of New York. On April 9, 2004, Petitioner filed a motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255. This motion was denied in its entirety on June 28, 2004, and District Court Judge Colleen McMahon further certified that any appeal from the order denying

² The United States Supreme Court denied certiorari on April 19, 2004. Wahab v. United States, 124 S. Ct. 2055 (2004).

Petitioner's § 2255 motion would not be taken in good faith. See Abdel Whab v. United States of America, Civ. No. 04-2720 (S.D. N.Y. June 28, 2004 and Aug. 6, 2004) (J. McMahon). In an order dated September 13, 2004 denying a certificate of appealability, Judge McMahon wrote, "Lest there be any confusion, the Court hereby states that Whab's petition does not establish that he was denied a constitutional right; therefore, there is no question of substance for appellate review." Abdel Whab v. United States of America, Civ. No. 04-2720, Order (S.D. N.Y. Sept. 13, 2004) (J. McMahon).

On April 9, 2004, the same date on which his § 2255 motion was filed, Petitioner also filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2241 before the United States District Court for the Middle District of Pennsylvania. Petitioner filed a second § 2241 habeas petition before the same court on July 12, 2004, and the two were subsequently consolidated into a single amended petition. The consolidated petition and supplemental filings not only challenged Petitioner's detention and the decisions of the Immigration Judge and Board of Immigration Appeals, but also attacked Petitioner's underlying convictions on the grounds of trial court error.

Upon reviewing the consolidated petition, Magistrate Judge Malachy E. Mannion recommended that it be denied and that the order staying Petitioner's deportation be lifted. Abdel Whab v.

Ridge et al, Civ. No. 04-787, Report and Recommendation (M.D. Pa. Oct. 22, 2002) (M.J. Mannion). Among other concerns, Magistrate Judge Mannion noted that challenges to a federal conviction, such as the ones raised by Petitioner's § 2241 petition, are properly brought by way of a motion pursuant to 28 U.S.C. § 2255. Abdel Whab, Report and Recommendation at 9, n. 4. The report and recommendation was adopted in full by the United States District Court for the Middle District of Pennsylvania on December 22, 2004. Abdel Whab v. Ridge et al, Civ. No. 04-787, Memorandum and Order (M.D. Pa. Dec. 22, 2004) (J. McClure). In its Memorandum and Order, the court reviewed the Immigration Judge's finding that Petitioner made a false claim of citizenship subjecting him to deportation under 8 U.S.C. § 1227(a)(3)(D). District Court Judge James F. McClure, Jr. held that the Immigration Judge did not err in using the record underlying Petitioner's convictions under 18 U.S.C. § 1001 and 18 U.S.C. § 1542 to find that Petitioner made a false claim of citizenship. Abdel Whab, Memorandum and Order at 11-16. Although Petitioner was never convicted of 18 U.S.C. § 911 (false personation of citizenship), Judge McClure found that the conduct which resulted in Petitioner's convictions for passport fraud has been treated by the Third Circuit as a false claim of United States citizenship for the purposes of criminal conviction under 18 U.S.C. § 911 and subsequent deportation. Id.

Eight days after the court denied his § 2241 petition for habeas corpus, Petitioner moved to voluntarily dismiss the petition on the grounds that he had filed a "more accurate petition in the Eastern District of Pennsylvania, which he is not attacking his convictions as the Magistrate judge alleged in his report and recommendation." As the underlying petition had already been denied, this motion was denied as moot. Abdel Whab v. Ridge et al, Civ. No. 04-787, Order (M.D. Pa. Jan. 3, 2005) (J. McClure).

On November 18, 2004, Petitioner filed a 28 U.S.C. § 2241 Petition for Habeas Corpus before this Court, seeking release from detention, adjustment of status, and grant of a § 212(i) waiver of inadmissibility under the Immigration and Nationality Act. The petition, which sets forth substantially the same arguments as were presented in the earlier petition before the Middle District of Pennsylvania, is docketed at Civ. No. 04-5386. Presently before this Court is the government's Motion to Dismiss, as well as Petitioner's Amended Motion for Summary Judgment, Motion for Expedited Decision, Motion for Additional Relief, Request for Release or Bail, and Motion to Submit Exhibits.

Petitioner has also filed a second 28 U.S.C. § 2241 Petition for Habeas Corpus before this Court, docketed at Civ. No. 05-59. The new petition explicitly attacks Petitioner's underlying

convictions for passport fraud, raising allegations of trial court error, and conspiracy and bias on the part of the trial judge.

Discussion

I. The Abuse of Writ Doctrine

Principles of federal comity and judicial economy permit a court to decline jurisdiction over an action when a complaint involving the same parties and issues has already been filed in another district. See, e.g., Peregrine Corp. v. Peregrine Indus., Inc., 769 F. Supp. 169, 171 (E.D. Pa. 1991). In the context of petitions for habeas corpus, these concerns are reflected in the "abuse of writ" doctrine, which prohibits petitioners from filing subsequent petitions for habeas corpus where an earlier petition has already been denied. See Christy v. Horn, 115 F.3d 201, 208 (3d Cir. 1997) (citing McCleskey v. Zant, 499 U.S. 467, 491-92 (1991)); Schlup v. Delo, 513 U.S. 298, 319 (1995).

