IN THE UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF OKLAHOMA

FILED

SEP 3 0 2020

CARMELITA REEDER SHINN, CLERK
U.S. DIST. COURT, WESTERN DIST. OKLA.
BY RB ,DEPUTY

MARCEL MALACHOWSKI,

Petitioner,

v.

Case NO: CIV-20-736-G

UNITED STATES OF AMERICA,

Respondant,

OBJECTIONS TO REPORT AND RECOMMENDATION

Petitioner Marcel Malachowski, proceeding prose, hereby offers the following objections to the report and recommendation entered by Magistrate Judge Shon T. Erwin, in accordance to 28 U.S.C. §636 and Fed. R. Civ. P. 72. Petitioner assumes this Courts familiarity with issues for review. In support of motion brought under 28 U.S.C. §2241, Petitioner states the following under 28 U.S.C. §1746:

1. On July 28, 2020, this Court filed pro se motion brought under 28 U.S.C. §2241, in request for relief providing instruction/ request to the "[Batavia] Immigration Court To Re-Open

[Administrative] Proceedings And Decide Whether An Expedited Removal Order Should Have Been Utilized." (Question 15, § 2241 form)

2. This matter was referred to Magistrate Judge Shon T. Erwin, for initial proceedings according to 28 U.S.C. § 636 (b)(1)(B)-(C). On September 10, 2020, the Court entered recommendation that this Court should: (1) dismiss Grounds One and Three as untimely, (2) conclude that it lacks jurisdiction over Ground Two, and (3) treat Ground Four as an unauthorized second or successive petition under 28 U.S.C. § 2255 and decline to transfer to the Second Circuit Court of Appeals.

DISCUSSION

The Magistrate Judge makes only a recommendation to this Court. The recommendation has no presumptive weight. The responsibility to make a final determination remains with this Court. See Mathews v. Weber, 423 U.S. 261, 270-71 (1976). The court reviews de novo only those portions of a magistrate judge's report and recommendation to which specific objections are filed, and reviews those portions which are not objected to - including those portions to which only "general and conclusionary" objections have been made - for clear error. Diamond v. Colonial Life & Acc. Inc. Co., 466 F.3d 310, 315

(4th Cir. 2005). The court may accept, reject, or modify, in whole or in part, the recommendation of the magistrate judge or recommit the matter with instructions. See 28 U.S.C. §636(b)(1).

3. <u>OBJECTION ONE</u>: Report suggests that the court has erroneously determined that "[O]n October 31, 2008, Border Patrol agents arrested Petitioner for illegally entering the United States..." Id. (pg. 3) A review of the facts and circumstances along with EARM Summary (Immigration Court Docket), provides that no such arrest or charge occured on this day relative to administrative proceedings.

Reasonable argument exists that this error prejudiced evaluation of this matter as the instant petition does not challenge an "illegal entry" conviction, but rather, raises significant question to the appropriateness of administrative proceedings by addressing inadmissability under Section 212(a)(7)(A)(i)(I)- Immigrant without an immigrant visa. Furthermore, a question whether someone has entered the United States is not straightforward, for not every physical crossing into United States territory constitutes an entry. See e.g., <u>United States v. Wilson</u>, 754 F. Supp. 2d 540 (2d Cir. 2010). In this particular case, evidence unavailable at the time now provides Petitioner was not required to obtain an immigrant visa, thus he was not required to have one. See, INA § 240(c)(2), and; 22 CFR § 42.1(f). Applicable federal regulations list American Indians born in Canada among the '[a]liens not required to obtain immigration visas.' Id.

For consideration, the question properly posed by Grounds One through Three ask whether administrative proceedings were appropriate under the facts and circumstances presented by this case while in view of Native Status. See also, Wilson, supra. Since October 31, 2008, ICE Officials have also twice determined that Petitioner falls under protection of 8 U.S.C. § 1359, occurring in two different districts (Oklahoma and Louisiana). Noting, facts provide that at the time Tribal Police detained Petitioner, he had no identification on his possession. What is not available from the report is that Border Patrol was not involved until Petitioner had already been detained, encountered at the Tribal Station. The instant petition does not ask whether he is deportable or not, nor does it challenge "entry."

