Case No. S142892

IN THE SUPREME COURT OF CALIFORNIA

NORTH COAST WOMEN'S CARE MEDICAL GROUP et al.,
Petitioners,

v.

SUPERIOR COURT OF SAN DIEGO COUNTY,
Respondent;

GUADALUPE T. BENITEZ,
Real Party in Interest.

After a Decision by the Court of Appeal,
Fourth Appellate District, Division One,
Court of Appeal Case No. DO 45438

ANSWER TO PETITION FOR REHEARING OF REAL PARTY IN INTEREST GUADALUPE T. BENITEZ

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTRODUCTION

DISCUSSION

I. DEFENDANTS HAVE WAIVED ANY ARGUMENT THAT THEIR RELIGIOUS FREEDOM AFFIRMATIVE DEFENSE RUNS AGAINST PLAINTIFF'S CONTRACT AND TORT CLAIMS 2

II. BOTH SIDES HAVE BRIEFED THE ARGUMENT, WHICH CAN BE ACKNOWLEDGED AND REJECTED WITHOUT FURTHER BRIEFING OR REHEARING 4

III. PLAINTIFF'S PROPOSED MINOR MODIFICATION..... 7

CONCLUSION 8

CERTIFICATE OF COMPLIANCE 9

TABLE OF AUTHORIES

Page

Cases

American Life League, Inc. v. Reno
(4th Cir. 1995) 47 F.3d 642, 654-655 4

Bridge Publications, Inc. v. Vien
(S.D. Cal. 1993) 827 F.Supp. 629 ..... 4, 6

Catholic Charities of Sacramento, Inc. v. Superior Court
(2004) 32 Cal.4th 527, 565 6

Curcio v. Svanevik
(1984) 155 Cal.App.3d 955, 960 ..... 3, 7

Electronic Equip. Express, Inc. v. Donald H. Seiler & Co.
(1981) 122 Cal.App.3d 834 3

Hester v. Barnett
(Mo.App. 1987) 723 S.W.2d 544 4

Lucich v. City of Oakland
(1993) 19 Cal.App.4th 49 ..... 3, 7

Molko v. Holy Spirit Association
(1988) 46 Cal.3d 1092 4

Park v. Schlitgen
(N.D.Cal. Mar. 9, 1999) No. C 97-1813 SI, 1999 WL 138887 4

People v. Jones
(Ill.App.Ct. 1998) 697 N.E.2d 457 4

Richelle L. v. Roman Catholic Archbishop of San Francisco
(2003) 106 Cal.App.4th 257 4

TABLE OF AUTHORIES

Page

Cases

American Life League, Inc. v. Reno
(4th Cir. 1995) 47 F.3d 642, 654-655 4

Bridge Publications, Inc. v. Vien
(S.D. Cal. 1993) 827 F.Supp. 629 ..... 4, 6

Catholic Charities of Sacramento, Inc. v. Superior Court
(2004) 32 Cal.4th 527, 565 6

Curcio v. Svanevik
(1984) 155 Cal.App.3d 955, 960 ..... 3, 7

Electronic Equip. Express, Inc. v. Donald H. Seiler & Co.
(1981) 122 Cal.App.3d 834 3

Hester v. Barnett
(Mo.App. 1987) 723 S.W.2d 544 4

Lucich v. City of Oakland
(1993) 19 Cal.App.4th 49 ..... 3, 7

Molko v. Holy Spirit Association
(1988) 46 Cal.3d 1092 4

Park v. Schlitgen
(N.D.Cal. Mar. 9, 1999) No. C 97-1813 SI, 1999 WL 138887 4

People v. Jones
(Ill.App.Ct. 1998) 697 N.E.2d 457 4

Richelle L. v. Roman Catholic Archbishop of San Francisco
(2003) 106 Cal.App.4th 257 4

INTRODUCTION

Defendant doctors Christine Brody and Douglas Fenton have petitioned for rehearing or modification, asking the court to rule explicitly on their contention that their thirty-second affirmative defense applies against the contract and tort claims presented by plaintiff Guadalupe Benitez, despite the court's ruling that the defense is invalid against her Unruh Civil Rights Act claim. (Civ. Code, § 51.)

Plaintiff does not object to a modification of the court's August 18, 2008 decision ("the Decision") to address – and reject – defendants' assertion that they should be allowed to present their thirty-second affirmative defense against the contract and tort causes of action at trial. Defendants' assertion does not warrant rehearing, however, for at least two reasons. First, defendants waived this ground for reinstatement of their thirty-second affirmative defense by not asserting it in either the superior court or the Court of Appeal. Second, even if the court were to consider the merits of this untimely argument now, there would be no cause for rehearing because both sides already have briefed the point. (See, e.g., defendants' Answer Brief on the Merits ("ABOM") 66; plaintiff's Reply Brief on the Merits ("RBOM") 19; defendants' Supplemental Letter Brief ("DSLB") 1-2, 4-5; plaintiff's Responding Supplemental Letter Brief ("PRSLB") 10-11; defendants' Reply Letter Brief ("DRLB") 1, 2-3.) There is no need for yet further briefing and argument. However, for the superior court's guidance on remand, it would be helpful for this court to modify the Decision as plaintiff proposes below to reject defendants' belated, unsound contention that the constitutional restrictions protecting religious liberty from government interference allow private parties to

commit tortious acts against other private parties and breach private contracts they choose to make as they engage in business.

DISCUSSION

I. DEFENDANTS HAVE WAIVED ANY ARGUMENT THAT THEIR RELIGIOUS FREEDOM AFFIRMATIVE DEFENSE RUNS AGAINST PLAINTIFF'S CONTRACT AND TORT CLAIMS.

