T COURT
SOUTHERN DISTRICT OF NEW YORK

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PAUL LAWRENCE, : 00 Civ. 2154 (AJP)

Petitioner, :

-against- : **OPINION AND ORDER**

IMMIGRATION AND :
NATURALIZATION SERVICE,
:
Respondent.
:
\- x

ANDREW J. PECK, United States Magistrate Judge:

Petitioner Paul Lawrence brought this petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241 against the Immigration and Naturalization Service ("INS"), challenging the validity of his order of removal and his mandatory detention pending removal. (Dkt. No. 1: Pet. ¶ 9.) This Court appointed counsel for Lawrence pursuant to the Criminal Justice Act ("CJA"), 18 U.S.C. § 3006A. (Dkt. No. 16.) The Government has moved to

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vacate the Court's order appointing CJA counsel. (Dkt. No. 18: INS 10/18/00 Letter Br. at 1.)

For the reasons set forth below, the Government's application to vacate the Court's order appointing CJA counsel is DENIED.

FACTS

Background

In May 1971, Lawrence came to the United States from Jamaica at the age of 7 as a permanent resident alien. (See INS Return Ex. A: Certified Administrative Record ("R.) at 35: Immigration Judge ("IJ") 8/23/99 Oral Decision; R. 48: 5/27/99 Removal Hearing Tr.; R. 27: Immigrant Visa & Alien Registration.)

In 1986, Lawrence pleaded guilty to attempted criminal possession of a controlled substance (cocaine) and was sentenced to five years probation. (R. 36, 62-68.) In June 1995, Lawrence was convicted by a jury of sale of a controlled substance (cocaine) and sentenced to four and a half to nine years imprisonment. (R. 35, 69-77.)

The INS Removal Proceedings

Based on his convictions, the INS instituted removal proceedings against Lawrence in March 1999 under Immigration and Naturalization Act ("INA") § 237(a)(2)(A)(iii) and § 237(a)(2)(B)(i), codified at 8 U.S.C. § 1227(a)(2)(A)(iii) and § 1227(a)(2)(B)(i), providing for removal of aliens convicted of certain drug crimes. (See R. 92-94: INS Notice to Appear in Removal Proceedings.) At Lawrence's initial removal hearing on May 27, 1999, the IJ informed Lawrence that he had "a right to an attorney" but that the INS "cannot get you an attorney or give you an attorney. You have to get an attorney on your own. That's because these are administrative and not criminal proceedings." (R. 42: 5/27/99 Removal Hearing Tr.) The IJ then adjourned the hearing until August 20, 1999. (R. 44-45.) At the August 20, 1999 removal hearing, Lawrence was represented by Rev. Robert Vitaglione, a credited representative. (R. 46-48: 8/20/99 Removal Hearing Tr.) Through his representative, Lawrence conceded the 1986 and 1995 narcotics convictions (Tr. 48-49) and sought relief from removal under INA § 212(c), 8

U.S.C. § 1182(c) (repealed 1996), which provided for discretionary relief from removal for aliens in the United States for seven years or more. (R. 50: 8/23/99 Removal Hearing Tr.)

At the conclusion of the hearing, the IJ held that § 212(c) relief was repealed in 1996 by the Antiterrorism and Effective Death Penalty Act ("AEDPA") and the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"). (R. 52-53.) The IJ's Oral Decision further held that "Section 212(c) relief is only available for aliens in deportation proceedings prior to April 24, 1996 [the date of the AEDPA's enactment], and not to aliens in removal proceedings." (R. 36: IJ Oral Decision.)[1/] The IJ ordered Lawrence deported to Jamaica. (R. 36-37, 53.)