Lending further challenge to the appropriateness of administrative proceedings, relevant Second Circuit authority provides that as a registered Native Indian (Canadian or American citizenship), Petitioner was not required to report for

for inspection (as defined as lawful entry) while present on the reservation. Inspection is only required, if Petitioner was to leave the reservation continuing further on. See, Wilson, supra. Additionally, Petitioner has since proved admissability according to Matter of Yellowquill.

4. OBJECTION TWO: The report further suggests that, the court may have exceeded it's scope of review. At no point does the report indicate that, the court provided review of Petitioner's claim that the expedited removal procedure should not have been used because the person qualifies as a lawful permanent resident. The report suggests that the court focused on the merits rather than the narrow scope available, to evaluate whether or not Petitioner qualified as a lawful permanent resident.

For consideration, an American Indian born in Canada who possesses 50 per centum or more of blood of the American Indian race (qualified for protection under 8 U.S.C. § 1359) is regarded as a lawful permanent resident of the United States. INA § 242(e), See also; 8 C.F.R. 289, 289.2; Perrault v. Larkin, 2005 U.S. LEXIS 487705, 4-5, 2005 WL 2455351 (D. Kan. Oct. 5, 2005) Arguing ineffect, the combination of three factors qualify Petitioner to be viewed as a LPR because, he is non-deportable (8 U.S.C. §1359), non-inadmissable, and was not required to have a visa. American Indians do not fall under standard immigration law. See also, § 1252(g) does not bar habeas review of claims by Canadian born American Indians and their right affected by a particular immigration official not to allow a particular born American Indian into the United States or deporting that individual, even though he could not be removed. See MacDonald v. United States, 2011 U.S. Dist. LEXIS 148407. Construed liberally, the instant petition raises additional argument challenging Border Patrol Agent Witkop's particular decision to deport Petitioner.

5. OBJECTION THREE: The Magistrate Court's improper focus on subsequent convictions resulting from (08-CR-701 (DWH)) has deterred evaluation from the crux of Petitioner's claim. Further evidenced by the court's determination that "Ground Four attacks the validity of Petitioner's criminal convictions and sentence..." Id. (pg. 6)

Liberally construed presenting its intended argument, Ground Four suggests that Petitioner received ineffective assistance of counsel pertaining to subsequent immigration offenses. This contention is supported by prior determinations rendered by the Second Circuit Court of Appeals, which directly impute IAC. See, Malachowski, 623 F. App'x 555 (2d Cir. 2015)("[Petitioner] had burden of proof on this issue." citing Curnew; 415 F. App'x 307 (2d Cir. 2011)("defense counsel failed to request affirmative defense [under 8 U.S.C. § 1359].") Arguing ineffect, counsel's failures also prejudiced possible review of underlying administrative charges. See also, INA § 276 (barring collateral attack unless person has exhausted all administrative remedies with respect to the underlying removal order, [Petitioner] had been improperly deprived of the opportunity for judicial review, and the removal order had been "fundementally unfair." INA § 276(a); United States v. Mendoza-Lopez, 481 U.S. 828, 107 S.Ct. 2148, 95 L.Ed 2d 772 (1987)(the court concluded that the lack of advice as to the possibility of judicial review had effectively deprived the [Petitioner] of such an opportunity.) Counsel plainly failed to apprise himself of relevant law, and mount a defense to immigration related charges.

Although the court correctly recites the lengthy docket under (08-CR-701), the report offers no meaningful inquiry into prior criminal proceedings. Furthermore, if the intended purpose was to call attention to prior determinations, the court has critically overlooked further matters including a pending Petition for Certiorari docket (20-5149), on appeal from the Second Circuit Court of Appeals. Matters involving the district court's denial of request for recusal, and motion brought under Rule 60(b). Issues that provide valuable insight into prior proceedings raising significant questions of Due Process, including the Equal Protection Clause.

6. OBJECTION FOUR: Recommendation stands in tension with judicial precedent under the Supreme Court which speak to the underlying issues.

