IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

v.

JUAN LARIOS-BUENTELLO,

Defendant.

OPINION & ORDER

13-cr-158-wmc

Defendant Juan Larios-Buentello is charged with a single count of unlawfully re-entering the United States after previously being deported under 8 U.S.C. § 1326. (Dkt. #2.) He has moved to dismiss the indictment, arguing that the government cannot rely on the 1998 deportation order to prove the previously-deported element because it was entered in violation of his due process rights. (Dkt. #22.) The parties agree that Larios-Buentello is permitted to make a pretrial collateral attack on that order.

On October 9, 2014, Magistrate Judge Stephen Crocker issued a report and recommendation on Larios-Buentello's motion to dismiss. (Dkt. #31.) He recommended that the court deny the motion to dismiss in light of the Seventh Circuit's controlling decision in *United States v. Zambrano-Reyes*, 724 F.3d 761 (7th Cir. 2013). Alternatively, he found Larios-Buentello does not meet the three-step test for a viable due process claim articulated in 8 U.S.C. § 1326(d). Larios-Buentello subsequently objected to the magistrate's analysis almost in its entirety. Accordingly, this court considers *de novo* the recommendations of Magistrate Judge Crocker. *See* 28 U.S.C. § 636(b)(1) (judge shall make a *de novo* determination with respect to any recommendations to which objection is made).

BACKGROUND

For the most part, Larios-Buentello does not challenge Judge Crocker's factual findings. The one exception is the finding that Larios-Buentello has been convicted of and sentenced for felony offenses on five separate occasions. Larios-Buentello indicates that two of the offenses in question were actually misdemeanors. With that modification, the magistrate's factual findings are adopted in full as laid out in his report and recommendation. For the sake of clarity, the court briefly summarizes the background of this case below.

Juan Larios-Buentello was born in Mexico in 1965 and admitted into the United States as a lawful permanent resident alien in 1970. He was convicted of felonies three times between 1987 and 1997.

Up until 1996, Larios-Buentello could have applied for relief from deportation under § 212(c) of the Immigration and Naturalization Act ("INA"), codified at 8 U.S.C. § 1182(c). However, the passage of the Antiterrorism and Effective Death Penalty Act ("AEDPA") in 1996, and the subsequent passage of the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA") in April of 1997, expanded the list of deportable crimes and repealed § 212(c). Thus, when Larios-Buentello received a notice to appear for deportation proceedings on August 21, 1997, § 212(c) relief appeared unavailable. He was ordered deported on September 10, 1998, after waiving his right to appeal.

In *INS v. St. Cyr*, 533 U.S. 289 (2001), however, the Supreme Court held that the repeal of § 212(c) could not be applied retroactively to aliens who would have been eligible to seek relief under that provision *at the time they pled guilty.* Thus, Larios-Buentello could have sought relief from deportation under § 212(c), AEDPA and IIRIRA notwithstanding,

because he entered guilty pleas to the offenses on which his deportation was based well before the IIRIRA passed.

OPINION

Under the Supreme Court's holding in *United States v. Mendoza-Lopez*, 481 U.S. 828 (1987), deportation orders entered in violation of due process cannot be used to prove § 1326 violations. 481 U.S. at 840. Under 8 U.S.C. § 1326(d), however, an alien cannot challenge his deportation order unless he 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.

The Seventh Circuit has "yet to expressly state that all three of those requirements must be met before an alien can successfully, collaterally attack a prior removal, [but it has] implied as much." *United States v. Baptist*, 759 F.3d 690, 695 (7th Cir. 2014) (citing *United States v. Santiago-Ochoa*, 447 F.3d 1015, 1019-20 (7th Cir. 2006); *United States v. Lara-Unzueta*, 735 F.3d 954, 961 (7th Cir. 2013)). Nevertheless, at Larios-Buentello's request and because the Seventh Circuit has yet to definitively confirm that the test is conjunctive, the court will address all three factors.

