Appendix

NOT FOR PUBLICATION

FILED

JAN 6 2020

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. RAUL GUZMAN-IBAREZ, AKA Raul Guzman, AKA Raul Ibarez Guzman, Jr., AKA Raul Ibarez, AKA Raul Guzman Ibarez, Jr., AKA Little Playboy, AKA Manuel Torres, AKA Miguel Duran Torres, Defendant-Appellant.	No. 17-50141 D.C. No. 2:12-cr-00843-DMG-1 MEMORANDUM[*]

Appeal from the United States District Court
for the Central District of California
Dolly M. Gee, District Judge, Presiding

Submitted December 12, 2019[**]
Pasadena, California

Before: BOGGS,[***] WARDLAW, and BEA, Circuit Judges.

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[*] This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

[**] The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

[***] The Honorable Danny J. Boggs, United States Circuit Judge for the U.S. Court of Appeals for the Sixth Circuit, sitting by designation.

Raul Guzman-Ibarez ("Guzman"), a native and citizen of Mexico, appeals the district court's judgment reinstating his conviction and sentence for illegal reentry after deportation in violation of 8 U.S.C. § 1326. We review de novo a collateral attack on a prior deportation order in a prosecution under 8 U.S.C. § 1326. *United States v. Alvarado-Pineda*, 774 F.3d 1198, 1201 (9th Cir. 2014); *United States v. Vidal-Mendoza*, 705 F.3d 1012, 1014 (9th Cir. 2013). We may affirm the district court's denial of a motion to dismiss an indictment on any basis supported by the record. *United States v. Davis*, 336 F.3d 920, 922 (9th Cir. 2003).

1. As Guzman concedes, our recent decision in *United States v. Martinez-Hernandez*, 932 F.3d 1198, 1205–07 (9th Cir. 2019), forecloses his argument that his robbery conviction under California Penal Code section 211 does not qualify as an aggravated felony. Accordingly, any error in the district court's failure to consider this issue was harmless.

2. Guzman next argues that the district court erred in concluding that he was not prejudiced by the immigration judge's ("IJ") failure to advise him of the potential availability of discretionary relief under former 8 U.S.C. § 1182(c) (Immigration and Nationality Act § 212(c)). To establish prejudice, Guzman must demonstrate that he had "plausible grounds" for discretionary relief from removal. *United States v. Esparza-Ponce*, 193 F.3d 1133, 1136–37 (9th Cir. 1999).

Under procedures in effect at the time of Guzman's removal proceedings, an

IJ determined whether to provide relief under § 212(c) by balancing positive and negative factors. *Yepes-Prado v. INS*, 10 F.3d 1363, 1365–66 (9th Cir. 1993). Positive factors included: "1) family ties within the United States; 2) residence of long duration in this country (particularly when residence began at a young age); 3) hardship to the petitioner or petitioner's family if relief [was] not granted; 4) service in the United States armed forces; 5) a history of employment; 6) the existence of business or property ties; 7) evidence of value and service to the community; 8) proof of rehabilitation if a criminal record exists; 9) other evidence attesting to good character." *Id.* at 1366. Negative factors included the nature of the ground for deportation, additional violations of the immigration laws, a recent or serious criminal record, and other evidence of bad character. *Id.* When a defendant had committed a serious crime or demonstrated a pattern of serious criminality, he had to "make a heightened showing that his case present[ed] unusual or outstanding equities to warrant discretionary relief." *Id.*; *see United States v. Vasquez-Gonzalez*, 901 F.3d 1060, 1069 (9th Cir. 2018).

Here, Guzman would have had to make this heightened showing because the succession of his criminal acts, taken together, established a pattern of serious criminal misconduct. Guzman cited several positive factors warranting § 212(c) relief, such as his strong family ties within the United States; that his parents brought him to the United States at a young age; that his removal caused hardship for him and his family; and that he worked various jobs since a young age. But most of the favorable evidence that Guzman submitted in the district court addressed events that occurred *after* he was deported in 1999, which are not relevant to the prejudice inquiry. Weighing the positive factors against the negative factors, it is not plausible that the IJ would have found that Guzman's case presented the "unusual or outstanding equities" necessary to warrant discretionary relief under § 212(c) given his extensive criminal history and the lack of evidence of rehabilitation. Guzman therefore was not prejudiced by the IJ's failure to advise him about the availability of potential § 212(c) relief.

Because Guzman's 1999 removal order was valid on account of his conviction for robbery under California Penal Code section 211, an aggravated felony, and he was not prejudiced by the IJ's failure to advise him of the potential availability of discretionary relief, the district court did not err in reinstating Guzman's conviction and sentence.

AFFIRMED.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JS-3

CRIMINAL MINUTES—GENERAL

Case No.	CR 12-843-DMG	Date	April 20, 2017

Present: The Honorable	DOLLY M. GEE, UNITED STATES DISTRICT JUDGE
Interpreter	N/A

KANE TIEN	NOT REPORTED	CASSIE D. PALMER NOT PRESENT
Deputy Clerk	*Court Reporter*	*Assistant U.S. Attorney*

U.S.A. v. Defendant(s):	Present	Cust.	Bond	Attorneys for Defendant(s):	Present	Appt.	Ret.
RAUL GUZMAN-IBAREZ	NOT	NOT		DAVID I. WASSERMAN, DFPD	NOT	✗	

Proceedings: **IN CHAMBERS - ORDER UPON REMAND FROM THE NINTH CIRCUIT COURT OF APPEALS**

This matter comes before the court upon the Mandate from the Ninth Circuit Court of Appeals, filed herein on December 31, 2015 and directing that the appellate court's judgment take effect, vacating Defendant's conviction and sentence and remanding to the district court for further proceedings. [Doc. # 109.] The court stayed this action to allow Defendant to seek a Writ of Certiorari in the United States Supreme Court. [Doc. # 114.] On October 28, 2016, the Court lifted the stay and ordered counsel to file briefs addressing the issues pending before this Court upon remand. [Doc. # 117.] On March 6, 2017, the Government filed its opening brief. [Doc. # 120.] On March 20, 2017, Defendant filed his response. [Doc. #121.] On March 28, 2017, the Government filed its reply brief. [Doc. # 122.] The Court held a hearing on April 19, 2017.

I.
BACKGROUND

On August 31, 2012, the Government filed an indictment charging Defendant Raul Guzman-Ibarez with violation of 8 U.S.C. § 1326(a) and (b)(2), as an illegal alien found in the United States following deportation.[1] [Doc. # 12.] On October 13, 2013, this Court denied Defendant's motion to dismiss challenging the constitutionality of his prior

[1] The Indictment alleges that Defendant was found in Riverside County, California on or about July 24, 2012, after having been deported from the United States on August 26, 1999, November 8, 2000, November 8, 2002, November 16, 2004, and June 2, 2010.

deportation.[2] [Doc. # 49.] In his motion to dismiss, Defendant contended that the Immigration Judge ("IJ") failed to inform him of his apparent eligibility to apply for discretionary relief under Sections 212(c) and (h) of the Immigration and Nationality Act ("INA"), 8 U.S.C. §§ 1182(c), (h). In denying the motion to dismiss, this Court rejected Defendant's claims under both Section 212(c) and (h). Thereafter, on November 26, 2013, after a court trial upon stipulated facts, Defendant was found guilty. [Doc. # 61.] On March 19, 2014, the Court sentenced Defendant to a 33-month prison term, followed by a three-year term of supervised release. [Doc. # 84.]