The Board of Immigration Appeals ("BIA") affirmed on March 2, 2000. (R. 2-15: BIA Decision.) Lawrence argued on appeal to the BIA that the AEDPA and IIRIRA provisions repealing § 212(c) relief should not be applied

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[1/] At the hearing, Lawrence questioned the applicability of the AEDPA/IIRIRA repeal of § 212(c) relief as applied retroactively to his pre-1996 convictions. (See R. 55-57.)

retroactively since his crimes were committed before 1996. (See R. 3, 16-23.) The BIA held that Lawrence was properly in removal not deportation or exclusion proceedings, and that the "application of the terms of IIRIRA to cases begun after the effective date of IIRIRA does not constitute a retroactive application of the Act." (R. 3 & n.1.) In a concurring and dissenting opinion, Board Member Rosenberg argued that the BIA's "conclusion results in an impermissibly retroactive application of the law" to Lawrence and that he should be eligible to apply for § 212(c) relief. (R. 5-15: BIA Decision, member Rosenberg concurring and dissenting.)

Lawrence's Present § 2241 Habeas Petition

Lawrence's pro se habeas corpus petition pursuant to 28 U.S.C. § 2241 was received by this Court's Pro Se Office on March 14, 2000. (Dkt. No. 1: Pet., cover page.) In his petition, Lawrence asserts, inter alia, that he "seeks relief from deportation . . . [because] when he committed the crime, for which he became deportable, Sec. 212(c) relief was available." (Pet. ¶ 10(b).) Lawrence further "contends that the INS is without authority to deport him

because [he is] not an alien." (Pet. ¶ 10(c).) Lawrence claims that he "legally became a citizen of the United States when [his] father was naturalized in 1975," citing 8 U.S.C. § 1432(a)(3), which provides for derivative citizenship. (Pet. ¶ 10(c); see also Pet. ¶ 9(c); Return Ex. B: Lawrence 7/19/00 Letter to Court & attachments thereto.)[2/]

[2/] The Administrative Record submitted to the Court by the INS is devoid of any reference to Lawrence's claim that he is a derivative citizen, although Lawrence claims that he informed Immigration Judge Alan Page of his derivative citizenship claims. (Pet. ¶ 10(c).) According to Lawrence, IJ Page presided over a December 1999 INS bail hearing (Return Ex. D: Lawrence 8/30/00 Letter to Court), the records of which are not included in the administrative record that the INS has provided to the Court. Lawrence also alleges that he raised his derivative citizenship claim in off-the-record discussions at both hearings before IJ Levinsky. (Id.)

The Government states that Lawrence's "hearing before IJ Alan Page was a bond hearing" and that "[b]y regulation, the records of custody proceedings are kept 'separate and apart from' any underlying removal proceedings." (INS 9/29/00 Br. at 5 n.2.) That may be, but the Court directs the INS to supplement the record, by January 3, 2001, with the transcript(s) and any other documentation concerning Lawrence's raising of his derivative citizenship claim in bond proceedings.

On March 22, 2000, in order to preserve the Court's jurisdiction, Chief Judge Mukasey stayed Lawrence's removal. (Dkt. No. 2: 3/22/00 Order.)

On August 4, 2000, the case was referred to me (see Dkt. No. 4), and the parties thereafter consented to disposition of the petition by a Magistrate Judge pursuant to 28 U.S.C. § 636(c). (See Dkt. No. 14.)

On October 2, 2000, I sua sponte appointed counsel for Lawrence under the Criminal Justice Act ("CJA")[3/] "[b]ecause of the complex legal issues" raised by Lawrence's § 2241 habeas petition. (Dkt. No. 13: 10/2/00 Order; see also Dkt. No. 16: 10/11/00 Order.) The Government opposed the appointment of counsel under the CJA, arguing that "the CJA does not authorize the appointment of counsel at Government expense for challenges

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[3/] The CJA provides counsel for "financially eligible" petitioners in certain cases. 18 U.S.C. § 3006A(a)(2), quoted at pages 6-7 below. This Court assumed that Lawrence is "financially eligible" based on the financial affidavit he filed before the INS, in September 1999, showing no income and no assets. (R. 30.) The INS has not challenged Lawrence's financial eligibility for appointed counsel.

to administrative immigration orders." (INS 10/18/00 Letter Br. at 1; see also INS 10/4/00 Letter to Court.)