I. Deprivation of Judicial Review

The government's first argument is that *Zambrano-Reyes* categorically forecloses the possibility of relief because of the factual similarities between that case and this one. In

Zambrano-Reyes, the Seventh Circuit considered an alien's § 1326(d) attack under what are certainly similar circumstances to Larios-Buentello's. In that case, the defendant had exhausted his administrative remedies, but had not sought judicial review of his order of removal. 724 F.3d at 764. Conceding that he had been informed of his right to seek judicial review, and that the Seventh Circuit had held that direct review remained available for aliens challenging their deportation on constitutional grounds, the defendant in *Zambrano-Reyes* nevertheless argued that he was deprived of judicial review "as a practical matter." *Id*. He contended that the Seventh Circuit had already held that the AEDPA eliminated habeas corpus relief for aliens in his position, and he argued that the issue he would have raised had been decided against him in earlier Seventh Circuit cases, rendering an appeal pointless. *Id.*

The Seventh Circuit rejected both those arguments. With respect to the first, the court referred to its opinion in *United States v. Roque-Espinoza*, 338 F.3d 724 (7th Cir. 2003). In that case, Roque-Espinoza had been informed by an Immigration Judge that he was ineligible for § 212(c) relief. Still, the Seventh Circuit held that he could have filed for a writ of habeas corpus:

> After all, this is the mechanism that Enrico St. Cyr used, and his efforts yielded a Supreme Court decision to the effect that the repeal of § 212(c) relief could not be applied retroactively to aliens in his position. *St. Cyr*, 533 U.S. at 526, 121 S. Ct. 2271. Nothing prevented Roque-Espinoza from playing the role of St. Cyr in his particular situation. The fact that he chose not to make the attempt does not mean that he was deprived of all avenues of judicial review of his removal order.

338 F.3d at 729. The Seventh Circuit found its holding in *Roque-Espinoza* foreclosed Zambrano from arguing that he had been deprived of judicial review since he, like Roque-

Espinoza, *could* have sought relief, even though its availability was at best uncertain. *Zambrano-Reyes*, 724 F.3d at 764.

The Seventh Circuit also rejected the second argument, holding that Zambrano had "misapprehend[ed] the state of the law in this circuit at the time of his removal." *Id.* Indeed, the Seventh Circuit had decided five weeks before the decision issued in Zambrano's removal proceedings that his position had merit. *See Jideonwo v. INS*, 224 F.3d 692, 700 (7th Cir. 2000) (prohibiting retroactive application of AEDPA to bar an alien from seeking § 212(c) relief where "specific facts demonstrate[d] that [the] alien pled guilty to an aggravated felony before the enactment of AEDPA and relied, at least in part, on the availability of § 212(c) relief in making his decision to so plead"). The Seventh Circuit noted that the defendant's attorney in *Zambrano-Reyes* failed to recognize the relevance of *Jideonwo*, which "would have been a strong argument for Zambrano to raise in a motion to reopen," *id.* at 764-65, but since Zambrano did not ask the court to excuse his failure to seek judicial review due to ineffective assistance of counsel, he had not been deprived of the opportunity for judicial review, *id.* at 765. That failure alone, in the Seventh Circuit's view, was enough to reject Zambrano's § 1326(d) challenge. *See id.* at 766 ("Because we hold that Zambrano was not deprived of an opportunity for judicial review, we have no occasion to explore the meaning of 'fundamental unfairness' for purposes of Section 1326(d) in this case."); *see also United States v. Santiago-Ochoa*, 447 F.3d 1015, 1019 (7th Cir. 2006) (stating that *Roque-Espinoza* holds "that an alien is not deprived of judicial review for purposes of § 1326(d)(2) as long as he has recourse to relief through a petition for habeas corpus").

As was true of the defendant in *Zambrano-Reyes*, Larios-Buentello here did not seek relief through a writ of habeas corpus. Thus, under the rule of *Roque-Espinoza*, reaffirmed in *Zambrano-Reyes*, he was not *prevented* from seeking judicial review of his removal order.

Larios-Buentello would distinguish his case from *Zambrano-Reyes* on two grounds, neither of which has merit. *First*, Larios-Buentello points out that he was not represented by counsel, while the defendants in both *Roque-Espinoza* and *Zambrano-Reyes* were. *Second*, he points out that Zambrano could have relied on *Jideonwo* to seek review of his removal proceedings, while his own proceeding concluded before *Jideonwo* was decided. The latter point relies on a futility-type argument that, while innately appealing, has been foreclosed by binding case law. As already discussed, the Seventh Circuit held in *Roque-Espinoza* (and reaffirmed in *Zambrano-Reyes*) that an alien is not deprived of the opportunity for judicial review simply because he has good reason for thinking that review is unavailable. *Roque-Espinoza*, 338 F.3d at 729; *see also Zambrano-Reyes*, 724 F.3d at 765. The former argument -- that Larios-Buentello did not have the benefit of counsel – does not appear to have any bearing on the determination of whether he was improperly derived of judicial review. Zambrano's failure to show he was deprived of judicial review was itself enough to foreclose § 1326(d) relief in *Zambrano-Reyes*. Given the similarities between *Zambrano-Reyes* and the present case, it is likely that the holding in *Zambrano-Reyes* controls.

