

03-2503-pr

To be Argued By:
PATRICK F. CARUSO

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 03-2503

MARK RICHARDS,
Petitioner-Appellant,

-vs-

JOHN ASHCROFT,
Respondent-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

BRIEF FOR JOHN ASHCROFT

KEVIN J. O'CONNOR
*United States Attorney
District of Connecticut*

PATRICK F. CARUSO
Assistant United States Attorney
JEFFREY A. MEYER
Assistant United States Attorney (of counsel)

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STATEMENT OF JURISDICTION

The district court (Janet C. Hall, J.) had subject matter jurisdiction over this habeas corpus petition pursuant to 28 U.S.C. § 2241. In accordance with Fed. R. App. P. 4(b), the petitioner filed a timely notice of appeal from the district court's denial of his petition. This Court has appellate jurisdiction over the appeal pursuant to 28 U.S.C. § 1291 and § 2253(a).

STATEMENT OF ISSUE PRESENTED FOR REVIEW

Did the district court err in holding that petitioner's conviction for second-degree forgery was an aggravated felony?

United States Court of Appeals

FOR THE SECOND CIRCUIT
Docket No. 03-2503

MARK RICHARDS,
Petitioner-Appellant,

-vs-

JOHN ASHCROFT,
Respondent-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR JOHN ASHCROFT

This appeal presents a single legal issue whether a criminal alien's conviction for second-degree forgery under Connecticut law is an aggravated felony for purposes of the Immigration and Nationality Act. The district court held that Connecticut's forgery statute is an aggravated felony, because it falls within the broad parameters of "an offense relating to . . . forgery" as set out in 8 U.S.C. § 1101(a)(43)(R). This Court should affirm.

STATEMENT OF THE CASE

On January 9, 2003, an Immigration Judge (“IJ”) ordered the alien petitioner-appellant, Mark Richards, removed from the United States based upon his prior conviction for second-degree forgery. The Board of Immigration Appeals (“BIA”) affirmed the IJ’s order on April 10, 2003.

On May 2, 2003, Richards filed a petition for a writ of habeas corpus in United States District Court for the District of Connecticut. The government filed its response to the petition on June 11, 2003. On July 15, 2003, the district court (Janet C. Hall, J.) issued a ruling denying the petition.

Judgment entered on July 22, 2003 in favor of the government. On August 14, 2003, Richards filed a timely notice of appeal. On October 7, 2003, this Court granted a motion on consent for a stay of removal pending resolution of this appeal.

STATEMENT OF FACTS

A. Background

Richards is a citizen and native of Jamaica. *See* Government Appendix (“GA”) at 20.¹ He was born there

¹ Richards has filed an appendix that does not comply with this Court’s rules, because it does not include a copy of the district court docket entries or notice of appeal. *See* Fed. (continued...)

on July 17, 1971, and he entered the United States on March 13, 1981. *Id.*

On April 26, 2001, Richards was convicted in Connecticut Superior Court for second-degree forgery in violation of Conn. Gen. Stat. § 53a-139. GA 21. The statute states in pertinent part that “[a] person is guilty of forgery in the second degree when, with intent to defraud, deceive or injure another, he falsely makes, completes or alters a written instrument or issues or possesses any written instrument which he knows to be forged” Conn. Gen. Stat. § 53a-139. As a result of this conviction and another conviction for third-degree assault, Richards was sentenced to a prison term of two years. GA 21.

The INS initiated removal proceedings against Richards based upon his forgery conviction. GA at 22-23.² The INS contended that Richards’ forgery conviction was a removable “aggravated felony” offense on the ground that it was an “offense relating to . . . forgery . . . for which the term of imprisonment is at least one year.” Immigration and Nationality Act (“INA”) § 101(a)(43)(R), codified at 8 U.S.C. § 1101(a)(43)(R).

¹ (...continued)

R. App. P. 30(a)(1)(A) and Second Circuit Local Rule 30(d) . The Government Appendix includes these documents.

² The INS also sought to remove Richards based upon his simultaneous conviction for third-degree assault, but later abandoned that charge in light of this Court’s decision in *Chrzanoksi v. Ashcroft*, 327 F.3d 188 (2d Cir. 2003) (third-degree assault under Conn. Gen. Stat. § 53a-61(a)(1) not a removable “crime of violence” aggravated felony offense).