On March 26, 2014, Defendant filed a notice of appeal. [Doc. # 85.] On July 6, 2015, the Ninth Circuit issued its opinion upholding this Court's ruling with respect to Section 212(h) of the INA but reversing the ruling regarding Section 212(c). The Ninth Circuit vacated Defendant's conviction and sentence and remanded the matter for further proceedings, directing this Court to consider whether Defendant was prejudiced by the Immigration Judge's failure to properly inform him of his apparent eligibility to apply for discretionary relief under Section 212(c).[3]

II.
PREJUDICE

Defendant claims that he suffered prejudice as a result of the IJ's failure to inform him of his apparent eligibility to apply for discretionary relief under Section 212(c). Defendant must show that it was "plausible (not merely conceivable)" that the IJ would have exercised discretion in his favor:

> If the alien alleges that the IJ's failure to provide information about a form of potentially available discretionary relief caused a due process violation, the alien must show prejudice by

[2] Defendant's motion challenged the constitutionality of his 1999 deportation. All of the subsequent deportations were reinstatements of the 1999 deportation order.

[3] In his response filed March 20, 2017, Defendant, for the first time, contends that his 1997 robbery conviction is not sufficient to support his 1999 deportation because it is not an aggravated felony under the categorical approach of *Descamps v. United States*, 133 S.Ct. 2276, 2283 (2013), when comparing the elements of the state robbery offense with those of the aggravated felonies of a "crime of violence" or "theft offense." This was not raised in this Court before the appeal, was not raised during the appeal, was not addressed by the Ninth Circuit, and is beyond the limited scope of this Court's instructions from the Ninth Circuit remand. As Defendant concedes, the rule-of-mandate doctrine "requires a district court to strictly follow this [the appellate] Court's instructions when a case is remanded." [Doc. # 121 at 13.] As such, Defendant's late-blooming contention is beyond the scope of this Court's limited authority upon remand.

> establishing that it was plausible that the IJ would have granted such relief. This requires the alien to demonstrate that, in light of the factors relevant to the form of relief being sought, and based on the unique circumstances of the alien's own case, it was plausible (not merely conceivable) that the IJ would have exercised his discretion in the alien's favor.

United States v. Cisneros-Resendiz, 656 F.3d 1015, 1018 (9th Cir. 2011) (citations, quotation marks and brackets omitted).

In determining whether to grant discretionary relief under § 212(c), some factors to consider in favor of relief are (1) family ties within the United States; (3) residence of long duration within the United States, especially when residence begins at a young age; (3) hardship to petitioner and his family if relief is not granted, (4) history of petitioner's employment and (5) proof of rehabilitation if a criminal record exists. *Pablo v. INS*, 72 F.3d 110, 113 (9th Cir. 1995). Some factors to be weighed against relief include (1) the nature and underlying circumstances of the ground of deportation, (2) petitioner's criminal record and (3) other evidence of bad character. *Id.*

> In this weighing process, as the negative factors grow more serious, it becomes incumbent upon the alien to introduce additional offsetting favorable evidence, which in some cases may have to involve unusual or outstanding equities. A single serious crime or a pattern of misconduct can trigger a need to make this showing, and to warrant a favorable exercise of discretion, an applicant with a criminal record will ordinarily be required to present evidence of rehabilitation. However, there are cases in which the adverse considerations are so serious that a favorable exercise of discretion is not warranted even in the face of unusual or outstanding equities.

Paredes-Urrestarazu v. I.N.S., 36 F.3d 801, 806-07 (9th Cir. 1994) (citations, quotation marks and brackets omitted).

Defendant contends that there were plausible grounds for granting Defendant discretionary relief: Defendant came to the United States with his family in 1979, when he was six years old, became a Lawful Permanent Resident ("LPR") in 1989 and, by the time of the 1999 deportation proceedings, had lived here for 20 years. He had substantial family ties to the United States, including five siblings (three U.S. citizens and two LPRs), two LPR parents, two U.S. citizen children, and a U.S. citizen wife who was present at the 1997 immigration hearing. Defendant further contends that he was a hard worker with an excellent work history, having worked since the ninth grade in the fast food industry, on a newspaper route and in construction and agriculture; and had provided his family with substantial financial support over the years. Therefore, Defendant contends, his family faced substantial hardship due to his removal because they lost his financial and moral support.

Balanced against these favorable factors is Defendant's extensive criminal history. In 1992 at age 18, Defendant was convicted of carrying a concealed weapon. One year later, in 1993, Defendant was convicted of possession of a controlled substance. In 1994, Defendant was convicted of spousal battery causing corporal injury and receiving stolen property. In 1995, Defendant was, again, convicted of spousal battery causing corporal injury. In 1997, Defendant was convicted of first-degree robbery and was sentenced to four years of imprisonment. Upon Defendant's release from prison, his removal proceedings resumed in 1999, resulting in his deportation.

Defendant's favorable factors appear strong. His family ties to the United States were substantial and he provided his family with financial and moral support, which would mean his removal could cause family hardship. In addition, he came to the United States at a young age (six years old) and his residence here was of long duration (20 years). But the Court also must weigh these favorable factors against Defendant's extensive criminal record – spanning his entire adult life until deportation[4] – and the lack of any evidence of rehabilitation. The favorable factors are diluted by the extensiveness of his criminal record. Because his criminal record covered his entire adult life, including two years in prison immediately prior to his first deportation, and there is no evidence of a close relationship with his former wife and his children from that marriage, the amount of hardship that was likely to have been caused by his removal becomes more attenuated.

Defendant's criminal record is troubling. Beginning in 1992, when Defendant was 18 years old, and continuing for five years to 1997, Defendant was convicted of six offenses. There was no evidence of rehabilitation and, in fact, his criminal activity

[4] Defendant suffered no convictions from 1997 to 1999, during which time Defendant was imprisoned on his 1997 robbery conviction. Upon his release in 1999, Defendant's removal proceedings resumed, resulting in his deportation in August 1999.

appeared to be escalating. In line with this escalation, Defendant's last three convictions before the first deportation – the two convictions for spousal battery in 1994 and 1995, and his 1997 robbery conviction – all involved the infliction of physical injury on the victims.

On balance, when his favorable factors are weighed against his criminal record, which showed escalation rather than any indication of rehabilitation, Defendant's favorable factors are not sufficient to demonstrate that discretionary relief was plausible. As such, Defendant was not prejudiced by the IJ's failure to properly inform him of his apparent eligibility to apply for discretionary relief.

III.
SUBSEQUENT REMOVALS OF 2000, 2002, 2004 AND 2010

The Government argues, alternatively, that even if Defendant suffered prejudice as a result of the IJ's failure to inform him of his apparent eligibility for discretionary relief under Section 212(c) at his 1999 deportation hearing, Defendant cannot show actual prejudice because, due to statutory changes, Defendant's 1997 robbery conviction was classified as an aggravated felony rendering him subject to removal and ineligible for relief under Section 212(c) at the time of his subsequent removal proceedings in 2000, 2002, 2004, and 2010.

Defendant counters that (1) because his subsequent removals were reinstatements of his 1999 removal, the subsequent removals suffer from the same defect as does the 1999 removal, and (2) it is irrelevant that his robbery conviction qualified as an aggravated felony because that was not the basis for the subsequent removals. Nevertheless, because he was subject to removal and ineligible for Section 212(c) relief at the time of his subsequent removals, the subsequent removals, even if based on an invalid reason (i.e., the 1999 removal), caused no prejudice to Defendant because a valid reason existed at those times (i.e., the aggravated felony and ineligibility for Section 212(c) relief) to support deportation. *See United States v. Quintanilla-Gonzalez*, 450 Fed. Appx 612 (9th Cir. 2011).