Plaintiff moved for summary adjudication of defendants' thirty-second affirmative defense in its entirety. (See Writ Petition Exhibits ("Pet. Ex.") 3 and 4, at pp. 44-71.) In opposing the motion, defendants only presented arguments concerning the Unruh Act. (See Pet. Ex. 18, at pp. 256-275.) Defendants did *not* claim a religious freedom right to breach commercial contracts into which they had entered voluntarily or to commit tortious acts against their patients. (See generally *id.*) The superior court granted plaintiff's motion in its entirety. (Pet. Ex. 25, at pp. 438-439.)

Defendants then sought writ review in the Court of Appeal. As in the superior court, their writ petition contended only that they have a constitutional right not to be compelled by the state to comply with the Unruh Act. (See generally Petition for Writ of Mandate and/or Prohibition.) Defendants' replication to the Court of Appeal likewise only contended that they have a religious freedom defense to the Unruh Act cause of action. (See Replication 1-2, 5-43.) At no time in the Court of Appeal did defendants argue that the superior court had erred in granting plaintiff's motion and striking the thirty-second affirmative defense on the

ground that they purportedly have a constitutionally protected right to breach business contracts and to commit torts against their patients.

Not until defendants reached this court did they assert, for the first time, that their religious freedom affirmative defense runs against *all* of plaintiff's claims, not just her Unruh Act claim. (ABOM 23-34, 66.) Plaintiff pointed out in her Reply Brief on the Merits that defendants had failed to present any plausible legal authority for this untimely argument. (RBOM 19.)

When defendants pressed this unsupportable argument again in their Supplemental Letter Brief (DSLB 1-2, 4-5), plaintiff pointed out that a defense theory not asserted in the trial court is waived and cannot be argued for the first time in the Court of Appeal, let alone the Supreme Court. (PRSLB 8-9, citing *Lucich v. City of Oakland* (1993) 19 Cal.App.4th 494, 498; *Curcio v. Svanevik* (1984) 155 Cal.App.3d 955, 960.) Even if it were true that a plaintiff's summary adjudication motion regarding an affirmative defense must address and affirmatively negate that defense with respect to each cause of action (which is not the rule, as plaintiff explained), defendants waived any claim on that point by failing to assert it in the trial court. (See *Telles Transport, Inc. v. Workers' Comp. App. Bd.* (2001) 92 Cal.App.4th 1159, 1167; *Sperber v. Robinson* (1994) 26 Cal.App.4th 736, 742-743; *Electronic Equip. Express, Inc. v. Donald H. Seiler & Co.* (1981) 122 Cal.App.3d 834, 856-857.)

Accordingly, given defendants' failure to assert any such defense before reaching this court, they have waived the argument. It does not warrant further consideration either now by this court by way of rehearing or on remand.

II. BOTH SIDES HAVE BRIEFED THE ARGUMENT, WHICH CAN BE ACKNOWLEDGED AND REJECTED WITHOUT FURTHER BRIEFING OR REHEARING.

Regardless of defendants' waiver, the lack of merit in their new argument is demonstrated in the briefs already presented to this court. When defendants first made this argument in their Answer Brief on the Merits, they offered only article 1, section 4 of the California Constitution and one New York City court decision from 1813 as supporting authority. (ABOM 23-34.) As plaintiff pointed out in her Responding Supplemental Letter Brief, the lack of authority supporting defendants' new argument is not because it has never been tried before. (PRSLB 10-11, citing RBOM 19.) Rather, numerous courts over the years have considered and rejected religious freedom affirmative defenses to both civil and criminal charges. (*Id.*, citing RBOM 19; see, e.g., *Park v. Schlitgen* (N.D.Cal. Mar. 9, 1999) No. C 97-1813 SI, 1999 WL 138887 [claimed religious right to commit involuntary manslaughter] [copy attached hereto per Cal. Rules of Court, rule 8.1115(c)]; *People v. Jones* (Ill.App.Ct. 1998) 697 N.E.2d 457, 460 [claimed religious right to beat wife]; *American Life League, Inc. v. Reno* (4th Cir. 1995) 47 F.3d 642, 654-655 [claimed religious right to block property entrance]; *Bridge Publications, Inc. v. Vien* (S.D. Cal. 1993) 827 F.Supp. 629, 635 [claimed religious right to infringe copyright] (*Bridge Publications*); *Hester v. Barnett* (Mo.App. 1987) 723 S.W.2d 544, 557-558 [claimed religious right to defame].)[1]

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[1] Defendants cited two cases in support of their position, *Molko v. Holy Spirit Association* (1988) 46 Cal.3d 1092, and *Richelle L. v. Roman Catholic Archbishop of San Francisco* (2003) 106 Cal.App.4th 257. (See DSLB 4.)

The constant rejection of such religious freedom claims is not surprising. First, as this court noted when rejecting defendants' free speech argument, "the First Amendment prohibits *government* abridgement of free speech. Here, plaintiff is a private citizen. Therefore, her conduct as complained of by defendants does not fall within the ambit of the First Amendment." (Decision, typed opn. p. 12, original italics.)

