



COURT  
YORK

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JOSE GUTIERREZ,

Petitioner,

- against -

JANET RENO, Attorney General of the  
U.S.; DORIS MEISSNER, Commissioner of  
Immigration and Naturalization;  
IMMIGRATION AND NATURALIZATION SERVICE,

Respondents.

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A P P E A R A N C E S:

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#98-R-5477  
Marcy Correctional Facility  
Marcy, NY 13403

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99 Civ. 11036 (RWS)

O P I N I O N

**Sweet, D.J.,**

Petitioner Jose Gutierrez ("Gutierrez") seeks a writ of habeas corpus on the grounds that the Immigration Judge ("IJ") violated due process and the right to counsel at Gutierrez's deportation hearing. For the reasons set forth below, the petition is denied.

### **Background and Prior Proceedings**

Gutierrez, a citizen of the Dominican Republic, entered the United States as a lawful permanent resident on November 19, 1987.

On May 5, 1998, Gutierrez pled guilty in New York State Supreme Court, Bronx County, to the criminal sale of a controlled substance in the third degree, to wit, crack cocaine, in violation of New York Penal Law § 220.39. Gutierrez was sentenced to a one to three year term of imprisonment.

The Immigration and Naturalization Service ("INS") commenced removal proceedings against Gutierrez in January of 1999 on the grounds that the conviction rendered him removable under the newly enacted amendment to the Immigration and Naturalization Act

("INA"), the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), as an alien convicted of an aggravated felony, 8 U.S.C. § 1227(a)(2)(A)(iii), (a)(2)(B)(i), and also as an alien convicted of violating a controlled substance law, 8 U.S.C. § 1101(a)(43)(B) (1996).

A removal hearing commenced on March 2, 1999 at the Ulster Correctional Facility, where Gutierrez was serving his state sentence. The IJ informed Gutierrez:

You have the right to have a lawyer come in this Court and help you out at your own expense if you can. The Court will not give you a lawyer so if you get one you have to get your own. There are two ways to do that. You can pay for one if you have the money or you can always try to find a free one. I cannot give you a list of free lawyers because none from this area have agreed to come here free of charge. But I will give you some time if you think you would like to go look for a lawyer or try to get a lawyer I'll give you some time to do that. What would you like to do Mr. Gutierrez?

Administrative Record ("AR") at 1-2. Gutierrez answered, "I would like to have the time to get a lawyer because right now I depend only on my family and on my mother-in-law and wife and my wife is with my mother-in-law." Id. at 2. The IJ stayed the hearing until March 30, 1999.

When the hearing reconvened, Gutierrez, who was still serving a prison sentence, had not been able to find an attorney to represent him. The IJ granted another adjournment until May 5, 1999, and warned Gutierrez that "[i]f you do not have a lawyer on the 5th of May then I will not give you anymore time after that, that's your last adjournment, sir. You do the best you can because that's your final adjournment to get a lawyer." AR at 4.

On May 5, 1999, Gutierrez reported to the IJ that the only Spanish-speaking attorney his family could find charged \$800 per visit, a price Gutierrez could not afford. The IJ denied Gutierrez's motion to adjourn the hearing once more to afford him time to retain an attorney. The IJ told him,

Sir, you've had over two months to either get started on preparing your case yourself or to get a lawyer so this is the last chance that you had. I told you last time when you were here in March that if you didn't have your lawyer this time we're going to finish your case without one. So you're going to represent yourself today, Mr. Gutierrez. We're going to proceed without a lawyer for you...

AR at 6-7. For the record, the IJ stated, "The Court finds that he did not have a lawyer or any prospects of a lawyer so he will have to represent himself today." AR at 7. Gutierrez asked for "the opportunity to defend my case you know in the library with other presenters learning," a request the IJ denied. AR at 6.

The IJ commenced the hearing and informed Gutierrez of his rights to present evidence and question witnesses. Under questioning from the IJ, Gutierrez admitted that he was a Dominican citizen and that he had been convicted of selling narcotics in May of 1998. After a very brief colloquy comprising only one and a half transcript pages, the IJ found Gutierrez to be removable on the basis of his 1998 conviction, and held he was statutorily ineligible for relief from removal because he had been convicted of an aggravated felony. Gutierrez was ordered removed to the Dominican Republic.

Gutierrez filed a timely appeal to the BIA, which affirmed the IJ and dismissed the appeal in a written decision issued on September 8, 1999. Specifically, the BIA upheld the IJ's determination that Gutierrez was deportable due to his conviction, and that, because the conviction qualified as an aggravated felony under IIRIRA, Gutierrez was ineligible for any discretionary relief from deportation. Furthermore, the BIA rejected Gutierrez's claim that he had been denied the right to counsel and a fair hearing.

