UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA,	:	
	:	CRIMINAL NO.
v.	:	3-03-cr-190 (JCH)
	:	
RICARDO ETIENNE,	:	
	:	JUNE 23, 2004

RULING ON DEFENDANT'S MOTION TO DISMISS OR IN THE ALTERNATIVE FOR CONSTRUCTION OF INDICTMENT AS STATING 1326(a) OFFENSE ONLY [DKT. NO. 13]

The defendant, Ricardo Etienne, has been indicted under sections 1326(a) and 1326(b)(2) of Title 8 of the United States Code for unlawful reentry of a removed alien. The indictment charges that, on or about April 29, 2003, defendant, an alien who had previously been deported to Haiti from the United States on or about August 14, 2000, was found in Stamford, Connecticut without the express consent of the Attorney General of the United States. [Dkt. No. 1]. Currently pending before the court is the defendant's Motion to Dismiss [Dkt. No. 13].

Defendant challenges the indictment as failing to allege an essential element of the offense, namely, his prior aggravated felony conviction. Further, defendant collaterally attacks the December 1999 deportation proceedings as fundamentally unfair and depriving him of due process. In the alternative, defendant moves the court to construct the indictment as stating a 8 U.S.C. § 1326(a) offense only. Def. Mem. In Supp. of Mot. To Dismiss [Dkt. No. 14]. The government refutes defendant's arguments, contending that the current indictment and the prior deportation order are both valid. Gov't Mem. In Opp. Of

Mot. To Dismiss [Dkt. No. 20].

At oral argument, the court requested that the parties submit supplemental briefing on the issue of ineffective assistance of counsel, which they did. Def. Supp'l Memo. [Dkt. No. 24]; Gov't Supp'l Memo. [Dkt. No.25].

For the reasons set forth below, the court denies defendants motion to dismiss.

I. BACKGROUND

Defendant, a citizen of Haiti, entered the United States as an immigrant on or about July 14, 1980. On December 20, 1995, defendant plead guilty to possession of 1.9 grams of base cocaine with intent to distribute. He was convicted and received a sentence of five years probation. On October 17, 1997, defendant plead guilty to possession of a narcotic. He was convicted and sentenced to four years incarceration.

Resulting from these convictions, the Immigration and Naturalization Service ("INS") instituted deportation proceedings against the defendant on April 16, 1999. Proceedings were held before an immigration judge. Defendant was represented by counsel during the proceedings. Through counsel, defendant submitted written pleadings, which, inter alia, admitted the basis for the deportation, acknowledged the right to appeal, requested no relief from the deportation order, and designated Haiti as the country for removal. At the final hearing on December 9, 1999, the immigration judge ruled that defendant was subject to removal and, further, that he was not eligible for any relief from removal. Then, the immigration judge expressly asked defendant's counsel if there would be an appeal.

Counsel unequivocally answered that there would not be an appeal and that any appeal was waived.

Defendant did not appeal decision to the Board of Immigration Appeals ("BIA"). Defendant did not seek to reopen the proceedings. On August 14, 2000, defendant was deported to Haiti.

On April 29, 2003, defendant was found in Stamford, Connecticut. The charges in this case followed.

II. STANDARD

Rule 12(b) of the Federal Rules of Criminal Procedure requires that, prior to trial, a defendant raise any defenses or objection based on defects in the indictment and make motions to suppress evidence or request discovery. United States v. Crowley, 236 F.3d 104, 108 (2d Cir. 2000). Rule 12(b) further provides that a motion to dismiss may raise "any defense, objection, or request which is capable of determination without the trial of the general issue . . . ." F.R.C.P. 12(b). "The general issue in a criminal trial is, of course, whether the defendant is guilty of the offense charged." United States v. Doe, 63 F.3d 121, 125 (2d Cir.1995). "Thus, on a Rule 12(b) motion, a court assesses the legal sufficiency of an indictment without considering the evidence the Government may introduce at trial." United States v. Al-Marri, 230 F. Supp. 2d 535, 538 (S.D.N.Y. 2002) (citing United States v. Alfonso, 143 F.3d 772, 776-77 (2d Cir. 1988)).