Second, it only takes a moment to imagine the consequences for the marketplace and our society generally if those engaged in commerce were free to breach the contracts into which they voluntarily enter, and to commit tortious acts against third parties, as protected forms of religious exercise. If defendants were correct and the constitutional protections for religious exercise empowered individuals to breach contracts and commit torts against others – absolved of responsibility for the resulting harms because of their religious motivation – our society would descend in short order into sectarian conflict and chaos. As explained in plaintiff's Reply Brief on the Merits, however, the framers of the California Constitution did not intend the protection of religious liberty to excuse lawless conduct and conduct that harms others. (RBOM 11-13.) Accordingly, the framers paired the protection against state restriction of religious belief and worship with the principle that there shall be no preferences between religions, nor of religious interests over secular interests. (Cal. Const., art. 1, § 4; see also

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Both cases, however, involved tort claims against clergy and churches regarding conduct that occurred in the context of a clergy person's ministerial work or personal relationship with a parishioner, or a church's religious proselytizing. Neither case even remotely supports defendants' radical notion that the constitutional protections against state interference with religious belief and worship authorize those engaged in secular business or professional activities to commit torts and breach their contracts.

RBOM 19-20; *Sands v. Morongo Unified School Dist.* (1991) 53 Cal.3d 863, 883-884; *Bridge Publications, supra,* 827 F. Supp. at p. 635.) As that principle requires even churches to adhere to religiously neutral rules that maintain a level-playing field for sectarian and secular interests (see, e.g., *Roman Catholic Archbishop of Los Angeles v. Superior Court* (2005) 131 Cal.App.4th 417, 437-438 [church is not exempt from duty to comply with valid subpoenas]), it is beyond reasonable dispute that those engaged in state-regulated professional activities have no greater license to violate age-old rules of contract and tort law than they do to violate modern society's civil rights laws.

Defendants attempt the argument that no state policy justifies forcing them to comply with contract and tort laws because those rules are not embodied in statutes like the Unruh Act. (Petition for Rehearing 4, citing ABOM 66.) That is nonsense. Much of contract and tort law has become codified in California. But more to the point, there is no such requirement. Tort and contract principles are among society's oldest, having come to us from the common law. Many tort and contract rules predate not only California but the United States of America. These rules are essential for the orderly functioning of any civilized society. The framers of the California Constitution implicitly referenced these rules when limiting the protections provided by article 1, section 4: "This liberty of conscience does not excuse acts that are licentious or inconsistent with the peace or safety of the State." (Cal. Const, art. 1, § 4; see also RBOM 19-20.)

Given this court's emphasis on the law's responsibility to protect third parties from religiously motivated harm in commercial contexts (see, e.g., *Catholic Charities of Sacramento, Inc. v. Superior Court* (2004) 32 Cal.4th 527, 565; *Smith v. Fair Employment & Housing Comm'n* (1996) 12

Cal.4th 1143, 1170-1171, 1174-1175), it is beyond dispute that the state has ample interests requiring enforcement of the tort and contract laws invoked by plaintiff's complaint, all of which apply in a religiously neutral manner and prevent designated harms in a properly tailored manner. There is no cause for further briefing or argument of defendants' untimely and baseless contentions.

III. PLAINTIFF'S PROPOSED MINOR MODIFICATION

Instead of the suggestions defendants offer in their Petition for Rehearing (see page 5), plaintiff respectfully proposes to the contrary that the court modify the Decision by inserting the following footnote at the end of the third sentence of the first full paragraph on page 6 of the typed Decision, which references defendants' filing of their writ petition in the Court of Appeal:

> Defendants argue to this court that they should be permitted to assert a religious freedom affirmative defense to plaintiff's contract and tort claims on remand. Because defendants made this argument neither in the superior court in opposition to plaintiff's summary adjudication motion nor in the Court of Appeal in support of their petition for a writ of mandate, it has been waived and the court does not address its substance in this decision. (*Lucich v. City of Oakland* (1993) 19 Cal.App.4th 494, 498; *Curcio v. Svanevik* (1984) 155 Cal.App.3d 955, 960.)

CONCLUSION

For the foregoing reasons, there is no need for this court to entertain further briefing and argument. The superior court's order granting summary adjudication of defendants' thirty-second affirmative defense was correct. The petition for rehearing should be denied.

Dated: September 15, 2008

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that, excluding tables and this certificate, but including footnotes, the foregoing brief contains 1,900 words on the computer program used to prepare the brief, and that it is proportionately spaced and has a typeface of 13 points.

Dated: September 15, 2008

Jennifer C. Pizer
Attorney for Plaintiff and Real Party in Interest Guadalupe T. Benitez

Park v. Schlitgen
Not Reported in F.Supp.2d, 1999 WL 138887
N.D.Cal.,1999.
March 09, 1999 (Approx. 7 pages)

Not Reported in F.Supp.2d, 1999 WL 138887 (N.D.Cal.)

Motions, Pleadings and Filings

United States District Court, N.D. California.
Eun Kyung PARK, Petitioner,
v.
Thomas J. SCHLITGEN, Respondent.
No. C 97-1813 SI.
March 9, 1999.

Robert Yeargin, Esq., U.S. Attorney's Office, San Francisco.

Gregory Chandler, Esq., San Francisco.

ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS

ILLSTON, District J.

*1 Petitioner Eun Kyung Park seeks a writ of habeas corpus pursuant to 28 U.S.C. § 2241. She raises three general complaints: (1) that the immigration judge in her deportation proceeding engaged in judicial misconduct; (2) that the deportation stemmed from an involuntary manslaughter conviction obtained in violation of the Free Exercise Clause of the Constitution; and (3) that her involuntary manslaughter conviction was not a deportable offense. For the reasons set forth below, the Court finds that it has jurisdiction to hear Park's writ, and Park's writ is hereby DENIED.

