No. 17-

IN THE

Supreme Court of the United States

EMILIO ESTRADA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

A noncitizen being prosecuted for the crime of illegal reentry following removal may challenge the validity of the underlying removal order by showing that, among other things, the "entry of the order was fundamentally unfair." 8 U.S.C. §1326(d)(3). Petitioner, a longtime lawful permanent resident, challenged his illegal reentry prosecution on the ground that the entry of his removal order was fundamentally unfair because he was deprived of the opportunity to seek discretionary relief from removal. Acknowledging a division in the circuits, the Sixth Circuit ruled that, where the relief at issue is discretionary, deprivation of the opportunity to seek such relief cannot render the entry of the removal order fundamentally unfair.

The question presented is:

Whether the deprivation of a lawful permanent resident's opportunity to pursue statutorily available discretionary relief from removal can render entry of the removal order fundamentally unfair.

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PETITION FOR A WRIT OF CERTIORARI

Emilio Estrada respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

INTRODUCTION

As of 2007, Emilio Estrada had been a lawful permanent resident of the United States for seventeen years, and for twelve years he had lived with his wife (also a lawful permanent resident) in McMinnville, Tennessee. There, he and his wife raised their four children (all U.S. citizens); the children were good students, and he actively participated in their lives. He was also the breadwinner for the family, having worked his way up to a management position.

In 2007, Mr. Estrada was charged with possession of a firearm by an unlawful user of a controlled substance. Mr. Estrada's guilty plea turned his life, and his family's life, upside down. Because of the conviction, the government sought his removal from the country. The first immigration lawyer he hired failed to appear at the removal hearing, leaving Mr. Estrada to appear unrepresented. After his hearing was continued, he retained a new lawyer, who appeared at the hearing only to concede Mr. Estrada's removability, concede the unavailability of any relief, and waive Mr. Estrada's right to appeal—without raising the possibility of any discretionary relief, such as a waiver of inadmissibility under Section 212(h) of the Immigration and Nationality Act on the ground that his removal would cause "extreme hardship" to his family. The immigration judge similarly failed to inform Mr. Estrada of the possibility of discretionary relief. Mr. Estrada was removed from the United States later that month.

After his removal, Mr. Estrada returned to McMinnville to be with his family. He was discovered, arrested, and charged with the crime of illegal reentry after removal. He sought to dismiss the indictment on the ground that the entry of his deportation order violated the Due Process Clause in light of his lawyers' deficient performance and the immigration judge's failure to inform him of the possibility of discretionary relief from removal. The district court rejected his claim, and the Sixth Circuit affirmed in a published decision, ruling that Mr. Estrada had no constitutionally protected liberty interest in pursuing discretionary relief.

The Sixth Circuit's decision in this case deepened a well-defined and longstanding circuit split. Notably, the Second and Ninth Circuits, which decide the vast majority of immigration appeals, have held that due

process protects the ability of noncitizens facing removal to pursue statutorily available discretionary relief.

For Mr. Estrada and many noncitizens, this issue is critically important. Nearly one hundred thousand individuals face removal every year. For many, discretionary relief—which is granted not infrequently—is the only hope of remaining in this country.

Review by this Court is needed to resolve the circuit split on this important question of law and to correct the Sixth Circuit's mistaken rule, the application of which has left Mr. Estrada without recourse to defend himself against a criminal sanction that is based on a constitutionally defective removal proceeding.

OPINIONS BELOW

The court of appeals' opinion (App. 1a-8a) is reported at 876 F.3d 885. The relevant orders of the district court (App. 9a-12a, 13a-20a) are unreported.

JURISDICTION

The court of appeals entered judgment on December 4, 2017. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The Due Process Clause of the Fifth Amendment and relevant portions of Sections 212 and 276 of the Immigration and Nationality Act, 8 U.S.C. §1182 and §1326, are reproduced in the appendix to this petition. App. 21a-26a.

STATEMENT

A. Factual Background

1. Emilio Estrada, a Mexican national, became a lawful permanent resident of the United States in 1990. Dist. Ct. Dkt. 42 at 3; Dist. Ct. Dkt. 42-1. He married Armida Vera in 1993. Dist. Ct. Dkt. 42-2. The couple lived in Nebraska until 1995, when they settled in McMinnville, Tennessee. *Id.*

Over the next twelve years in McMinnville, Ms. Vera became a lawful permanent resident, and the couple raised four children, all of whom are U.S. citizens. Dist. Ct. Dkt. 26-2 at 3. Mr. Estrada supported the family through consistent employment, first at a manufacturing company and then in a salaried management position at a garden nursery. Dist. Ct. Dkt. 42-1; Dist. Ct. Dkt. 42-2; Dist. Ct. Dkt. 53. The children performed well in school and participated in school sports, and Mr. Estrada was an active presence in their lives. Dist. Ct. Dkt. 58-2.

2. In November 2007, police encountered Mr. Estrada at the scene of a controlled drug purchase. Gov't C.A. Br. 1. Mr. Estrada was not one of the individuals selling drugs, but upon searching Mr. Estrada and his car, officers found a small amount of a controlled substance, a rifle, and ammunition. *Id.* After being transferred to federal custody, Mr. Estrada pleaded guilty in the U.S. District Court for the Eastern District of Tennessee to possession of a firearm by an unlawful user of a controlled substance, and he was sentenced to twelve months' imprisonment. Dist. Ct. Dkt. 42-1; *see* 18 U.S.C. §922(g)(3).

3. After sentencing, Mr. Estrada was released into the custody of U.S. Immigration and Customs En-

forcement ("ICE"). Dist. Ct. Dkt. 42-1. Attorney Vincent Anderson was retained to represent him in immigration proceedings. Pet. C.A. Br. 8. Attorney Anderson noticed his appearance with the local Office of Detention and Removal Operations in November 2008. Dist. Ct. Dkt. 42-4.

On December 15, 2008, Mr. Estrada was served with a Notice to Appear alleging that his conviction rendered him subject to removal. App. 2a; Dist. Ct. Dkt. 26-1. Mr. Anderson spoke with Mr. Estrada by phone that day, but merely advised him not to sign any documents. Dist. Ct. Dkt. 26-2 at 4.

In early 2009, Mr. Estrada appeared before an immigration judge ("IJ"). Pet. C.A. Br. 7; Dist. Ct. Dkt. 20, Tracks 1-4 (Jan. 29, 2009). Attorney Anderson did not show up, and the IJ noted on the record that no attorney had entered an appearance in the Immigration Court. *Id.*, Track 4, at 1:52-2:16 (Jan. 29, 2009). After a brief colloquy with Mr. Estrada, the IJ rescheduled the hearing to allow counsel to appear. *Id.*, Track 4, at 2:16-2:55.

Mr. Estrada then retained attorney Luke Abrusley to take over the case. On March 10, 2009, Attorney Abrusley appeared with Mr. Estrada in Immigration Court. Dist. Ct. Dkt. 20, Track 10 (Mar. 10, 2009). Mr. Abrusley admitted the facts alleged in the Notice to Appear and conceded Mr. Estrada's removability. *Id.*, Track 10, at 1:03-1:11. The IJ then stated on the record that no relief was available to Mr. Estrada, and Mr. Abrusley agreed. *Id.*, Track 10, at 1:48-2:11. The IJ ordered that Mr. Estrada be removed to Mexico. *Id.*, Track 10, at 2:11-2:15; Dist. Ct. Dkt. 26-3. Mr. Abrusley accepted the order and waived Mr. Estrada's right to appeal. *Id.*, Track 10, at 2:16-2:20. Neither the IJ nor Mr. Abrusley ever mentioned to Mr. Estrada the

possibility of seeking discretionary relief under Section 212(h) of the INA, which grants the Attorney General "discretion" to "waive" inadmissibility if it "would result in extreme hardship" to a spouse or child who is a U.S. citizen or lawful permanent resident, as Mr. Estrada's wife and children are. 8 U.S.C. §1182(h)(1)(B); *see* Dist. Ct. Dkt. 20 (Mar. 10, 2009).