ANALYSIS

I. SECTION 3006A AUTHORIZES APPOINTMENT OF COUNSEL IN § 2241 PROCEEDINGS, LAWRENCE'S PETITION IS A § 2241 PETITION, AND THUS THE PLAIN MEANING OF THE STATUTE ALLOWS APPOINTMENT OF CJA COUNSEL

Lawrence filed his habeas petition pursuant to 28 U.S.C. § 2241. (Dkt. No. 1: Pet.) "Despite the jurisdiction stripping language and other restrictions on judicial review of INS decisions in the AEDPA and IIRIRA, 'the Second Circuit and a majority of other courts that have considered the issue have held that habeas review of immigration decisions remains available under the general federal habeas statute, 28 U.S.C. § 2241.'" Merisier v. INS, 00 Civ. 0393, 2000 WL 1281243 at *7 (S.D.N.Y. Sept. 12, 2000) (Peck, M.J.) (quoting Ncube v. INS, 98 Civ. 0282, 1998 WL 842349 at *7 (S.D.N.Y. Dec. 2, 1998) (Peck, M.J.)); see, e.g., St. Cyr v. INS, 229 F.3d 406, 409-

10 (2d Cir. 2000); Calcano-Martinez v. INS, No. 98-4033, 232 F.3d 328, 2000 WL 1336611 at *10 (2d Cir. Sept. 1, 2000); Henderson v. INS, 157 F.3d 106, 118-22 (2d Cir. 1998), cert. denied, 526 U.S. 1004, 119 S. Ct. 1141 (1999); Jean-Baptiste v. Reno, 144 F.3d 212, 220 (2d Cir. 1998); see also cases cited in Merisier.

The CJA provides: "Whenever the United States magistrate or the court determines that the interests of justice so require, representation may be provided for any financially eligible person who . . . . is seeking relief under section 2241, 2254, or 2255 of title 28." 18 U.S.C. § 3006A(a)(2)(B).[4/]

[4/] In deciding whether to exercise its discretion to appoint counsel under the CJA for a habeas petitioner, "courts in this circuit have looked to such factors as the petitioner's likelihood of success on the merits, the complexity of the legal issues raised by the petition, and the petitioner's ability to investigate and present the case." De Los Rios v. United States, No. 86 Cr. 279, 1994 WL 502635 at *6 (S.D.N.Y. Sept. 14, 1994); see, e.g., Haney v. Leonardo, No. CV-91-3577, 1993 WL 173627 at *2 (E.D.N.Y. May 13, 1993) (same); Saldina v. Thornburgh, 775 F. Supp. 507, 511-12 (D. Conn. 1991) (appointing § 3006A counsel to INS § 2241 habeas petitioner utilizing these standards); Vaughan v. United States, 647 F. Supp. 826, 827 (S.D.N.Y. 1986); see generally Cooper v. Sargenti Co., 877 F.2d 170, 172 (2d Cir. 1989); Hodge v. Police Officers, 802 F.2d 58, 61-62 (2d Cir. 1986). In this case, the Court exercised its discretion to appoint counsel based on the "legal complexity" of the case. The INS (continued...)

Thus, the express language of Section 3006A clearly authorizes the appointment of CJA counsel, when "the court determines that the interests of justice so require," in cases brought under 28 U.S.C. § 2241, 18 U.S.C. § 3006A(a)(2)(B), and it is undisputed that Lawrence brought his habeas petition under § 2241. (Dkt. No. 1: Pet.)

Indeed, the INS concedes that "[t]here is no doubt that the plain language of the CJA states that it applies to petitions for writ of habeas corpus under 28 U.S.C. § 2241." (INS 10/18/00 Letter Br. at 9.)

Earlier this year, the Second Circuit reiterated the black letter rule of statutory interpretation that if the statute's language is clear, the Court looks only to the statute: "if the words of a statute are unambiguous, judicial inquiry should end, and the law is interpreted according to the plain meaning of its words." Devine v. United States, 202 F.3d 547, 551 (2d Cir.

[4/] (...continued)
does not challenge the propriety of appointing pro bono counsel in this case under these standards (see INS 10/18/00 Letter Br. at 1), but rather the propriety of CJA counsel in any INS § 2241 habeas case.