BACKGROUND

Park is a native and citizen of South Korea. On September 6, 1995, she was charged with murder in violation of California Penal Code § 187. *People v. Eun Kyung Park and Hwa Ja Ra,* No. 125011AB. She later pled guilty to involuntary manslaughter under California Penal Code § 192(b). On August 2, 1996, Park was convicted of involuntary manslaughter and sentenced to a three year prison term.

On August 29, 1996, the Immigration and Naturalization Services ("INS") issued an Order to Show Cause while Park was still in custody, alleging that Park was deportable because she had entered the United States without inspection and had been convicted of a crime involving moral turpitude. Subsequently, additional charges were made against her, alleging that she was deportable as a result of her aggravated felony conviction. The OSC was filed with the immigration court. On May 9, 1997, the immigration court ordered Park deported as an aggravated felon under § 241(a)(2)(A)(iii) of the Immigration and Nationality Act (INA), codified at 8 U.S.C. § 1251(a)(2)(A)(iii).[FN1]

FN1. Under the Illegal Immigration Reform and Immigration Responsibility Act of 1996, this section has been renumbered and now appears at section 237 of the Act, 8 U.S.C. § 1227.

On May 15, 1997, Park filed a petition for writ of habeas corpus with this Court. In the petition, she alleged (1) that the immigration judge engaged in judicial misconduct in violation of her due process rights, (2) that the deportation order stemmed from an involuntary manslaughter conviction which was allegedly obtained in violation of the Free Exercise Clause of the Constitution, and (3) that her involuntary manslaughter conviction was not a deportable offense.

On May 30, 1997, Park appealed the immigration judge's decision to the Board of Immigration Appeals ("BIA"), claiming that she was denied an adequate opportunity to defend. On November 14, 1997, the BIA dismissed Park's appeal, finding no merit in Park's claims.

Park appealed the BIA's decision directly to the Ninth Circuit. On January 29.1998, the Ninth Circuit ordered the briefing schedule and INS's motion to dismiss to be held in abeyance, noting that the jurisdictional issues raised in the petition were before the court in *Magana-Pizano,* Nos. 97-70384, 97-15678. On September 1, 1998, the Ninth Circuit rendered a decision in *Magana-Pizano v. I.N.S.*, 152 F.3d 1213 (9th Cir.1998). Thereafter, both parties filed supplemental briefs addressing the issue of this Court's jurisdiction in light of *Magana-Pizano.*

LEGAL STANDARD

*2 Park's application for habeas corpus relief was filed pursuant to 28 U.S.C. § 2241. To obtain habeas corpus relief, Park must demonstrate that she is in custody in violation of the federal Constitution, a federal statute, or a treaty. 28 U.S.C. § 2241(c)(3); *Magana-Pizano,* 152 F.3d at 1222 (1998) ("if a first time habeas corpus petitioner is 'in custody in violation of the Constitution or laws or treaties of the United States,' petitioner is entitled to habeas corpus relief").

DISCUSSION

1. This Court's Jurisdiction Under 28 U.S.C. § 2241

As a threshold issue, the parties dispute whether this Court has jurisdiction over Park's request for habeas relief under § 2241. Park argues that this Court has jurisdiction because it is the only judicial forum that may hear Park's constitutional claims relating to her deportation order. Respondent counters that the newly enacted Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) prevent district courts from exercising jurisdiction over habeas petitions, and that the court of appeals is the exclusive forum for judicial review of a deportation order.

The new immigration laws enacted under AEDPA and IIRIRA substantially restrict the scope of judicial review afforded to aliens seeking to contest their deportation orders. For example, newly enacted INA § 242(g), which applies retroactively to claims arising from all past removal proceedings, provides:

Except as provided in this section and notwithstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter. INA § 242(g) (codified at 8 U.S.C. § 1252(g) (Supp. II 1996)).

The Ninth Circuit has construed INA § 242(g) as divesting federal courts of jurisdiction to hear § 2241 habeas petitions from aliens challenging final orders of deportation. *Magana-Pizano,* 152 F.3d at 1217.[FN2] An alien may still file a petition for review of a final removal order directly with the appellate court under INA § 242(b), (codified at 8 U.S.C. § 1252(b)). However, in cases of certain criminal aliens, the scope of review applied to § 242(b) petitions is limited to a determination of "whether the petitioner is (I) an alien (ii) deportable (iii) by reason of a criminal offense listed in the statute." *Magana-Pizano,* 152 F.3d at 1216, quoting *Yang v. INS,* 109 F.3d 1185, 1192 (7th Cir.1997).

FN2. The court in *Magana-Pizano* based its construction of § 242(g) on an earlier decision, *Hose v. I.N.S.,* 141 F.3d 932 (9th Cir.1998). However, the decision in *Hose* has since been withdrawn and rehearing en banc is currently pending. *Hose v. I.N.S.,* 161 F.3d 1225.

This narrow scope of review is the result of IIRIRA's transitional provisions at § 309(c)(4)(G) (codified at 8 U.S.C. § 1252(a)(2)(C)).[FN3] Section 309(c)(4)(G) provides:

FN3. Immigration proceedings were undertaken against Park on August 29, 1996, before the IIRIRA's general effective date of April 1, 1997. Since Park's final deportation order was filed after October 30, 1996, Park's claims are governed by IIRIRA's interim transitional rules. *See amended order, Magana-Pizano v. I.N.S.,* 159 F.3d 1217, 1218 (9th

Cir.1998).

there shall be no appeal permitted in the case of an alien who is inadmissible or deportable by reason of having committed a criminal offense covered in section 212(a)(2) or section 241(a)(2)(A)(iii), (B), (C), or (D) of the Immigration and Nationality Act (as in effect as of the date of the enactment of this Act), or any offense covered by section 241(a)(2)(A)(ii) of such Act (as in effect on such date) for which both predicate offenses are, without regard to their date of commission, otherwise covered by section 241(a)(2)(A)(I) of such Act.

