DISTRICT COURT OF GUAM

SANG HO KIM,
 	
            Petitioner,
 	
     vs.
 	
UNITED STATES OF AMERICA,
 	
            Respondent.
	Civil Case No. 08-00018
	Criminal Case No. 06-00071
	
	**OPINION AND ORDER RE: MOTION
	PURSUANT TO 28 U.S.C. § 2255**

This matter comes before the court on a Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody, filed by Petitioner Sang Ho Kim ("Petitioner") on October 24, 2008. Pursuant to Local Civil Rule 7.1(e)(3), this matter is appropriate for decision without the need for oral argument.[1] After reviewing the parties' submissions, as well as relevant authority, the court hereby **DENIES** the motion and issues the following decision.

I.   FACTUAL AND PROCEDURAL BACKGROUND

The Petitioner was indicted on November 15, 2006, on charges of Fraud in Connection with Identification Documents in violation of 18 U.S.C. §§ 2 and 1028(a)(6). *See* Docket No. 1. On January 23, 2008, a Superseding Indictment charged him with Criminal Conspiracy in violation of 18 U.S.C. §§ 2 and 371, and Fraud in Connection with Identification Documents in violation of 18 U.S.C. §§ 2 and 1028(a)(1); 1028(b)(1)(A)(ii) and 1028(c)(3)(A). *See* Docket No. 4. Attorney

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[1] Local Civ.R. 7.1(e)(3) states "[i]n cases where the parties have requested oral argument, such oral argument may be taken off calendar by Order of the Court, in the discretion of the Court, and a decision rendered on the basis of the written materials on file."

1 Joseph Razzano was appointed to represent him. *See* Docket No. 14. On April 9, 2008, the

2 Petitioner entered a guilty plea to the first count of the Superseding Indictment, Criminal Conspiracy

3 in violation of 18 U.S.C. §§ 2 and 371. *See* Docket Nos. 19 and 22. The Magistrate Judge issued

4 a Report and Recommendations that the Petitioner's guilty plea be accepted. *See* Docket No. 21.

5 The guilty plea was accepted and sentencing was held on August 8, 2008. *See* Docket Nos. 23 and

6 35. The Petitioner was sentenced to time served (of approximately 84 days) and two years of

7 supervised release. He was also ordered to pay a $1,000 fine. The court granted the Government's

8 oral motion to dismiss the second count of the Superseding Indictment.

9   On October 17, 2008, the Petitioner's request for substitution of new counsel was granted.

10 On October 24, he filed the instant motion and a supporting memorandum. *See* Docket Nos. 46 and

11 47. The Government filed its response. *See* Docket No. 49. During the pendency of the instant

12 case, the case of *United States v. Haeng Hwa Lee*, Criminal Case No. 06-00080, was also pending

13 before this court and was later appealed to the Ninth Circuit.[2] Recognizing that the Ninth Circuit's

14 decision in *Haeng Hwa Lee* would be guiding authority, this court stayed the instant case until the

15 Ninth Circuit ruled on the appeal in *Haeng Hwa Lee*. *See* Docket No. 52. The Ninth Circuit held

16 oral argument in *Haeng Hwa Lee* on February 11, 2010, and filed its Memorandum on February 22,

17 2010, holding that the appellant was precluded from challenging the legality of the requirement that

18 she present an ITIN to obtain a Guam driver's license. On May 27, 2010, the Ninth Circuit issued

19 its mandate in the *Haeng Hwa Lee* case.

20 **II.   DISCUSSION**

21   The Petitioner's Motion does not specifically cite the specific grounds under § 2255 that

22 serve as the basis for his Motion. He essentially argues that the Superseding Indictment does not

23 allege any unlawful conduct. *See* Docket No. 47. Thus, he contends that: 1) that there was no

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26   [2] An issue on appeal in the *Haeng Hwa Lee* case is the identical issue raised by Petitioner
here, that the indictment does not state an offense. Specifically, both the appellant in *Haeng Hwa
Lee* and the Petitioner argue that there was no lawful authority, no statute or regulation, requiring

27 a Taxpayer Identification Number (TIN).

1 federal offense committed; 2) his conviction is invalid because it was obtained by the guilty plea

2 entered into without understanding the charge; 3) his conviction was obtained by the guilty plea that

3 he entered into without understanding the charge because the Petitioner did not understand the

4 meaning of "collateral attack"; and 4) he was denied effective assistance of counsel. *See* Criminal

5 Case No. 06-00071, Docket 46.

6   The Government requests the court dismiss the Motion, arguing that the Petitioner

7 procedurally defaulted these claims by failing to appeal from the conviction or sentence.

8 Furthermore, the Government contends that the Petitioner waived his right to collaterally attack his

9 conviction, and has not demonstrated ineffective assistance of counsel.

