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E-FILED - 8/17/10

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

HANG NAM YOON,)	No. C 10-2930 RMW (PR)
)	
Petitioner,)	ORDER OF DISMISSAL
)	
vs.)	
)	
ATTORNEY GENERAL JANET)	
NAPOLITANO, et al.,)	
)	
Respondents.)	
_____)	

Petitioner, a citizen of South Korea, who has been ordered removed from this country under its immigration laws, filed this action under 28 U.S.C. § 2241, claiming he received ineffective assistance of counsel during the pendency of his petition for review in the Ninth Circuit Court of Appeal. Petitioner has paid the filing fee. For the reasons stated below, the court DISMISSES the petition.

BACKGROUND

Petitioner arrived in the United States in 1975 as a Lawful Permanent Resident. In 2002, petitioner was convicted of willful infliction of corporal injury, in violation of California Penal Code § 273.5(a). On December 24, 2003, the Department of Homeland Security charged petitioner as removable as an aggravated felon and placed him into custody. On January 29, 2004, the immigration judge issued an order of removal. The Board of Immigration Appeals denied petitioner’s appeal on August 9, 2004. On January 21, 2005, the Ninth Circuit dismissed

1 petitioner's petition for review for lack of jurisdiction. On March 1, 2005, petitioner filed a
2 petition for writ of habeas corpus in the federal district court in Arizona, which transferred the
3 petition to the Ninth Circuit. On May 6, 2010, the Ninth Circuit dismissed the case for lack of
4 jurisdiction. On June 29, 2010, petitioner filed the underlying petition.

5 DISCUSSION

6 A. Standard of Review

7 The court may entertain a petition for a writ of habeas corpus in behalf of a person "in
8 custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. §
9 2241(c)(3). It shall "award the writ or issue an order directing the respondent to show cause
10 why the writ should not be granted, unless it appears from the application that the applicant or
11 person detained is not entitled thereto." *Id.* at § 2243. Summary dismissal is appropriate only
12 where the allegations in the petition are vague or conclusory, palpably incredible, or patently
13 frivolous or false. See Hendricks v. Vasquez, 908 F.2d 490, 491 (9th Cir. 1990) (citation
14 omitted).

15 B. Petitioner's Claim

16 Petitioner claims that his retained counsel who filed his petition for review before the
17 Ninth Circuit in 2004 rendered ineffective assistance. Specifically, petitioner argues that counsel
18 should have alerted the Ninth Circuit regarding the effect of Leocal v. Ashcroft, 543 U.S. 1
19 (2004),¹ which was issued prior to the Ninth Circuit's dismissal of his case. Petitioner's main
20 contention is that his conviction under California Penal Code § 273.5(a) is not a categorical
21 crime of violence and thus, petitioner should not have been found removable as an aggravated
22 felon. Petitioner asserts that Leocal was relevant to his petition for review and because counsel
23 should have presented an argument using Leocal but did not, he was ineffective. As a result,
24 claims petitioner, the Ninth Circuit erroneously dismissed his petition.

25
26 ¹ Leocal held that a conviction of driving under the influence of alcohol could not be a
27 crime of violence if the statute "reach[es] individuals who were negligent or less." 543 U.S. at
28 13. "The bedrock principle of Leocal is that to constitute a federal crime of violence an offense
must involve the intentional use of force against the person or property of another." Fernandez-
Ruiz v. Gonzales, 466 F.3d 1121, 1132 (9th Cir. 2006) (en banc).

1 A district court has jurisdiction to consider a petition for a writ of habeas corpus brought
2 by a person in custody pursuant to an order of removal, where the petition is not a direct
3 challenge to an order of removal. See Singh v. Gonzales, 499 F.3d 969, 972 (9th Cir. 2007). In
4 the context of a removal proceeding, “[i]neffective assistance of counsel amounts to a violation
5 of due process if the proceeding was so fundamentally unfair that the alien was prevented from
6 reasonably presenting [the alien’s] case.” Mohammed v. Gonzales, 400 F.3d 785, 793-94 (9th
7 Cir. 2005) (internal quotation and citation omitted).

8 The Ninth Circuit has recently held that California Penal Code § 273.5(a) is categorically
9 a crime of violence within the meaning of 18 U.S.C. § 16. Banuelos-Ayon v. Holder, 2010 WL
10 2757372, *3 (9th Cir. July 14, 2010). Thus, even if counsel had presented such an argument to
11 the Ninth Circuit in the petition for review, the result would not have been different. Strickland
12 v. Washington, 466 U.S. 668, 686 (1984). Because it “plainly appears from the face of the
13 petition . . . that petitioner is not entitled to relief” on this claim, see Hendricks, 908 F.2d at 491,
14 this federal habeas action is DISMISSED.

15 CONCLUSION

16 For the foregoing reasons, the court DISMISSES petitioner’s habeas petition.

17 Rule 11(a) of the Rules Governing Section 2254 Cases requires a district court to rule on
18 whether a petitioner is entitled to a certificate of appealability in the same order in which the
19 petition is denied. Petitioner has failed to make a substantial showing that his claims amounted
20 to a denial of his constitutional rights or demonstrate that a reasonable jurist would find the
21 denial of his claim debatable or wrong. Slack v. McDaniel, 529 U.S. 473, 484 (2000).
22 Consequently, no certificate of appealability is warranted in this case.

23 The Clerk shall terminate all pending motions and close the file.

24 IT IS SO ORDERED.

25 DATED: 8/17/10 _____


26 RONALD M. WHYTE
United States District Judge