Mr. Estrada was deported later that month. Dist. Ct. Dkt. 26-2 at 6. His family struggled after that. Without Mr. Estrada's steady income, Ms. Vera barely was able to make ends meet, and the family began living paycheck to paycheck. Dist. Ct. Dkt. 58-3 at 1. Ms. Vera also suffered from health problems, as a hearing loss condition worsened and required surgery on her left ear. Dist. Ct. Dkt. 33.

B. Proceedings Below

1. Around 2013, Mr. Estrada returned to his family in McMinnville. In March 2015, he was discovered by local law enforcement officers, arrested, and charged in the Eastern District of Tennessee with two counts of illegal reentry following removal, in violation of 8 U.S.C. §1326(a). Dist. Ct. Dkt. 11.

Mr. Estrada moved to dismiss the indictment on the ground that the 2009 deportation order was invalid under Section 276 of the INA, 8 U.S.C. §1326(d), because its entry was "fundamentally unfair." Dist. Ct. Dkt. 18. Specifically, he argued that the IJ had deprived him of due process by failing to inform him of the possibility of discretionary relief from removal under Section 212(h). *Id.* at 2. Mr. Estrada's motion explained that removal would cause hardship to his wife and his four children. *Id.* at 4.

The government opposed the motion on the ground that, because Section 212(h) relief is discretionary rather than mandatory, "the failure to advise the defendant of §212(h) relief does not rise to a life, liberty, or property interest sufficient to trigger constitutional protection." Dist. Ct. Dkt. 25 at 5. The government cited Sixth Circuit precedent holding that there is "no constitutionally-protected liberty interest in obtaining discretionary relief from deportation." *Ashki* v. *INS*, 233 F.3d 913, 921 (6th Cir. 2000). After a hearing and additional briefing, the district court denied Mr. Estrada's motion, agreeing with the government that, under *Ashki*, "the IJ's failure to inform [Mr. Estrada] of the possibility of discretionary relief cannot, as a matter of law, amount to a due process violation." App. 18a.[1]

Mr. Estrada then filed an amended motion to dismiss, expressly incorporating his prior arguments and adding a claim that his due process rights were violated "by his attorneys' grievously deficient representation." Dist. Ct. Dkt. 42 at 8. He pointed to Mr. Anderson's and then Mr. Abrusley's unresponsiveness, as well as Mr. Abrusley's failure to raise or inform him of the possibility of discretionary relief under Section 212(h), concession that there was no possibility of relief, and waiver of appeal without consulting Mr. Estrada. *Id.* at 6.

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[1] The government also argued that even if Mr. Estrada's right to due process had been violated, he could not meet the other requirements of §1326(d): that he was prejudiced by the constitutional violation; that he had exhausted available administrative remedies; and that he had been "improperly deprived … of the opportunity for judicial review" during the deportation proceedings. Dist. Ct. Dkt. 25 at 7-8. Neither the district court nor the court of appeals addressed those issues, and they are not before this Court now.

Because of this ineffective assistance, he argued, he had been "deprived of the ability to assert a claim to relief from deportation." *Id.* at 11. The government responded that Mr. Estrada's amended motion failed for the same reasons its predecessor did—he had no constitutional right to obtain discretionary relief from removal under *Ashki*—and the district court again agreed. Dist. Ct. Dkt. 45 at 9; App. 9a-12a.

With his collateral attack on the underlying deportation order thus thwarted, Mr. Estrada pleaded guilty to unlawful reentry but reserved the right to appeal the court's denial of his motions to dismiss the indictment. Dist. Ct. Dkt. 48 ¶2; Dist. Ct. Dkt. 68 at 14-15. The court accepted the plea agreement and sentenced him to time served.

2. The court of appeals affirmed. It stated that "[t]o prove the fundamental unfairness of an underlying deportation order, a defendant must show both a due process violation emanating from defects in the underlying deportation proceeding and resulting prejudice." App. 4a-5a. It then concluded that the principle "previously announced" in *Ashki*—that a person "has no constitutionally-protected liberty interest in obtaining discretionary relief from deportation"—applied fully to discretionary relief under Section 212(h) and dictated the result here. App. 5a. The court also determined that it "matters not" whether the claim was based on the "attorneys' alleged shortcomings [or] the Immigration Judge's": "[w]ithout a cognizable liberty or property interest at stake," the court explained, "a due process violation cannot occur." App. 7a (internal quotation marks omitted). The court "acknowledge[d] the circuit split on this question" and elected to side with "the majority of our sister circuits likewise holding that an alien has no

constitutional right to be informed of eligibility for, or to be considered for, discretionary relief." App. 6a.

REASONS FOR GRANTING THE PETITION

I. THE CIRCUITS ARE DIRECTLY AND INTRACTABLY DIVIDED REGARDING THE QUESTION PRESENTED

As the court below readily admitted, there is a "circuit split" on the question presented in this case: whether deprivation of a lawful permanent resident's opportunity to pursue statutorily available discretionary relief from removal, such as a waiver of admissibility under Section 212(h) of the INA, can render the entry of the removal order fundamentally unfair. App. 6a. At least five other circuits have also acknowledged the split. *See United States* v. *Copeland*, 376 F.3d 61, 70 (2d Cir. 2004); *United States* v. *Torres*, 383 F.3d 92, 95 n.3, 103 (3d Cir. 2004); *United States* v. *De Horta Garcia*, 519 F.3d 658, 661 (7th Cir. 2008); *United States* v. *Lopez-Velasquez*, 629 F.3d 894, 897 n.2 (9th Cir. 2010); *United States* v. *Aguirre-Tello*, 353 F.3d 1199, 1205 (10th Cir. 2004) (en banc).

On one side of the issue are the Second and Ninth Circuits, which together resolve nearly three-quarters of all immigration appeals. U.S. Courts, *Judicial Business 2016—U.S. Courts of Appeals* (2016). In *Copeland*, the IJ had incorrectly told the noncitizen that he was ineligible for relief from removal under Section 212(c), which accorded the Attorney General discretion to waive removal orders under certain circumstances. 376 F.3d at 63-64. The noncitizen accepted the IJ's statement, did not seek relief under Section 212(c), and was removed. *Id.* at 64. After subsequently being charged with illegal reentry, the noncitizen collaterally attacked the deportation order under §1326(d). *Id.* at 62. The Second Circuit

held that a removal proceeding is fundamentally unfair under §1326(d) when the noncitizen "is erroneously denied information regarding the right to seek [discretionary] relief, and the erroneous denial of that information results in a deportation that likely would have been avoided if the alien was properly informed." *Id.* at 71. Citing *INS* v. *St. Cyr*, 533 U.S. 289, 307-308 (2001), the Second Circuit explained that although "relief under Section 212(c) is not constitutionally mandated and is discretionary," there is a "[c]ritical … distinction between a right to seek relief and the right to that relief itself." 376 F.3d at 71-72. Emphasizing "the special duties of an IJ to aliens," *id.*, the court analogized its conclusion to circuit precedent holding "a deportation proceeding to be fundamentally unfair when the erroneous advice of counsel caused an alien who was 'eligible for §212(c) relief and could have made a strong showing in support of such relief' to fail to apply for waiver," *id.* at 73 (quoting *United States* v. *Perez*, 330 F.3d 97, 104 (2d Cir. 2003)); *see also, e.g., United States* v. *Lopez*, 445 F.3d 90, 100 (2d Cir. 2006) (following *Copeland*); *United States* v. *Cerna*, 603 F.3d 32, 41 (2d Cir. 2010) (where immigration counsel "fail[s] to file an application for relief under §212(c)" because of professional incompetence and that error is prejudicial, "fundamentally unfair" prong is met).