IV.
CONCLUSION

Based on the foregoing, the Court finds that Defendant has failed to show that it was plausible that the IJ would have exercised discretion in Defendant's favor had Defendant been informed that he might be entitled to relief under Section 212(c) and had sought such relief. Accordingly, because Defendant has failed to show that he was prejudiced as a result of the IJ's error, IT IS ORDERED that Defendant's motion to dismiss is DENIED. Defendant's conviction and sentence are hereby REINSTATED.

IT IS SO ORDERED.

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

Scott S. Harris
Clerk of the Court
(202) 479-3011

October 3, 2016

Mr. James H. Locklin
Deputy Federal Public Defender
321 East 2nd Street
Los Angeles, CA 90012

Re: Raul Guzman-Ibarez
v. United States
No. 15-8280

Dear Mr. Locklin:

The Court today entered the following order in the above-entitled case:

The petition for a writ of certiorari is denied.

Sincerely,

Scott S. Harris

Scott S. Harris, Clerk

792 F.3d 1094
United States Court of Appeals,
Ninth Circuit.

UNITED STATES of America, Plaintiff–Appellee,
v.
Raul GUZMAN–IBAREZ, aka Raul Guzman, Raul Ibarez Guzman, Jr., Raul Ibarez, Raul Guzman Ibarez, Jr., Little Playboy, Manuel Torres, Miguel Duran Torres, Defendant–Appellant.

No. 14–50142.
|
Argued and Submitted June 2, 2015.
|
Filed July 6, 2015.

Synopsis
Background: Defendant was convicted in the United States District Court for the Central District of California, Dolly M. Gee, J., of illegally reentering the United States after deportation, and he appealed on theory that his due process rights were violated in connection with prior deportation proceedings.

Holdings: The Court of Appeals, Fernandez, Circuit Judge, held that:

[1] immigration judge properly applied the Illegal Immigration Reform and Immigrant Responsibility Act's (IIRIRA's) amended definition of "aggravated felony" to alien in finding that he was deportable as having been convicted of "aggravated felony";

[2] immigration judge violated alien's due process rights when, in course of deportation proceedings, she failed to advise alien of availability of discretionary relief in form of waiver of deportation;

[3] case had to be remanded to district court to determine, in first instance, whether alien was prejudiced by this due process violation; and

[4] immigration judge did not violate alien's due process rights by failing to anticipate substantive change in the law and to advise him of possibility of discretionary relief from deportation for which he became eligible only later.

Vacated and remanded.

Fisher, Circuit Judge, concurred in part and dissented in part and filed opinion.

West Headnotes (10)

[1] Aliens, Immigration, and Citizenship
De novo review in general

In prosecution for illegal reentry, the Court of Appeals reviews de novo a collateral attack on prior deportation order. Immigration and Nationality Act, § 276, 8 U.S.C.A. § 1326.

Cases that cite this headnote

[2] Criminal Law
Theory and Grounds of Decision in Lower Court

Court of Appeals may affirm district court's denial of motion to dismiss indictment on any basis supported by the record.

Cases that cite this headnote

[3] Aliens, Immigration, and Citizenship
Failure to advise alien of rights in general

Immigration judge's violation of duty to inform alien of his or her apparent eligibility to apply for certain discretionary relief may be the centerpiece of collateral attack on deportation order in subsequent prosecution for illegally reentering the United States after deportation or removal. Immigration and Nationality Act, § 276, 8 U.S.C.A. § 1326; 8 C.F.R. § 1240.11(a)(2).

Cases that cite this headnote

[4] Aliens, Immigration, and Citizenship
Fraud, forgery, and theft offenses
Aliens, Immigration, and Citizenship
Length of sentence

Appendix 12a

While robbery offense with which alien was charged, and for which he was ultimately sentenced to four years in prison, would not have qualified as "aggravated felony" when his deportation proceedings began, prior to enactment of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) and to change in definition of "aggravated felony" to include theft offenses for which defendant received sentence of at least one, rather than five, year(s) in prison, immigration judge properly applied the IIRIRA's amended definition of "aggravated felony" to alien in finding that he was deportable as having been convicted of "aggravated felony," where the IIRIRA's amended definition of "aggravated felony" was in effect when alien pled guilty and received his four-year sentence for robbery offense. Immigration and Nationality Act, §§ 101(a)(43)(G), 237(a)(2)(A)(iii), 8 U.S.C.A. §§ 1101(a)(43)(G), 1227(a)(2)(A)(iii).

Cases that cite this headnote

[5] Aliens, Immigration, and Citizenship
Informing alien of rights in general
Constitutional Law
Admission and exclusion; deportation

Immigration judge violated alien's due process rights when, in course of deportation proceedings, she failed to advise alien of availability of discretionary relief in form of waiver of deportation. U.S.C.A. Const.Amend. 5; Immigration and Nationality Act, § 212(c), 8 U.S.C.A. § 1182(c).

Cases that cite this headnote

[6] Aliens, Immigration, and Citizenship
Retroactive operation

Section of the Antiterrorism and Effective Death Penalty Act (AEDPA) eliminating discretionary relief from deportation for aliens convicted of certain crimes could not be applied in deportation proceedings that were pending on date that the AEDPA became law. Antiterrorism and Effective Death Penalty Act of 1996, § 440(d), 110 Stat. 1214.

Cases that cite this headnote

[7] Aliens, Immigration, and Citizenship
Retroactive operation

Lawful permanent resident (LPR) alien remained eligible for waiver of deportation, even though alien's robbery conviction, for which he received four-year sentence, occurred after effective date of provision of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) foreclosing such discretionary relief, where deportation proceedings against alien had commenced before the IIRIRA went into effect. Immigration and Nationality Act, § 212(c), 8 U.S.C.A. § 1182(c); Omnibus Consolidated Appropriations Act, 1997, § 304(b), 110 Stat. 3009.

Cases that cite this headnote

[8] Aliens, Immigration, and Citizenship
Remand

While immigration judge violated alien's due process rights when, in course of deportation proceedings, she failed to advise alien of availability of discretionary relief in form of waiver of deportation, because issue of whether alien was prejudiced by this due process violation was never addressed by district court when it convicted alien of illegally reentering the United States after deportation, matter had to be remanded to district court for determination of prejudice issue. U.S.C.A. Const.Amend. 5; Immigration and Nationality Act, § 276, 8 U.S.C.A. § 1326.

Cases that cite this headnote

[9] Constitutional Law
Admission and exclusion; deportation

Immigration judge did not violate alien's due process rights by failing to anticipate substantive change in the law and to advise him of possibility of discretionary relief from deportation for which he became eligible only in light of subsequent Court of Appeals decision. U.S.C.A. Const.Amend. 5.

Cases that cite this headnote

[10] **Aliens, Immigration, and Citizenship**
Informing alien of rights in general

Immigration judge's duty is limited to informing alien of reasonable possibility that alien is eligible for relief at time of hearing; immigration judge need not be clairvoyant and anticipate substantive changes in the law.

Cases that cite this headnote

Attorneys and Law Firms

***1096** James H. Locklin (argued), Deputy Federal Public Defender; Hilary L. Potashner, Federal Public Defender, Federal Public Defender's Office, Los Angeles, CA, for Defendant–Appellant.