A removal hearing was held on January 9, 2003. GA 25-31. Richards disputed that his forgery conviction qualified as an aggravated felony offense. GA 28. The IJ rejected Richards' argument, concluding that a second-degree forgery offense under Connecticut law is "an offense relating to . . . forgery" under § 1101(a)(43)(R). GA 35-36.

On April 10, 2003, the BIA dismissed Richards' appeal. It concluded without further discussion that "[t]he Immigration Judge correctly concluded that the respondent is removable as an alien convicted of an aggravated felony" GA 38.

B. The District Court's Ruling

Richards filed a petition for habeas corpus in the district court to dispute the BIA's conclusion that Connecticut's second-degree forgery statute qualifies as an aggravated felony. The district court rejected Richards' argument, in principal reliance on the Third Circuit's decision in *Drakes v. Zimski*, 240 F.3d 246 (3d Cir. 2001), that denied a similar challenge involving Delaware's second-degree forgery statute. GA 14-15. Noting the "expansive" scope of 8 U.S.C. § 1101(a)(43)(R), insofar as it extends to any offense "relating to" forgery, the district court concluded that the Connecticut forgery statute qualifies as an aggravated felony under the Immigration and Nationality Act. GA 16.

SUMMARY OF ARGUMENT

The district court correctly concluded that Richards' Connecticut conviction for second-degree forgery was an aggravated felony that subjected him to removal from the United States. The court appropriately relied on the broad scope of the definition of an aggravated felony, which applies to any offense "relating to . . . forgery." 8 U.S.C. § 1101(a)(43)(R). All of the conduct proscribed by Connecticut's second-degree forgery statute relates to forgery. The district court properly rejected Richards' efforts to show that his conviction did not relate to forgery, and this Court should affirm.

ARGUMENT

I. THE DISTRICT COURT DID NOT ERR IN HOLDING THAT A CONVICTION FOR SECOND-DEGREE FORGERY IS AN OFFENSE "RELATING TO FORGERY" UNDER THE IMMIGRATION AND NATIONALITY ACT

A. GOVERNING LAW AND STANDARD OF REVIEW

The Immigration and Nationality Act authorizes the removal of aliens from the United States who have been convicted of "aggravated felony" offenses. *See* INA § 237(a)(2)(A)(iii), 8 U.S.C. § 1227(a)(2)(A)(iii). The term "aggravated felony" extends to a broad variety of offenses, including in pertinent part "an offense relating to commercial bribery, counterfeiting, *forgery*, or trafficking in vehicles the identification numbers of which have been

altered for which the term of imprisonment is at least one year.” INA § 101(a)(43)(R), 8 U.S.C. § 1101(a)(43)(R) (emphasis added).

To determine whether a state law offense qualifies as an aggravated felony under the INA, this Court applies a “categorical approach” that “asks whether the statutory definition of the offense of conviction is any broader than an offense defined as an ‘aggravated felony’ under federal law.” *Gousse v. Ashcroft*, 339 F.3d 91, 95-96 (2d Cir. 2003); *see also Sui v. INS*, 250 F.3d 105, 116-18 (2d Cir. 2001) same). The Court “look[s] only to the elements of the offense of conviction and not to the factual circumstances of the crime.” *Sui*, 250 F.3d at 116. “Unless the offense of conviction is broader [than the offense described as an ‘aggravated felony’ under the INA], the petitioner has committed an ‘aggravated felony’ irrespective of the particular circumstances of his crime.” *Gousse*, 331 F.3d at 96.

On appeal from the denial of a habeas corpus petition, the Court generally reviews the merits of the petition *de novo*. *See Evangelista v. Ashcroft*, 359 F.3d 145, 150 (2d Cir. 2004); *Chrzanoski*, 327 F.3d at 191. To the extent that the text of the Immigration and Nationality Act is not ambiguous or to the extent that the BIA’s ruling involves the interpretation of other state and federal laws, the Court applies *de novo* review. *See Brissett v. Ashcroft*, 363 F.3d 130, 133 (2d Cir. 2004); *Chrzanoski*, 327 F.3d at 191. On the other hand, under the *Chevron* doctrine of administrative deference, where the outcome of an appeal rests on text of the Immigration and Nationality Act that is determined to be ambiguous, this Court gives “substantial

deference to the BIA, rejecting its interpretation only if it is ‘arbitrary, capricious, or manifestly contrary to the statute.’” *Evangelista*, 359 F.3d at 150 (internal citation omitted and quoting *Chevron, U.S.A., Inc. v. Natural Resources Def. Council, Inc.*, 467 U.S. 837, 844 (1984)).