2000); see also, e.g., Miller v. French, 530 U.S. 327, 120 S. Ct. 2246, 2253-565 (2000); Sullivan v. Everhart, 494 U.S. 83, 89, 110 S. Ct. 960, 964 (1990); Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-43, 104 S. Ct. 2778, 2781 (1984) ("If the intent of Congress is clear, that is the end of the matter; for the court . . . must give effect to the unambiguously expressed intent of Congress."); Esden v. Bank of Boston, 229 F.3d 154, 174 (2d Cir. 2000); Nussel v. Willette, 224 F.3d 95, 100-01 (2d Cir. 2000) ("In considering the proper scope of [a statute], we begin by examining the text of the statute itself, since the language of a statutory provision, if clear and unambiguous on its face, is presumed to bear its plain meaning unless the text suggests an absurd result."); Bell v. Reno, 218 F.3d 86, 90 (2d Cir. 2000); Luyando v. Grinker, 8 F.3d 948, 950 (2d Cir. 1993).

The two other decisions by Courts in this Circuit to have addressed this question came to the same conclusion. In Saldina v. Thornburgh, Judge Eginton explained:

> The clear construction of this statute [§ 3006A] is that any indigent person seeking habeas corpus relief under the provisions of

> Title 28 is entitled to CJA representation when the interest of justice so requires. This statute is not ambiguous, vague, or confusing. Petitioners are seeking relief under 28 U.S.C. § 2241 and fall within the plain meaning of the language of this statute. Section 2241 provides relief for prisoners in custody of the authority of the United States "in violation of the Constitution or laws or treaties of the United States." See 28 U.S.C. § 2241(c). This remedy has never been viewed as available only to challenge criminal convictions. The canon of statutory construction is that Congress is presumed to understand the judicial background against which it legislates.

Saldina v. Thornburgh, 775 F. Supp. 507, 508 (D. Conn. 1991). And the Second Circuit also has appointed CJA counsel in a § 2241 case challenging an INS deportation order, holding (in an opinion by then Chief Judge Winter, on which Chief Judge Mukasey of this District was on the panel):

> The CJA clearly provides for the appointment of counsel to otherwise qualified individuals "seeking relief under section 2241, 2254, or 2255 of title 28." 18 U.S.C. § 3006A(a)(2). Appellant's request for counsel falls squarely within the unambiguous meaning of the statute, which expressly includes actions under Section 2241. Thus, CJA funds may be used to provide counsel for appellant in this case.
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> We therefore grant appellant's motion for appointment of counsel. Counsel shall be appointed from the Criminal Justice Act panel.

Duran v. Reno, 193 F.3d 82, 84-85 (2d Cir.), vacated as moot, 197 F.3d 63, 63 (2d Cir. 1999) (appellant's deportation mooted case).

The Court notes that the Eleventh Circuit, based on its reading of Section 3006A and its legislative history, concluded that Section 3006A does "not provide for the appointment of counsel for excludable aliens challenging the denial of parole through habeas corpus petitions because these challenges are not collateral [to a criminal conviction] in nature." Perez-Perez v. Hanberry, 781 F.2d 1477, 1480 (11th Cir. 1986). That case is factually distinguishable -- it involved excludable aliens (i.e., those who never achieved entry into the United States), who were seeking parole, id. at 1479, while Lawrence is at least a lawful permanent resident (and possibly a U.S. citizen) challenging his removal order based on his prior criminal convictions -- and has not been followed on this issue by any other court. Judge Eginton "decline[d] to follow the Eleventh Circuit's narrow reading of § 3006A(a)." Saldina v. Thornburgh, 775 F. Supp. at 509. For the reasons explained in this and succeeding sections of this Opinion, the Court disagrees with the Eleventh

Circuit's Perez-Perez decision and, like Judge Eginton in Saldina, declines to follow the Eleventh Circuit.

Based on the plain meaning of § 3006A, the Court may appoint counsel (when the interest of justice so requires) in § 2241 proceedings, and Lawrence's petition is brought pursuant to § 2241. Thus, appointment of CJA counsel is appropriate.

II. EVEN IF THE COURT WERE TO LOOK BEYOND THE PLAIN-MEANING OF SECTION 3006A, IT DOES NOT CONTRADICT THE INA, 8 U.S.C. § 1362, NOR DOES ITS LEGISLATIVE HISTORY COMPEL A RESULT DIFFERENT FROM ITS PLAIN MEANING

The Government argues that "[r]eliance . . . on the plain language of the CJA alone would compel an odd result and one that Congress clearly could not have intended." (INS 10/18/00 Letter Br. at 4.)