Cassie D. Palmer (argued), Assistant United States Attorney, General Crimes Section; Stephanie Yonekura, Acting United States Attorney; Robert E. Dugdale, Assistant United States Attorney, Chief, Criminal Division, Office of the United States Attorney, Los Angeles, CA, for Plaintiff–Appellee.

Appeal from the United States District Court for the Central District of California, Dolly M. Gee, District Judge, Presiding. D.C. No. 2:12–cr–00843–DMG–1.

Before: FERDINAND F. FERNANDEZ, RAYMOND C. FISHER, and CARLOS T. BEA, Circuit Judges.

OPINION

FERNANDEZ, Circuit Judge:

Raul Guzman–Ibarez appeals his conviction and sentence for illegal reentry after deportation or removal. *See* 8 U.S.C. § 1326. Specifically, he asserts that his indictment should have been dismissed by the district court because he was denied due process at his deportation hearing on August 25, 1999, which precludes use of the deportation order in a criminal proceeding. ***1097** *See id.* § 1326(d). We vacate his conviction and sentence and remand.

BACKGROUND

Guzman was born in Mexico, but came to the United States in 1979, when he was about six years old. He became a Legal Permanent Resident ("LPR") on July 13, 1989. He was far from being a perfect peregrine; rather, he committed numerous crimes and on December 21, 1995, a deportation proceeding was initiated against him. Undeterred, he committed a robbery in California, was convicted of first degree robbery [1] on February 14, 1997, and was sentenced to four years' imprisonment as a result. Because state criminal proceedings necessitated a delay in the deportation proceeding, it was administratively closed in 1997. Guzman served his term, and the deportation proceeding was reopened. On August 12, 1999, the robbery conviction was added to the charges supporting his deportation. On August 25, 1999, the immigration judge (IJ) found that he was deportable as an alien convicted of an aggravated felony (8 U.S.C. § 1227(a)(2)(A)(iii)) and a firearm offense (8 U.S.C. § 1227(a)(2)(C)), and that he was ineligible for discretionary relief based upon his robbery conviction. Guzman waived his right to appeal. He was deported. [2]

1 *See* Cal.Penal Code §§ 211, 212.5(a).

2 We recognize that removal is the term used currently, but we use deportation throughout to avoid any undue complexity or confusion.

Guzman paid no more attention to the laws of the United States than he paid to the laws of the State of California; he reentered and was deported again in 2000, 2002, 2004 and 2010 based on the initial 1999 deportation. But ours is a patient polity, and it was not until Guzman was found here in July of 2012 that the current criminal proceeding was commenced against him for violation of 8 U.S.C. § 1326(a).

Guzman moved to dismiss the indictment on the basis that his due process rights had been violated in the 1999 deportation proceeding because he had not been informed of the availability of potential discretionary relief under the provisions of 8 U.S.C. § 1182(c) (Immigration and Nationality Act ("INA") § 212(c)), and 8 U.S.C. § 1182(h) (INA § 212(h)). The district court denied the motion, found Guzman guilty of the offense charged, and sentenced him to imprisonment for 33 months. This appeal followed.

JURISDICTION AND STANDARDS OF REVIEW

The district court had jurisdiction pursuant to 18 U.S.C. § 3231. We have jurisdiction pursuant to 28 U.S.C. § 1291.

[1] **[2]** We review de novo a collateral attack on a prior deportation order in a prosecution under 8 U.S.C. § 1326. *See United States v. Vidal–Mendoza,* 705 F.3d 1012, 1014 (9th Cir.2013). We may affirm the district court's denial of a motion to dismiss an indictment on any basis supported by the record. *See United States v. Davis,* 336 F.3d 920, 922 (9th Cir.2003).

DISCUSSION

The parties agree that if neither the Antiterrorism and Effective Death Penalty Act of 1996, Pub.L. No. 104–132, 110 Stat. 1214 ("AEDPA") nor the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub.L. No. 104–208, 110 Stat. 3009–546 ("IIRIRA") had been enacted, Guzman would not have stood convicted of an aggravated felony under the law as it previously existed [3] and would have been ***1098** entitled to consideration for waiver of deportation. [4]

3 *See* 8 U.S.C. § 1101(a)(43)(G) (1995).

4 *See* 8 U.S.C. § 1182(c), (h) (1995).

Thus, as is true of the situation of many LPRs, timing in this case is everything. To briefly recapitulate the timeline here: deportation proceedings commenced December 21, 1995; the AEDPA was enacted April 24, 1996; [5] IIRIRA was enacted September 30, 1996; [6] Guzman was convicted and sentenced for first degree robbery February 14, 1997; Guzman was ordered deported August 25, 1999. Guzman's motion to dismiss the indictment depends upon his ability to challenge the validity of his deportation order. That is constrained by the provisions of 8 U.S.C. § 1326(d).

5 We will say more about effective dates hereafter.

6 *Supra* n. 5.

[3] Essentially, when the IJ violates the "duty under [8 C.F.R.] § 1240.11(a)(2) to inform the alien of his or her apparent eligibility to apply for certain discretionary relief [, that] may be the centerpiece of a collateral challenge under § 1326(d)." *Vidal–Mendoza,* 705 F.3d at 1016 (internal quotation marks omitted); *see also* 8 C.F.R. § 240.11(a)(2) (1999). More specifically, in order to challenge a removal order in a proceeding under § 1326, a defendant must first demonstrate that he "exhausted any administrative remedies that may have been available to seek relief against the order." *Id.* § 1326(d)(1). Where, as here, a defendant contends that "the IJ has failed to provide information about apparent eligibility for relief, we excuse the alien from demonstrating that the alien exhausted any administrative remedies that may have been available." *Vidal–Mendoza,* 705 F.3d at 1015 (internal quotation marks omitted). Next, a defendant must demonstrate that the deportation proceedings in which the order was issued improperly " 'deprived [him] of the opportunity for judicial review.' " *Id.; see also* 8 U.S.C. § 1326(d)(2). An IJ's failure to inform an alien regarding apparent eligibility for relief deprives the alien of the opportunity for judicial review. *See Vidal–Mendoza,* 705 F.3d at 1015. Finally, a defendant must demonstrate that "the entry of the order was fundamentally unfair." 8 U.S.C. § 1326(d)(3). An underlying deportation order is fundamentally unfair if: (1) the defendant's "due process rights were violated by defects in his underlying deportation proceeding, and (2) he suffered prejudice as a result of the defects." *See Vidal–Mendoza,* 705 F.3d at 1015–16 (internal quotation marks omitted).

Guzman asserts that the IJ did, indeed, fail to properly advise him regarding his eligibility for relief. He also argues that the IJ's basis for finding him deportable was fundamentally flawed.

(A) *Aggravated Felony*

[4] Guzman asserts for the first time on appeal that his due process rights were violated because his first degree robbery conviction did not qualify as an "aggravated felony" when his immigration proceedings began in 1995, and therefore the IJ erred in finding him deportable pursuant to 8 U.S.C. § 1227(a)(2)(A)(iii) based on that offense. [7] We disagree.

7 The parties agree that Guzman was not deportable on the basis of the concealed weapon offense. Thus, we do not further consider that issue at this time, except to note that upon remand the district court should not rely upon that offense either.

