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SECOND CIRCUIT REVIEW

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Habeas Petitioner's Challenge to State Ruling: Jurisdiction

In this month's column, we discuss *Ogunwomoju v. United States*,[1] in which the U.S. Court of Appeals for the Second Circuit ruled for the first time that a petitioner being held in immigration detention or under an order of removal as a result of a state court conviction is not "in custody" pursuant to the judgment of a state court for purposes of establishing jurisdiction to consider a habeas challenge to that conviction under 28 U.S.C. §2254.

28 U.S.C. §2254(a) states that:

> The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus [o]n behalf of a *person in custody pursuant to the judgment of a State court* only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States. (Emphasis added).

In its decision, written by Judge Roger J. Miner, and joined by Judge José A. Cabranes,[2] the Second Circuit aligned itself with the Ninth and Tenth circuits[3] in ruling that a person being held in immigration detention is not "in custody" pursuant to the judgment of a state court for the purpose of challenging a state conviction under 28 U.S.C. §2254(a). Finding that the "in custody" language of §2254(a) is jurisdictional, the court affirmed the dismissal of petitioner's habeas petition by then-Chief Judge of the U.S. District Court for the Southern District of New York Michael B. Mukasey, for lack of jurisdiction.[4]

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Background and Procedural History

Adeniyi Ogunwomoju (Mr. Ogunwomoju), a Nigerian citizen, came to this country in 1987 as a lawful permanent resident.[5] Between 1990 and 2000, Mr. Ogunwomoju was convicted of various offenses in New York state and federal courts, including conspiracy to commit credit card fraud, filing fraudulent income tax returns and petit larceny. On March 7, 2000, Mr. Ogunwomoju pleaded guilty to criminal possession of a controlled substance in the seventh degree in the Criminal Court of the City of New York. This last conviction was the subject of Mr. Ogunwomoju's habeas petition.[6]

As a result of Mr. Ogunwomoju's convictions, the U.S. Department of Homeland Security filed multiple charges of removeability against him, pursuant to 8 U.S.C. §1227(a)(2)(A)(i) and (ii). On Sept. 8, 2004, Mr. Ogunwomoju's application for asylum, withholding of removal, and protection under the Convention Against Torture was denied by an immigration judge, who ordered Mr. Ogunwomoju's removal to Nigeria.[7]

On Feb. 14, 2005, the Board of Immigration Appeals (BIA) affirmed the order of removal and remanded the case to the immigration judge to permit Mr. Ogunwomoju to file an application for relief under §212(c) of the Immigration and Naturalization Act, 8 U.S.C. §1182(c). On Oct. 11, 2005, the immigration judge ruled that Mr. Ogunwomoju was ineligible for §212(c) relief because his March 2000 drug conviction occurred after §212(c) was repealed, and because Mr. Ogunwomoju's post-conviction challenge was still pending in the New York State courts. On Feb. 17, 2006, the BIA denied Mr. Ogunwomoju's motion to reopen the case on his original application for protection under the Convention Against Torture.[8]

Mr. Ogunwomoju subsequently appealed the BIA's denial of his motion to reopen the case to the Third Circuit. On Dec. 7, 2006, the Third Circuit denied Mr. Ogunwomoju's petition to review the BIA's denial of his motion to reopen the case. The Third Circuit also dismissed Mr. Ogunwomoju's claims of error with respect to the immigration judge's original denial of his application for asylum, withholding of removal and protection under the Convention Against Torture for lack of jurisdiction.[9]

On March 21, 2006, while being held

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at an immigration detention center in York, Pa., and after exhausting his appeals for post-conviction relief in the New York State courts, Mr. Ogunwomoju filed a habeas petition in the Southern District, challenging his March 7, 2000 drug conviction. Mr. Ogunwomoju made three arguments in support of his petition: (1) that he did not voluntarily plead guilty; (2) that he had ineffective assistance of counsel; and (3) that the evidence used to secure his guilty plea was seized unlawfully in violation of the Fourth Amendment. On June 15, 2006, Chief Judge Mukasey held that the district court lacked jurisdiction to consider Mr. Ogunwomoju's habeas petition because his sentence for the conviction had already been served by the time Mr. Ogunwomoju filed his habeas petition. Therefore, Mr. Ogunwomoju was not "in custody" for purposes of establishing jurisdiction under 28 U.S.C. §2254.[10]

On July 6, 2006, Mr. Ogunwomoju appealed Chief Judge Mukasey's decision to the Second Circuit.