"[E]ven if [the Court] were to look beyond the plain meaning of the statutory language, nothing in the legislative history [or the INS's other arguments] alters our understanding of the statute's language." Devine v. United States, 202 F.3d 547, 552 (2d Cir. 2000).

A. Section 3006A Does Not Conflict with 8 U.S.C. § 1362

First, the Government argues that appointment of CJA counsel in an INS § 2241 habeas case would contradict the express provisions of the INA, 8 U.S.C. § 1362, which provides:

> In any removal proceedings before an immigration judge and in any appeal proceedings before the Attorney General from any such removal proceedings, the person concerned shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose.

8 U.S.C. § 1362. The INS argues that the "intent of this statute [§ 1362] should not be undone by the CJA's general provision allowing CJA monies to be used for criminal defendants who bring section 2241 challenges. . . . [T]he only interpretation that can give effect to both statutes is the conclusion that CJA monies can be used to appoint counsel for individuals bringing section 2241 actions except in cases where an alien challenges an administrative immigration order, such as a final order of removal." (INS 10/18/00 Letter Br. at 9.) The Court cannot agree.

First of all, the two sections are not inconsistent. The INA allows aliens to be represented by counsel before the IJ or Attorney General, but makes clear that the Government is not obligated to provide or pay for counsel. Obviously, the present petition is not a proceeding before an IJ or the Attorney General. Section 3006A does not entitle the petitioner to counsel or require the Court to appoint counsel in § 2241 habeas proceedings, but it does give the Court discretion, "in the interests of justice," to appoint CJA counsel if the Court thinks it would be helpful. Obviously, that discretionary authority will be used infrequently. Section 2241 petitions in INS cases are limited to purely legal issues involving violations of the Constitution, laws or treatises of the United States. See, e.g., Merisier v. INS, 00 Civ. 0393, 2000 WL 1281243 at *7-9 (S.D.N.Y. Sept. 12, 2000) (Peck, M.J.), citing, inter alia, Henderson v. INS, 157 F.3d 106, 122 (2d Cir. 1998), cert. denied, 526 U.S. 1004, 119 S. Ct. 141 (1999). Thus, it would not be irrational for Congress to have given the courts discretion to appoint counsel in appropriate § 2241 cases to assist with serious legal issues regarding INS proceedings. See, e.g., Reno v. INS, 193

F.3d 82, 84-85 (2d Cir.) (appointing CJA counsel in a case of first impression for petitioner challenging deportation order), vacated as moot, 197 F.3d 63 (2d Cir. 1999). In any event, while Congress would be free to amend Section 3006A to allow for the appointment of counsel in § 2241 proceedings except those challenging INS actions, Congress has not engrafted such an exception on present Section 3006A and nothing in § 1362 requires the Court to do so.

The Court notes that this is not the only situation where § 3006A counsel is available in federal court despite the absence of the right to free counsel in the underlying matter. For example, a criminal defendant is not entitled to appointed counsel in state collateral proceedings (such as under CPL § 440.10 in New York). See, e.g., Lugo v. Kuhlmann, 68 F. Supp. 2d 347, 375-76 & n.16 (S.D.N.Y. 1999) (Patterson, D.J. & Peck, M.J.) (& cases cited therein); see also, e.g., Veras v. Strack, 58 F. Supp. 2d 201, 207-10 (S.D.N.Y. 1999) (Peck, M.J.) (& cases cited therein). Nevertheless, Section 3006A allows the Court to appoint counsel in a § 2254 habeas proceeding based on constitutional issues raised in the state collateral proceeding. Thus, the

situation posited by the Government -- no entitlement to counsel in the original INS proceeding but counsel via Section 3006A on the habeas petition -- is not unique. If there are to be any exceptions to the plain language of Section 3006A, it is up to Congress to amend the statute to so provide.