Because he did not raise that specific issue before trial or show good cause for not having done so, we would normally treat the issue as waived. *See* Fed.R.Crim.P. 12(b)(3), (c)

(3); *United States v. Anderson,* 472 F.3d 662, 669–70 (9th Cir.2006); ***1099** *United States v. Murillo,* 288 F.3d 1126, 1135 (9th Cir.2002). However, because the issue is basically a pure issue of law and, more importantly, because we must consider the aggravated felony question in any event, we will review the issue. *See United States v. Flores–Montano,* 424 F.3d 1044, 1047 (9th Cir.2005) (per curiam).

When the proceeding against Guzman commenced in 1995, a theft offense, like robbery, was an aggravated felony if the term of imprisonment imposed upon the defendant was at least five years. *See* 8 U.S.C. § 1101(a)(43)(G) (1995). Under that provision, his robbery conviction would not constitute an aggravated felony because he was sentenced to a term of four years. However, before he pled guilty to the robbery offense, IIRIRA § 321(a) made theft offenses aggravated felonies so long as the defendant was sentenced to one year or more in prison, rather than five years or more. *See* 8 U.S.C. § 1101(a)(43)(G) (1996). That new definition applies to convictions "before, on, or after the date of enactment." IIRIRA § 321(b). Moreover, as we have previously determined, the new definition applies when an IJ takes action "on or after the date of the enactment." *Id.* at (c); *see also Park v. INS,* 252 F.3d 1018, 1025 (9th Cir.2001) *overruled on other grounds by Fernandez–Ruiz v. Gonzales,* 466 F.3d 1121, 1127 (9th Cir.2006) (en banc); *Ortiz v. INS,* 179 F.3d 1148, 1155–56 (9th Cir.1999); *Valderrama–Fonseca v. INS,* 116 F.3d 853, 854–56 (9th Cir.1997).[8] As we have said: " 'actions taken' refers to orders and decisions issued against an alien by the Attorney General acting through the BIA or Immigration Judge. This makes logical and practical sense, as 'actions taken' is easily understood to encompass things done by an agency to an alien." *Valderrama–Fonseca,* 116 F.3d at 856.

8 Guzman asks that we overrule our prior cases which explain the meaning of "actions taken." *See Saqr v. Holder,* 580 F.3d 414, 422 (6th Cir.2009) (holding that the phrase refers to the commencement of a proceeding only). That, of course, we cannot do. *See Avagyan v. Holder,* 646 F.3d 672, 677 (9th Cir.2011).

Therefore, by the time the IJ acted on August 25, 1999, by entering a removal order, she correctly decided that Guzman's robbery conviction was an aggravated felony because the term of imprisonment for his offense exceeded one year.

(B) ***INA § 212(c) Relief***

[5] Guzman next argues that the IJ erred, and violated his due process rights, when she failed to advise him of the possibility of relief under 8 U.S.C. § 1182(c) (INA § 212(c)). We agree that the IJ erred. *See United States v. Muro–Inclan,* 249 F.3d 1180, 1183–84 (9th Cir.2001).

[6] When the proceedings against Guzman commenced, consideration for waiver of deportation pursuant to 8 U.S.C. § 1182(c) (1995) (INA § 212(c)) was available.[9] However, the AEDPA was enacted a few months later and under its provisions § 1182(c) was amended to entirely eliminate the phrase "served for such felony ... a term of imprisonment of at least 5 years." AEDPA § 440(d). However, as we have previously held, the § 440(d) provision was not effective as to proceedings which had commenced prior to the date of its enactment. *See Magana–Pizano v. INS,* 200 F.3d 603, 611 (9th Cir.1999). In other words, when Guzman pled guilty to first degree robbery, the protections previously offered by § 1182(c) remained in full force and effect.[10]

9 The section provided for discretionary relief, but excluded relief for "an alien who has been convicted of one or more aggravated felonies and has served for such felony or felonies a term of imprisonment of at least 5 years."

10 We recognize that at that time and at the time the IJ acted, the Board of Immigration Appeals (BIA) had determined that the provisions of § 440(d) did apply to cases like Guzman's. *See In re Soriano,* 21 I. & N. Dec. 516, 519 (B.I.A.1996) *overruled by Magana–Pizano,* 200 F.3d at 611 n. 11. Nevertheless, the IJ knew, or should have known, that we had not yet addressed the retroactivity question and, therefore, that the BIA's ruling did not obviate her duty to inform Guzman of the § 1182(c) possibility. *See Vidal–Mendoza,* 705 F.3d at 1017–18, 1018 n. 6. ("Because only the federal courts, and not the BIA, have the authority to determine a 'question of statutory retroactivity,' the IJ's duty to inform an alien of a 'reasonable possibility' of the continued availability of § 212(c) relief was not eliminated by the BIA's conclusion on this issue." (citations omitted)).

***1100** **[7]** By the time Guzman pled guilty, IIRIRA had also been enacted and it eliminated relief under § 1182(c) (INA § 212(c)). IIRIRA § 304(b). However, that provision did not apply to aliens, like Guzman, whose proceedings had commenced before the enactment of IIRIRA. *See Pascua v. Holder,* 641 F.3d 316, 321 (9th Cir.2011).

In other words, at the time Guzman pled guilty, for him the § 1182(c) relief provision was "in full bloom, [and] the amending and repealing statutes did not retroactively take away that provision." *United States v. Leon–Paz,* 340 F.3d 1003, 1006 (9th Cir.2003).

In short, the IJ erred when she failed to tell Guzman of the possibility that § 1182(c) (INA § 212(c)) relief was available; that violated his due process rights. Moreover, "the district court erred when it held to the contrary." *Leon–Paz,* 340 F.3d at 1007.

[8] That leaves the issue of prejudice to be resolved. The issue was not addressed by the district court, but should now be considered by it. *See id.* As we declared in *Leon–Paz, id.:*

> We, therefore, vacate [Guzman's] conviction and sentence, and remand the case to the district court so that it can consider whether [Guzman] was prejudiced by the deprivation of his due process rights in his [1999] removal proceeding. If he was not prejudiced, the district court may reinstate the conviction and sentence. If he was prejudiced, the district court must dismiss the indictment.

(C) ***INA § 212(h) Relief***

[9] Guzman finally argues that the IJ erred, and violated his due process rights, when she failed to advise him of the possibility of relief under 8 U.S.C. § 1182(h) (INA § 212(h)). [11] We do not agree.

11 The section as modified by IIRIRA § 348 provides for waiver of inadmissibility for aliens whose denial of admission "would result in extreme hardship to [a] United States citizen or lawfully resident spouse, parent, son or daughter of such alien." § 1182(h)(1)(B). But: "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 ... since the date of such admission the alien has been convicted of an aggravated felony." § 1182(h) (closing paragraph).

Because he had committed an aggravated felony, that would preclude him from relief if he was an LPR who had been "lawfully admitted for permanent residence." 8 U.S.C. § 1182(h) (1999) (INA § 212(h)). Guzman was not admitted as an LPR; he became one some ten years after he entered the United States. Nevertheless, commencing before the IJ decided Guzman's case [12] and for over a decade thereafter, the BIA interpreted that phrase to include those who were accorded LPR status after their admission. [13] According ***1101** to that interpretation, Guzman would not be eligible for § 1182(h) consideration. But in 2010, we decided that "admitted" meant what that word normally means, that is, at entry only; it did not include those who later become LPRs on one basis or another. *See Negrete–Ramirez v. Holder,* 741 F.3d 1047, 1051 (9th Cir.2014); *see also Hing Sum v. Holder,* 602 F.3d 1092, 1096 (9th Cir.2010). We do not question that decision [14] and it certainly would entitle Guzman to § 1182(h) consideration if he were before the IJ at this time.

