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

UNITED STATES OF AMERICA,

Plaintiff,

v.

JOSÉ DE HORTA-GARCIA,

Defendant.

REPORT AND RECOMMENDATION

06-CR-185-C

REPORT

The grand jury has charged defendant José De Horta-Garcia with illegally re-entering the United States after having been deported, in violation of 8 U.S.C. §1326. Before the court for report and recommendation is defendant's motion to dismiss the indictment. *See* Dkt. 10. Defendant contends that his due process rights were violated at his 1996 deportation hearing because the immigration judge incorrectly applied a new statutory scheme that prohibited defendant from petitioning the Attorney General for discretionary waiver of deportation. The government responds that the immigration judge got it right. The government is correct and I am recommending that the court deny defendant's motion.

FACTS

On August 19, 1985, defendant José De Horta-Garcia, a Mexican citizen, entered the United States as a lawful permanent resident alien and began living in Alaska. Over the next ten years, defendant married a United States citizen, had two children, separated from his wife, began a relationship with his current girlfriend and fathered two more children.

On November 28, 1995, defendant was arrested in Alaska on a state charge of possessing with intent to distribute four grams of heroin. The next day, November 29, 1995, the charged was modified to misconduct involving a controlled substance in the second degree. If convicted of this charge, defendant was subject to deportation as an excludable alien under 8 U.S.C. § 1182(a)(2)(C). However, at the time of defendant's arrest in 1995, a convicted defendant could petition the Attorney General for discretionary relief from deportation pursuant to 8 U.S.C. § 1181(c).[1]

On April 25, 1996, Congress adopted the Antiterrorism & Effective Death Penalty Act of 1996 (AEDPA). AEDPA § 440(d) amended § 1181 so that immigrants convicted of drug crimes no longer were eligible to seek discretionary relief from deportation.[2]

On June 17, 1996, defendant entered into a plea agreement in which the state agreed to amend his charge to attempted misconduct involving a controlled substance in the second degree, a felony. It appears that defendant pled guilty to the charge on that date.

On or about August 14, 1996, immigration proceedings were initiated against defendant.

On September 13, 1996, the state court sentenced defendant to 48 months in prison with 30 months suspended.

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[1] More specifically, § 212(c) of the INA permitted the Attorney General to waive the deportation of an immigrant who had spent at least seven lawful years in the United States so long as he had not been convicted of an aggravated felony for which he had served a term of imprisonment of at least five years.

[2] The law has been amended yet again, *see* dkt. 17 at 5, but this does not affect defendant's motion to dismiss.

On September 18, 1996, the INS ordered defendant to show cause why he should not be deported.

On December 12, 1996, defendant appeared before an immigration judge in Seattle for a group deportation hearing. The immigration judge ordered defendant deported to Mexico. Apparently, the immigration judge had concluded that the AEDPA applied retroactively, so he did not inform defendant that he could petition for a waiver of deportation. The next day, December 13, 1996, the INS released defendant at the Mexican border.

On November 12, 1997, officials discovered defendant back in Alaska and brought a federal criminal charge of illegal entry against him. Defendant moved to dismiss the charge on the ground that the AEDPA's override of § 212(c) was not retroactive; therefore the immigration judge had violated defendant's due process rights because he had not advised defendant of his right to seek discretionary review of his deportation order. The district court granted defendant's motion and dismissed the charge.

On April 7, 1998, the government moved for reconsideration. On June 26, 1998, the district court, citing new Ninth Circuit law on the salient issue, vacated its earlier order and re-instated the illegal re-entry charge against defendant. Defendant requested re-reconsideration; the district court denied his motion but encouraged defendant to appeal to the Ninth Circuit. Around the same time the INS denied defendant's request to reopen his case so that he could apply for discretionary relief from deportation.

On November 18, 1998, defendant was convicted on the federal charge of illegal reentry and sentenced to 57 months in prison. Defendant did not appeal this conviction or the court's denial of his motion to dismiss.

On June 21, 2002, the INS removed defendant to Mexico.

On September 4, 2006, authorities found defendant in the Western District of Wisconsin and brought the instant charge against him.

ANALYSIS

Defendant contends that because at the time he committed his drug crime he had the right to petition for waiver of deportation, the government violated his due process rights when the immigration judge thereafter applied the AEDPA's new rule to his case and declined to advise defendant that he could petition the Attorney General for a waiver of deportation. Defendant acknowledges that Seventh Circuit law does not support his argument.

