

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

UNITED STATES OF AMERICA	:	
	:	
v.	:	CRIMINAL NO. 00-695
	:	
BRIAN SULLIVAN	:	

MEMORANDUM

BUCKWALTER, J.

December 12, 2002

Presently before the Court is Defendant’s Motion to Dismiss the Indictment, the United States’ response thereto, and Defendant’s reply. For the reasons stated below, Defendant’s Motion to Dismiss the Indictment is **DENIED**.

I. BACKGROUND

Brian Sullivan (“Sullivan”) was born in Jamaica on September 9, 1965. He lived in his native land until the age of four when he entered the United States as an immigrant on November 19, 1969.

On June 10, 1994, Sullivan entered a guilty plea in the New Jersey Superior Court to the offenses of possession of cocaine and the possession of cocaine with the intent to distribute, and was sentenced on September 23, 1994 to ten years incarceration. See Def.’s Mot. Dismiss Indictment-Ex. 1. This conviction rendered Sullivan deportable because it was a controlled substance offense, see former 8 U.S.C. § 1251(a)(2)(B), and “aggravated felony,” see

former 8 U.S.C. § 1251(a)(2)(A)(iii).¹ This conviction ultimately served as the predicate for Sullivan’s deportation.

On April 25, 1995, the Immigration and Naturalization Service (“INS”) initiated deportation proceedings against Sullivan by serving him with an order to show cause why he should not be deported, along with a notice of hearing. See Def.’s Mot. Dismiss Indictment-Ex.

1. At this time, Sullivan was incarcerated in the Bayside State Prison at Leesburg, New Jersey, but he was subsequently transferred to Oakdale, Louisiana for removal proceedings.

Meanwhile, in 1996, Congress amended the Immigration and Nationality Act (“INA”) by enacting the Illegal Immigration Reform and Immigration Responsibility Act (“IIRIRA”) and the Anti-Terrorism and Effective Death Penalty Act (“AEDPA”). Both the AEDPA and the IIRIRA impacted former § 212(c) of the INA, which allowed aliens to apply for a discretionary waiver of deportation. First, the AEDPA reduced the class of aliens eligible for § 212(c) relief. See INS v. St. Cyr, 533 U.S. 289 (2001). Then, later in 1996, Congress repealed § 212(c) entirely when it passed the IIRIRA and replaced it with a new section that bars anyone convicted of an aggravated felony from obtaining discretionary relief. See 8 U.S.C. § 1229b(a)(3). Additionally, the 1996 amendments were interpreted to allow for the retroactive denial of § 212(c) relief. This retroactive denial of § 212(c) relief, however, was subsequently invalidated by the Supreme Court in INS v. St. Cyr, holding that § 212(c) relief is available to aliens with convictions based on guilty pleas entered prior to the enactment of the IIRIRA and AEDPA. St. Cyr, 533 U.S. at 326.

1. These subsections were restated in 8 U.S.C. § 1227 in 1996 and remained essentially unchanged.

On September 18, 1997, Sullivan’s deportation hearing began. Immigration Judge Charles A. Weigand (“Judge Weigand”) held a hearing with Sullivan and his attorney, Leslie Lipton (“Lipton”), participating.² Lipton requested and was granted a continuance for additional time to prepare.

On October 9, 1997, Sullivan’s deportation hearing resumed. Lipton, once again, served as Sullivan’s counsel via telephone from her office. At the hearing, Sullivan admitted that he was convicted of possession of cocaine and possession of cocaine with intent to deliver. Sullivan also designated Jamaica as his country for removal. Lipton then requested, *inter alia*, “relief under section 212(c).” Tr.-Deportation Hr’g, Oct. 9, 1997. Judge Weigand denied this request based on the 1996 amendments to the INA. Judge Weigand then ordered Sullivan deported, but he did state “you may appeal this decision or reserve the right to do so over 30 days.” *Id.* Lipton reserved Sullivan’s right to appeal the decision but never followed up with an appeal to the Board of Immigration Appeals (“BIA”). Sullivan was deported on January 22, 1998.

On October 19, 2000, Sullivan re-appeared in the United States. He was found in Allentown, Pennsylvania by INS agents after law enforcement was advised that Sullivan was selling drugs in Allentown. Sullivan was using a fictitious name, Milton Morris, and possessed a Pennsylvania driver’s license containing his photograph with that fictitious name. The agents determined that Sullivan had been previously deported from the United States and had re-entered illegally.