Similarly, in *United States* v. *Ubaldo-Figueroa*, the Ninth Circuit held a deportation order fundamentally unfair because the noncitizen was "prejudiced" by the IJ's "unconstitutional failure to inform him that he was eligible for §212(c) relief." 364 F.3d 1042, 1051 (9th Cir. 2004). The court explained: "The requirement that the IJ inform an alien of his or her ability to apply for relief from removal is mandatory, and failure to so inform the alien of his or her eligibility for relief from removal is a denial of due process that invalidates the underlying de-

portation proceeding." *Id.* at 1050 (brackets and internal quotation marks omitted); *see also Lopez-Velasquez*, 629 F.3d at 896-897 ("We have repeatedly held that an IJ's failure to … advise an alien [of his apparent eligibility for discretionary relief] violates due process and can serve as the basis for a collateral attack to a deportation order where, as here, the order is used as the predicate for an illegal reentry charge under §1326.").

Joining the Sixth Circuit on the other side of the issue are the Third, Fourth, Fifth, Seventh, Tenth, and Eleventh Circuits. For example, in *United States* v. *Lopez-Ortiz*, the Fifth Circuit also confronted a claim that "the Immigration Judge's failure to inform him of the possibility of §212(c) relief rendered his removal hearing fundamentally unfair." 313 F.3d 225, 230-231 (5th Cir. 2002). The court rejected the proposition that "eligibility for discretionary relief under §212(c) is an interest warranting constitutional due process protection … because [§212(c) relief] is available within the broad discretion of the Attorney General." *Id.* at 231; *see also Torres*, 383 F.3d at 103-106; *United States* v. *Wilson*, 316 F.3d 506, 510 (4th Cir. 2003), *overruled on other grounds*, *Lopez* v. *Gonzales*, 549 U.S. 47, 52 n.3 (2006); *De Horta Garcia*, 519 F.3d at 661; *Aguirre-Tello*, 353 F.3d at 1204-1205; *Alhuay* v. *U.S. Att'y Gen.*, 661 F.3d 534, 548-549 (11th Cir. 2011).

II. THE SIXTH CIRCUIT'S DECISION IS WRONG AND CONFLICTS WITH THIS COURT'S PRECEDENT

Although the circuit split alone warrants this Court's review, this case also warrants review because the Sixth Circuit's analysis cannot be squared with this Court's prior decisions.

A. The position adopted by the Sixth Circuit in this case incorrectly "collapse[s] th[e] distinction" be-

tween "a right to seek relief and the right to that relief itself." *Copeland*, 376 F.3d at 72; *accord De Horta Garcia*, 519 F.3d at 662-663 (Rovner, J., concurring).

This distinction is self-evident and well established in this Court's precedent. In *St. Cyr*, a noncitizen brought a habeas petition challenging the retroactive elimination of his eligibility "for a waiver of deportation at the discretion of the Attorney General" under Section 212(c) of the INA. 533 U.S. at 292-293. As part of its analysis finding jurisdiction to hear the habeas petition, this Court noted that "[t]raditionally, courts recognized a distinction between eligibility for discretionary relief, on the one hand, and the favorable exercise of discretion, on the other hand." *Id.* at 307. The Court elaborated: "Eligibility that was 'governed by specific statutory standards' provided 'a right to a ruling on an applicant's eligibility,' even though the actual granting of relief was 'not a matter of right under any circumstances, but rather is in all cases a matter of grace.'" *Id.* at 307-308 (quoting *Jay* v. *Boyd*, 351 U.S. 345, 353-354 (1956)). The Court also drew on *United States ex rel. Accardi* v. *Shaughnessy*, 347 U.S. 260, 261 (1954), where it had held that "even though the actual suspension of deportation authorized by §19(c) of the Immigration Act of 1917 was a matter of grace, … a deportable alien had a right to challenge the Executive's failure to exercise the discretion authorized by the law." *St. Cyr*, 533 U.S. at 308.[2]

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[2] Relatedly, on the merits of the habeas challenge in *St. Cyr*, the Court determined that, although relief under §212(c) was discretionary, the new law's "elimination of any possibility of §212(c) relief for people who entered into plea agreements with the expectation that they would be eligible for such relief clearly 'attaches a new disability, in respect to transactions or considerations already

The Fifth Circuit, in a decision that reached a result similar to the Sixth Circuit's in this case, dismissed *St. Cyr* on the ground that its "holding was not grounded in §212(c) relief having the status of a constitutionally protected interest; rather, it was based on the Court's interpretation" of a statute. *Lopez-Ortiz*, 313 F.3d at 231. But that fails to grapple with the point recognized by the Second and Ninth Circuits: even if the relief itself is based in statute, the Due Process Clause may still apply to the procedures affecting the noncitizen's ability to *pursue* available discretionary relief under the statutory standards. *See Copeland*, 376 F.3d at 72-73; *Ubaldo-Figueroa*, 364 F.3d at 1048.

The Third Circuit, to its credit, has recognized that "a meaningful distinction may exist between the claim that an alien has a due process interest in being *considered* for statutorily available discretionary relief on the one hand, and the very different claim that an alien has a due process interest in the *favorable exercise* of that relief." *Torres*, 383 F.3d at 105 (citing *United States* v. *Roque-Espinoza*, 338 F.3d 724, 729-730 (7th Cir. 2003)). But that court then inexplicably obliterated that "meaningful distinction," holding that a lawful permanent resident has no "due process liberty interest in being considered for §212(c) relief" because that section "use[d] no 'explicit mandatory language' that could create in an alien any protectible expectation of entitlement to relief." *Id.* at 105.

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past.'" 533 U.S. at 321 (quoting *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 269 (1994)); *see also id.* at 325 ("Because respondent, and other aliens like him, almost certainly relied upon th[e] likelihood [of receiving §212(c) relief] in deciding whether to forgo their right to a trial, the elimination of any possibility of §212(c) relief by [the new law] has an obvious and severe retroactive effect.").

B. The Sixth Circuit's position does not follow from the proposition that there can be no procedural right to seek discretionary relief without a substantive right to that relief. Such reasoning overlooks the constitutionally protected liberty interest actually at stake.

The Sixth Circuit and others have observed that the "fundamentally unfair" requirement of §1326(d)(3) sounds in "procedural" due process. App. 5a; *see Torres*, 383 F.3d at 103-104 (stating that "'[f]undamental fairness is a question of procedure'" and reciting test for procedural due process articulated in *Mathews* v. *Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Lopez-Ortiz*, 313 F.3d at 230)); *see also United States* v. *Mendoza-Lopez*, 481 U.S. 828, 841-842 (1987) (where "fundamental procedural defects of the deportation hearing … render[] direct review of the Immigration Judge's determination unavailable," the "deportation proceeding … may not be used to support a criminal conviction"). The court below accordingly searched elsewhere for "'a life, liberty, or property interest sufficient to trigger the protection of the Due Process Clause in the first place.'" App. 5a.[3] And like other Circuits rejecting a similar due process claim, the court below rejected Mr. Estrada's due process claim on the ground that the interest "in obtaining discretionary relief" from removal is not a "constitutionally-protected

[3] Section 1326(d) does not expressly provide that a procedural flaw can render entry of a deportation order "fundamentally unfair" only if it qualifies as a violation of due process, and this Court has not so held. This case, however, does not require the Court to decide whether a due process violation is required to meet the "fundamentally unfair" standard of §1326(d)(3), because deprivation of the right to seek discretionary statutory relief is a due process violation.

liberty interest" because, at bottom, it is discretionary. *Id.* (internal quotation marks omitted); *see also, e.g.*, *Torres*, 383 F.3d at 105-106; *Lopez-Ortiz*, 313 F.3d at 231.