The Magistrate Court has asked that Grounds One and Three be dismissed as untimely. For consideration, the Supreme Court has established that "habeas corpus is, at it's core, an equitable remedy." Schlup v. Delo, 513 U.S. 298, 319 (1995) (Citing cases); See also, Gomez v. U.S. Dist. Ct. for the N. Dist. of Cal., 503 U.S. 653, 654 (1992)(per curium); Fay v. Noia, 372 U.S. 391, 438 (1963). In Murray v. Carrier, the Court limited the availability of the "miscarrige of justice" exception to "extra-ordinary case[s], where a Constitutional violation has probably resulted in the conviction of one who is actually innocent." 477 U.S. 478, 496, 106 S.Ct. 2639, 91 L.Ed 2d 397 (1986); See also, Schlup, 513 U.S. at 321 (stating that Carrier "explicitly tied the miscarriage of justice exception to the petitioner's innocence.") Petitioner argues that because administrative proceedings (charges) are, in essence, subsumed under subsequent criminal sanctions. This Court's determination should be guided by the aforementioned authority while in view of Petitioner qualifying under relevant federal statutes precluding subjectaction.

In view of such authority, consider that Petitioner is a Native American ironically convicted of administrative charges while being present on a reservation. While judicial authority raises significant question as to whether Petitioner had affected entry into the United States. And, then subsequently convicted of unlawful entry, and re-entry, when federal statute precludes conviction of American Indians born in Canada. Further considering that, occuring not only once but twice, ICE officials have later qualified Petitioner under §1359 cancelling active detainers. (On September 2, 2020, ICE Agent R. Calloway issued a second Notice of Action. See (Attached Notice). Agent Calloway notified Petitioner in person, further stating D.H.S. Attorneys determined that he qualified under 8 U.S.C. §1359. Such evidence raises a veritable question as to whether or not Border Patrol Agent Witkop would have initiated administrative proceedings had Petitioner been able to present relevant documentation on October 31, 2008. Documentation and identification were located at Petitioner's residence, and not on his person at the time. Noting, Tribal Police issued a citation for driving without a license.)

a) In request to re-open administrative proceedings, Petitioner argues that thus far there has been no meaningful review of proceedings. To dismiss the instant petition would run contrary to principles enunciated under Mendoza-Lopez, Supra., (".. there must be some meaningful review of administrative proceedings.") For consideration, if procedurally (which is unclear), the underlying administrative proceedings preclude resolution of subsequent criminal convictions. Would therefore establish that subject administrative proceedings have unconstitutionally prejudiced review of criminal convictions under prior appeals. In turn, giving rise to significant questions of Due Process and Eighth Amendment concern.

b) Alternatively, in view of related matter (civ-20-445-G), and recent action implemented by ICE cancelling subject detainer. ICE Officials may bring forth a motion to re-open removal proceedings filed with the immigration judge. 8 CFR §§ 1003.2(a), 1003.23(b) (2018). A motion to re-open is the vehicle used to present material new facts that were "not available and could not have been discovered or presented at former hearing." Id. § 1003.2(c)(1). See Iaverski v. Ins, 232 F.3d 124 (2d Cir. 2000)(ineffective assistance of counsel can equitably toll the 90-day time limit if the person has exercised due diligence.) Arguably, Petitioner has exercised pro se due diligence throughout pendancy of criminal proceedings which should reasonably apply.

However, possibly more appropriate under the current circumstances, a motion to re-open that is jointly filed by all parties is exempt from time limitations. Id. § 1003.23(b)(4)(iv). The unusual circumstances presented by this case should persuade ICE that special facts warrant another look. It is important to consider that Petitioner has demonstrated every effort available, providing specific request to D.H.S. General Counsel, Batavia, N.Y. As such, habeas relief with regard to this avenue for relief is the only remedy available to pro se litigant. Noting, ICE representatives have been reluctant to communicate directly with Petitioner.

7. OBJECTION FIVE: Recommendations Two, and Three are misplaced.

As previously stated, Ground Four is inappropriately construed as an attack on convictions under (08-CR-701), rather than evidencing Petitioner has possibly received ineffective assistance of counsel relative to administrative proceedings. In effect, providing additional grounds under which to grant requested relief.