C. DISCUSSION

The district court correctly concluded under the categorical approach that Connecticut’s second-degree forgery statute is “an offense relating to . . . forgery.” 8 U.S.C. § 1101(a)(43)(R). This conclusion is clear from the text of the Connecticut statute and its application in scope only to conduct that constitutes or directly stems from acts of forgery: “[a] person is guilty of forgery in the second degree when, with the intent to defraud, deceive or injure another, he falsely makes, completes or alters a written instrument or issues or possesses any written instrument which he knows to be forged” Conn. Gen. Stat. § 53a-139.³

For purposes of the aggravated felony definition, Congress did not limit its scope only to traditional “forgery” offenses. Instead, it chose a broader description: “an offense *relating to* . . . forgery.” 8 U.S.C. 1101(a)(43)(R) (emphasis added). The “relating to forgery” requirement is clearly met in this case. All of the

³ The remainder of the statute not quoted above concerns the specific type of documents to which the statute applies. The full text of the Connecticut statute is set forth in the addendum attached to this brief.

conduct that comes within the scope of the Connecticut statute relates to forgery.

In light of the broad scope of § 1101(a)(43)(R), the Third Circuit has ruled that Delaware’s second-degree forgery statute is an offense that is “relating to . . . forgery” within the meaning of § 1101(a)(43)(R). *See Drakes v. Zimski*, 240 F.3d 246, 249-50 (3rd Cir. 2001) (emphasis in original). The alien in *Drakes* argued that the Delaware statute -- like the Connecticut statute -- departed from the generally accepted common law definition of forgery, because it allowed conviction not just upon a showing of an “intent to defraud” but also upon a lesser “intent to deceive.” *Id.* at 249. The Third Circuit concluded that any such deviation was not dispositive in view of the expansive scope of § 1101(a)(43)(R). “Congress evidenced an intent to define forgery in its broadest sense by stating that ‘an offense *relating to* . . . forgery qualifies under § 1101(a)(43)(R).” *Id.* at 250 (emphasis in original). Therefore, “[u]nless the words ‘relating to’ have no effect, the enumerated crime -- here forgery -- must not be strictly confined to its narrowest meaning.” *Id.*⁴

⁴ Richards claims that the *Drakes* decision “never considered whether the statute itself dealt with forgery as defined in federal law . . . as [is] required under *Taylor [v. United States]*, 110 U.S. 575 (1990).” Richards Br. at 8. In fact, *Drakes* cited *Taylor* and undertook a detailed analysis of this issue, ultimately concluding that “[t]he meaning of “forgery” in federal law is ambiguous.” *Drakes*, 240 F.3d at 248-49. It nonetheless concluded in light of the “relating to” language of § 1101(a)(43)(R) that “it would be eminently appropriate for the BIA to read into § 1101(a)(43)(R) the broad (continued...)”

To the same effect, the Ninth Circuit has observed that § 1101(a)(43)(R) “necessarily covers a range of activities beyond those of counterfeiting or forgery itself.” *Albillo-Figueroa v. INS*, 221 F.3d 1070, 1073 (9th Cir. 2000). The Ninth Circuit concluded that an alien’s conviction for unlawful possession of counterfeit obligations under 18 U.S.C. § 472 qualified as an aggravated felony. In light of the statute’s “relating to” language, it rejected the alien’s argument that his offense involved only the possession of counterfeit obligations and not the act of counterfeiting. *Id.* at 1073.

Although this Court has not previously addressed the scope of § 1101(a)(43)(R), it has similarly recognized the wide reach of the term “relating to” as used elsewhere in the INA’s definition of an aggravated felony. In *Evangelista v. Ashcroft*, 359 F.3d 145 (2d. Cir. 2004), an alien had been convicted under 26 U.S.C. § 7201 for willfully attempting to “evade *or* defeat” income tax. *Id.* at 148. The INS claimed that Evangelista was removable because his conviction was an aggravated felony under 8 U.S.C. § 1101(a)(43)(M)(ii), which defines an aggravated felony as: “an offense that . . . is described in section 7201 of Title 26 (relating to tax evasion).” *Id.*

Arguing that the aggravated felony definition applied only to tax evasion, Evangelista insisted that it was unclear whether he had been convicted of attempting to *evade*

⁴ (...continued)
minority definition of forgery [to include intent to deceive, not just intent to defraud] rather than the narrow traditional definition.” *Id.* at 250.

taxes or merely *defeat taxes*. *Id.* This Court held “that whatever differences there may be between . . . [evading taxes and defeating taxes], ‘defeat [of a tax]’ is at least ‘relat[ed] to tax evasion,’ rendering a conviction for it an ‘aggravated felony’ within section 1101(a)(43)(M)(ii).” *Evangelista*, 359 F.3d at 151.