*3 The Ninth Circuit has found that the application of INA § 242(g) raises serious constitutional problems where a petitioner (1) is subject to a final order of deportation based on criminal offenses that fall within IIRIRA § 309(c)(4)(G); and (2) files a § 2241 habeas petition in district court that raises colorable constitutional claims falling outside the narrow scope of reviewable issues on direct appeal. *Magana-Pizano*, 152 F.3d at 1217-1222. The application of INA § 242(g) in these circumstances is unconstitutional because a petitioner contesting her deportation order is left with no avenue of judicial review: the district court is without jurisdiction to hear a § 2241 habeas claim under INA § 242(g), and the appellate court would be without jurisdiction to hear a direct appeal under IIRIRA § 309(c)(4)(G). *Id.*

The petitioner in *Magana-Pizano* was ordered deported based on criminal offenses that fell within the scope of IIRIRA § 309(c)(4)(G). He filed a petition for direct review with the Ninth Circuit and a § 2241 habeas petition with the district court. In his direct appeal, Magana-Pizano contested the retroactive application of AEDPA § 440(d), which removes from the Attorney General the authority to waive deportation of aliens convicted of certain crimes. The district court dismissed Magana-Pizano's habeas petition for lack of jurisdiction, and he appealed the dismissal to the Ninth Circuit. The Ninth Circuit consolidated Magana-Pizano's appeal from the dismissal of his habeas action with his § 242(b) request for direct review.

First, with respect to Magana-Pizano's § 242(b) appeal, the Ninth Circuit found that under IIRIRA § 309(c)(4)(G). it was without jurisdiction to hear the petitioner's request for direct review. Since the petitioner's deportation was based on criminal offenses enumerated under § 309(c)(4)(G), the court's scope of review was limited to whether the petitioner was (1) an alien, (2) deportable, and (3) by reason of a criminal offense listed in the statute. *Id.* at 1216. Since Magana-Pizano's appeal raised issues outside the narrow scope of the court's review on direct appeal, the court dismissed the § 242(b) petition for lack of jurisdiction. *Id.*

Having found that the *Magana-Pizano* petitioner's avenue of direct appeal had been eliminated, the court was next faced with the question of whether INA § 242(g) "violated the Suspension Clause of the United States Constitution by denying habeas relief in cases where no other avenue of judicial review exists." [FN4] *Id.* at 1217. The court answered in the affirmative: "because the Suspension Clause prevents IIRIRA from foreclosing access to general statutory habeas relief in this case, Magana-Pizano may pursue his remedies

under 28 U.S.C. § 2241." *Id.* at 1222. Accordingly, the court reversed the district court and held that district courts retained jurisdiction to hear habeas petitions in immigration cases where no other avenue of judicial remedy exists. *Id.* at 1221 ("IIRIRA's impediment to the general habeas remedies of 28 U.S.C. § 2241 is removed for Magana-Pizano and those similarly situated.").

FN4. The Suspension Clause provides: "The privilege of the Writ of Habeas Corpus shall not be suspended unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. Const ., Art. 1, § 9, cl.2.

*4 The holding in *Magana-Pizano* controls the outcome of the jurisdictional question presented in the case at bar. Like Magana-Pizano, Park (1) was ordered deported based on criminal offenses that fall within the scope of IIRIRA § 309(c)(4)(G); and (2) has filed a § 2241 habeas petition in which she raises at least one colorable constitutional argument that falls outside the limited scope of review on direct appeal. Accordingly, this Court has jurisdiction over Park's habeas petition because she is otherwise left with no avenue of judicial review. *Magana-Pizano,* 152 F.3d at 1222.

First, Park has been found deportable because of a criminal offense enumerated in IIRIRA § 309(c)(4)(G). The immigration court found petitioner deportable as an aggravated felon under INA § 241(a)(2)(A)(iii), 8 U.S.C. § 1251(a)(2)(A)(iii) (recodified at INA § 237(a)(2)(A)(iii), 8 U.S.C. § 1227(a)(2)(A)(iii)). Second, Park has filed a § 2241 habeas petition in which she presents at least one colorable argument in her petition that is not within the narrow scope of appellate review on direct appeal. Park argues that her right to due process was violated when, on the eve of her deportation hearing, the Immigration Judge failed to provide her notice of her counsel's withdrawal from her case. Because IIRIRA § 309(c)(4)(G) has foreclosed the Ninth Circuit's jurisdiction over at least some of Park's arguments on direct appeal, this Court must exercise jurisdiction over Park's habeas petition. *Magana-Pizano,* 152 F.3d at 1222; U.S. Const., Art. 1, § 9, cl.2.

2. Park's Claims for Relief

In support of her claim for habeas relief, Park argues that the immigration judge's misconduct or gross negligence violated her Fifth Amendment rights to due process. Petition for writ at 3:8-17. She further alleges that her deportation order stemmed from an involuntary manslaughter conviction obtained in violation of the Free Exercise Clause of the Constitution. Petition for writ at 3:25-4:7. Finally, Park argues that her involuntary manslaughter conviction was not a deportable offense. Petitioner's brief at 3:21-4:4. Each of Park's contentions is addressed below.

a. The Immigration Judge's Misconduct or Gross Negligence

Park claims that the immigration judge in her deportation proceeding engaged in judicial misconduct. Petition for writ at 2:23-3:24. Respondent argues that petitioner's claim does not amount to a constitutional violation. Respondent's opposition at 17:6-23.