II. Exhaustion of Administrative Remedies

As for the first prong of § 1326(d), which requires the alien to exhaust any administrative remedies available, Larios-Buentello concedes, as he must, that it is not technically met insofar as he waived his right to appeal the deportation order in his case.

See United States v. Alegria-Saldana, 750 F.3d 638, 641 (7th Cir. 2014) ("Despite being informed of his right to appeal, [Alegria-Saldana] did not file an appeal or ask his lawyer to do so, and thus he failed to exhaust his available remedies."). Larios-Buentello argues that the court should excuse his failure to exhaust his remedies because: (1) he was informed by immigration agents that he would lose any direct appeal he took; and (2) seeking to exhaust his administrative remedies would have been futile.

Unfortunately, while the law of other circuits lends support to Larios-Buentello's arguments, *see, e.g.*, *Ramirez-Osorio v. INS*, 745 F.2d 937, 939-40 (5th Cir. 1984), Magistrate Judge Crocker correctly recognized that Seventh Circuit case law does not. In *Roque-Espinoza*, the court strongly suggested, though it did not definitively hold, that futility does not excuse a failure to exhaust administrative remedies. *See Roque-Espinoza*, 338 F.3d at 728-29.

Like Larios-Buentello, Roque-Espinoza had failed to appeal his deportation order to the Board of Immigration Appeals ("BIA"). He argued, however, that because the BIA at that time applied the AEDPA retroactively to eliminate § 212(c) relief, an administrative appeal would have been futile, excusing him from the need to exhaust. The Seventh Circuit noted:

> There is some support for this position in our cases, *see*, *e.g.*, *Iddir v. INS*, 301 F.3d 492, 498 (7th Cir. 2002) (exhaustion of administrative remedies not required when 'appealing through the administrative process would be futile because the agency . . . has predetermined the issue"). Nonetheless, the law would never change if litigants did not request the responsible tribunals to reconsider earlier rulings. Furthermore, Roque-Espinoza has bigger problems than administrative exhaustion. Whether or not we agreed with him on that point (and the Supreme Court's cases construing the contemporaneous exhaustion requirements of the Prison Litigation Reform Act

> suggest strongly that futility excuses will not go far . . . the fact remains that Roque-Espinoza was not completely deprived of an opportunity to seek judicial review of the IJ's understanding of the law.

Id. at 729 (internal citations omitted).

Later, in *Alvarado-Fonseca v. Holder*, 631 F.3d 385, 391 (7th Cir. 2011), the court similarly declined to consider an alien's argument because he had not raised it in an appeal to the BIA:

> As noted above, the BIA has concluded in other cases that IMMAct § 602(c) overrides ADAA § 7344(b). Presumably, the BIA would have dismissed Alvarado-Fonseca's appeal on that ground if he had presented the argument he now raises in his administrative appeal. Therefore, one might argue that Alvarado-Fonseca should be excused from administrative exhaustion on futility grounds. (Alvarado-Fonseca does not attempt to avoid the exhaustion requirement by advancing this argument, or any other for that matter). However, *we rejected a similar argument in United States v. Roque-Espinoza*, 338 F.3d 724, 729 (7th Cir. 2003), noting that 'the law would never change if litigants did not request the responsible tribunals to reconsider earlier rulings'.

Alvarado-Fonseca, 631 F.3d at 391 n.4 (emphasis added). Therefore, little room exists between *Roque-Espinoza* and *Alvarado-Fonseca* to excuse the failure to exhaust on futility grounds. Indeed, Larios-Buentello is unable to point to *any* case law from the Seventh Circuit supporting his contrary argument.