2. Lipton participated via telephone from her office in New York, New York.

Based on Sullivan's illegal re-entry into the United States, the government named Sullivan in an indictment alleging re-entry after deportation in violation of 8 U.S.C. § 1326(a) and (b)(2).

On April 19, 2002, while awaiting prosecution for illegal entry after deportation, Sullivan learned that his 1994 New Jersey conviction for possession of cocaine and possession of cocaine with the intent to distribute was vacated by the Superior Court of New Jersey on constitutional grounds. See Def.'s Mot. Dismiss Indictment-Ex. 3. Sullivan's conviction was one of eighty-six dismissed with prejudice by the State of New Jersey due to allegations of racial profiling and selective enforcement. Id.

Sullivan moves to dismiss the present indictment, contending that his 1997 deportation hearing was fundamentally unfair and that the 1994 New Jersey conviction, which served as the basis for his deportation but has since been vacated, cannot be used as a basis for an illegal re-entry prosecution. The government, in turn, argues that Sullivan has not established the elements necessary to collaterally attack the deportation order and that the "alleged invalidity of the underlying conviction . . . cannot provide a defense to the violation of Section 1326." Govt's Resp. at 16.

II. STANDARD FOR MOTION TO DISMISS INDICTMENT

Dismissal of a criminal indictment is authorized if its allegations are not sufficient to charge an offense. See United States v. Ward, No. 00-681, 2001 U.S. Dist. LEXIS 15897, at *11 (E.D. Pa. Sept. 5, 2001). When analyzing a motion to dismiss an indictment, "the Court

must accept as true the facts alleged in the indictment and determine if those facts constitute a violation of the law under which the defendant is charged.” Id. (citations omitted).

III. DISCUSSION

A. Deportation and § 212(c)

In immigration law, aliens convicted of aggravated felonies or crimes relating to controlled substances are deportable. See 8 U.S.C. § 1227(a)(2). Here, Defendant was convicted of a crime designated as an aggravated felony, and, as such, Defendant was deported. See 8 U.S.C. § 1101(a)(43)(B). Before the enactment of the 1996 amendments, however, former § 212(c) of the INA allowed aliens to apply for a discretionary waiver of deportation. See St. Cyr, 533 U.S. at 294-97.

Former § 212(c) of the INA, 8 U.S.C. § 1182(c), allowed consideration, “in the discretion of the Attorney General,” of waiver of deportation for an alien who had “a lawful unrelinquished domicile of seven consecutive years.” 8 U.S.C. § 1182(c). Although the text of the statute explicitly addressed permanent residents who temporarily left the United States and sought readmission, former § 212(c) “was interpreted to give the Attorney General broad discretion to waive deportation of resident aliens.” St. Cyr, 533 U.S. 289. Though discretionary in nature, if the relief was granted, the deportation proceeding was terminated and the alien would remain a permanent resident. Id. at 295. In the present case, the government concedes that “[h]ad Sullivan’s deportation proceeding taken place prior to 1996, he would have been eligible for consideration for what was known as a 212(c) waiver.” Govt’s Resp. at 3.

In 1996, however, the enactment of the AEDPA and the IIRIRA changed the landscape of our immigration laws, particularly sections involving discretionary waiver. For example, “the large class of aliens depending on § 212(c) relief was reduced in 1996 by § 401 of AEDPA, which identified a broad set of offenses which convictions would preclude such relief.” St. Cyr, 533 U.S. at 289. Later in 1996, Congress repealed § 212(c) entirely when it passed the IIRIRA and replaced it with a new section that bars anyone convicted of an aggravated felony from obtaining discretionary relief. See 8 U.S.C. § 1229b(a)(3). Additionally, the 1996 amendments were interpreted to allow for the retroactive denial of § 212(c) relief.

Based on the 1996 change in the law, immigration judges often ruled that certain otherwise eligible aliens were no longer eligible for the § 212(c) waiver. This interpretation of the law, however, ultimately was deemed incorrect. In St. Cyr, the Supreme Court held that the repeal of § 212(c) did not apply retrospectively to aliens “whose convictions were obtained through plea agreements and who, notwithstanding those convictions, would have been eligible for § 212(c) relief at the time of the plea under the law then in effect.” St. Cyr, 533 U.S. at 290.