12 *See In re Rosas–Ramirez,* 22 I. & N. Dec. 616, 618–19 (B.I.A.1999) (interpreting the phrase as used in INA § 237(a)(2)(A)(iii)); *see also* 8 U.S.C. § 1101(a)(20).

13 *See In re Koljenovic,* 25 I. & N. Dec. 219, 220–21 (B.I.A.2010) (interpreting the phrase in INA § 212(h) specifically), *overruled by In re J–H–J–,* 26 I. & N. Dec. 563, 564–65 (BIA 2015) (withdrawing from decision in light of "overwhelming circuit court authority").

14 Interestingly enough, we had previously interpreted the phrase to encompass those who were lawfully admitted at any time; not just at entry. *See Garcia–Quintero v. Gonzales,* 455 F.3d 1006, 1015 (9th Cir.2006); *Shivaraman v. Ashcroft,* 360 F.3d 1142, 1147 (9th Cir.2004); *Ocampo–Duran v. Ashcroft,* 254 F.3d 1133, 1134–35 (9th Cir.2001). Like *Rosas–Ramirez,* those cases were not considering § 212(h) as such. We mention them here solely for the purpose of pointing out that the restriction which we later discovered in the language of § 212(h), which limited that section to those who were admitted as LPRs at the border, was far from obvious ten years earlier.

[10] However, what we are concerned with here is whether the IJ had to predict that possibility when she advised Guzman of his rights in 1999. We think not. As we have previously declared, with narrow exceptions, [15] "an IJ's duty is limited to informing an alien of a reasonable possibility that the alien is eligible for relief at the time of the hearing." *United States v. Lopez–Velasquez,* 629 F.3d 894, 895 (9th Cir.2010) (en banc). The change wrought by our decision was one of substantive law about which clairvoyance could not have been expected of the IJ. *See Vidal–Mendoza,* 705 F.3d at 1017; *Lopez–Velasquez,* 629 F.3d at 900. Thus, Guzman's due process rights were not violated when the IJ failed to advise him of possible relief under § 212(h). The IJ could not have been expected to know that relief might be possible under the circumstances.

15 *See* discussion in part (B) of this opinion regarding the narrow exception for retroactivity decisions.

CONCLUSION

While we do not intend to vilipend legislative efforts in this area of the law, we must say that, as is all too often the case, it has taken a good deal of concentrated praxis to wend our way through the maze of overlapping statutory commands that affect the seemingly simple question of whether an IJ was a seer who could discover what Guzman had to be told at the time of his hearing before her. We have determined that the IJ correctly decided that Guzman's robbery conviction was an aggravated felony, and did not err when she failed to inform him that he might be entitled to relief under 8 U.S.C. § 1182(h) (INA § 212(h)). However, she did err when she failed to inform him that he might be entitled to relief under 8 U.S.C. § 1182(c) (INA § 212(c)). Thus, because he was denied due process in that respect, if he was also prejudiced as a result, the indictment for violation of 8 U.S.C. § 1326 must be dismissed. Therefore, we vacate his conviction and sentence and remand to the district court for further proceedings.

VACATED and **REMANDED.**

FISHER, Circuit Judge, concurring in part and dissenting in part:

I concur fully in Parts A and B of the opinion, but I respectfully disagree with the analysis in Part C. In addition to informing Guzman about his eligibility for ***1102** § 212(c) relief, the IJ should have advised him he was eligible for § 212(h) relief.

Section 212(h) prohibits relief only for "an alien who has *previously been admitted* to the United States *as an alien lawfully admitted for permanent residence* if ... since the date of such admission the alien has been convicted of an aggravated felony." 8 U.S.C. § 1182(h) (emphasis added). Relying on *In re Rosas–Ramirez,* 22 I. & N. Dec. 616, 618–19 (BIA 1999), the opinion concludes the IJ had no obligation to inform Guzman of his eligibility for § 212(h) relief because the term "admitted" includes adjustments of status.

Rosas is inapposite. There, the BIA analyzed the meaning of "admission" in the specific statutory context of INA § 237(a)(2)(A)(iii), 8 U.S.C. § 1227(a)(2)(A)(iii), which provides that "[a]ny alien who is convicted of an aggravated felony at any time *after admission* is deportable." 22 I. & N. Dec. at 617 (emphasis added). The BIA concluded "the reference in section 237(a)(2)(A)(iii) of the Act to 'after admission' includes both those aliens who are 'admitted' at the time of entry ... as well as those who are 'lawfully admitted for permanent residence.' " *Id.* at 623. Under this definition, the BIA held "the respondent's adjustment of status ... constituted an 'admission' to the United States *as that term is used in section 237(a)(2)(A)(iii).*" *Id.* (emphasis added). Immediately after this sentence, the BIA included a footnote in which it stated: "We do not here attempt to resolve the meaning of 'admission' in other contexts." *Id.* at 623 n. 5.[1]

1 Only in 2010 did the BIA explicitly extend *Rosas* to the § 212(h) context. *See Matter of Koljenovic,* 25 I. & N. Dec. 219, 222 (BIA 2010), *withdrawn by Matter of J–H–J–,* 26 I. & N. Dec. 563 (BIA 2015).

Unlike the provision interpreted in *Rosas*, § 212(h) contains *both* the terms "previously been admitted" and "lawfully admitted for permanent residence." Under the INA's own definitions—of which the IJ presiding over Guzman's hearing would have undoubtedly been aware—these terms have different meanings. "Admitted" means "the lawful entry of an alien into the United States after inspection and authorization," *see* 8 U.S.C. § 1101(a)(13)(A), whereas "lawfully been admitted for permanent residence" means "the status of having been lawfully accorded the privilege of residing permanently in the United States," *see* 8 U.S.C. § 1101(a)(20). If an adjustment of status could constitute an "admission" under § 212(h), as the opinion concludes, the phrase "previously been admitted" in § 212(h) would be superfluous. The provision could simply have prohibited relief for "an alien lawfully admitted for permanent residence if, since the date of such admission, the alien has been convicted of an aggravated felony." But § 212(h) refers to "an alien who has previously been admitted to the United States as an alien lawfully admitted for permanent residence," meaning a noncitizen who was granted lawful entry into the United States *as* a lawful permanent resident. Under this reading, Guzman could not have fallen within the purview of § 212(h)'s prohibition because he had not entered the United States as an LPR.

Given the significant difference in the statutory provision interpreted in *Rosas* and the one at issue here, the IJ had a duty to inform Guzman of his apparent eligibility for § 212(h) relief under the INA's own definitions of the relevant terms. "We have interpreted 'apparent eligibility' to mean 'where the record, fairly reviewed by an individual who is intimately familiar with the immigration laws—as IJs no doubt are—raises a reasonable possibility that the petitioner *may* ***1103** *be eligible* for relief.' " *United States v. Lopez–Velasquez,* 629 F.3d 894, 896 (9th Cir.2010) (en banc) (emphasis added). Here, the IJ was faced with a situation in which the INA's own definitions of the relevant terms compelled the conclusion that Guzman remained eligible for 212(h) relief, whereas the interpretation of "admission" in *Rosas* merely suggested Guzman might not be eligible, *if* the BIA chose to extend that interpretation to the context of 212(h), which it had not done.