10 **A. No federal offense**

11   The Petitioner asserts that there is no statute or regulation that requires the use of a Taxpayer

12 Identification Number ("TIN") in obtaining a Guam driver's license; therefore, his "alleged use of

13 a false use of a TIN could not have caused the Guam Department of Revenue and Taxation ("DRT")

14 to produce a driver's license without lawful authority." Docket No. 47. As noted above, the court

15 stayed this case pending the Ninth Circuit's disposition of the *Haeng Hwa Lee* case. The defendant

16 in *Haeng Hwa Lee*, like the defendant here, argued that the DRT lacked the lawful authority to

17 require to require a TIN and thus, DRT could not have produced a driver's license without lawful

18 authority. After hearing oral argument on February 11, 2010, the Ninth Circuit rejected this

19 argument in an unpublished memorandum opinion. Citing *Dennis v. United States*, 384 U.S. 855,

20 866 (1966),[3] the Ninth Circuit held that defendant Lee was precluded from challenging the legality

21 of the underlying requirement of presenting a TIN in order to receive a driver's license.

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23   [3] The appellants in *Dennis* were convicted of conspiracy to fraudulently obtain the services
24 of the National Labor Relations Board by filing false affidavits to satisfy § 9(h) of the National
   Labor Relations Act. 384 U.S. at 857. They argued that their convictions should be set aside
25 because § 9(h) was unconstitutional. The United States Supreme Court refused to address their
   argument, stating that the appellants, who were convicted of conspiring to circumvent the statute,
26 were "in no position to attack the constitutionality" of this statute. *Id.* at 865. The Court held it was
   no defense to a charge based on fraud "that the statutory scheme sought to be evaded is somehow
27 defective." *Id.* at 866.

1   The court is guided by the holdings of the United States Supreme Court in *Dennis* and the

2   Ninth Circuit's reliance on *Dennis* in *Haeng Hwa Lee*. The court rejects the Petitioner's claim that

3   no federal offense was committed, and finds that the Petitioner here is precluded from challenging

4   the legality of the requirement of presenting a valid TIN in order to receive a Guam driver's license.

5   The court further rejects the Petitioner's claim that he entered a guilty plea without understanding

6   the charge. As concluded, there was indeed a federal offense.

7   **B.   Waiver**

8   The Petitioner's plea agreement filed on April 3, 2008, contains an express waiver, stating:

9   "In exchange for the Government's concessions in this plea agreement, the defendant waives any

10   right to appeal or to collaterally attack his conviction but reserves the right to appeal the sentence

11   imposed in this case." Docket No. 18.

12   He contends that he entered a guilty plea without understand the meaning of "collateral

13   attack," and therefore, the conviction is invalid. *See* Docket No. 46. The Government asserts that

14   the Petitioner, in his plea agreement, waived his right to collaterally attack his conviction. *See*

15   Docket No. 18.

16   The Ninth Circuit has held that "[a] plea agreement does not waive the right to bring a §

17   2255 motion unless it does so expressly." *United States v. Transfiguracion*, 442 F.3d 1222, 1231

18   (9th Cir. 2006) (quoting *United States v. Pruitt*, 32 F.3d 421, 433 (9th Cir. 1994). Despite the

19   Petitioner's express waiver, he seemingly argues that he received ineffective assistance of counsel,

20   because he was not advised of the meaning of "collateral attack." Docket No. 46. About half of the

21   federal circuits have held that a petitioner may challenge the validity of this waiver on ineffective

22   assistance of counsel grounds.[4] Establishing ineffective assistance counsel requires a petitioner to

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24   [4] *See United States v. White*, 307 F.3d 336, 341 (5th Cir. 2002) (stating that "a waiver of
     appeal may not be enforced against a section 2255 petitioner who claims that ineffective assistance
25   of counsel rendered that waiver unknowing or involuntary."); *United States v. Cockerham*, 237 F.3d
     1179, 1187 (10th Cir. 2001) ("[W]e hold that a plea agreement waiver of postconviction rights does
26   not waive the right to bring a § 2255 petition based on ineffective assistance of counsel claims
     challenging the validity of the plea or the waiver."); *DeRoo v. United States*, 223 F.3d 919, 924 (8th
27   Cir. 2000) ("A defendant's plea agreement waiver of the right to seek section 2255 post-conviction

1 demonstrate deficient performance by counsel, and that such deficient performance prejudiced his

2 defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). A court evaluating this claim "need

3 not determine whether counsel's performance was deficient before examining the prejudice suffered

4 by the defendant as a result of the alleged deficiencies. . . . If it is easier to dispose of an

5 ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be

6 so, that course should be followed." *Id.* at 697.

7   This course is followed here. The Petitioner has not shown prejudice, because he has not

8 demonstrated that the outcome of the proceeding would have been different. The Petitioner's

9 conviction was the result of a guilty plea. The Petitioner has not shown that he would have

10 withdrawn his plea, and more importantly, that the court would have accepted withdrawal of his

11 guilty plea. Because he has not shown prejudice, the court finds there was no ineffective assistance

12 of counsel, and furthermore, that the Petitioner has waived his right to collaterally attack his

13 conviction.