The Supreme Court addressed the "abuse of writ" problem presented by successive habeas filings in 1991 in McCleskey v. Zant. In McClesky, the Supreme Court established that, where a petitioner has filed successive habeas petitions in more than one district court, the dismissal of the first habeas petition is of "vital relevance" to later court determinations of whether to

consider similar petitions, and may be given "controlling weight." McClesky, 499 U.S. at 482. Given the restrictions set forth in 28 U. S. C. § 2244(b) at the time, a petitioner was permitted to file a second or successive habeas petition only if he showed good cause for failing to raise the claims earlier, or if he showed that a fundamental miscarriage of justice would result from failure to entertain the claim. McCleskey, 499 U.S. at 494-95. In 1996, however, 28 U.S.C. § 2244 was amended by the Anti-Terrorism and Effective Death Penalty Act (AEDPA) to tighten the gatekeeping requirements for successive habeas petitions. Under the AEDPA amendments, a petitioner, prior to filing a second or successive habeas corpus petition, is first required to move in the appropriate court of appeals for an order authorizing the district court to consider his application. 28 U.S.C. § 2244(b)(3)(a).

The Third Circuit has held that the stricter AEDPA gatekeeping mechanism set forth in 28 U.S.C. § 2244(b) applies only to habeas petitions filed pursuant to § 2254 and § 2255, but not those filed pursuant to 28 U.S.C. § 2241, such as petitions challenging orders of deportation. Perez Zayas v. INS, 311 F.3d 247, 255 (3rd Cir. 2002). A second or successive § 2241 habeas petition may, however, be dismissed if its filing constitutes an abuse of writ as defined in McClesky, as long as such as resolution is "in harmony" with AEDPA. Perez Zayas v. INS, 311

F.3d at 257.

II. Petitioner's § 2241 Petitions for Writ of Habeas Corpus

Prior to filing the two § 2241 petitions presently before this Court, Petitioner filed a § 2255 petition before United States District Court for the Southern District of New York and a § 2241 petition before United States District Court for the Middle District of Pennsylvania. Both prior petitions were denied.

The first § 2241 petition before this Court, docketed at Civ. No. 04-5386, is nearly identical, both substantively and in form, to the consolidated § 2241 petition which was denied on the merits by the United States District Court for the Middle District of Pennsylvania on December 22, 2004. Because the first petition raises no new claims beyond those which have already been considered and dismissed by the Middle District of Pennsylvania, we will give controlling weight to the judgment of that court and dismiss the petition as an abuse of writ. See McClesky, 499 U.S. at 482. As Plaintiff has already exhausted these claims before another district court, our dismissal is both consistent with McClesky and with the AEDPA. See Perez Zayas v. Ins, 311 F.3d at 257.

Petitioner's second § 2241 petition, docketed at Civ. No. 05-59, challenges Petitioner's convictions of passport fraud on the grounds of trial court error and bias. Many of these

allegations were raised, albeit in a more limited form, in Petitioner's supplements to his § 2241 petition before Middle District of Pennsylvania. As correctly noted by Magistrate Judge Mannion, challenges such as these to a federal conviction must be brought by way of a motion pursuant to 28 U.S.C. § 2255, not pursuant to § 2241. Thus, the second § 2241 petition before this court must likewise be dismissed.

On a final note, we recognize that Petitioner has already once sought and been denied § 2255 relief before United States District Court for the Southern District of New York. If Petitioner wishes to bring a second § 2255 challenge to his conviction or sentence, he will be bound by the strict gatekeeping requirements of the AEDPA, which require that he first move before the appropriate court of appeals for an order of authorization. 28 U.S.C. § 2244(b)(3)(a).

Conclusion

In summary, Petitioner has fully exhausted his claims of error by the Immigration Judge and Board of Immigration Appeals before the United States District Court for the Middle District of Pennsylvania. This Court must dismiss as an abuse of writ the § 2241 petition at Civ. No. 04-5386 because it raises no new claims in support of Petitioner's request for release from detention. Furthermore, Petitioner's challenges to his

underlying conviction for passport fraud, addressed in the § 2241 petition at Civ. No. 05-59, may be raised only by a second § 2255 petition which has been authorized by the appropriate court of appeals pursuant to the requirements set forth at 28 U.S.C. § 2244. As a § 2241 petition is not the appropriate method for challenging a federal conviction on the basis of trial court error or bias, Petitioner's § 2241 petition at Civ. No. 05-59 must likewise be dismissed.

An appropriate Order follows.

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

USAMA SADIK ABDEL-WHAB,	:	CIVIL ACTIONS
	:	
Petitioner,	:	04-5386
	:	
v.	:	05-59
	:	
TOM RIDGE, <u>et al</u> ,	:	
	:	
Respondents.	:	
	:	

ORDER

AND NOW, this 3rd day of March, 2005, upon consideration of Petitioner Usama Sadik Abdel-Whab's Petitions for Writ of Habeas Corpus (Doc. No. 1 at Civ. No. 04-5386 and Civ. No. 05-59), Respondents' Motion to Dismiss (Doc. No. 5 at Civ. No. 04-5386), and all responses thereto, it is hereby ORDERED as follows:

(1) Respondents' Motion to Dismiss is GRANTED, and the Petitions for Writ of Habeas Corpus are hereby DISMISSED;

(2) Petitioner's Motion for Expedited Decision (Doc. No. 7 at Civ. No. 04-5386), Motion for Additional Relief (Doc. No. 14 at Civ. No. 04-5386), Amended Motion for Summary Judgment (Doc. No. 116 at Civ. No. 04-5386), Motion to Submit Exhibits (Doc. No. 24 at Civ. No. 04-5386; Doc. No. 6 at Civ. No. 05-59), and Counsel's Renewed Motion to Withdraw as Counsel (Doc. No. 22 at Civ. No. 04-5386) are hereby DENIED AS MOOT.

BY THE COURT:

s/J. Curtis Joyner
J. CURTIS JOYNER, J.