III. ANALYSIS

Defendant urges two grounds on which the indictment should be dismissed: (1) the government failed to allege a necessary element of the charged offense, to wit, his prior felony conviction; and (2) the order of deportation was fundamentally unfair and was the result of a proceeding which deprived him of due process of law. The court concludes that the defendant's failure to exhaust the administrative remedies which were available to him after the deportation proceedings precludes him from now attacking those proceedings, and the resulting order, as unfair. Moreover, the court finds that defendant cannot attack that earlier conviction on the basis of ineffective assistance of counsel in light of his failure to raise the issue, in the first instance, to the BIA.

A. Government failure to allege prior conviction as part of the indictment

Defendant argues that the indictment is fatally insufficient insofar as it fails to specifically allege his prior felony conviction as an element of the crime. The government argues, and the defendant concedes, that current Supreme Court precedent, Alamendaraz-Torres v. United States, 523 U.S. 224 (1984), holds that the government need not include such allegations in an indictment under 8 U.S.C. 1326(a). Defendant acknowledged that his argument is contrary to controlling precedent, but expressed hope that such the precedent would be overruled by a differently comprised Supreme Court. This court rejects his argument, being bound by clear, pertinent precedent.

B. Collateral attack of the 2000 deportation order

Defendant next seeks to collaterally attack his prior deportation order under 8

U.S.C. § 1326(d). In order to successfully collaterally attack such an order, an alien must demonstrate that:

(1) He 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 denied the alien of the opportunity for judicial review; and

(3) the entry of the order was fundamentally unfair.

8 U.S.C. § 1326(d). These requirements are conjunctive and, therefore, the defendant must establish all three in order to successfully challenge his removal order. United States v. Fernandez-Antonia, 278 F.3d 150, 157 (2d Cir. 2001). The court's analysis ends with consideration of the first requirement, exhaustion of administrative remedies; defendant's admitted failure to appeal the order of deportation precludes him from making the requisite showing under 8 U.S.C. § 1326(d).

Defendant argues that exhaustion is not required where the immigration judge does not apprise an alien, at the deportation hearing, of his "apparent eligibility" for discretionary relief under section 212(c) of the Immigration and Naturalization Act ("INA"), 8 U.S.C. § 1182(c) ("section 212(c)"). Defendant also argues, at the time the deportation order was entered, the BIA's interpretation of the INA – that section 212(c) relief was not available – rendered any appeal futile. Considerations of these arguments requires a brief gloss of the history of section 212(c).

Aliens convicted of certain crimes, labeled "aggravated felonies" in immigration

law, become deportable. See 8 U.S.C. § 1227(a)(2)(A)(iii). Certain drug offenses, including the possession of narcotics with intent to sell to which the defendant plead guilty in December 1995, constitute aggravated felonies. 8 U.S.C. § 1101(a)(43)(B). Prior to 1996, section 212(c) allowed aliens facing deportation to apply for a discretionary waiver of deportation. I.N.S. v. St. Cyr, 533 U.S. 289, 294-95 (2001). In 1996, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), Pub.L. No. 104-208, 110 Stat. 3009, § 304(B) (Sept. 30, 1996) and the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214 (April 24, 1996), significantly amending the NIA. Id. at 292. One of the effects these enactments was that aliens convicted of deportable offenses could no longer apply for section 212(c) relief. Id. at 297.

The BIA interpreted Congress' amendments as applying to all deportation proceedings initiated after their effective date. Id. at 320 n.45. According to the BIA's interpretation, even if an alien had plead guilty to a deportable offense prior to the repeal of 212(c) relief, that alien could not apply for 212(c) relief. Id. In 2001, however, the Supreme Court corrected the BIA's misinterpretation of the law, holding that section 212(c) relief is available to aliens with convictions based on pleas of guilty entered prior to the enactment of the IIRIRA and the AEDPA. St. Cyr. 533 U.S. at 326. The court reasoned that plea agreements involve a quid pro quo between a criminal defendant and the government. Id. at 321. When an alien plead guilty to a deportable offense, he or she likely did so in the

knowledge of the availability section 212(c) relief. Id. at 323.