The Government's argument about the alleged inconsistency between § 3006A and § 1362 also was reviewed and rejected by Judge Eginton, who concluded:

> Juxtaposing § 3006A and § 1362 presents no inconsistency when one considers the discretionary nature of the court's ability to appoint counsel in habeas proceedings. In this circuit, appointment is not made without consideration of the merits of the case, the complexity of the legal issues raised, and the ability of the petitioner to investigate and present the case. Because petitioners have no right to counsel in these cases, there is no cause for speculation as to the calamitous results which might occur if all aliens were to receive CJA counsel.

Saldina v. Thornburgh, 775 F. Supp. 507, 511-12 (D. Conn. 1991) (citations omitted). Again, this Court is in full agreement with Judge Eginton.

B. The Legislative History of § 3006A Does Not Change Its Plain Meaning

Second, the Government argues that "[t]he strongest and most direct evidence that the CJA does not apply to aliens challenging their final orders of removal is the legislative history of the CJA." (INS 10/18/00 Br. at 4.) According to the Government, "the legislative history demonstrates that Congress intended to reach only collateral challenges to criminal convictions, or those proceedings 'intimately related to the criminal process.' . . . [T]he legislative history does not support the use of CJA monies in purely civil matters. . . . [H]abeas challenges to administrative deportation orders are 'civil' – not 'criminal' – in nature, and are thus not susceptible to appointment of counsel under the CJA." (Id. at 5-6.) The Court rejects the Government's argument. Contrary to the Government's position, the legislative history of § 3006A supports the appointment of CJA counsel in this case.

The legislative history provides that:

> Inasmuch as [collateral relief] proceedings have traditionally been regarded as technically civil in nature rather than criminal, no right to appointed counsel has as yet been recognized under the Sixth Amendment. The distinction between civil and criminal matters, however, has become increasingly obscure where deprivation of personal liberty is involved. . . . The proceedings listed [in the CJA

> statute] are intimately related to the criminal process. . . . The Committee believes that compensation should be available under the Act whenever a Judge determines that counsel must be appointed to safeguard the interest of justice.

1970 WL 5700 at *7, H.R. Rep. No. 91-1546 (1970), reprinted in 1970 U.S.C.C.A.N. 3982 (emphasis added); see also De Los Rios v. United States, No. 86 Cr. 279, 1994 WL 502635 at *6 (S.D.N.Y. Sept, 14, 1994) ("a court may exercise its discretion under 18 U.S.C. § 3006A and appoint counsel for a habeas petitioner" where the interests of justice require and the petitioner faces a "deprivation of liberty"); Saldina v. Thornburgh, 775 F. Supp. 507, 510 (D. Conn. 1991) ("An equally plausible reading of . . . [the] legislative history is that Congress decided to provide court appointed counsel in certain civil proceedings which involve 'the deprivation of personal liberty.'") In other words, Congress recognized that the constitutional right to counsel does not attach to certain "technically civil" proceedings such as habeas corpus petitions, and intentionally provided for the discretionary appointment of counsel where "a deprivation of personal liberty is involved."

The Court rejects the Government's argument that "this case involves a challenge to Lawrence's final order of removal, and thus does not implicate deprivation of personal liberty." (INS 10/18/00 Letter Br. at 8.) As a practical matter, removal from the United States can impose as much a "deprivation of liberty" as imprisonment, particularly if, as Lawrence alleges, his removal would be unconstitutional because, inter alia, he is a derivative citizen. See Saldina v. Thornburgh, 775 F. Supp. at 510 ("even though [proceedings challenging the prolonged custody of excludable aliens] are civil in nature and do not invoke sixth amendment rights to counsel, appointment of counsel is appropriate due to the loss of an important fundamental interest").