Only by misstating the elements of the Connecticut second-degree forgery statute does Richards argue that his conviction was not “relating to . . . forgery.” First, Richards argues that Connecticut’s forgery statute criminalizes “the simple possession of a forged instrument regardless of knowledge.” Richards Br. at 8.⁵ But, as the district court noted, “[t]his argument is patently incorrect. Knowledge that the document is forged is clearly an element of the offense, as is evident from the plain language of the statute.” GA 15 n.2; Conn Gen. Stat. § 53a-139 (prohibiting “possess[ing] any written instrument *which he knows to be forged*”) (emphasis added).

Second, Richards claims that the Connecticut statute allows a defendant to be convicted for merely possessing forged documents and without any criminal intent. *See* Richards Br. at 11. But this argument does not square with the most natural reading of the Connecticut statute, which imposes without limitation a blanket requirement of an intent to defraud (or deceive or injure) to the entire range

⁵ A few lines later in his brief, Richards seems to concede that knowledge is required, when he argues that “simple possession *with knowledge* but without the intent to defraud is sufficient to convict under the Connecticut statute.” Richards Br. at 8.

of conduct that is prohibited (including the acts of falsely making, completing, or altering a document as well as issuing or possessing a document known to be forged).

The Connecticut Supreme Court has similarly described the scope of the statute in terms that require knowing possession of forged documents to be accompanied by criminal intent: “A defendant may be found guilty of forgery in the second degree, in violation of § 53a-139, if the state establishes that the defendant, with intent to deceive another, falsely made, possessed or altered a written instrument that he or she knew to be forged.” *State v. DeCaro*, 745 A.2d 800, 811 (Conn. 2000); *see also State v. Henderson*, 706 A.2d 480, 485 (Conn. App. 1998) (affirming conviction under “possession” prong of second-degree forgery statute and noting that “[f]or the defendant to be found guilty of violating § 53a-139, the state must prove that (1) the defendant intended to deceive another and (2) that he possessed a written instrument that he knew to be forged.”); *cf. State v. Brown*, 668 A.2d 1288, 1295 (Conn. 1995) (construing similar text of third-degree forgery statute and identifying “intent to defraud, deceive or injure” as element of offense where offense based on possession of forged documents).

Ignoring the foregoing case authority, Richards relies instead on a single Connecticut form jury instruction that does not identify intent as an element. *See Richards Br.* at 9 (citing Connecticut Criminal Jury Instruction § 10.5). But he fails to cite accompanying jury instructions that make clear that proof of criminal intent is required. *See Connecticut Criminal Jury Instruction 10.1 Forgery -*

General Instructions (“I want to take up one very important aspect of the forgery statute, and that is the phrase "with intent to defraud;" for without that intent being proven beyond a reasonable doubt, there can be no conviction.”); Connecticut Criminal Jury Instruction § 10.3 Forgery - Second Degree § 53a-139.⁶

The defendant misplaces his reliance on *Sui v. INS, supra*, in which a petitioner pled guilty to possession of counterfeit securities in violation of 18 U.S.C. § 513(a). *See* 250 F.3d at 108. The INS contended that this conviction qualified as an aggravated felony, because it was, effectively, an attempted fraud involving more than \$10,000. *Id.* at 110 (citing 8 U.S.C. §§ 1101(a)(43)(M)(i) & (U)). Noting that an attempt offense required as an element that a defendant engage in a “substantial step” toward committing the underlying offense, that the alien had not been convicted of an attempt-to-defraud offense, and that the element of a “substantial step” to defraud could not be inferred from merely the fact of conviction for possession of counterfeit securities, the Court concluded that the alien had not been convicted of an aggravated felony. *Id.* at 119. The *Sui* decision is manifestly distinguishable, because it had nothing to do with forgery or with the meaning of “relating to forgery” under § 1101(a)(43)(R).

⁶ These instructions are reproduced at GA 45-49 and are also available on the Connecticut Judicial Branch website. *See* www.jud.state.ct.us/CriminalJury. A “Caveat” posted on the website warns that the form instructions are “entirely discretionary” and “their promulgation by the Judicial Branch is not a guarantee of their legal sufficiency.”