The opinion relies on *Lopez–Velasquez* and *Vidal–Mendoza* for the proposition that the IJ could not have been expected to inform Guzman of his eligibility for § 212(h) relief. But in those cases, our ex post interpretation of the relevant statutory term upended the definition that governed at the time of the hearing. For example, in *United States v. Vidal–Mendoza,* 705 F.3d 1012 (9th Cir.2013), the petitioner argued his conviction for third-degree rape did not constitute "sexual abuse of a minor" under an en banc decision postdating his removal order. *Id.* at 1019. We rejected the petitioner's argument, concluding the decision "deviat[ed] from longstanding Ninth Circuit and BIA precedent," and therefore the IJ could not have been expected to advise the petitioner about it. *See id.* at 1020 (internal quotation marks omitted). Similarly, in *Lopez–Velasquez,* 629 F.3d at 894, we concluded the definition of "domicile" in a decision postdating the petitioner's removal was a "deviation" from established precedent, and therefore the IJ did not erroneously advise the petitioner he was ineligible for certain relief. *Id.* at 898.

In *Vidal–Mendoza* and *Lopez–Velasquez,* the IJ could not have been reasonably expected to inform the petitioners they were eligible for such relief because they were unquestionably *ineligible* under governing law at the time of their proceedings. Here, by contrast, *Rosas* ' interpretation of an entirely different statutory provision did not govern in the context of § 212(h), and the definitions contained within the INA required concluding that Guzman was eligible for such relief. Under these circumstances, I cannot agree that "[t]he IJ could not have been expected to know that relief might be possible."

At the time of Guzman's hearing, § 212(h) relief was "reasonably possible" under the statutory definitions, and the IJ should have so advised him. I would therefore hold the removal order is constitutionally infirm both on § 212(c) and § 212(h) grounds.

All Citations

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiffs, v. RAUL GUZMAN-IBAREZ, Defendant.	Case No. CR 12-843-DMG ORDER DENYING DEFENDANT'S MOTION TO DISMISS

This matter came before the Court for hearing on August 28, 2013 on the motion filed July 30, 2013 by Defendant Raul Guzman-Ibarez to dismiss the indictment due to unlawful deportation. [Doc. # 30.] The Government's Opposition was filed August 12, 2013 [Doc. # 33] and Defendant's reply was filed August 20, 2013 [Doc. # 37]. At the August 28, 2013 hearing, upon Defendant's request for the opportunity to file further briefing, the hearing was continued to September 25, 2013 and a further briefing schedule was set. [Doc. # 39.] On September 4, 2013, Defendant filed his further brief [Doc. # 42], and on September 11, 2013, the Government filed its response [Doc. # 43]. At the September 25, 2013 hearing, the Court took this matter under submission allowing the Government to file a supplemental brief by September 27, 2013 and Defendant to file a supplemental reply by October 3, 2013. [Doc. # 45.] On September 27, 2013, the

Government filed its supplemental brief [Doc. # 44] and on October 3, 2013, Defendant filed his supplemental reply [Doc. # 47].[1] Having duly considered the papers filed and the arguments of counsel, the Court finds that dismissal is not warranted for the reasons set forth below.

I.
INTRODUCTION

Defendant is charged with violation of 8 U.S.C. § 1326(a), (b)(2), for being found in the United States on or about July 24, 2012, after deportation. By this motion to dismiss, Defendant challenges the validity of his prior deportation, an essential element of the offense charged, and without which dismissal of the indictment would be warranted.

Defendant was born in Mexico in 1973, came to the United States with his family in 1979, and became a Lawful Permanent Resident ("LPR") in 1989. In 1992, Defendant was convicted of carrying a concealed weapon, in violation of Cal. Penal Code § 12025(a). In 1994, Defendant was convicted of receiving stolen property in violation of Penal Code § 496 and spousal battery causing corporal injury in violation of Penal Code § 273.5. In September 1995, Defendant was again convicted of spousal battery causing corporal injury.

On December 21, 1995, the Immigration and Naturalization Service ("INS") commenced deportation proceedings by issuing to Defendant a Notice of Rights and taking Defendant's fingerprints. (Defendant's Motion, Exhibits G and H.) In 1996, Defendant appeared before Immigration Judge Margaret Reichenberg who advised him that he was not eligible for relief under § 212(c) but was potentially eligible for relief under § 212(h) based on his marriage to a United States citizen. In February 1997, while deportation proceedings were still pending, Defendant was arrested and convicted of

[1] On October 3, 2013, Defendant appears to have re-filed his August 20, 2013 reply brief [Doc. # 37] as his supplemental reply brief [Doc. # 47].

first-degree robbery in violation of Penal Code § 211. Because Defendant was in custody on the robbery charge, his removal case was administratively closed in 1997. Upon his release from state custody, Defendant's removal proceedings resumed in July 1999 before Immigration Judge Sitgraves, at which time the INS attorney argued that under the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"), which took effect on April 24, 1996, Defendant's robbery conviction constituted an aggravated felony rendering Defendant ineligible for § 212(h) relief. The hearing was continued to August 25, 1999, at which time the Immigration Judge found Defendant ineligible for § 212(h) relief because of his aggravated felony (robbery) conviction and ordered him deported. Since then, Defendant has reentered the United States and has been repeatedly deported in 2000, 2002, 2004 and 2010.[2]

To prove invalidity of a prior deportation, 8 U.S.C. § 1326(d) requires that Defendant demonstrate (1) fundamental unfairness of the entry of the deportation order, (2) exhaustion of administrative remedies, and (3) improper deprivation of the opportunity for judicial review at the deportation proceedings. To demonstrate fundamental unfairness, Defendant must show (1) his due process rights were violated in the deportation proceedings and (2) he suffered prejudice as a result. *United States v. Garcia-Martinez*, 228 F.3d 956, 959-60 (9th Cir. 2000). Defendant argues that because the Immigration Judge erroneously informed Defendant that he was not eligible for relief from deportation, (1) he is excused from exhausting his administrative remedies and (2) his waiver of appeal was not "considered and intelligent" and, thus, he has been deprived of judicial review. In the absence of a due process violation, however, the Court need not reach these latter issues.

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[2]Because each of the subsequent removals was a reinstatement of the 1999 removal, Defendant's motion focuses on the validity of the 1999 removal.

II.

DUE PROCESS VIOLATION

In his motion, Defendant contends that his 1999 removal proceeding violated his due process rights because Immigration Judge Sitgraves ordered his removal without providing him with the opportunity to seek relief under Sections 212(c) and 212(h) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1182(c) and (h). Defendant argues that he suffered prejudice as a result because, had he been allowed to apply for discretionary relief, there was a plausible chance it would have been granted.

A. <u>Section 212(h)</u>

Section 212(h) of the INA allows the Attorney General to waive inadmissibility based on crimes of moral turpitude when the citizen or LPR spouse, parent or child of the inadmissible alien would suffer extreme hardship from his removal. As an exception to relief under § 212(h), however, there is no waiver for any alien "who has *previously been admitted to the United States as an alien lawfully admitted for permanent residence* if . . . since the date of such admission the alien has been convicted of an aggravated felony . . . ." 8 U.S.C. § 1182(h) (emphasis added).