In the present case, Sullivan meets the initial requirements for consideration of a § 212(c) waiver. First, he met the seven year requirement of residency in the United States as he spent approximately twenty-five years in the United States before entering a guilty plea in New Jersey Superior Court on June 10, 1994 for the offenses of possession of cocaine and the possession of cocaine with the intent to distribute. Additionally, his guilty plea occurred approximately two years before the enactment of the amendments to the INA. Therefore, even though an alien convicted of a violation of any law relating to a controlled substance is

deportable, see 8 U.S.C. § 1227(a)(2)(B)(i), the alien in this situation was also eligible to apply for a waiver of deportation under former INA § 212(c). See St. Cyr, 533 U.S. at 293.

The issue that remains, however, is whether the immigration judge's application of law that ultimately was deemed incorrect by the Supreme Court in St. Cyr rendered Sullivan's deportation hearing fundamentally unfair so that the initial deportation cannot serve as the foundation for the government's present action alleging illegal re-entry after deportation, in violation of 8 U.S.C. § 1326(a) and (b)(2).

B. Section 1326 Prosecution for Illegal Reentry

The United States charged Sullivan with illegal re-entry after deportation, in violation of 8 U.S.C. § 1326(a) and (b)(2). In order to prove that Sullivan is guilty of violating 8 U.S.C. § 1326, the government must establish beyond a reasonable doubt that Sullivan (1) is an alien; (2) who previously was denied admission, was excluded, deported or removed; (3) and subsequently entered, attempted to enter, or was found in the United States; (4) without having the express consent of the Attorney General. See 8 U.S.C. § 1326(a).

C. Collateral Attack of a Deportation Order

Sullivan alleges that he was denied Due Process because the alleged "unlawful application of the [AEDPA] amendments effectively deprived [him] of the right to meaningful review of his deportation order." Def.'s Mot. Dismiss Indictment at ¶ 4. This argument requires the Court to determine the validity of the underlying deportation order.

It is well settled that the procedures employed in deportation or removal proceedings must satisfy due process. United States v. Gonzalez-Roque, 301 F.3d 39, 45 (2d Cir. 2002). As such, "a defendant may collaterally attack an order of deportation on due process

grounds where . . . the order becomes an element of a criminal offense.” Id. Sullivan’s deportation order is an element of the government’s present case of illegal re-entry after deportation under 8 U.S.C. § 1326. But Sullivan’s due process challenge to the deportation order must satisfy the requirements of 8 U.S.C. § 1326(d), which places limits on an alien’s collateral attack of the underlying deportation order.

Section 1326(d) specifically provides that:

[A]n alien may not challenge the validity of the deportation order . . . unless the alien demonstrates that—
(1) the alien exhausted any administrative remedies that may have been available to seek relief against the order;
(2) the deportation proceedings at which the order was issued improperly deprived the alien of the opportunity for judicial review; and
(3) the entry of the order was fundamentally unfair.” 8 U.S.C. § 1326(d).

This statutory provision codifies the Supreme Court’s holding in United States v. Mendoza-Lopez, 481 U.S. 828, 837-39 (1987). “[T]he statute, as amended, allows collateral attack only if the defects in the deportation proceedings effectively deprive the deportee of *judicial review*, not administrative relief.” United States v. Adame-Salgado, 214 F.Supp.2d 853, 858 (N.D. Ill. 2002) (emphasis in original).

The Government contends that Sullivan did not satisfy any of the three requirements under § 1326(d).³ The Court addresses each of the requirements below and concludes that Sullivan failed to demonstrate §1326(d)’s three requirements.

3. In his Motion to Dismiss the Indictment, Sullivan does not set forth his argument within the express framework of § 1326(d); however, he essentially makes the arguments required under § 1326(d).

1. Exhaustion of Administrative Remedies

The Government contends that Sullivan did not exhaust the administrative remedies available to him. Sullivan argues that “[b]ecause defendant was improperly advised as to his eligibility for section 212(c) relief, any waiver of his right to appeal was not a considered judgment.” Def.’s Reply at 3.

“To exhaust administrative remedies, an alien is generally required to appeal from an Immigration Judge’s order to the Board of Immigration Appeals.” United States v. Perez, 213 F.Supp.2d 229, 232 (E.D.N.Y. 2002). The record is clear that even though the Immigration Judge incorrectly advised Sullivan about his eligibility for § 212(c) relief, the Immigration Judge properly informed Sullivan and his attorney of the right to appeal his decision. See Tr.-Deportation Hr’g, Oct. 9, 1997. Sullivan even reserved his right to appeal the decision; there was no waiver of the right to appeal as Defendant suggests. See id. Sullivan, however, did not appeal the Immigration Judge’s decision. As such, Sullivan failed to establish the first element of a § 1326(d) collateral attack on an underlying deportation order, that is, exhaustion of administrative remedies.