The same ideology and argument exist for Ground Two. Arguing in effect, Petitioner could not have been found without an immigrant visa if he had not affected entry, or tried to enter the United States by leaving the reservation while being free from official restraint. Noting, on October 31, 2008, Petitioner was transported off the reservation by Tribal Police to the Massena Border Patrol Station. Where he was interviewed by Agent Witkop for identification purposes. These arguments however, deal with the merits which is beyond the scope of habeas review.

a) To the extent that the Magistrate Court suggests "it is the petitioner's burden to show the § 2255 remedy is inadequate or ineffective." citing Caravalho v. Pugh, 177 F.3d 1177, 1178 (10th Cir. 1999). Petitioner argues that the inadequacy and unavailability of § 2255 should be liberally implied short of being stated.

For consideration, as a first matter taking into consideration the twelve year time gap while "[Petitioner] has not identified any 'new evidence' in his petition and supporting brief or any new rule of Constitutional law made retroactive to his case." Id. (pg. 8) Furthermore, decision by ICE Official M. Fontenot rendered in 2015, does not qualify as (con't next pg.)

"new" under § 2255 provisions, nor does it announce a new rule of law. Furthermore, because the court has critically overlooked pending matters before the Supreme Court of the United States docket (20-5149), and issues presented therein. Demonstrate critical Due Process and Eighth Amendment challenges that have went unresolved, also rendering § 2255 ineffective.

8. OBJECTION SIX: Petitioner made no request for compassionate release / sentence modification.

Construed liberally, "Motion To Supplement and Expedite Proceedings," presented "that the underlying [immigration] issues presented by both matters (20-445-G; 20-736-G), including any subsequent decision resulting thereof, come to bear upon custody classification.[1] Currently preventing potential application for a sentence modification under 18 U.S.C. § 3582..." Id. (pg. 2) Arguing in effect, presence of any immigration detainer in view of Native Status, raises significant questions of Due Process and Eighth Amendment concern in light of COVID-19. COVID-19 presents potentially life threatening circumstances, warranting judicial concern and justifiable reason to expedite habeas proceedings in order to resolve subject issues. In turn, providing possible opportunity to present a request under

[1] Custody classification is a protected liberty interest. Yohey v. Collins, 985

§ 3582 to the sentencing court.

9. CONCLUSION

WHEREFORE, for the reasons setforth herein, Petitioner respectfully request this Court reject recommendations as entered in their entirety, and thereby grant request to re-open administrative proceedings, either by providing request to the immigration court or ICE officials. And, further affording such other relief as deemed justified and proper.

Date: September 18, 2020

Respectfully Submitted,
Marcel Malachowski
#15287-052
Great Plains Correctional Fac.
P.O. Box 400
Hinton, OK 73047

F.2d 222, 225 (5th Cir. 1993)

DEPARTMENT OF HOMELAND SECURITY

# IMMIGRATION DETAINER - NOTICE OF ACTION

Subject ID: 361184777
Event #: BSC1804000420

File No: 076 502 427
Date: April 23, 2018

TO: (Name and Title of Institution - OR Any Subsequent Law Enforcement Agency) BIG SPRING FED.CORR.INST.
1900 SIMLER
BIG SPRING, TX 79720

FROM: (Department of Homeland Security Office Address)
ERO - Big Springs, TX IRP Sub-Office
ICE
ERO BIG SPRING SUB OFFICE
1901 West 16Th Street
Big Spring, TX 79720

Name of Alien: MALACHOWSKI, MARCEL OWEN AKA: UNKNOWN, MEMO AKA: UNKNOWN, COWBOY See I-831

Date of Birth: 06/26/1972 Citizenship: CANADA Sex: M

**1. DHS HAS DETERMINED THAT PROBABLE CAUSE EXISTS THAT THE SUBJECT IS A REMOVABLE ALIEN. THIS DETERMINATION IS BASED ON *(complete box 1 or 2).*** BOP #: 15287-052

- ☐ A final order of removal against the alien;
- ☒ The pendency of ongoing removal proceedings against the alien;
- ☐ Biometric confirmation of the alien's identity and a records check of federal databases that affirmatively indicate, by themselves or in addition to other reliable information, that the alien either lacks immigration status or notwithstanding such status is removable under U.S. immigration law; and/or
- ☐ Statements made by the alien to an immigration officer and/or other reliable evidence that affirmatively indicate the alien either lacks immigration status or notwithstanding such status is removable under U.S. immigration law.