That analysis errs in assuming that the relevant interest is merely the obtaining of the discretionary relief. To the contrary, the relevant liberty interest is one that is unquestionably protected by the Due Process Clause: the interest of a lawful permanent resident in remaining in this country. That is the liberty interest the government seeks to deprive a noncitizen of when it initiates removal proceedings, and that interest is why "[i]t is well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings." *Reno* v. *Flores*, 507 U.S. 292, 306 (1993); *see also, e.g.*, *Bridges* v. *Wixon*, 326 U.S. 135, 154 (1945) (due process governs procedural requirements in deportation proceeding because "the liberty of an individual is at stake"); *Landon* v. *Plasencia*, 459 U.S. 21, 34-35 (1982) (noting for purposes of due process analysis that a resident noncitizen has "the right to stay and live and work in this land of freedom" (internal quotation marks omitted)); *Wong Yang Sung* v. *McGrath*, 339 U.S. 33, 50, *modified by* 339 U.S. 908 (1950) ("A deportation hearing involves issues basic to human liberty and happiness and, in the present upheavals in lands to which aliens may be returned, perhaps to life itself."); *Ng Fung Ho* v. *White*, 259 U.S. 276, 284 (1922) (removal "may result … in loss of both property and life, or of all that makes life worth living").

Thus, like any defense to removal, discretionary relief is a means to vindicate a lawful permanent resident's constitutionally protected liberty interest in remaining in this country. That is underscored by this Court's recent decision in *Padilla* v. *Kentucky*, 559 U.S. 356 (2010). There, the Court held that noncitizens

facing criminal charges have a Sixth Amendment right to be informed by counsel of the removal consequences of a guilty plea, in part because "'preserving the client's right to remain in the United States may be more important to the client than any potential jail sentence.'" *Id.* at 368, 374 (brackets omitted) (quoting *St. Cyr*, 533 U.S. at 322). In so holding, the Court emphasized the importance to a noncitizen of "'preserving the possibility of' discretionary relief" from removal when considering whether to accept a plea offer. *Id.* at 368 (quoting *St. Cyr*, 533 U.S. at 323); *see also id.* (noting "expect[ation]" that defense counsel "would 'follow the advice of numerous practice guides' to advise themselves of the importance of this particular form of discretionary relief" (quoting *St. Cyr*, 533 U.S. at 323 n.50)).

By ignoring the well-established liberty interest that a lawful permanent resident has in remaining in the country, the Sixth Circuit failed even to evaluate whether the circumstances that affected Mr. Estrada's ability to seek a waiver rendered the process he received inadequate to protect that interest. *See Landon*, 459 U.S. at 34 (citing *Mathews*, 424 U.S. at 334-335). That error is troubling because the procedural flaws here—including the IJ's failure to inform Mr. Estrada of the possibility of relief under Section 212(h), and Mr. Estrada's lawyers' failure to take any actions to pursue Section 212(h) relief or to inform him of the possibility of such relief—deprived him of the chance to seek Section 212(h) relief, and thus assured that he would be removed. *See Cerna*, 603 F.3d at 41; *Asani* v. *INS*, 154 F.3d 719, 727 (7th Cir. 1998). As this Court said in *St. Cyr*, "[t]here is a clear difference … between facing possible deportation and facing certain deportation." 533 U.S. at 325. These circumstances cast substantial doubt on whether the entry of Mr. Estrada's deporta-

tion order was fundamentally fair. *Cf. Padilla*, 559 U.S. at 368, 374 (criminal counsel provides constitutionally ineffective assistance by failing to advise client of immigration consequences of guilty plea).

The Sixth Circuit was accordingly wrong to conclude that there is no constitutionally protected liberty interest at stake here. The Court should grant review and reverse that judgment.

III. THE QUESTION PRESENTED IS EXCEPTIONALLY IMPORTANT AND COULD AFFECT NUMEROUS CRIMINAL AND IMMIGRATION PROCEEDINGS

The question presented is one of great practical importance, both for lawful permanent residents in removal proceedings and for criminal defendants facing prosecution for illegal reentry after removal.

In fiscal year 2017, ICE initiated over 81,000 "interior removals" against noncitizens residing in the United States. U.S. Immigration & Customs Enf't, *FY 2017 ICE Enforcement Removal Operations Report*, at Figure 13. For many of those people, the only possible means of avoiding the serious penalty of removal is to pursue discretionary relief. *See Padilla*, 559 U.S. at 364 (noting that "if a noncitizen has committed a removable offense …, his removal is practically inevitable but for the possible exercise of limited remnants of equitable discretion vested in the Attorney General"); *St. Cyr*, 533 U.S. at 295-296 ("[T]he class of aliens whose continued residence in this country has depended on their eligibility for §212(c) relief is extremely large[.]"). Indeed, the vast majority of available statutory relief from removal is discretionary. *See, e.g.*, 8 U.S.C. §1158(b)(1)(A) (asylum); *id.* §1182(h) (waiver of admissibility); *id.* §1229b(a) (cancellation of removal); *cf. id.*

§1231(b)(3) (prescribing when withholding relief is mandatory); 18 U.S.C. §§2340 & 2340A (mandatory relief under Convention Against Torture). Unless the Court affirms that the Due Process Clause applies to a lawful permanent resident's ability to pursue statutorily available discretionary relief from removal, many noncitizens will be improperly deprived of their only chance to remain in this country lawfully.

Similarly, for a lawful permanent resident facing a criminal charge of illegal reentry—of which there were over 18,000 in fiscal year 2013[4]—the answer to the question presented likely will determine whether the noncitizen has any defense to the charge at all.

It is highly problematic, moreover, that the disposition of a lawful permanent resident's removal proceeding or his subsequent prosecution for unlawful reentry might depend on the judicial circuit in which the proceeding occurs. *See Gerbier* v. *Holmes*, 280 F.3d 297, 311 (3d Cir. 2002) ("'Fundamental fairness dictates that permanent resident aliens who are in like circumstances, but for irrelevant and fortuitous factors, be treated in a like manner.'" (quoting *Francis* v. *INS*, 532 F.2d 268, 273 (2d Cir. 1976))). And it undermines the policy of "national uniformity" in the administration of immigration laws. *Cazarez-Gutierrez* v. *Ashcroft*, 382 F.3d 905, 912 (9th Cir. 2004); *accord Arizona* v. *United States*, 567 U.S. 387, 394-397 (2012) (discussing the need for authority over immigration to rest with the federal

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[4] U.S. Sentencing Comm'n, *Illegal Reentry Offenses* 8 (Apr. 2015). Illegal reentry cases made up about 25 percent of all federal criminal cases reported to the U.S. Sentencing Commission for fiscal year 2013 (the most recent year for which such data is available).

government rather than the states); *Gerbier*, 280 F.3d at 311; *Jaramillo* v. *INS*, 1 F.3d 1149, 1155 (11th Cir. 1993) (noting the court's holding would "help achieve nationwide uniformity in an area of the law where uniformity is particularly important").

Accordingly, the Court should grant review to ensure national uniformity in the treatment of lawful permanent residents facing removal or prosecution for reentry who were improperly deprived of the opportunity to seek relief from removal.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MARCH 2018

APPENDICES

APPENDIX A

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 17a0275p.06

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 17-5081

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

EMILIO ESTRADA,

Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Tennessee at Winchester.
No. 4:13-cr-00013-1—Harry S. Mattice, Jr.,
District Judge.

