NONPRECEDENTIAL DISPOSITION
To be cited only in accordance with FED. R. APP. P. 32.1

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Submitted July 24, 2023*
Decided July 26, 2023

Before

ILANA DIAMOND ROVNER, *Circuit Judge*

MICHAEL Y. SCUDDER, *Circuit Judge*

JOHN Z. LEE, *Circuit Judge*

No. 22-1928

TOMAS D. CUESTA, SR.,
Petitioner-Appellant,

v.

U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT,
Respondent-Appellee.

Appeal from the United States District Court for the Eastern District of Wisconsin.

No. 21-CV-695

Nancy Joseph,
Magistrate Judge.

O R D E R

Tomas Cuesta, a Wisconsin prisoner, petitioned for a writ of habeas corpus to contest a request from immigration authorities that Wisconsin notify them if the state releases him. The district court dismissed the petition. It correctly ruled that this request did not place him in federal custody or otherwise affect his custody. Because Cuesta does not meet the custody requirement for habeas-corpus relief, we affirm.

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* We have agreed to decide the case without oral argument because the briefs and record adequately present the facts and legal arguments, and oral argument would not significantly aid the court. FED. R. APP. P. 34(a)(2)(C).

Cuesta, a citizen of Cuba, was convicted in 2001 of aggravated battery, false imprisonment, and recklessly endangering safety in Wisconsin. Cuesta has collaterally attacked his convictions repeatedly and unsuccessfully. *See, e.g.*, *Cuesta v. Richardson*, No. 17-cv-623, 2017 WL 4863057 (E.D. Wis. June 6, 2017) (recounting history and dismissing unauthorized successive petition), *cert. of appealability denied*, No. 17-3342, 2018 WL 2229336 (7th Cir. May 8, 2018). He is currently serving a sentence in state prison, and his release is expected in 2025.

Cuesta also faces the prospect of removal from the United States. Shortly after his conviction, the Immigration and Naturalization Service (INS) filed a detainer with the Wisconsin Department of Corrections. It requested, among other things, that the state detain Cuesta for not more than 48 hours past his scheduled release to allow INS to take custody of him. *See* 8 C.F.R. § 287.7(d). The detainer specifies that it is "for notification purposes only and does not limit [the state's] discretion in any decision affecting [Cuesta's] classification, work and quarters assignments, or other treatment." According to an affidavit from the Wisconsin Department of Corrections, the Department releases prisoners from state custody when their prison terms are complete, regardless of a request in an immigration detainer to detain beyond the term.

Removal proceedings have not advanced while Cuesta has been in state custody. He apparently received in 2002 and 2020 notices that would ordinarily have started those proceedings, *see* 8 U.S.C. § 1229, but those proceedings have not begun.

After learning about the federal detainer, Cuesta petitioned for a writ of habeas corpus. He contended that, without notice to Cuesta and a hearing, the prison's warden responded to the detainer by denying him work-release assignments or a transfer to a minimum-security institution. The district court, through a magistrate judge presiding by consent, 28 U.S.C. § 636(c), limited Cuesta's use of the petition. The court explained that, in light of his prior collateral attacks, Cuesta could not use it to challenge his state-court custody. But he could use it under 28 U.S.C. § 2241 against Immigration and Customs Enforcement (ICE) to contest the legality of the detainer.

Later, ICE successfully moved to dismiss the § 2241 petition. The district court ruled that the detainer did not place Cuesta "in custody," a prerequisite to relief against ICE under § 2241. An immigration detainer, the court recognized, might place him in federal custody if it would keep him in prison past his sentence. *See Vargas v. Swan*, 854 F.2d 1028, 1032–33 (7th Cir. 1988). But Wisconsin stated that it would not detain Cuesta beyond his term. In addition, the court ruled, the detainer was not unlawful

because Cuesta did not substantiate his claim that it had produced the adverse effects (lost work-release and prison-transfer opportunities) that he attributed to it.

On appeal, Cuesta first argues that his state convictions are flawed. But, as the district court observed, he has not properly requested or received permission for a successive collateral attack. Nor would he qualify for permission—he does not rely on a new, retroactive case from the Supreme Court or new evidence about a constitutional error in his state conviction. *See* 28 U.S.C. § 2244(b).

Second, he complains that he has not yet received a removal hearing even though he received notices about removal proceedings. But he may not assert defects in his removal proceedings (which by his own admission have not yet occurred) through a petition under § 2241; he may do so only by petitioning for review of a final order of removal, if and when one occurs. *See* 8 U.S.C. § 1252(a)(5).

Finally, Cuesta repeats his challenge to the validity of the immigration detainer, but he is not eligible for § 2241 relief because he is not "in custody" under that detainer. 28 U.S.C. § 2241(c)(3). We understand that, on appeal, Cuesta seeks to contest the detainer based on his belief that, by presenting it to Wisconsin authorities, ICE has prevented his transfer to a minimum-security facility and his inclusion in work-release programs. But this argument has two flaws. First, the undisputed record contradicts his belief. The detainer explicitly states that it is for "notification" purposes only; it "does not limit" the prison's discretion "in any decision" about "classification, work and quarters assignments." In any case, even if the detainer has influenced decisions on these matters, habeas relief remains unavailable because these decisions do not create a "quantum change in the level of custody," a necessary condition for § 2241 relief. *Graham v. Broglin*, 922 F.2d 379, 381 (7th Cir. 1991). And because the absence of a change in custody means that Cuesta did not suffer a loss of liberty, his contention that he was procedurally entitled to a hearing is meritless. *See Sandin v. Conner*, 515 U.S. 472, 485–86 (1995).

AFFIRMED