**2. DHS TRANSFERRED THE ALIEN TO YOUR CUSTODY FOR A PROCEEDING OR INVESTIGATION *(complete box 1 or 2).***

- ☐ Upon completion of the proceeding or investigation for which the alien was transferred to your custody, DHS intends to resume custody of the alien to complete processing and/or make an admissibility determination.

**IT IS THEREFORE REQUESTED THAT YOU:**

- **Notify DHS** as early as practicable (at least 48 hours, if possible) before the alien is released from your custody. Please notify DHS by calling ☒ U.S. Immigration and Customs Enforcement (ICE) or ☐ U.S. Customs and Border Protection (CBP) at 32-264-7780 711. If you cannot reach an official at the number(s) provided, please contact the Law Enforcement Support Center at: (802) 872-6020.
- **Maintain custody** of the alien for a period NOT TO EXCEED 48 HOURS beyond the time when he/she would otherwise have been released from your custody to allow DHS to assume custody. The alien **must be served with a copy of this form** for the detainer to take effect. This detainer arises from DHS authorities and should not impact decisions about the alien's bail, rehabilitation, parole, release, diversion, custody classification, work, quarter assignments, or other matters.
- Relay this detainer to any other law enforcement agency to which you transfer custody of the alien.
- Notify this office in the event of the alien's death, hospitalization or transfer to another institution.

☒ If checked: please cancel the detainer related to this alien previously submitted to you on 4-23-2018 (date).

R 8433 ORTEGA - DO
(Name and title of Immigration Officer)

R. Callaway
Deportation Officer # 4492 9-2-2020
Immigration & Customs Enforcement
Oklahoma City, Oklahoma
(Signature of Immigration Officer)

**Notice:** If the alien may be the victim of a crime or you want the alien to remain in the United States for a law enforcement purpose, notify the ICE Law Enforcement Support Center at (802) 872-6020. You may also call this number if you have any other questions or concerns about this matter.

**TO BE COMPLETED BY THE LAW ENFORCEMENT AGENCY CURRENTLY HOLDING THE ALIEN WHO IS THE SUBJECT OF THIS NOTICE:**

Please provide the information below, sign, and return to DHS by mailing, emailing or faxing a copy to ____________

Local Booking/Inmate #: ________ Estimated release date/time: ____________

Date of latest criminal charge/conviction ________ Last offense charged/conviction: ____________

This form was served upon the alien on ____________, in the following manner:

☐ in person ☐ by inmate mail delivery ☐ other (please specify): ____________

Acknowledged by: C.K
With a return copy to OK ICE
On: 9-3-2020 Removed
Projected Release date: 12-21-2024

LIFT/Cancel!

(Name and title of Officer) (Signature of Officer) (Sign in ink)

DHS Form I-247A (3/17)

**Federal Rules of Appellate Procedure Form 7. Declaration of Inmate Filing**

United States District Court for the District of Oklahoma

| | | |
|---|---|---|
| Marcel Malachowski, | ) | |
| *Plaintiff,* | ) | |
| v. | ) | Case No. CIV-20-736-G |
| | ) | |
| United States of America | ) | |
| *Defendant.* | ) | |

I am an inmate confined in an institution. Today, Sept 27, 2020 [*insert date*], I am depositing the Objection [*insert title of document; for example, "notice of appeal"*] in this case in the institution's internal mail system. First-class postage is being prepaid either by me or by the institution on my behalf.

I declare under penalty of perjury that the foregoing is true and correct (see 28 U.S.C. § 1746; 18 U.S.C. § 1621).

Sign your name here [signature]

Signed on Sept 27, 2020 [insert date]

[***Note to inmate filers:*** *If your institution has a system designed for legal mail, you must use that system in order to receive the timing benefit of Fed. R. App. P. 4(c)(1) or Fed. R. App. P. 25(a)(2)(A)(iii).*]