At the immigration court hearings, Park was represented by her attorney Gregory Chandler.[FN5] On March 5, 1997, Chandler moved to dismiss the case. (Oral Decision of the Immigration Judge at 1, Yeargin Decl., Exhibit D) ("Immig.Dec."). After finding that Chandler's request lacked legal authority, the court postponed the case for one week in order to give Chandler time to prepare. *Id.* at 2. At the next hearing on March 12, 1997, Chandler indicated that his client would seek relief under INA § 212(c). *Id.* The court, however, informed Chandler that under IIRIRA § 212(c) relief was no longer available as a matter of law. *Id.* After asking Chandler several questions regarding IIRIRA, the court became concerned about Chandler's lack of knowledge in immigration law. *Id.* As a result, the court gave Chandler another continuance to file an amended brief. *Id.* at 3.

FN5. Gregory Chandler is representing Park in this habeas corpus petition.

*5 Following a series of custody hearings, the case was set for an individual hearing on April 21, 1997. *Id.* at 4. Chandler was not present at the April 21 hearing. *Id.* at 5. The court found that Chandler had neither provided an explanation for his absence nor asked for a continuance. *Id.* Thereafter, the case was continued until April 25. *Id.* at 6. On April 25, Chandler explained to the court that he missed the April 21 hearing because he was in another court handling a civil matter. *Id.* Chandler also informed the court that Martin Guajardo was entering as co-counsel of record and that he would address the issue of deportability. *Id.* at 6-7. On the same day, Park admitted to the allegations contained in the OSC, but indicated that she would file an application for relief from deportation. *Id.* at 10-11. After admonishing Chandler for his failure to show up on April 21, the court granted a two-week continuance for attorney preparation, setting May 9 as the last day to file a request for relief from deportation. *Id.* at 6-7.

Next, on May 1, Chandler moved to disqualify the judge, arguing that the judge was biased against petitioner. The court denied Chandler's motion, finding the motion without merit. *Id.* at 8. On May 2, Guajardo filed a motion to withdraw as co-counsel citing lack of cooperation on the part of Chandler. *Id.* at 7. The immigration court granted Guajardo's motion on May 6. Park claims, however, that the immigration judge erred by failing to serve Chandler a copy of the order granting Guajardo's motion to withdraw. On May 7, Park filed a motion to continue as a result of Guajardo's withdrawal. That motion was denied.

Park failed to meet the court's deadline for filing an application for deportation relief. On May 9, 1997, the court found that Park had failed to file an application for deportation relief despite having had ample time to do so. *Id.* at 10. The court noted:

[Park] had appeared in Court on at least eight separate occasions. The record clearly indicates that [Park] has been given ample opportunity to file any relief from deportation.... The record clearly indicates that [Park] is well aware of the filing schedule set by the Court, particularly that today, May 9, 1997, as being the last day for filing of any relief from deportation. However, no application for relief from deportation has been filed by [Park]. *Id.* at 11-12.

The court also found that Park had conceded deportability and that deportability had been established by clear and convincing evidence. *Id.* at 11. Accordingly, Park was ordered deported as an aggravated felon under INA § 241(a)(2)(A)(iii).

Park claims that the immigration judge violated her right to due process by failing to serve Gregory Chandler, petitioner's attorney, a copy of the order permitting petitioner's co-counsel to withdraw. Petition for writ at 3:8-17. Park argues that the immigration judge intentionally attempted to deprive Chandler of information necessary to defend the deportation allegations. *Id.* Park cites to 8 U.S.C. § 1252b(a)(2) and argues that notice by mail of deportation hearings was required. Petitioner's brief at 2:23-26. Respondent contends that petitioner's due process claim does not constitute a constitutional violation. Respondent's opposition at 17:6-23.

*6 Park's argument that she was not provided sufficient notice pursuant to 8 U.S.C. § 1252b is unpersuasive. While the immigration court may have erred by failing to serve the withdrawal order on Chandler, Park was not prejudiced. In removal proceedings, the immigration court is required to provide a written notice of deportation proceedings in person to the alien, or if personal service is not practicable, the notice must be sent by mail to the alien or to the alien's counsel of record. 8 U.S.C. § 1252b(a)(2).[FN6] Park here does not allege that she was not given notice of the proceeding. Further, she is not without responsibility for missing the filing deadline. The record of the immigration proceedings demonstrates that the court provided Park and her counsel with several opportunities to file an application for relief from deportation. Park appeared in court on numerous occasions and was granted several continuances. The Court initially set the deadline for filing an application for relief from deportation on April 18 and set the case for a hearing on April 21. Immig. Dec. at 4. Chandler, however, failed to show up to the hearing. *Id.* at 5. Park informed the court that Chandler was still her attorney and that she did not want to proceed on her own. *Id.* The court continued the case until April 25. *Id.* at 6. Thereafter, on April 25, the court granted another continuance. *Id.* at 7. At that point, the court made it very clear that the last day for filing a request for relief from deportation was May 9. *Id.* Park was well aware of the date of the immigration proceeding. The mere fact that the court failed to inform Park's attorney that the co-counsel had withdrawn does not constitute lack of notice. [FN7] Park had notice of the May 9 proceeding because the court informed her on April 25 that the last day to file an application was on May 9. Therefore, she cannot claim lack of service under 28 U.S.C. § 1252b(a)(2).

FN6. The IIRIRA repealed section 1252b and replaced it with a new removal proceeding provision codified at 8 U.S.C. § 1129(a). However, since the deportation proceedings against Park commenced before April 1, 1997, the effective date of IIRIRA, the old rules under 8 U.S.C. § 1252b apply. *Romani v. I.N.S.*, 146 F.3d 737, 739 n. 3 (9th Cir.1998).