Decided and Filed: December 4, 2017

Before: CLAY, GIBBONS, and COOK, Circuit Judges.

OPINION

COOK, Circuit Judge. Emilio Estrada, a Mexican citizen, entered a conditional guilty plea to one count of illegal reentry following removal. The district court denied his motions to dismiss the indictment, and Es-

trada appeals. His challenge hinges on collaterally attacking his original removal proceedings. Because Estrada falls short of the statutory requirements to lodge this attack on the underlying removal order, we AFFIRM the district court's judgment.

I.

In November 2007, undercover officers attempting a controlled purchase of methamphetamine arrested Emilio Estrada upon finding meth in his pocket and a rifle and ammunition in his car. He eventually pleaded guilty to possession of a firearm by an unlawful user of a controlled substance, *see* 18 U.S.C. § 922(g)(3), and the district court sentenced him to 12 months' imprisonment plus two years of supervised release.

Owing to this conviction for an aggravated felony, *see* 8 U.S.C. § 1101(a)(43)(E)(ii), Estrada—a green-card holder but not a U.S. citizen—was ordered to appear in immigration court for removal[1] proceedings, *see id.* § 1227(a)(2)(A)(iii). At his first appearance, Estrada confirmed he understood his rights as read by the Immigration Judge to a group of respondents. He then advised the Immigration Judge that he had retained counsel; Estrada's counsel (Vincent Anderson), however, was neither present nor had he entered an appearance, and the judge continued the case. Estrada appeared again several weeks later with his newly retained counsel (Luke Abrusley), who admitted the facts alleged in the Notice to Appear and conceded Estrada's removability. Noting the unavailability of other relief, the Immigration Judge ordered Estrada removed to his

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[1] We use "removal" and "deportation," and their variants, interchangeably in this opinion.

home country of Mexico. Estrada waived his right to appeal, and he was deported in March 2009.

Six years later, law enforcement discovered Estrada in the United States without permission. A federal grand jury charged him with two counts of illegal reentry following deportation, in violation of 8 U.S.C. § 1326(a) and (b)(2). Estrada moved to dismiss the indictment via a collateral attack on the underlying deportation order, arguing that the Immigration Judge violated his due process rights by failing to advise him of the possibility of discretionary relief from removal under § 212(h) of the Immigration and Nationality Act (INA). *Id.* § 1182(h). He filed an amended motion to dismiss making similar arguments, but the district court found no due process violation and thus denied both motions.

Undeterred, Estrada amended once more. He again collaterally attacked the deportation order on due process grounds, newly alleging that he received ineffective assistance of counsel because his attorneys "failed to advise him of or present to the Immigration Court his eligibility for relief from deportation" under INA § 212(h). Reiterating that Estrada had no constitutionally-protected liberty interest in securing discretionary relief, the district court denied the motion.

Estrada ultimately pleaded guilty to one count of illegal reentry. As part of his plea agreement, he reserved the right to appeal the denials of his motions to dismiss. We now entertain Estrada's timely appeal.

II.

A.

We review de novo a defendant's collateral attack on the deportation order underlying his conviction for unlawful reentry. *United States v. Zuñiga-Guerrero*, 460 F.3d 733, 735 (6th Cir. 2006).

A defendant charged with unlawful reentry may not challenge the validity of his deportation order unless he demonstrates 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 deprived [him] of the opportunity for judicial review; and (3) the entry of the order was fundamentally unfair." 8 U.S.C. § 1326(d). Because the requirements are conjunctive, the alien must satisfy all three prongs. Estrada focuses on the third one; like the district court, we begin—and end—our analysis there.

B.

"Fifth Amendment guarantees of due process extend to aliens in deportation proceedings, entitling them to a full and fair hearing." *Huicochea-Gomez v. INS*, 237 F.3d 696, 699 (6th Cir. 2001). Estrada contends that his due process rights were violated when his attorneys "failed to advise him of or present to the Immigration Court his eligibility for relief from deportation under" INA § 212(h). Accordingly, he claims that the entry of his removal order was fundamentally unfair.

To prove the fundamental unfairness of an underlying deportation order, a defendant must show both a due process violation emanating from defects in the un-

derlying deportation proceeding and resulting prejudice. *Id.*; *see also United States v. Lopez-Collazo*, 824 F.3d 453, 460 (4th Cir. 2016); *United States v. Cisneros-Rodriguez*, 813 F.3d 748, 756 (9th Cir. 2015); *United States v. Luna*, 436 F.3d 312, 319 (1st Cir. 2006). With respect to the procedural component, the defendant "must establish that [he] has been deprived of a life, liberty, or property interest sufficient to trigger the protection of the Due Process Clause in the first place." *Ashki v. INS*, 233 F.3d 913, 921 (6th Cir. 2000).

We have previously announced that an individual "has no constitutionally-protected liberty interest in obtaining discretionary relief from deportation." *Id.*; *see also Huicochea-Gomez*, 237 F.3d at 700 ("The failure to be granted discretionary relief does not amount to a deprivation of a liberty interest."). In *Ashki*, the petitioner appealed the Board of Immigration Appeals' denial of her motion to reopen her deportation proceedings so that she could apply for a discretionary grant of suspension of deportation. 233 F.3d at 916–17. She argued, in part, that the Nicaraguan Adjustment and Central American Relief Act (NACARA) denied her a fair removal hearing because it exempted only certain nationalities from the "stop time" provision of the Illegal Immigration Reform and Immigrant Responsibility Act. *Id.* at 919, 920–21. But given that the petitioner sought, at bottom, a discretionary grant of suspension of deportation, *id.* at 917, we held that she had "not asserted any constitutionally protected interest" and that NACARA therefore did not violate her due process rights, *id.* at 921.

Even though *Ashki* did not examine INA § 212(h), its holding guides us here. Section 212(h) provides that "[t]he Attorney General may, *in his discretion*, waive" inadmissibility for certain aliens with criminal convic-

tions if he is satisfied that denying the alien's admission would result in extreme hardship to the alien's spouse, child, or parent who is a U.S. citizen or lawful resident, and if "the Attorney General, *in his discretion*, … has consented to the alien's applying or reapplying for a visa, for admission to the United States, or adjustment of status." 8 U.S.C. § 1182(h)(1)(B), (2) (emphases added). The statute's plain language is clear: relief under § 212(h) is discretionary. And when "suspension of deportation is discretionary, it does not create a protectable liberty or property interest." *Ashki*, 233 F.3d at 921 (quoting *Appiah v. INS*, 202 F.3d 704, 709 (4th Cir. 2000)).

We acknowledge the circuit split on this question, with the majority of our sister circuits likewise holding that an alien has no constitutional right to be informed of eligibility for, or to be considered for, discretionary relief. *See United States v. Santiago-Ochoa*, 447 F.3d 1015, 1020 (7th Cir. 2006); *Bonhometre v. Gonzales*, 414 F.3d 442, 448 n.9 (3d Cir. 2005); *United States v. Aguirre-Tello*, 353 F.3d 1199, 1205 (10th Cir. 2004) (en banc); *United States v. Lopez-Ortiz*, 313 F.3d 225, 231 (5th Cir. 2002); *Smith v. Ashcroft*, 295 F.3d 425, 430 (4th Cir. 2002); *Oguejiofor v. Attorney Gen. of the United States*, 277 F.3d 1305, 1309 (11th Cir. 2002); *Escudero-Corona v. INS*, 244 F.3d 608, 615 (8th Cir. 2001); *but see United States v. Lopez-Velasquez*, 629 F.3d 894, 897 (9th Cir. 2010) (en banc) (noting the Ninth Circuit has "repeatedly held that an [Immigration Judge]'s failure to" advise an alien of his potential eligibility for discretionary relief violates due process); *United States v. Copeland*, 376 F.3d 61, 71 (2d Cir. 2004) ("We believe that a failure to advise a potential deportee of a right to seek Section 212(c) [discretionary] relief can, if prejudicial, be fundamentally unfair within the meaning of Section

1326(d)(3).”). Estrada asks us to eschew *Ashki* and follow the Second and Ninth Circuits’ approaches. We decline the invitation. *See Rutherford v. Columbia Gas*, 575 F.3d 616, 619 (6th Cir. 2009) (“A published prior panel decision ‘remains controlling authority unless an inconsistent decision of the United States Supreme Court requires modification of the decision or this Court sitting en banc overrules the prior decision.’” (quoting *Salmi v. Sec’y of Health & Human Servs.*, 774 F.2d 685, 689 (6th Cir. 1985))).