2. Opportunity for Judicial Review

Under § 1326(d), Sullivan must also show that the deportation proceeding improperly deprived him of the opportunity for judicial review. 8 U.S.C. § 1326(d)(2). Sullivan contends that the “unlawful application of the amendments effectively deprived [him] of the right to meaningful review of his deportation order and amounted to a denial of Due Process at the deportation stage.” Def.’s Mot. Dismiss Indictment at ¶ 4.

The key to this analysis is whether the Immigration Judge obstructed or impeded Sullivan's right to appeal. See United States v. Hernandez-Rodriguez, 170 F.Supp.2d 700, 705 (N.D. Tex. 2001) (finding that defendant alien was not denied the opportunity for meaningful judicial review of his deportation order). The record is clear that Judge Weigand informed Sullivan and his counsel of the right to appeal the decision. See Tr.-Deportation Hr'g, Oct. 9, 1997. Sullivan's counsel, Lipton, reserved the right to appeal the decision, but Sullivan never appealed to the BIA.

The Court emphasizes that even though the Immigration Judge applied law that ultimately was deemed incorrect by the Supreme Court, Judge Weigand's opinion as to the availability of § 212(c) relief is "distinct from any actual or constructive denial on his part of the *right to appeal*." Hernandez-Rodriguez, 179 F.Supp.2d at 705 (emphasis in original). Sullivan could have challenged Judge Weigand's decision, and he even "could have made a good faith argument for changing extant immigration law that required retroactive application of the 1996 INA amendments to his case." Id. Sullivan, however, did not do so, and as such, he was not denied the opportunity for meaningful judicial review of his deportation order.

3. Fundamental Unfairness

The third and final prong of § 1326(d) asks whether Sullivan's deportation hearing was fundamentally unfair. Sullivan argues that his deportation proceeding was fundamentally unfair because of the Supreme Court's ruling in St. Cyr. The government correctly argues, however, that the fundamental unfairness test concerns only procedural due process, and, accordingly, Sullivan's deportation hearing was not fundamentally unfair.

The Supreme Court has held that fundamental unfairness is an issue of procedural due process. See Mendoza-Lopez, 481 U.S. at 839. In Mendoza-Lopez, the Supreme Court, though not announcing an exhaustive list, enumerated some procedural errors which “are so fundamental that they may functionally deprive the alien of judicial review, requiring that the result of the hearing in which they took place not be used to support a criminal conviction.” Id. at 839 n.17. It is incorrect, therefore, “to turn the fundamental fairness inquiry, which is procedural in nature, into an expanded substantive inquiry.” Hernandez-Rodriguez, 170 F.Supp.2d at 703-04.

The process which is due an alien facing a deportation proceeding requires that an alien be provided notice of the charges, a hearing, and a fair opportunity to be heard. See Kwong Hai Chew v. Colding, 344 U.S. 590, 597-98 (1953). A legal error, however, in which the 1996 INA amendments were applied retroactively to Sullivan’s deportation hearing “does not rise to the level of a due process violation and therefore [does] not render the deportation hearing fundamentally unfair.” Hernandez-Rodriguez, 170 F.Supp.2d at 704. In the present case, Sullivan received notice that he was subject to deportation to Jamaica and had a hearing before Judge Weigand. In the deportation hearing, Sullivan, through his counsel Lipton, was allowed to argue that he was eligible for a § 212(c) waiver, and Judge Weigand ruled that he was not eligible for the waiver due to the 1996 amendments. Even though Judge Weigand applied law that ultimately was deemed incorrect, there is no evidence that Judge Weigand was procedurally deficient in the deportation hearing, as required by the fundamental fairness analysis. See id.

Therefore, the Court finds that there were no “procedural errors rising to the level of due process violations and thus fundamental unfairness.”⁴ Id.

D. Deportation is Void Ab Initio

Sullivan also argues that his deportation cannot serve as the basis for the instant indictment because his prior conviction was vacated by the Superior Court of New Jersey on April 19, 2002 on constitutional grounds. He contends that “the deportation proceeding, a direct consequence of the vacated matter, is without foundation and is *void ab initio*.” Def.’s Mot. Dismiss Indictment. This argument asks the Court to determine the validity of the conviction that served as the basis for Sullivan’s underlying deportation order.