FN7. The record here indicates that Park was aware of her co-counsel's withdrawal before the May 9 hearing. Although it is unclear from the briefs exactly when Chandler found out about Guajardo's withdrawal, Park acknowledges that she requested a continuance on May 6 because she wanted to "remedy the intended-but not yet-finalized withdrawal of [Park's] lead counsel." Petitioner's brief at 2:15-18. Furthermore, Park also notes that

Chandler received a fax of the withdrawal order on May 8. Petition for writ at 3:22-25.

b. First Amendment Claim

Park argues that the deportation order stemmed from an involuntary manslaughter conviction which was allegedly obtained in violation of the Free Exercise Clause of the First Amendment. Petition for writ at 3:25-4:7. Park claims that her actions leading up to her manslaughter conviction were lawful because they occurred in the context of a religious prayer session.[FN8] *Id.* Respondent argues that Park may not collaterally attack her underlying state conviction under 28 U.S.C. § 2241. Respondent's supplemental briefing at 5:13-22.

FN8. Park did not raise a constitutional defense based on religious conviction in either her criminal or immigration proceedings.

The Court agrees with respondent. Generally, a petitioner may not collaterally attack her state court conviction in a subsequent habeas petition against the INS. *Contreras v. Schiltgen,* 122 F.3d 30, 31-32 (9th Cir.1997) (" *Contreras I* ") (holding that petitioner "may not collaterally attack his state court conviction in a habeas proceeding against the INS"). There can be no collateral review of the validity of the underlying conviction except for claims arguing a violation of the *Gideon* right to appointment of counsel. *Contreras v. Schiltgen,* 151 F.3d 906 (9th Cir.1998) (" *Contreras II* "). In *Contreras I,* the petitioner pleaded no contest to assault with a firearm and thus was subject to deportation under 8 U.S.C. §§ 1251(a)(2)(A)(I)(I) (crimes of moral turpitude) and 1251(a)(2)(C) (firearm offenses). He filed a habeas petition under § 2241, arguing that his trial counsel was ineffective. The district court dismissed Contreras' action for lack of jurisdiction. The Ninth Circuit affirmed, finding that the "validity of Contreras' California conviction can only be tested in an action against the state ...." *Id.* at 33. The court reasoned that statutory language which made Contreras deportable addressed only the fact of conviction and that nothing "in the statute requires or authorizes the INS to inquire into whether the conviction is valid." *Id.* at 32.

*7 In *Contreras II,* the Ninth Circuit granted a rehearing to resolve a conflict between *Contreras I* and its decision in *Feldman v. Perrill,* 902 F.2d 1445 (9th Cir.1990). In *Feldman,* the court had held that a federal prisoner serving a sentence enhanced by a prior state conviction could bring a § 2241 habeas action against the federal official detaining him in order to attack the validity of the state court conviction. *Feldman,* 902 F.2d at 1448-49. In *Custis v. United States,* 511 U.S. 485, 496, 114 S.Ct. 1732, 1732 (1994), however, the Supreme Court held that a defendant in a federal sentencing hearing does not have a right to challenge the validity of a prior state conviction which was used for enhancement purposes, unless the conviction was obtained in violation of the *Gideon* right to counsel. In light of the *Custis* decision, the *Contreras II* court found that *Feldman* 's reach had been narrowed and that federal habeas review was limited. Accordingly, the court affirmed *Contreras I,* finding that:

when a habeas petition attacks the use of a prior conviction as a basis for INS custody, and the prior sentence has expired, federal habeas review is limited. When the federal proceeding is governed by statutes that limit inquiry to the fact of conviction, there can be no collateral review of the validity of the underlying conviction except for Gideon claims.

Contreras II, 151 F.3d at 908.

Based on the foregoing authority, Park may not challenge her underlying state court conviction. Like the petitioner in *Contreras,* Park was found deportable pursuant to 8 U.S.C. § 1227. That statute limits the INS inquiry only to the fact of conviction. *Contreras I,* 122 F.3d at 32. Furthermore, Park's habeas claim does not fall under *Contreras* ' *Gideon* exception because she does not allege that she was denied counsel. Accordingly, she cannot challenge the validity of her conviction for involuntary manslaughter.[FN9]

FN9. Respondent cites *Urbina-Mauricio v. INS,* 989 F.2d 1085, 1089 (9th Cir.1993) and *Grageda v. INS,* 12 F.3d 919 (9th Cir.1993), for the proposition that a petitioner may not collaterally attack a state court conviction. Both cases, however, appear inapplicable here because they were appeals from BIA decisions. In contrast, Park has filed a habeas petition under 28 U.S.C. § 2241.

c. Aggravated Felony

Next, Park cites to *U.S. v. Springfield,* 829 F.2d 860 (9th Cir.1987), and claims that her involuntary manslaughter conviction did not constitute an aggravated felony because it was not a "crime of violence." Petitioner's brief at 3:21-4:4. Respondent argues that the BIA, which interprets the immigration laws at the administrative level, has found that "crimes of violence" include involuntary manslaughter. Respondent's opposition at 15:5-13

Park's assertion that her involuntary manslaughter conviction was not a "crime of violence" and did not constitute an aggravated felony is without merit. Congress has made aggravated felonies deportable offenses under 8 U.S.C. § 1227(a)(2)(A)(iii).[FN10] Both the immigration court and the BIA found that Park's involuntary manslaughter conviction constituted an aggravated felony. Under 8 U.S.C. § 1101(a)(43)(F), aggravated felonies include "crimes of violence" with at least a one year prison term. A "crime of violence" is defined as an offense "that is a felony and that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." 18 U.S.C. § 16(b).