That Estrada’s appeal concentrates on his attorneys’ alleged shortcomings, rather than the Immigration Judge’s, matters not. In *Hanna v. Gonzales*, the petitioner sought to reopen proceedings before the Board of Immigration Appeals because his attorney failed to seek a discretionary waiver of removal under INA § 237(a)(1)(H). 128 F. App’x 478, 480 (6th Cir. 2005). We disagreed with Hanna that this violated his due process rights, “because Hanna possessed no constitutionally protected liberty interest in receiving a *discretionary* waiver.” *Id.* at 480–81. Hanna claimed that he was challenging his attorney’s failure to file for discretionary relief rather than the denial of discretionary relief, “[b]ut this distinction lack[ed] constitutional significance. Without a cognizable liberty or property interest at stake, a due process violation cannot occur.” *Id.* at 481.

Like Hanna, Estrada argues that he received “grievously deficient representation” that “denied [him] his right to assert relief from deportation.” Yet “no due process violation occurs when an attorney’s errors cause an alien to be denied discretionary relief.” *Id.* (citing *Huicochea-Gomez*, 237 F.3d at 700). Although *Hanna* is an unpublished decision, we discern no reason to stray from its holding in the instant case.

Because we hold that Estrada has not established a due process violation, we perceive no fundamental unfairness in the entry of his underlying deportation order. Accordingly, we need not decide whether he exhausted all available administrative remedies, 8 U.S.C. § 1326(d)(1), or whether his deportation proceedings improperly deprived him of judicial review, *id.* § 1326(d)(2).

III.

For these reasons, we AFFIRM.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
at WINCESTER

Case No. 4:13-cr-13

UNITED STATES,
Plaintiff,
v.

EMILIO C. ESTRADA,
Defendant.

Judge Mattice
Magistrate Judge Steger

ORDER

Before the Court is Defendant's Amended Motion to Dismiss Indictment (Doc. 42). Because Defendant's Motion merely restates arguments already presented to and rejected by this Court and because the Court is bound by controlling precedent, Defendant's Motion will be **DENIED**.

I. BACKGROUND AND ANALYSIS

The pertinent facts were outlined in the Court's January 12, 2016 Order (Doc. 34) denying Defendant's first Motion to Dismiss (Doc. 18) and Amended Motion to Dismiss (Doc. 30), and will not be reiterated here. In his previous Motions to Dismiss, Defendant argued that the Immigration Judge's "fail[ure] to advise [Defend-

ant] regarding his right to relief from deportation under the Immigration and Nationality Act § 212(h) [("Section 212(h) relief")] … violated [Defendant's] due process rights." (Doc. 18 at 2). Moreover, Defendant argued that a circuit split regarding due process violations and prejudice should be resolved in his favor. (Doc. 32 at 1–4). On January 12, 2016, the Court denied Defendant's Motions to Dismiss the Indictment. (Doc. 34). Specifically, the Court noted that it could not resolve the circuit split in Defendant's favor because it was bound by the United States Court of Appeals for the Sixth Circuit's decisions in *Ashki v. I.N.S.*, 233 F.3d 913 (6th Cir. 2000), *Gasca-Rodriguez v. Holder*, 322 F. App'x 447 (6th Cir. 2009), and *Hanna v. Gonzales*, 128 F. App'x 478 (6th Cir. 2005). (Doc. 34 at 4–5).

On June 23, 2016, Defendant filed yet another Amended Motion to Dismiss Indictment (Doc. 42). Defendant only raises one novel argument in the instant Motion. Instead of claiming that the Immigration Judge's failure to inform Defendant of his eligibility for discretionary Section 212(h) relief amounted to a due process violation, he now claims that his previous attorneys' failure to inform him of the availability of such relief amounted to ineffective assistance of counsel (and thus a due process violation). (Doc. 42 at 8–11). As the Court articulated in its previous Order, however, this argument has already been presented to, and rejected, by the Sixth Circuit. *See Hanna*, 128 F. App'x at 481 ("Hanna, however, claims he is not contesting 'the denial of a form of discretionary relief,' but instead challenging 'his attorney's failure to file for such relief before the Immigration Court,' which deprived him of even being considered for the waiver. But this distinction lacks constitutional significance. Without a cognizable liberty or property interest at stake, a due pro-

cess violation cannot occur."). Because Sixth Circuit precedent dictates that there is "no constitutionally-protected liberty interest in obtaining discretionary relief from deportation," Defendant's claim is without merit. *Ashki*, 233 F.3d at 921.

The remainder of Defendant's brief addresses in detail a circuit split regarding 8 U.S.C. § 1326(d)(3). His argument concludes with the following passage:

> Mr. Estrada requests that this court adopt the above-described standard set forth by the Second and Ninth Circuits. He contends that the current analysis utilized by the Sixth Circuit should be deemed erroneous, and that this court look to the proof set forth below, regarding the facts he would have presented at his immigration hearing, had he been advised of his eligibility for and had his attorney applied for §212(h) relief from deportation on his behalf.

(Doc. 42 at 15). No matter how compelling such an approach may be, "it is not within the province of this Court to abandon nearly two decades of Sixth Circuit precedent in favor of the approach adopted by the Second and Ninth Circuits." (Doc. 34 at 6); *Timmreck v. United States*, 577 F.2d 372, 374 n.6 (6th Cir. 1978) ("The district courts in this circuit are, of course, bound by pertinent decisions of this Court even if they find what they consider more persuasive authority in other circuits."), *rev'd on other grounds*, 441 U.S. 780 (1979). Accordingly, Defendant's Amended Motion to Dismiss Indictment will be **DENIED**. Moreover, because the Court finds that this result is mandated by a purely legal conclusion, Defendant's request for an evidentiary hearing will also be **DENIED**.

II. CONCLUSION

For the reasons stated herein, Defendant's Amended Motion to Dismiss Indictment (Doc. 42) and Defendant's request for an evidentiary hearing are hereby **DENIED**.

SO ORDERED this 15th day of August, 2016.

/s/ Harry S. Mattice, Jr.
HARRY S. MATTICE, JR.
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
at WINCHESTER

Case No. 4:13-cr-13

UNITED STATES,

Plaintiff,

v.

EMILIO C. ESTRADA,

Defendant.

JUDGE MATTICE
MAGISTRATE JUDGE STEGER

ORDER

Before the Court are Defendant's Motion to Dismiss Original Indictment and Superseding Indictment (Doc. 18) and Defendant's Amended Motion to Dismiss Original Indictment and Superseding Indictment (Doc. 30). For the reasons stated herein, Defendant's Motions will be **DENIED**.

I. BACKGROUND

On May 29, 2013, Defendant, Emilio C. Estrada, was indicted by a federal grand jury on one count of being found in the United States after having been removed and deported therefrom subsequent to a conviction for commission of an aggravated felony and not having obtained the express consent of the Secretary of Homeland Security to reapply for admission to the

United States, in violation of 8 U.S.C. §§ 1326(a) and (b)(2). (Doc. 1). The indictment alleges that the relevant conduct occurred in May 2013. On March 24, 2015, a federal grand jury indicted Defendant on a second count of the same offense. The conduct giving rise to the second count allegedly occurred on March 12, 2015. (Doc. 11).