In the instant case, in light of his December 20, 1995 guilty plea which lead to his conviction, defendant falls into that category of individuals who plead guilty prior to the enactment of the IIRIRA and the AEDPA so that the BIA actually had the power to grant him section 212(c) relief. Accordingly, defendant's argument that appeal of his deportation order would have been futile rests upon the notion that the BIA's apparent belief that section 212(c) relief was not available satisfies the futility requirement. The court refuses to accept such a formulation of the futility requirement.

As an initial matter, the exhaustion requirement at issue in this case is statutory, demanding a stricter application than in other instances. See McCarthy v. Madigan, 503 U.S. 140, 144 (1992). The court acknowledges that exhaustion may be excused "where resort to the agency would be futile because the challenge is one that the agency has no power to resolve in the applicant's favor." Sousa v. INS, 226 F.3d 28, 32 (1st Cir. 2000). Defendant refers us to an unpublished decision for the proposition that "[a]dministrative appeal is futile if the body being appealed to lacks the power or believes that it lacks the power to resolve the matter in the applicant's favor." United States v. Calderon, 02-CR-0691 (JBW), 2003 U.S. Dist. LEXIS 224, at *12 (E.D.N.Y. January 9, 2003) (citing Sousa, 226 F.3d at 32). In this instance, defendant does not (and, indeed, cannot) suggest that the BIA did not actually have the power to grant him relief under 8 U.S.C. § 212(c). See I.N.S. v. St. Cyr, 533 U.S. 289 (2001). Rather, he relies upon the BIA's erroneous

belief that it had no such power.

In an analogous situation, the Supreme Court has held that a party must raise an objection to an administrative proceeding even in the face of that agency's policy that would compel it to overrule the objection. See United States v. L.A. Tucker Truck Lines, Inc., 344 U.S. 33, 37 (1952). As a consequence of not raising the issue to the administrative agency, a party is precluded from doing so on any subsequent appeal. See id. The court reasoned as follows:

> It is urged in this case that the Commission had a predetermined policy on this subject which would have required it to overrule the objection if made. While this may well be true, the Commission is obliged to deal with a large number of like cases. Repetition of the objection in them might lead to a change of policy, or, if it did not, the Commission would at least be put on notice of the accumulating risk of wholesale reversals being incurred by its persistence. Simple fairness to those who are engaged in the tasks of administration, and to litigants, requires as a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice.

Id. In the instant case, even if we accept defendant's contention that the BIA would have refused to grant section 212(c) relief, his failure to press his claim at the administrative level precludes the court from considering such an argument.

Defendant next urges the court to follow a line of Ninth Circuit authority standing for the proposition that "failure to exhaust cannot bar collateral review of a deportation proceeding when the waiver of the right to an administrative appeal was not considered and intelligent." United States v. Ubaldo-Figueroa, 347 F.3d 718, 726 (9th Cir. 2003);

United States v. Leon-Paz, 340 F.3d 1003, 1005-06 (9th Cir. 2003). The Ninth Circuit has held that the exhaustion requirement of section 1326(d) may be effectively waived when the immigration judge did not adequately apprise the alien of his right to appeal. See United States v. Muro-Inclan, 249 F.3d 1180, 1183 (9th Cir. 2001). The court cannot accept such a construction of section 1326(d) insofar as it completely ignores express statutory language by conflating three distinct statutory requirements into a general fairness inquiry. The Second Circuit has unequivocally noted that the requirements of section 1326(d) are conjunctive and, as such, a defendant must establish all three in order to successfully challenge a deportation order. Fernandez-Antonia, 278 F.3d at 157. If this court were to ignore the exhaustion requirement of section 1326(d), it would be impermissibly treating express statutory language as mere surplusage.