The same is true of his alternative argument that his waiver of any administrative appeal was not "considered and intelligent" and that it violated due process.[1] The court has

[1] The Ninth Circuit, at least, has held that the exhaustion requirement of § 1326(d) "cannot bar collateral review of a deportation proceeding when the waiver of right to an administrative appeal did not comport with due process." *United States v. Muro-Inclan*, 249 F.3d 1180, 1183 (9th Cir. 2001). Faced with the Ninth Circuit's approach, which differs from that of the Second, Third, Fourth and Eleventh Circuits, *see United States v. Dominguez*, 397 F. App'x 232, 234 (7th Cir. 2010), the Seventh Circuit declined to comment, *United States v. Arita-Campos*, 607 F.3d 487, 491 (7th Cir. 2010).

found no Seventh Circuit cases, and Larios-Buentello points to none, that suggest the advice he received from the unnamed immigration agent not to appeal excuses his failure to do so. Rather, the Seventh Circuit has stated, "To satisfy the exhaustion prong of § 1326, an alien must have filed a motion to reopen, appealed to the Board of Immigration Appeals, and pursued all other administrative remedies available to him. For purposes of § 1326, a failure to follow these procedures, including a failure to file a motion to reopen, will result in the inability to challenge the deportation order." *United States v. Arita-Campos*, 607 F.3d 487, 491 (7th Cir. 2010) (internal citations omitted). Again, at least in the Seventh Circuit, there appears no basis to deviate from this holding.

III. Fundamental Unfairness

The remaining prong of the analysis requires that Larios-Buentello show the entry of the deportation order was "fundamentally unfair." "To show fundamental unfairness, [Larios-Buentello] must show, first, a violation of due process, and second, that he was prejudiced by the removal proceedings." *United States v. De Horta Garcia*, 519 F.3d 658, 661 (7th Cir. 2008). Larios-Buentello does not clearly state just what acts or omissions supposedly violated his right to due process. On the contrary, most of his argument focuses on actual prejudice. To the extent that he argues the entry of the order was fundamentally unfair because he was misinformed about his eligibility for § 212(c) relief, the Seventh Circuit has held that "due process does not encompass a 'right to be informed of eligibility for – or to be considered for – discretionary relief." *Id.* (quoting *Santiago-Ochoa*, 447 F.3d at

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Given that the Seventh Circuit has implied on multiple occasions that all three prongs must be met for a successful collateral attack, *see id.* (collecting cases), and given that it is unlikely that the court would adopt the Ninth Circuit's approach, defendant's argument that his waiver was not knowing has no merit.

1020); *see also Alegria-Saldana*, 750 F.3d at 642 ("failure to consider an alien for *discretionary* relief does not violate due process and thus is not fundamentally unfair") (citing *Arita-Campos*, *De Horta Garcia* and *Santiago-Ochoa*). *But see De Horta Garcia*, 519 F.3d at 662-64 (Rovner, J., concurring) (discussing minority view); *United States v. Copeland*, 376 F.3d 61, 70-73 (2d Cir. 2004). This court cannot stray from the controlling precedent of this circuit.

Thus, even presuming Larios-Buentello was actually prejudiced by losing his chance "to apply for § 212(c) relief that might have been granted," *id.*, the Seventh Circuit's position on what due process requires means he cannot meet the third prong of § 1326(d). The magistrate also found that Larios-Buentello's proffer with respect to whether the relief he sought might have been granted was not persuasive, "rais[ing] more concerns than it quells." (Report & Recommendation (dkt. #31) 8.)

Given the frequency with which § 212(c) relief was granted in its heyday, however, the court is not prepared to say definitively that Larios-Buentello cannot show actual prejudice. What is clear is that it does not matter for purposes of this decision: actual prejudice without a cognizable due process violation cannot meet the third prong of § 1326(d). *See De Horta Garcia*, 519 F.3d at 661.

Accordingly, under binding Seventh Circuit precedent, Larios-Buentello cannot meet the requirements of § 1326(d). The court agrees with the magistrate that *Zambrano-Reyes* on its own likely justifies the denial of Larios-Buentello's motion, but more importantly, under the precedent that binds this court, he cannot meet *any* of the prongs of § 1326(d). Thus, the court adopts the magistrate's recommendation and will deny the motion to dismiss the indictment.

ORDER

IT IS ORDERED that:

(1) the report and recommendation (dkt. #31) is ADOPTED except as modified in the opinion above; and

(2) defendant Juan Larios-Buentello's motion to dismiss the indictment (dkt. #22) is DENIED.

Entered this 18th day of November, 2014.

BY THE COURT:

/s/

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WILLIAM M. CONLEY
District Judge