Defendant responded on June 30, 2015 by filing a motion to dismiss the indictments (Doc. 18) and amended his motion on October 5, 2015 (Doc. 30). Therein, he argues that because of defects in his deportation proceeding, he cannot be subject to criminal penalties based on the associated deportation order. (Doc. 18 at 2). Specifically, Defendant argues that the Immigration Judge's ("IJ") "fail[ure] to advise [Defendant] regarding his right to relief from deportation under the Immigration and Nationality Act § 212(h) [("Section 212(h) relief")] ... violated [Defendant's] due process rights." (*Id.*).

The Government filed its responses in opposition on August 3, 2015 (Doc. 25) and October 20, 2015 (Doc. 31). Therein, the Government raises several grounds upon which Defendant's motions should be denied. First, it argues that, because Section 212(h) relief is entirely discretionary,[1] the IJ's failure to inform Defend-

[1] The statute reads, in relevant part,

> The Attorney General may, in his discretion, waive the application of subparagraphs (A)(i)(I), (B), (D), and (E) of subsection (a)(2) of this section and subparagraph (A)(i)(II) of such subsection ... if ... in the case of an immigrant who is the spouse, parent, son, or daughter of a citizen of the United States or an alien lawfully admitted for permanent residence if it is established to the satisfaction of the Attorney General that the alien's denial of admission would result in extreme hardship to the Unit-

ant of such relief cannot, as a matter of law, amount to a due process violation. (Doc. 25 at 4–5). Second, the Government argues that Defendant has not established that he was prejudiced by the IJ's inaction. (*Id*. at 5–6). Finally, it argues that Defendant was never eligible for Section 212(h) relief because he entered the United States in 2006, or 15 years after he was granted Lawful Permanent Resident status. (*Id*. at 9–10).

Defendant filed his reply on October 27, 2015. Therein, Defendant argues that he is eligible for Section 212(h) relief, that there is a factual basis for the prejudicial effects of the IJ's failure to advise him of such relief, and that circuit splits regarding due process violations and prejudice should be resolved in his favor. (Doc. 32 at 1–4).

II. STANDARD OF REVIEW

A party may "raise by pretrial motion any defense, objection, or request that the court can determine without a trial on the merits." Fed. R. Crim. P. 12(b)(1). Where, such as here, the defendant claims that the indictment is deficient as a matter of law, the motion *must* be made before trial. Fed R. Crim. P. 12(b)(3)(B)(v). Courts may only rule upon such motions "if trial of the facts surrounding the commission of the alleged offense would be of no assistance in determining the validity of the defense." *United States v. Ali*, 557 F.3d 715, 719 (6th Cir. 2009) (quoting *United States v. Covington*, 395 U.S. 57, 60 (1969)). They are, however, permitted to "make preliminary findings of fact necessary to decide questions of law presented by pretrial

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ed States citizen or lawfully resident spouse, parent, son, or daughter of such alien.

8 U.S.C. § 1182(h)(1)(B) (referred to herein as Section 212(h)).

motions so long as the trial court's conclusions do not invade the province of the ultimate finder of fact." *United States v. Levin*, 973 F.2d 463, 467 (6th Cir. 1992).

III. ANALYSIS

While Defendant is correct to claim that "a collateral challenge to the use of a deportation proceeding as an element of a criminal offense must be permitted where the deportation proceeding effectively eliminates the right of the alien to obtain judicial review," *United States v. Mendoza-Lopez*, 481 U.S. 828, 839 (1987), such challenges are subject to certain limitations. Specifically,

> an alien may not challenge the validity of the deportation order described in subsection (a)(1) of this section or subsection (b) of this section 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). As these elements are enumerated in the conjunctive, Defendant must show all three in order to successfully mount a collateral challenge to the underlying deportation proceeding. *See, e.g., United States v. Cordova-Soto*, 804 F.3d 714, 719 (5th Cir. 2015) ("If the alien fails to establish one prong of the three part test, the Court need not consider the others.") (quoting *United States v. Mendoza-Mata*, 322 F.3d 829, 832 (5th Cir. 2003)).

In the interest of expediency, the Court first turns to the third prong. To prove that the underlying deportation order was "fundamentally unfair," Defendant must show that "(1) [his] due process rights were violated by defects in the underlying deportation proceeding, and (2) he suffered prejudice as a result of the defects." *United States v. Pallares-Galan*, 359 F.3d 1088, 1095 (9th Cir. 2004) (internal quotation marks omitted); *see also United States v. Rodriguez-Flores*, 2014 WL 1744860 at *4 (E.D. Ky. May 1, 2014) ("Under the third element of § 1326(d), to constitute fundamental unfairness ... a defect in the removal proceedings must have been such as might have led to a denial of justice ... Defendant must show both a due process violation and that he was prejudiced by the removal proceeding.") (internal quotation marks and citations omitted).

Here, Defendant's inability to show a due process violation is dispositive. It is undisputed that Section 212(h) relief is discretionary. In *Ashki v. I.N.S.*, the United States Court of Appeals for the Sixth Circuit held that there is "no constitutionally-protected liberty interest in obtaining discretionary relief from deportation."[2] 233 F.3d 913, 921 (6th Cir. 2000); *see also Gasca-Rodriguez v. Holder*, 322 F. App'x 447, 449 (6th. Cir. 2009) ("Although aliens enjoy a Due Process right to a 'full and fair hearing' before an immigration court, this right does not extend to discretionary relief from removal."). Furthermore, "[a]bsent a property interest in the right claimed, it is impossible to show a Due Pro-

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[2] Defendant correctly identifies that *Ashki* analyzes a different statute than that which is at issue in the present case. (Doc. 32 at 2). This distinction is immaterial, however, as the Court finds that the above-quoted constitutional holding applies in equal force to 8 U.S.C. § 1326(d).

cess violation." 322 F. App'x at 449. Defendant attempts to circumvent these clear Sixth Circuit holdings by characterizing his injury as one of procedural rather than substantive due process. That is, the IJ's failure to inform him of Section 212(h) relief, not the denial of relief itself, is the source Defendant's injury. This argument, however, has already been presented to, and rejected by the Sixth Circuit in an ineffective assistance of counsel claim. *Hanna v. Gonzales*, 128 F. App'x 478, 481 (6th Cir. 2005) ("Hanna, however, claims he is not contesting 'the denial of a form of discretionary relief,' but instead challenging 'his attorney's failure to file for such relief before the Immigration Court,' which deprived him of even being considered for the waiver. But this distinction lacks constitutional significance. Without a cognizable liberty or property interest at stake, a due process violation cannot occur."). Similarly here, the IJ's failure to inform Defendant of the possibility of discretionary relief cannot, as a matter of law, amount to a due process violation.