14   **C.   Ineffective assistance of counsel**

15   Finally, the Petitioner argues that he received ineffective assistance of counsel because his

16 attorney "led him to believe" that DRT's Motor Vehicles Division regulations "prohibited an alien

17 from receiving a three-year Guam drivers license unless he had proof he was entitled to be in the

18 United States" by showing a original Social Security card, notarized letter from Social Security, or

19 an original letter from the Internal Revenue Service as authenticating a TIN. Docket No. 46.

20   Again, this argument stems from his assertion that there were no regulations and thus no

21 federal offense charged. This argument was rejected above.

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24 relief does not waive defendant's right to argue, pursuant to that section, that the decision to enter
    into the plea was not knowing and voluntary because it was the result of ineffective assistance of
25 counsel."); *Jones v. United States*, 167 F.3d 1142, 1145 (7th Cir. 1999) (finding that a defendant
    could file a § 2255 petition despite cooperation agreement containing § 2255 waiver because
26 "[j]ustice dictates that a claim of ineffective assistance of counsel in connection with the negotiation
    of a cooperation agreement cannot be barred by the agreement itself-the very product of the alleged
27 ineffectiveness").

D.   Procedural default

The Government asserts that the Petitioner has procedurally defaulted these claims by failing to argue them on appeal. "Where a defendant has procedurally defaulted a claim by failing to raise it on direct review, the claim may be raised in habeas only if the defendant can first demonstrate 'cause' and 'actual prejudice,' or that he is ''actually innocent.'" *Bousley v. United States*, 523 U.S.614, 622 (1998) (citations omitted). *See also United States v. Skurdal*, 341 F.3d 921, 925 (9th Cir. 2003) ("If a criminal defendant could have raised a claim of error on direct appeal but nonetheless failed to do so, he must demonstrate both cause excusing his procedural default, and actual prejudice resulting from the claim of error.") (quoting *United States v. Johnson*, 988 F.2d 941, 945 (9th Cir. 1993)). Therefore, the court examines whether the Petitioner has demonstrated cause and actual prejudice, or whether he is actually innocent.

1.   Cause and actual prejudice

A petitioner bears the burden of showing cause and actual prejudice. *See Woolery v. Arave*, 8 F.3d 1325, 1331 (9th Cir. 1993). "Generally, to demonstrate 'cause' for procedural default, an appellant must show that 'some objective factor external to the defense' impeded his adherence to the procedural rule." *Skurdal*, 341 F.2d at 925. "Attorney ignorance or inadvertence is not 'cause'" that would excuse procedural default. *Coleman v. Thompson*, 501 U.S. 722, 753 (1991); *see also Murray v. Carrier*, 477 U.S. 478, 486 (1986) ("[T]he mere fact that counsel failed to recognize the factual or legal basis for a claim, or failed to raise the claim despite recognizing it, does not constitute cause for a procedural default.").

Here, the Petitioner has not shown any cause to excuse the procedural default. This argument was simply not raised. Therefore, this court need not examine whether there was actual prejudice. *See Cavanaugh v. Kincheloe*, 877 F.2d 1443, 1448 (recognizing that if a petitioner fails to demonstrate cause then a reviewing court need not determine whether he has carried his burden of showing actual prejudice).

2.   Actual innocence

The Petitioner bears the burden of proving that he was "actually innocent" of the offense.

1   *See Bousley*, 523 U.S. at 622. "[A]ctual innocence means factual innocence, not mere legal

2   insufficiency." *Id.* at 623. In short, actual innocence requires that "the trier of the facts would have

3   entertained a reasonable doubt of his guilt." *Kuhlmann v. Wilson*, 477 U.S. 436, 454 n.17 (1986)

4   (quoting Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38

5   U.Chi.L.Rev. 142, 160 (1970)).

6   Here, the Petitioner's argument is based on legal insufficiency. He asserts that there is no

7   statute or regulation that requires the use of a Taxpayer Identification Number ("TIN"); therefore,

8   his "alleged use of a false use of a TIN could not have caused the Guam Department of Revenue and

9   Taxation ("DRT") to produce a driver's license without lawful authority." Docket No. 47. This

10   argument was rejected by the Ninth Circuit, and is rejected herein.

11   **III. CONCLUSION**

12   Accordingly, the Petitioner's Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or

13   Correct Sentence is **HEREBY DENIED.** Furthermore, the court does not find that the Petitioner "has

14   made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2).

15   Therefore, the court will **NOT** issue a certificate of appealability. *See* Rule 11 of the Rules

16   Governing Section 2255 Proceedings for the United States District Courts.

17   **SO ORDERED**.

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19   **/s/ Frances M. Tydingco-Gatewood**
                                  Chief Judge

20   **Dated: Sep 14, 2010**

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