Alternatively, defendant contends that, at the conclusion of the deportation hearing, the immigration judge was required to "inform the alien of his or her apparent eligibility to apply for any benefits enumerated in this chapter and shall afford the alien an opportunity to make application during the hearing." Def. Supp. Memo., p. 2 (citing C.F.R. § 242.19(b)(1999)). This mandate, defendant argues, requires the immigration judge to inform the alien of his "apparent eligibility" for 212(c) relief. Id. (citing United States v. Lepore, 304 F. Supp. 2d 183, 194-95 (D. Mass. 2004); United States v. Andrade-Partida, 110 F. Supp. 2d 1260 (S.D. Cal. 2000)). The mandate is even broader, defendant contends, such that the immigration judge is required "to inform aliens of their 'apparent

eligibility' for any potential relief suggested by the record." Id. (citing United States v. Sanchez-Peralta, 1998 U.S. Dist. LEXIS 1660, at *12, 97-CR–536 (LAP) (S.D.N.Y. Feb. 13 1998)).

The government disputes the nature of the requirements imposed upon the immigration judge by 8 U.S.C. § 1240.11(a)(2). The court, however, need not determine precisely what was statutorily required of the immigration judge at the deportation hearing in light of defendant's waiver, through counsel, of any appeal.

In United States v. Loaisga, the First Circuit addressed a collateral attack on a deportation order quite similar to the instant case. 104 F.3d 484, 488 (1st Cir. 1997). In Loaisga, the defendant was charged with reentry after deportation under 8 U.S.C. § 1326. He challenged the validity of the deportation order on the ground that he was not adequately apprised of his right to appeal the order. The district court found the proceeding to be fundamentally unfair and grnated the motion to suppress. The First Circuit reversed, finding that defendant had "flatly disclaimed any desire to appeal." Id. at 487. The court noted that an alien facing deportation "must be told of his right to appeal from the deportation order; but there is no statute or regulation prescribing that he be told anything more if he says on the spot that he does not wish to appeal." Id.

Applying the First Circuit's reasoning to the instant case, the court finds that, even if the controlling statute required the immigration judge to expressly advise the defendant of his right to appeal, since the alien expressly waived a desire to appeal, on the record,

there was no harm in the failure to so advise.

Finally, defendant claims ineffective assistance of counsel as an additional ground for dismissing the indictment. Def.'s Supp'l Brief. at 7. Defendant argues that the performance of his attorney at the deportation hearing "'was so ineffective as to have impinged upon fundamental fairness of the hearing in violation of the Fifth Amendment due process clause.'" Id. (quoting Rabiu v. I.N.S., 41 F.3d 879, 882 (2d. Cir. 1994)). Specifically, defendant argues that competent counsel would have applied for section 212(c) relief on his behalf and, further, that defendant could have made a strong showing in support of such an application. Id. 8-9. The government does not appear to contest the facts which defendant proffers in support of section 212(c) relief. However, the court need not reach the issue.

Defendant was required to raise the issue in the first instance through an appeal to the BIA. See Arango-Aradondo v. INS, 13 F.3d 610, 614 (2d Cir. 1994). In Arango-Aradondo, the Second Circuit held that, for prudential reasons, this issue should be decided in the first instance by the BIA, which can reopen the proceedings to allow a petitioner to supplement the record in appropriate cases. 13 F.3d at 614. The court reasoned that, requiring the BIA to decide ineffectiveness claims in the first instance "'will avoid any premature interference with the agency's processes and, in addition to affording the parties and courts the benefit of the agency's expertise, it will compile a record which is adequate for judicial review. Id. (quoting Castaneda-Suarez v. I.N.S., 933 F.2d 142, 145

(7th Cir. 1993) (internal quotation marks omitted)).

In the instant case, the defendants's failure to raise the ineffective assistance of counsel claim in front of the BIA and, thereby, establish a record, is fatal to such a challenge at this time.

IV. CONCLUSION

For the foregoing reasons the defendants' Motion to Dismiss or In the Alternative for Construction of Indictment as Stating 1326(a) Offense Only [Dkt. No. 13] is denied.

SO ORDERED.

Dated at Bridgeport, Connecticut this 23rd day of June, 2004.

/s/ Janet C. Hall
Janet C. Hall
United States District Judge