Defendant admits in his brief that this is the current state of the law in the Sixth Circuit and in the majority of our sister circuits.[3] (Doc. 30 at 1–2). He goes

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[3] The Sixth Circuit has not been as explicit as its sister circuits in holding that an IJ's failure to inform a deportee of discretionary relief cannot form the basis of a successful collateral challenge under 8 U.S.C. § 1326(d). *See, e.g.*, *United States v. Santiago-Ochoa*, 447 F.3d 1015, 1020 (7th Cir. 2006) ("Since *Mendoza–Lopez* was decided, however, a majority of circuits have rejected the proposition that there is a constitutional right to be informed of eligibility for—or to be considered for—discretionary relief ... We now join the majority of circuits."); *United States v. Lopez-Ortiz*, 313 F.3d 225, 231 (5th Cir. 2002) ("Because eligibility for [discretionary] relief is not a liberty or property interest warranting due process protection, we hold that the Immigration Judge's error in failing to explain Lopez–Ortiz's eligibility does not rise to the level of fun-

on, however, to encourage this Court to adopt the contrary position of the United States Courts of Appeal for the Second and Ninth Circuits. Defendant claims that "the Sixth Circuit, along with the majority of circuits, has turned *Mendoza-Lopez* on its head" in concluding that "failing to advise an alien of the 'privilege' of suspension of deportation [does] not compare to other fundamentally unfair defects." (*Id*. at 3). This argument suffers from two infirmities. First, the majority of the Courts of Appeal cannot have "turned *Mendoza-Lopez* on its head," because in *Mendoza-Lopez*, the Supreme Court of the United States was asked to assume, without deciding, whether a situation such as this would be fundamentally unfair. *See Mendoza-Lopez*, 481 U.S. at 839–40 ("The United States did not seek this Court's review of the determination of the courts below that respondents' rights to due process were violated by the failure of the Immigration Judge to explain adequately their right to suspension of deportation or their right to appeal. The United States has asked this Court to assume that respondents' deportation hearing was fundamentally unfair in considering whether collateral attack on the hearing may be permitted. We consequently accept the legal conclusions of the court below that the deportation hearing violated due process."). Second, and more importantly, it is not within the province of this Court to abandon nearly two decades of Sixth

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damental unfairness."). Despite the lack of a similarly clear directive from the Sixth Circuit, this Court is not alone amongst Sixth Circuit District Courts in interpreting *Ashki* and its progeny to require the same result. *See, e.g., United States v. Rodriguez-Flores*, 2014 WL 1744860 at *4–5 (E.D. Ky. May 1, 2014); *United States v. Gonzales-Campos*, 2014 WL 1091043 at *7 (S.D. Ohio Mar. 18, 2014); *United States v. Barba*, 2009 WL 1586793 at *10 (E.D. Tenn. June 3, 2009).

Circuit precedent in favor of the approach adopted by the Second and Ninth Circuits. *See Timmreck v. United States*, 577 F.2d 372, 374 n.6 (6th Cir. 1978) ("The district courts in this circuit are, of course, bound by pertinent decisions of this Court even if they find what they consider more persuasive authority in other circuits."), *rev'd on other grounds*, 441 U.S. 780 (1979).

Defendant, having failed to show a due process violation, cannot establish that the underlying deportation proceeding was fundamentally unfair. Because Defendant has failed to satisfy one element of 8 U.S.C. § 1326(d), his collateral attack on the underlying deportation order must fail.[4] Accordingly, Defendant's Motions to Dismiss Original Indictment and Superseding Indictment will be **DENIED**.

IV. CONCLUSION

For the reasons stated herein, Defendant's Motion to Dismiss Original Indictment and Superseding Indictment (Doc. 18) and Defendant's Amended Motion to Dismiss Original Indictment and Superseding Indictment (Doc. 30) are hereby **DENIED**.

SO ORDERED this 12th day of January, 2016.

/s/ Harry S. Mattice, Jr.
HARRY S. MATTICE, JR.
UNITED STATES
DISTRICT JUDGE

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[4] Given this shortcoming, the Court declines to address the Parties' arguments regarding Defendant's eligibility for Section 212(h) relief and the resultant prejudice, or lack thereof, of the IJ's failure to advise Defendant of such relief.

APPENDIX D

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

8 U.S.C. §1182

(a) Classes of aliens ineligible for visas or admission

Except as otherwise provided in this chapter, aliens who are inadmissible under the following paragraphs are ineligible to receive visas and ineligible to be admitted to the United States:

* * *

(2) Criminal and related grounds

(A) Conviction of certain crimes

(i) In general

Except as provided in clause (ii), any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of—

(I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime, or

(II) a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of Title 21),

is inadmissible.

* * *

(B) Multiple criminal convictions

Any alien convicted of 2 or more offenses (other than purely political offenses), regardless of whether the conviction was in a single trial or whether the offenses arose from a single scheme of misconduct and regardless of whether the offenses involved moral turpitude, for which the aggregate sentences to confinement were 5 years or more is inadmissible.

* * *

(D) Prostitution and commercialized vice

Any alien who—

(i) is coming to the United States solely, principally, or incidentally to engage in prostitution, or has engaged in prostitution within 10 years of the date of application for a visa, admission, or adjustment of status,

(ii) directly or indirectly procures or attempts to procure, or (within 10 years of the date of application for a visa, admission, or adjustment of status) procured or attempted to procure or to import, prostitutes or persons for the purpose of prostitution, or receives or (within such 10-year period) received, in whole or in part, the proceeds of prostitution, or

(iii) is coming to the United States to engage in any other unlawful commercialized vice, whether or not related to prostitution,

is inadmissible.

(E) Certain aliens involved in serious criminal activity who have asserted immunity from prosecution

Any alien—

(i) who has committed in the United States at any time a serious criminal offense (as defined in section 1101(h) of this title),

(ii) for whom immunity from criminal jurisdiction was exercised with respect to that offense,

(iii) who as a consequence of the offense and exercise of immunity has departed from the United States, and

(iv) who has not subsequently submitted fully to the jurisdiction of the court in the United States having jurisdiction with respect to that offense,

is inadmissible.

(F) Waiver authorized

For provision authorizing waiver of certain subparagraphs of this paragraph, see subsection (h).

* * *

(h) Waiver of subsection (a)(2)(A)(i)(I), (II), (B), (D), and (E)

The Attorney General may, in his discretion, waive the application of subparagraphs (A)(i)(I), (B), (D), and (E) of subsection (a)(2) and subparagraph (A)(i)(II) of such subsection insofar as it relates to a single offense of simple possession of 30 grams or less of marijuana if—

(1)(A) in the case of any immigrant it is established to the satisfaction of the Attorney General that—

(i) the alien is inadmissible only under subparagraph (D)(i) or (D)(ii) of such subsection or the activities for which the alien is inadmissible occurred more than 15 years before the date of the alien's application for a visa, admission, or adjustment of status,

(ii) the admission to the United States of such alien would not be contrary to the national welfare, safety, or security of the United States, and

(iii) the alien has been rehabilitated; or

(B) in the case of an immigrant who is the spouse, parent, son, or daughter of a citizen of the United States or an alien lawfully admitted for permanent residence if it is established to the satisfaction of the Attorney General that the alien's denial of admission would result in extreme hardship to the

United States citizen or lawfully resident spouse, parent, son, or daughter of such alien; or

(C) the alien is a VAWA self-petitioner; and

(2) the Attorney General, in his discretion, and pursuant to such terms, conditions and procedures as he may by regulations prescribe, has consented to the alien's applying or reapplying for a visa, for admission to the United States, or adjustment of status.

No waiver shall be provided under this subsection in the case of an alien who has been convicted of (or who has admitted committing acts that constitute) murder or criminal acts involving torture, or an attempt or conspiracy to commit murder or a criminal act involving torture. No waiver shall be granted under this subsection in the case of an alien who has previously been admitted to the United States as an alien lawfully admitted for permanent residence if either since the date of such admission the alien has been convicted of an aggravated felony or the alien has not lawfully resided continuously in the United States for a period of not less than 7 years immediately preceding the date of initiation of proceedings to remove the alien from the United States. No court shall have jurisdiction to review a decision of the Attorney General to grant or deny a waiver under this subsection.

* * *

8 U.S.C. §1326(d)

(d) Limitation on collateral attack on underlying deportation order

In a criminal proceeding under this section, an alien may not challenge the validity of the deportation order

described in subsection (a)(1) or subsection (b) 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.