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

[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-

[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

[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.