Judge Eginton's opinion in Saldina v. Thornburgh, 775 F. Supp. 507 (D. Conn. 1991), thoroughly analyzed the legislative history of § 3006A and the change in that statute after the Eleventh Circuit's Perez-Perez decision. Rather than reinvent the wheel, the Court quotes at length from Saldina:

The Perez court's construction of § 3006A(a) is problematic on several levels. First, it relies heavily on a narrow definition of a term that is no longer in the statute. The Perez court relied specifically on the word "collateral" when determining whether challenges by Cuban nationals came under the scope of the Act. The court quoted § 3006A(a), supplying emphasis to the word "collateral," and concluded that "[t]hese subsections do not provide for the appointment of counsel for excludable aliens challenging the denial of parole through habeas corpus petitions because these challenges are not collateral in nature." Perez, 781 F.2d at 1480 (emphasis in original). Clearly, the Eleventh Circuit's analysis of § 3006A(a) rested in large part on its interpretation of the term "collateral." Thus, contrary to the Government's assertion, the removal of this term does suggest a change in the analysis employed by the Eleventh Circuit and logically restricts application of Perez to cases brought under the amended CJA.

Additionally, the Perez court looked to the legislative history of the Act in order to interpret the proper scope of the CJA. Quoting from the legislative history of the 1970 amendment, the Perez court stated that the authority to appoint counsel is provided in criminal proceedings or in those proceedings "intimately related to the criminal process." Once again, the Perez court's singular reliance on a sentence fragment results in an overly restrictive interpretation. An equally plausible reading of this passage of legislative history is that Congress decided to provide court appointed counsel in certain civil proceedings which involve "the deprivation of personal liberty." Thus, even though such proceedings are civil in nature and do not invoke sixth amendment rights to counsel, appointment of counsel is appropriate due to the loss of an important fundamental interest.

The Perez court apparently understands "deprivation of liberty" to mean only the loss incurred after a criminal conviction has been

entered. The legislative history of § 3006A(a) does not support this conclusion. Immediately preceding the sentence relied on by Perez, the legislative history cites to cases: In re Gault, 387 U.S. 1, 87 S. Ct. 1428, 18 L.Ed.2d 527 (1967) (Gault) and Johnson v. Avery, 393 U.S. 483, 89 S. Ct. 747, 21 L.Ed.2d 718 (1969) (Johnson). Neither case involved the appointment of counsel to challenge a criminal conviction. In Gault, a juvenile filed a habeas corpus petition challenging his confinement in a state industrial school. The Court noted the limited panoply of rights afforded juveniles and the civil nature of delinquency hearings. It nevertheless held that counsel should have been appointed at the hearing due to the consequences of the proceeding, that is, the "commitment to an institution in which the juvenile's freedom is curtailed." Gault, 387 U.S. at 14, 87 S. Ct. at 1436-37. Johnson discussed the importance of providing legal assistance to prisoners who are attempting to file federal habeas corpus actions. The Court framed this problem as involving "access to the courts," and held that the State must permit fellow inmates to assist each other or provide trained assistance to prisoners in order to protect their "access to the constitutionally and statutorily protected availability of the writ of habeas corpus." Johnson, 393 U.S. at 489, 89 S. Ct. at 750-51. Both cases recognized the need to assist individuals facing a loss of liberty even where the loss was not necessarily the result of a criminal proceeding. By citing these cases, Congress recognized the breadth of situations which might require court appointed counsel. The broad remedy of habeas corpus was therefore included in the CJA so that district judges would have the flexibility needed to appoint counsel in cases similar to Gault and Johnson.

The court does not imply that the 1986 amendment represents a substantive change or in any way broadens the scope of the CJA. As the Government points out, § 3006A(a) was restructured for "purposes of clarity only." Possibly, Congress felt it necessary to clarify any

> conflicting interpretations of the phrase "collateral relief." By removing the phrase without substituting language restricting the appointment of counsel in habeas proceedings, one might infer that the Perez interpretation was not the victorious version. Alternatively, it is possible that the amendment was purely technical in nature, in which case, Congress, in direct contrast to the Perez court's analysis, obviously placed little or no significance on the phrase "collateral relief." Either way, the court finds that the amendment does not alter the application of the Act. It is more the case that the Perez interpretation was never in line with the original intent of the statute.

Saldina v. Thornburgh, 775 F. Supp. at 509-10 (fn. omitted & emphasis added).

CONCLUSION

For the reasons set forth above, the Government's application to vacate the Court's order appointing CJA counsel pursuant to 28 U.S.C. § 3006A is DENIED.

SO ORDERED.

DATED: New York, New York
December 21, 2000

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Andrew J. Peck
United States Magistrate Judge

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