Gutierrez timely filed the instant pro se habeas corpus petition on November 3, 1999. The petition claims that the hearing denied Gutierrez both the right to counsel and the right to a full and fair hearing due to the IJ's denying Gutierrez's request for a

third adjournment in order to retain counsel, forcing Gutierrez, who was unprepared and untrained, to raise a defense unassisted. The government responded on February 22, 2000, and requested that decision in this case be held in abeyance pending the Second Circuit's resolution of Calcano-Martinez v. INS, No. 98-4033 (filed June 4, 1998) and companion cases, which would resolve the preliminary question of whether district courts have subject matter jurisdiction to review aliens' removal orders at all under the jurisdiction-stripping provisions of IIRIRA.

By order of April 13, 2000, this Court ordered a stay of Gutierrez's removal and held decision on the petition until the resolution of Calcano-Martinez. When the Second Circuit issued its opinion in that case, see Nos. 98-4033, 98-4214, 98-4216, 2000 WL 1336611 (2d Cir. Sept. 1, 2000), Gutierrez's petition was placed back on this Court's pending docket.

## Discussion

### I. This Court Has Jurisdiction Over Gutierrez's Petition

Although it argued that the permanent provisions of IIRIRA deprive this Court of jurisdiction over Gutierrez's habeas petition, the government requested that this case be held in

abeyance until the Second Circuit addressed the issue in Calcano-Martinez. On September 1, 2000, the Second Circuit held that "IIRIRA's permanent rules do not repeal a federal court's jurisdiction to review criminal aliens' removal orders by writ of habeas corpus under 28 U.S.C. § 2241." Calcano-Martinez, 2000 WL 1336611, at \*1. Under the clear mandate of Calcano-Martinez, this Court has habeas corpus jurisdiction over Gutierrez's petition.

## **II. Gutierrez's Right to Counsel Was Not Violated**

The fact that the IJ failed to adjourn the case for a third time to allow Gutierrez time to retain an attorney, and instead forced him to proceed unprepared, Gutierrez argues, violated his rights to counsel and due process.

Because deportation hearings are civil rather than criminal proceedings, aliens have no Sixth Amendment right to counsel. See Saleh v. United States Dep't of Justice, 962 F.2d 234, 241 (2d Cir.1992) (citing INS v. Lopez-Mendoza, 468 U.S. 1032, 1038, 104 S.Ct. 3479, 3483, 82 L.Ed.2d 778 (1984)). However, aliens in removal proceedings do have a statutory and regulatory right to the assistance of counsel, see 8 U.S.C. § 1229a(b)(4)(A) ("alien shall have the privilege of being represented, at no expense to the Government, by counsel of the alien's choosing who

is authorized to practice in such proceedings."); 8 U.S.C. § 1362 ("In any removal proceedings before an immigration judge . . . the person concerned shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose."); 8 C.F.R. § 240.3 ("The respondent [in a removal proceeding] may be represented at the hearing by an attorney or other representative qualified under 8 CFR part 292."), and are protected by the Fifth Amendment's Due Process Clause, see Montilla v. INS, 926 F.2d 162, 166 (2d Cir. 1991).

In order to ensure that an alien is aware of this right, the notice of appearance sent to the alien to advise of the hearing "shall advise that the alien: has the privilege of being represented, at no expense to the Government, by counsel of the alien's choosing, as long as counsel is authorized to practice in deportation proceedings." 8 C.F.R. § 238.1(b)(2)(i).<sup>1</sup> If the respondent seeks to be represented, the hearing may be adjourned, because, as the Supreme Court has stated, "a myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality." Ungar

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<sup>1</sup> The prior provision applicable in Montilla required that, at the initiation of the hearing, the IJ "advise the respondent of his right to representation, at no expense to the Government, by counsel of his own choice authorized to practice in the proceedings and require him to state then and there whether he desires representation." 8 C.F.R. § 242.16(a) (now reserved).

v. Sarafite, 376 U.S. 575, 589, 84 S.Ct. 841, 849, 11 L.Ed.2d 921 (1964). See also 8 C.F.R. § 240.6 ("After the commencement of the hearing, the immigration judge may grant a reasonable adjournment either at his or her own instance or, for good cause shown, upon application by the respondent or the Service.").

Although in general an alien may waive the right to counsel only if the record reflects that the alien specifically indicated that he knowingly wished to proceed without counsel, see Montilla, 926 F.2d at 169 (2d Cir. 1991), the Second Circuit has held that the right to counsel is not violated when, after two adjournments, the hearing proceeds without counsel, see Hidalgo-Disla v. INS, 52 F.3d 444 (2d Cir. 1995).

The facts of this case are strikingly similar to those in Hidalgo-Disla, where an alien adjudged deportable alleged a violation of his statutory right to counsel where, after two adjournments and a warning that there would be no more adjournments, the IJ proceeded with the hearing without defense counsel present. 52 F.3d 444. The Hidalgo-Disla Court found that, because the IJ had granted two adjournments for retaining counsel, and advised the alien of his right to counsel at each appearance, the fact that the hearing finally went forward without defense counsel did not violate the statutory right to counsel. Id., 52

F.3d at 447. "If an immigration judge could not proceed with a hearing, after two adjournments, without the alien's express waiver," the Second Circuit reasoned, "an alien seeking to stave off deportation would be able to win an infinite number of adjournments, and would be better off appearing without a lawyer than with one." Id.