The Second Circuit Decision

The Second Circuit re-examined its decision in *Duamutef v. I.N.S.*, in which it held that "where a petitioner who is currently serving a state sentence seeks to challenge a final order of removal, that order is 'sufficient, by itself, to establish the requisite custody' for habeas purposes."[11] The Second Circuit noted, however, that it had never considered whether a person under a final order of removal or in immigration detention was "in custody" for purposes of challenging the conviction upon which the final order of removal was based. The central issue presented in *Ogunwomoju*, therefore, was one of first impression in the Second Circuit.[12]

To resolve the issue, the Second Circuit looked to U.S. Supreme Court precedent for guidance. In *Carafas v. LaVallee*, the Supreme Court held that the "collateral consequences" of conviction, such as being disqualified from holding certain jobs, from voting and from serving as a juror, survive the expiration of a sentence.[13]

Relying on this decision, Mr. Ogunwomoju argued that his order of removal and subsequent immigration detention, which were "collateral consequences" of his state drug conviction, rendered him "in custody pursuant to the judgment of a State court" for purposes of establishing habeas jurisdiction under 28 U.S.C. §2254.[14]

According to the Second Circuit, however, the Supreme Court's decision in *Maleng v. Cook*, rendered Mr. Ogunwomoju's argument moot. In *Maleng*, the Supreme Court ruled that the holding in *Carafas* was based on the fact that the habeas petitioner "was in physical custody under the challenged conviction at the time the petition was filed," not on the collateral consequences of the conviction. Therefore, where "the sentence imposed for a conviction completely expired, the collateral consequences of that conviction are not themselves sufficient to render an individual 'in custody' for the purposes of a habeas attack upon it."[15]

Construing *Maleng*, the Second Circuit reasoned that although the removal proceedings instituted against Mr. Ogunwomoju and his subsequent detention may have been a "collateral consequence" of his state conviction, the collateral consequences of that conviction were not sufficient to render him "in custody" for purposes of his habeas challenge to the conviction because Mr. Ogunwomoju had completed his sentence for that conviction at the time of the removal proceedings.

The Ruling

The Second Circuit, therefore, ruled that in order for a court to have jurisdiction over a habeas petitioner's challenge to a state conviction, the petitioner must be in physical custody before serving a sentence, or currently serving a sentence, pursuant to the conviction. A petitioner in immigration custody following an order of removal due to a previous state court conviction *for which the sentence is complete*, is not "in custody" for purposes of a §2254 challenge to that conviction.[16] The Second Circuit thus affirmed the district court's dismissal of Mr. Ogunwomoju's habeas petition for lack of jurisdiction.[17]

1. Nos. 06-3734-pr, 06-4424-ag, F.3d, 2008 WL 60177 (2d Cir. Jan. 8, 2008).
2. Judge Thomas J. Meskill was a member of the panel but passed away following submission of this case. The remaining two judges, therefore, decided the case.
3. See *Resendiz v. Kovensky*, 416 F.3d 952, 956-58 (9th Cir. 2005); *Broomes v. Ashcroft*, 358 F.3d 1251, 1254 (10th Cir. 2004).
4. *Ogunwomoju*, 2008 WL 60177 at *5.
5. *Ogunwomoju v. Attorney General of the United States*, 207 Fed.Appx. 245, 246 (3d Cir. 2006).
6. *Ogunwomoju*, 2008 WL 60177 at *1, n. 4-6.
7. Id. at *1.
8. Id. at **1-2.
9. *Ogunwomoju*, 207 Fed.Appx. at 247-48.
10. *Ogunwomoju*, 2008 WL 60177 at **2-3.
11. 386 F.3d 172, 178 (2d Cir. 2004) (internal citations omitted).
12. *Ogunwomoju*, 2008 WL 60177 at *4.
13. 391 U.S. 234, 237-38 (1968).
14. *Ogunwomoju*, 2008 WL 60177 at *3.
15. 490 U.S. 488, 492 (1989).
16. *Ogunwomoju*, 2008 WL 60177 at *4.
17. Although the Southern District construed Mr. Ogunwomoju's petition in the alternative as a petition for a writ of error coram nobis, the Second Circuit affirmed the Southern District's denial of coram nobis relief on the ground that district courts only have jurisdiction to correct errors within their own jurisdiction and, therefore, lack jurisdiction to issue writs of error coram nobis to set aside judgments of state courts. Id. at *5.