FN10. Section 1227(a)(2)(A)(iii) provides that "[a]ny alien who is convicted of an aggravated felony at any time after admission is deportable."

*8 The BIA has classified involuntary manslaughter as a "crime of violence" under 18 U.S.C. § 16(b). *Matter of Alcantar,* 20 I. & N. Dec. 801 (BIA 1994) (finding that alien's

conviction for involuntary manslaughter under Illinois law constituted a crime of violence pursuant to 18 U.S.C. § 16(b) and an aggravated felony for deportation purposes). The *Alcantar* court's finding was specifically based on the Ninth Circuit decision in *U.S. v. Springfield,* 829 F.2d 860, 862-63 (9th Cir.1987). In *Springfield,* the court had to determine whether a federal conviction for involuntary manslaughter constituted a "crime of violence" under 18 U.S.C. § 924(c)(3). Section 924(c)(3)(B) defined a "crime of violence" as an offense that is a felony and "that by its nature, involves substantial risk that physical force against the person or property of another may be used in the course of committing the offense." The court in *Springfield* found that involuntary manslaughter came within the intent of section 924(c)(3). *Springfield,* 829 F.2d at 863. The court observed that "involuntary manslaughter, which 'by its nature' involved the death of another person, is highly likely to be the result of violence." *Id.* The *Alcantar* court found that *Springfield* 's analysis of involuntary manslaughter under 18 U.S.C. § 924(c)(3) was applicable because the term "crime of violence" had the same meaning in both 18 U.S.C. § 16 and 18 U.S.C. § 924(c)(3). *See also U.S. v. Clark,* 773 F.Supp. 1533, 1535 (M.D.Ga.1991) ("term 'crime of violence' is defined in the same way in both 18 U.S.C. § 16(b) and 18 U.S.C. § 924(c)(3)").

Based on the foregoing authority, Park has failed to show that the immigration court and the BIA erred in classifying her involuntary manslaughter conviction as an aggravated felony. Park here pled guilty to and was convicted of involuntary manslaughter. The BIA has defined involuntary manslaughter as a "crime of violence" under 18 U.S.C. 16(b) and as an aggravated felony. *Alcantar* 20 I. & N. Dec. at 813. Park's reliance on *Springfield* is misplaced. The *Springfield* court found that involuntary manslaughter came within the intent of section 924(c)'s definition of a "crime of violence." *Springfield,* 829 F.2d at 863. Courts have found that section 924(c) definition of the term "crime of violence" is similar to 18 U.S.C. § 16, the statute at issue here. *U.S. v. Clark,* 773 F.Supp. at 1535. Thus, Park has failed to show that her involuntary manslaughter was not a "crime of violence" under 18 U.S.C. § 16 and as a person convicted of an aggravated felony, she is subject to deportation under 8 U.S.C. § 1227(a)(2)(A)(iii).

CONCLUSION

For the foregoing reasons, Eun Kyung Park's petition for a writ of habeas corpus is DENIED.

IT IS SO ORDERED.

N.D.Cal.,1999.
Park v. Schlitgen
Not Reported in F.Supp.2d, 1999 WL 138887 (N.D.Cal.)

Motions, Pleadings and Filings (Back to top)

• 3:97cv01813 (Docket) (May. 15, 1997)
END OF DOCUMENT

DECLARATION OF SERVICE

I, John Teal, declare:

That I am a resident of the County of Los Angeles, California; that I am over eighteen (18) years of age and not a party to this action; that I am employed in the County of Los Angeles, California; and that my business address is 3325 Wilshire Blvd., Suite 1300, Los Angeles, CA 90010.

On September 15, 2008, I served copies of the attached document, described as SUPPLEMENTAL BRIEF OF PLAINTIFF AND REAL PARTY IN INTEREST GUADALUPE T. BENITEZ PURSUANT TO RULE 8.520(d), on the parties of record by placing true and correct copies thereof in sealed envelopes, addressed as follows:

Robert Carlo Coppo, Esq. Andrew Todd Evans, Esq. Di Caro, Coppo and Popcke 2780 Gateway Rd Carlsbad, CA 92011 *Attorneys for Defendants* Douglas L. Edgar, Esq. Timothy D. Chandler, Esq. Alliance Defense Fund 101 Parkshore Drive, Suite 100 Folsom, CA 95630 *Attorneys for Defendants* Curtis A. Cole, Esq. Kenneth R. Pedroza, Esq. Matthew S. Levinson, Esq. Cole Pedroza LLP 200 S. Los Robles Avenue Suite 678 Pasadena, CA 91101-4006 *Attorneys for Defendants*	Clerk of the Court California Court of Appeals Fourth Appellate District Division One 750 B Street, #300 *San Diego, CA 92101* Honorable Judge Prager San Diego Superior Court 330 West Broadway, Dept. 71 San Diego, CA 92101 California Solicitor General Office of the Attorney General 1300 "I" Street P.O. Box 944255 Sacramento, CA 94244-2530 Robert Henry Tyler, Esq. Jennifer Lynn Monk, Esq. Advocates for Faith and Freedom 24910 Las Brisas Road, Suite 110 Murietta, CA 92562 *Attorneys for Defendants*

I am readily familiar with the office's practice of collecting and processing correspondence for mailing. Under that practice, this correspondence would be deposited with the U.S. Postal Service on that same day. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after the date of deposit for mailing stated in this affidavit.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: September 15, 2008

John Teal