The Court of Appeals for the Seventh Circuit has concluded that AEDPA § 440(d)'s bar against discretionary waivers of deportation may be applied retroactively. *LaGuerre v. Reno*, 164 F.3d 1035, (7th Cir. 1998), *cert. denied*, 528 U.S. 1153 (2000). The court stated that it "bordered on the absurd" to suppose that an alien's decision whether to commit a deportable crime would be influenced by the consequences of his criminal act on the availability of discretionary relief from deportability. Therefore, no unfair "mousetrapping"

results from retroactively applying the tighter rule in the ordinary case. *Id*. at 1041.[3] In *Lara-Ruiz v. I.N.S.*, 241 F.3d 934, 945 (7th cir. 2001) the court re-embraced this position and applied it to a defendant whose crime of conviction (sexual abuse of a minor) had not even *been* a deportable offense at the time he pled guilty. *Id.* at 945, n.8.

Given this circuit's position that defendant had no right to petition for a waiver, the immigration court's silence on this point could not have been erroneous. Therefore, defendant suffered no due process violation during his deportation proceedings, and he is not entitled to dismissal of the criminal charge against him in this case.

Defendant's fall-back claim is detrimental reliance on the old statute, a claim that the Seventh Circuit has recognized as a narrow exception to retroactive application of the AEDPA. But the exception requires the defendant to have pled guilty before the enactment of the AEDPA and to supply specific facts showing that he relied at least in part on the availability of § 212(c) relief in making his decision so to plead. *Jideonwo*, 224 F.3d at 700. Defendant pled guilty after enactment of the AEDPA. Had the unavailability of a deportation waiver been a deal-breaker for defendant, then he could have gone to trial on the drug charge. But he didn't. Neither has defendant supported his claim of detrimental

[3] In extraordinary cases, however, there are legitimate mousetrapping concerns that militate against retroactively applying the AEDPA's tighter rule. *See, e.g., Jideonwo v. I.N.S.*, 224 F.3d 692, 700 (7th Cir. 2000) ("where specific facts demonstrate that an 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, AEDPA's § 440(d) cannot be applied retroactively to bar that alien from receiving a discretionary waiver under INA § 212(c)").

reliance with any specific facts, such as his own affidavit, a copy of a written plea agreement, or a transcript or minute sheet from his guilty plea or sentencing on the state drug charge.

Accordingly, defendant is not entitled to substantive relief on his claim. Defendant argues why the Seventh Circuit got it wrong in *LaGuerre,* but that argument is better addressed to that court, if this case gets there. *See United States v. Booker*, 115 F.3d 442, 444 (7th Cir. 1997) (in hierarchical judiciary, district court must follow circuit law).

The government also argues that defendant is procedurally barred from collaterally attacking his deportation because he cannot meet the three predicate requirements of 8 U.S.C. § 1326(d).[4] This court's interpretation of circuit law is that a defendant must meet all three prongs of the statutory test. *See United States v. Santiago-Ochoa*, 447 F.3d 1015, 1019 (7th Cir. 2006); *United States v. Roque-Espinoza*, 338 F.3d 724, 728 (7th Cir. 2003). The discussion above suggests that defendant cannot establish the second and third prongs of this test, but there is no need to explore this further because the discussion above also establishes that defendant is not entitled to substantive relief on his motion to dismiss.

[4] Namely: (1) He exhausted any administrative remedies 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.

RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(1)(B) and for the reasons stated above, I recommend that this court deny defendant José De Horta-Garcia's motion to dismiss the indictment.

Entered this 13th day of February, 2007.

BY THE COURT:

_____
STEPHEN L. CROCKER
Magistrate Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN
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February 13, 2007

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Re: United States v. Jose De Horta-Garcia
Case No. 06-CR-185-C

Dear Counsel:

The attached Report and Recommendation has been filed with the court by the United States Magistrate Judge.

The court will delay consideration of the Report in order to give the parties an opportunity to comment on the magistrate judge's recommendations.

In accordance with the provisions set forth in the newly-updated memorandum of the Clerk of Court for this district which is also enclosed, objections to any portion of the report may be raised by either party on or before February 26, 2007, by filing a memorandum with the court with a copy to opposing counsel.

If no memorandum is received by February 26, 2007, the court will proceed to consider the magistrate judge's Report and Recommendation.

Sincerely,

/s/

Connie A. Korth
Secretary to Magistrate Judge Crocker

Enclosures
cc: Honorable Barbara B. Crabb, District Judge