The government cites two provisions of § 1326 in its indictment against Sullivan—§1326(a) and §1326(b)(2). Section 1326(a) defines the crime of illegal re-entry after deportation. See Almendarez-Torres v. United States, 523 U.S. 224, 226 (1998). To establish a violation of 8 U.S.C. § 1326, the government must establish the following four elements: (1) the defendant is an alien; (2) who previously was denied admission, was excluded, deported or removed; (3) and subsequently entered, attempted to enter, or was found in the United States; (4) without having the express consent of the Attorney General. See 8 U.S.C. § 1326(a). If the government establishes the elements of this crime, then a deported alien who returns to the

4. Additionally, the Court notes that a substantive inquiry of the deportation order is inappropriate because the Supreme Court’s announcement of the new rule of law in St. Cyr only applies to cases on direct review and not to cases which previously became final. See Reynoldsville Casket Co. v. Hyde, 514 U.S. 749, 752 (1995); Harper v. Va. Dep’t of Taxation, 509 U.S. 86, 97 (1993) (stating that when the Court “applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule”); Hernandez-Rodriguez, 170 F.Supp.2d at 704 n.2. Here, Sullivan’s case was no longer on direct review when the Supreme Court decided St. Cyr. As such, Sullivan’s removal order was final, and he cannot “reopen his prior civil case through a collateral attack on his deportation order in this criminal proceeding.” Hernandez-Rodriguez, 170 F.Supp.2d at 704 n.2.

United States without permission is subject to fines and two years imprisonment. Id. Section 1326(b)(2) is the penalty provision, which authorizes an enhanced sentence. See Almendarez-Torres, 523 U.S. at 233. It provides that an alien “whose removal was subsequent to a conviction for commission of an aggravated felony” is subject to fines and twenty years imprisonment. 8 U.S.C. § 1326(b)(2).

In the present case, the government has met its burden of alleging the existence of a crime under § 1326(a). Despite Sullivan’s argument that his vacated conviction renders the underlying deportation *void ab initio*, the Court cannot consider the validity of the underlying conviction under § 1326(a). The express language of § 1326(a) makes no mention of the term “conviction.” The government need only show that Sullivan was a deported alien who re-entered the United States without permission from the Attorney General, and the government’s allegations are sufficient to charge an offense. See 8 U.S.C. § 1326(a). Therefore, the plain language of the statute indicates that the government’s indictment survives the present motion to dismiss.

The Court notes, however, that the validity of the underlying conviction is implicated within § 1326(b)'s framework. Specifically, as previously noted, § 1326(b)(2) authorizes imprisonment up to twenty years for an alien “whose removal was subsequent to a *conviction* for commission of an aggravated felony.” 8 U.S.C. Section 1326(b)(2) (emphasis added). As such, based on the express language of § 1326(b)(2), it is entirely appropriate for this Court to consider Sullivan’s vacated conviction, if this case reaches the sentencing phase. And even though the statute defines “conviction,” see 8 U.S.C. § 1101(a)(48)(A), the Court recognizes that some have argued for special consideration to be given to vacatur on the merits

for immigration law purposes. See e.g., Renteria-Gonzalez v. INS, No. 01-60364, 2002 U.S. App. LEXIS 23456, at *48 (Benavides, J., concurring) (arguing that a conviction that has been vacated or reversed based on a defect in the underlying criminal proceeding does not constitute a conviction under § 1101(a)(48)(A)). Absent guidance from the agency's interpretation of the law, see e.g., In re Roldan, 22 I. & N. Dec. 512 (BIA 1999) (determining that a conviction erased due to state rehabilitative measures remains a conviction for immigration law purposes but withholding judgment as to whether a conviction that has been vacated on the merits remains a conviction for immigration law purposes), the Court will address the issue of whether a conviction vacated on the merits remains a conviction for immigration law purposes when appropriate.

IV. CONCLUSION

For the foregoing reasons, Defendant's Motion to Dismiss the Indictment is denied. An appropriate Order follows.

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

UNITED STATES OF AMERICA,	:	
	:	CRIMINAL NO. 00-0695
v.	:	
	:	
BRIAN SULLIVAN	:	

ORDER

AND NOW, this 12th day of December, 2002, upon consideration of Defendant's Motion to Dismiss the Indictment (Docket No. 14), the United States' response thereto (Docket No. 16), and Defendant's reply (Docket No. 17), it is **ORDERED** that Defendant's Motion to Dismiss the Indictment is **DENIED**.

BY THE COURT:

RONALD L. BUCKWALTER, J.