Defendant concedes that after he became an LPR in 1989, he was convicted of an aggravated felony, namely his robbery conviction in 1997. Citing *Hing Sum v. Holder*, 602 F.3d 1092 (9th Cir. 2010), however, Defendant contends that he was not "previously . . . admitted to the United States as an alien lawfully admitted for permanent residence" because at the time of his admission into the United States in 1979, he was not an LPR. Instead, he entered without inspection in 1979 and did not become an LPR until 1989. Therefore, Defendant argues, he was not "admitted . . . as an alien lawfully admitted for permanent residence," and, thus, not barred from seeking relief under 212(h). As such, Defendant contends that the Immigration Judge violated Defendant's due process rights by failing to inform him of his "apparent eligibility" to apply for discretionary relief. 8 C.F.R. § 1240.11(a)(2). "[A]n IJ's duty [, however,] is limited to informing an alien of a reasonable possibility that the alien is eligible for relief *at the time of the hearing*."

United States v. Lopez-Velasquez, 629 F.3d 894, 895 (9th Cir. 2010) (emphasis added); *see also United States v. Vidal-Mendoza*, 705 F.3d 1012, 1016 (9th Cir. 2013).

Citing *In re Rosas-Ramirez*, 22 I.&N. Dec. 616 (BIA 1999), as the then-prevailing law, the Government contends that because the statutory construction giving rise to an "apparent eligibility" articulated in *Hing Sum* was not the law recognized at the time of Defendant's removal hearing in 1999, the Immigration Judge was not under a duty to inform Defendant of it. In *Rosas-Ramirez*, the BIA held that "aliens 'lawfully admitted for permanent residence' through the adjustment process are considered to have accomplished an 'admission' to the United States." *Id.* at 619. Under *Rosas-Ramirez*, regardless of whether or not Defendant was previously admitted to the United States in 1979 when he initially entered without inspection, he was "admitted" to the United States upon his adjustment of status in 1989 and since the date of such admission was convicted (in 1997) of an aggravated felony. Although the BIA in *Rosas-Ramirez* construed "admission" for purposes of § 237(a)(2)(A)(iii) of the INA, that construction also had been applied to § 212(h). *See Matter of Koljenovic*, 25 I.&N. Dec. 219, 221 (BIA 2010) ("We have consistently construed an adjustment of status as an 'admission.'").

The Court agrees with the Government that, under the prevailing law in 1999, Immigration Judge Sitgraves was under no obligation to inform Defendant of his "apparent eligibility" to apply for discretionary relief.

B. <u>Section 212(c)</u>

Defendant next argues that he may have obtained discretionary relief under § 212(c) of the INA because his immigration proceedings commenced prior to the repeal of § 212(c) by the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), which was passed by Congress on September 30, 1996 and became effective on April 1, 1997.[3]

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[3] The former § 212(c) allowed for discretionary waiver from deportation under certain circumstances for a deportable alien having an unrelinquished domicile of seven consecutive years. 8 U.S.C. § 1182(c) (1994); *Francis v. INS*, 532 F.2d 268, 270-73 (2d Cir. 1976).

Even if that may be the case, prior to the enactment of the IIRIRA, § 212(c) was amended in 1990 to preclude discretionary relief for anyone convicted of an "aggravated felony" who had served a term of imprisonment of at least five years. Pub. L. No. 101-649, § 511, 104 Stat. 4978, 5052 (1990) (amending 8 U.S.C. § 1182(c)). Furthermore, prior to the IIRIRA, AEDPA was enacted on April 24, 1996. Section 440(d) of AEDPA identified certain offenses, the conviction of which would preclude relief under § 212(c), including all aggravated felonies. Section 440(e) of the AEDPA expanded the definition of "aggravated felonies" to include burglary and theft offenses. "Section 440(f) [of the AEDPA] provides that '[t]he amendments made by subsection (e) shall apply to convictions entered on or after the date of the enactment of this Act. . . .'" *Duldulao v. I.N.S.*, 90 F.3d 396, 39 n.2 (9th Cir. 1996) (quoting AEDPA § 440(f)). At the time of Defendant's deportation proceedings, AEDPA § 440(d) applied to deportations that were pending on the effective date of AEDPA, April 24, 1996. *In re Soriano*, 21 Int. Dec. 3289 (BIA 1996).[4]

As such, because of his robbery conviction, § 440(d) of AEDPA precluded discretionary relief to Defendant under § 212(c). In his reply brief, Defendant concedes this issue. At the August 28, 2013 hearing, however, Defendant requested the opportunity to file further briefing addressing another potential bar to relief under § 212(c): Defendant's firearms conviction.

Defendant's firearms conviction was an additional bar to relief under § 212(c) because although it is a ground for deportation, it is not a ground for exclusion, and 8 C.F.R. § 1212.3(5) precluded relief for the deportable conviction under § 212(c) if the

[4] On December 27, 1999, the Ninth Circuit overturned *In re Soriano*, holding that AEDPA applied only to deportation proceedings commencing on or after the effective date of the AEDPA. *Magana-Pizano v. INS*, 200 F.3d 603, 611 (9th Cir. 1999). Because it was found to have been announcing a new rule of law, *Migana-Pizano* has been held to not be retroactively applicable. *United States v. Alvarenga-Villalobos*, 271 F.3d 1169, 1173 (9th Cir. 2011).

deportable conviction lacked a corresponding counter-part of inadmissibility. *Pascua v. Holder*, 641 F.3d 316, 321 (9th Cir. 2011).

In his September 4, 2013 brief, Defendant argues that Immigration Judge Reichenberg, *prior to* Defendant's 1997 robbery conviction, should have informed him that he could seek relief from exclusion under *Matter of Gabryelsky*, 20 I&N Dec. 750 (BIA 1993). Under *Gabryelsky*, it is possible that the bar to §212(c) relief due to his firearms conviction could have been eliminated by first allowing him to waive his non-firearms offenses under §212(c) and then allowing him to re-adjust status to that of legal permanent resident under § 245 thereby disposing of his firearms offense because there was no firearms ground of exclusion. The Government counters that even if that were the case, *Gabryelsky* could provide no relief due to Defendant's subsequent robbery conviction because (1) robbery, as a ground for exclusion, would bar adjustment of status and (2) as explained above, is not waivable under § 212(c) because it is an aggravated felony.

Having duly considered this issue, the Court finds that even if Immigration Judge Reichenberg's failure in 1996 to properly advise Defendant invalidates his 1999 deportation, that does not change the fact that Defendant suffered the robbery conviction in 1997, as to which *Gabrylsky* provides no relief. In order to demonstrate prejudice, Defendant would have to wish away the 1997 robbery conviction or pretend that he would have become a naturalized citizen by the time of that robbery conviction, thereby precluding any of the subsequent deportations. The Court declines to engage in such a speculative exercise. Consequently, the Court finds that the 1996 failure to properly advise Defendant of possible relief under *Gabryelsky* does not invalidate Defendant's subsequent deportations in 2000, 2002, 2004 and 2010, when Defendant was in fact an aggravated felon. *See, e.g., United States v. Quintanilla-Gonzalez*, 450 Fed. Appx. 612 (9th Cir. 2011) (defendant subject to invalid 2001 deportation order suffered no prejudice because he was an aggravated felon at the time of his subsequent 2006 removal proceedings). Each one of those deportations would be sufficient to sustain Defendant's conviction in this case.

III.

CONCLUSION

Defendant has failed to show that his due process rights were violated in the deportation proceedings occurring in 2000, 2002, 2004, and 2010 and that he suffered prejudice as a result. Accordingly, IT IS ORDERED that Defendant's motion to dismiss the indictment is DENIED.

DATED: October 10, 2013

Dolly M. Gee

DOLLY M. GEE
UNITED STATES DISTRICT JUDGE