In short, the district court properly concluded that Connecticut's second-degree forgery statute is an offense "relating to forgery" under § 1101(a)(43)(R). Although the meaning and application of § 1101(a)(43)(R) is clear, if the Court were to conclude that the statute's scope is ambiguous, it should nonetheless defer to the BIA's interpretation under principles of *Chevron* deference. See *Evangelista*, 359 F.3d at 149; see also *Aradondo v. INS*, 13 F.3d 610, 613 (2d Cir. 1994) (BIA does not abuse its discretion by affirming decision of immigration judge without elaboration so long as the Court can ascertain the reasoning on which the immigration judge's decision was based).

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Dated: June 16, 2004

Respectfully submitted,

KEVIN J. O'CONNOR
UNITED STATES ATTORNEY
DISTRICT OF CONNECTICUT

A handwritten signature in black ink, appearing to read 'Patrick F. Caruso', with a long horizontal flourish extending to the right.

PATRICK F. CARUSO
ASSISTANT U.S. ATTORNEY

JEFFREY A. MEYER
ASSISTANT U.S. ATTORNEY (of counsel)

ADDENDUM

8 U.S.C. § 1101. Definitions

(a) As used in this chapter --

....

(43) The term “aggravated felony” means --

....

(R) an offense relating to commercial bribery, counterfeiting, forgery, or trafficking in vehicles the identification numbers of which have been altered for which the term of imprisonment is at least one year.

Conn. Gen. Stat. § 53a-139. Forgery in the second degree: Class D felony

(a) A person is guilty of forgery in the second degree when, with intent to defraud, deceive or injure another, he falsely makes, completes or alters a written instrument or issues or possesses any written instrument which he knows to be forged, which is or purports to be, or which is calculated to become or represent if completed: (1) A deed, will, codicil, contract, assignment, commercial instrument or other instrument which does or may evidence, create, transfer, terminate or otherwise affect a legal right, interest, obligation or status; or (2) a public record or an instrument filed or required or authorized by law to be filed in or with a public office or public servant; or (3) a written instrument officially issued or created by a public office, public servant or governmental instrumentality; or (4) a prescription of a duly licensed physician or other person authorized to issue the same for any drug or any instrument or device used in the taking or administering of drugs for which a prescription is required by law.

(b) "Drugs" as used in this section includes all drugs except controlled drugs as defined in section 21a-240.

(c) Forgery in the second degree is a class D felony.

11 Del.C. § 861. Forgery; class F felony; class G felony; class A misdemeanor; restitution required.

(a) A person is guilty of forgery when, intending to defraud, deceive or injure another person, or knowing that the person is facilitating a fraud or injury to be perpetrated by anyone, the person:

(1) Alters any written instrument of another person without the other person's authority; or

(2) Makes, completes, executes, authenticates, issues or transfers any written instrument which purports to be the act of another person, whether real or fictitious, who did not authorize that act, or to have been executed at a time or place or in a numbered sequence other than was in fact the case or to be a copy of an original when no original existed; or

(3) Possesses a written instrument, knowing that it was made, completed or altered under circumstances constituting forgery.

(b) Forgery is classified and punished as follows:

(1) Forgery is forgery in the first degree if the written instrument is or purports to be:

a. Part of an issue of money, stamps, securities or other valuable instruments issued by a government or a governmental instrumentality; or

b. Part of an issue of stock, bonds or other instruments representing interests in or claims against a corporation, business enterprise or other organization or its property.

Forgery in the first degree is a class F felony.

(2) Forgery is forgery in the second degree if the written instrument is or purports to be:

- a. A deed, will, codicil, contract, release, assignment, commercial instrument, check or other instrument which does or may evidence, create, transfer, terminate or otherwise affect a legal right, interest, obligation or status; or
- b. A public record, or an instrument filed or required to be filed in or with a public office or public servant; or
- c. A written instrument officially issued or created by a public office, public servant or governmental instrumentality; or
- d. Part of an issue of tokens, tickets, public transportation transfers, certificates or other articles manufactured and designed for use as symbols of value usable in place of money for the purchase of property or services; or
- e. A prescription of a duly licensed physician or other person authorized to issue the same for any drug or any instrument or device for which a prescription is required by law.

Forgery in the second degree is a class G felony.

(3) All other forgery is forgery in the third degree, a class A misdemeanor.

(c) In addition to any other penalty provided by law for violation of this section, the court shall require a person convicted of a violation of this section to make restitution to the party or parties who suffered loss as a result of such forgery.