Under Hidalgo-Disla, then, although Gutierrez gave no clear waiver of the right to counsel, the IJ did not violate Gutierrez's right to counsel by going forward with the hearing.

### **III. IIRIRA Bars Gutierrez from Relief from Deportation**

Finally, Gutierrez alleges that if he had been allowed more time to prepare, he could have made a stronger showing of hardship in support of his application for relief from deportation. However, for the reasons that follow, despite the undoubted hardship Gutierrez and his family will suffer if he is deported, Gutierrez is statutorily ineligible for the relief he seeks.

IIRIRA provides that resident aliens are deportable if they have been convicted of an aggravated felony, see 8 U.S.C. § 1227(a)(2)(A)(iii), or of a controlled substance law, see § 1227(a)(2)(B)(i). Section 1101(43)(B) defines an aggravated felony

as including a drug trafficking crime as set forth in 18 U.S.C. § 924(c), namely a state conviction for the sale of narcotics that would be subject to federal felony prosecution. Gutierrez's guilty plea to selling narcotics clearly qualifies as an "aggravated felony" under this standard.

Gutierrez alleges that the IJ impermissibly applied IIRIRA's bar to relief from deportation for aggravated felons to his case retroactively, and that, because the aggravated felony took place on January 7, 1997, he should still be eligible for relief from deportation under pre-IIRIRA law.

Several provisions in the former INA granted the Attorney General the discretion to waive deportation, including former INA §§ 212(c) and 212(h). Section 212(c) provided for discretionary waiver of deportation for convicted aliens who could prove that they lived in the United States continuously for at least 7 years, had not been convicted of one or more "aggravated felonies," and who had not served a term of five or more years in prison. See 8 U.S.C. § 1182(c)(1994). Former INA § 212(h) provided for discretionary waiver of deportation for aliens whose deportation would cause undue hardship to remaining family members. See 8 U.S.C. § 1182(h)(1994).

On April 24, 1996, Congress amended the INA through the Antiterrorism and Effective Death Penalty Act ("AEDPA"), Pub.L. No. 104-132, 110 Stat. 1214 et seq. (1996). Section 440(d) of AEDPA expanded the kinds of criminal convictions that would bar an alien from seeking § 212(c) relief. Section 440(d) deleted the language referring to one or more aggravated felony convictions and substituted the following:

This section shall not apply to an alien who is deportable by reason of having committed any criminal offense covered in section 241(a)(2)(A)(iii), (B), (C), or (D), or any offense covered by section 241(a)(2)(A)(ii) for which both predicate offenses are covered by section 2419A)(2)(A)(i).

AEDPA § 440(d), 110 Stat. at 1277 (codified by IIRIRA as INA § 237, 8 U.S.C. § 1227).

Soon thereafter, on September 30, 1996, Congress again amended the INA, this time by passing IIRIRA. IIRIRA included transitional rules, which provided that the Attorney General retained the discretion to grant relief from deportation under INA § 212(c) as amended by AEDPA § 440(d) for those aliens who were already in deportation proceedings prior to April 1, 1997. See IIRIRA § 309(c)(1), 110 Stat. at 3009-625 (stating that most IIRIRA amendments to INA do not apply to aliens in deportation proceedings prior to April 1, 1997); St. Cyr, 2000 WL 1234850, at \*5.

The permanent rules of IIRIRA, which applied to all other aliens, repealed INA § 212(c) relief in its entirety and channeled all formerly available methods of relief into a new procedure entitled "cancellation of removal." See 8 U.S.C. § 1229b(A)(3)(1999). This form of relief, set forth in IIRIRA § 304(a), was not available to aliens who have been convicted of any aggravated felony, as that term was more broadly defined by IIRIRA, but did restore the possibility of discretionary relief for aliens who had been found deportable for committing two or more crimes of moral turpitude. Id.

As removal proceedings did not begin against Gutierrez until January of 1999, the permanent rules of IIRIRA clearly apply to him. IIRIRA's permanent rules foreclose the availability of relief from deportation for aliens such as Gutierrez who have aggravated felony convictions entered after IIRIRA went into effect. See St. Cyr, 2000 WL 1234850, at \*12. As such, this Court has no authority to consider his claims for relief from deportation formerly available under the INA.

The harshness of this result under these circumstances is attributable to the Congressional mandate contained in IIRIRA, not the judgment of this Court.

**Conclusion**

For the foregoing reasons, the petition is dismissed.

It is so ordered.

New York, NY  
November 1, 2000

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ROBERT W. SWEET  
U.S.D.J.