



JRT  
YORK

FELIPE NUNEZ,

Petitioner,

-v.-

IMMIGRATION AND NATURALIZATION  
SERVICE, et al.,

Respondents.

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99 Civ. 3620 (LAP)(FM)

**AMENDED REPORT AND  
RECOMMENDATION  
TO THE HONORABLE  
LORETTA A. PRESKA**

**FRANK MAAS**, United States Magistrate Judge.

Petitioner Felipe Nunez (“Nunez”) is an alien currently being detained by the United States Immigration and Naturalization Service (“INS”). Nunez’s pro se habeas corpus petition pursuant to 28 U.S.C. § 2241 (1994) (“Petition” or “Pet.”) alleges that his due process rights were violated at his deportation hearing before an Immigration Judge (“IJ”) because he was not adequately informed of his right to legal representation and to appeal.

On August 1, 2000, I issued a Report and Recommendation in this matter, which I subsequently withdrew on August 17, 2000, so that I could consider the INS’s objections thereto. Having reviewed those objections, as well as the original Petition, I now issue this Amended Report and Recommendation, which again concludes that the Petition should be dismissed.

I. Background

A. Nunez’s Criminal History

Nunez is a thirty-five year old citizen of the Dominican Republic who entered the United States as a lawful permanent resident on or about December 22, 1983. (Decl. of Krishna R. Patel, Esq., dated Nov. 5, 1999 (“Patel Decl.”) Ex. A at 5, 37, 66). Since his arrival here, Nunez has twice been convicted of criminal offenses in state court. In January 1992, he pleaded

guilty to robbery in the second degree in Supreme Court, Kings County, and was sentenced to one and one-half to four and one-half years' imprisonment ("1992 conviction"). (Id. at 23-24). In August 1995, he was convicted of attempted robbery in the first degree in the same court and was sentenced to six to twelve years' imprisonment ("1995 conviction"). (Id. at 57-58). His 1995 conviction was affirmed on March 16, 1998, although his sentence was reduced by the Appellate Division to a term of four to eight years. People v. Nunez, 669 N.Y.S.2d 881, 248 A.D.2d 561 (2d Dep't 1998).

B. INS Proceedings

In October 1996, following the 1995 conviction, the INS instituted deportation proceedings against Nunez, pursuant to 8 U.S.C. § 1227(a)(2)(A)(iii), by order to show cause. (Patel Decl. Ex. A at 42, 66-69). Nunez responded by filing a motion to terminate his deportation proceeding, arguing that the 1995 conviction was not final because his appeal had not been decided. (Id. at 38-40).

In January 1997, the IJ commenced the first of three deportation hearings regarding Nunez ("January Hearing"). (Id. Ex. B at 1). During the January Hearing, the IJ, with the assistance of a Spanish interpreter, furnished Nunez with a written notice of his right to appeal any deportation order, stating

. . . Mr. Nunez, the first thing that I want you to do is reach forward on the table and take one copy of that paper in front of you. Those are the appeal rights that you will have you [sic] in case you ever get deported by this or any other Immigration Court. And, the law requires that you be given them in writing, so I have given you your copy now.

(Id. at 2). The IJ also informed Nunez of his right to have the assistance of counsel and gave him a list of agencies that provide free legal services:

Q Now, sir, you have the right to have a lawyer represent you in this court at no expense to the Government. That means if you get a lawyer though, sir, that means you would have to pay one yourself or get one from the list of free agencies you've already been given to come up here and do it for you. Do you have a lawyer now, sir?

A No.

Q Do you want some time to get yourself a lawyer to help you in your Immigration case?

A Yes.

Q All right, sir, I'm going to give you until the 10th of February at 8:30 in the morning and then I'll bring you back at that time.

(Id. at 3).

After agreeing to adjourn the hearing to permit Nunez to secure an attorney, the IJ advised him that the INS would seek to overcome the nonfinal nature of the 1995 conviction by relying, instead, on the 1992 conviction at a resumed hearing:

Q . . . Mr. Nunez, I and the immigration attorney both agree that your case from 1995 is on appeal. And, so long as you are still pending an appeal on this case, it cannot be used against you to deport you. But the trial attorney does not want to dismiss this case against you for another reason. He says that you have an older robbery conviction that he can use to have you deported and he says that case is not on appeal. So I wanted to let you know that that's what he said he's going to do is bring new charges against you for an older offense, which [he] can do. I would suggest

that you do your utmost to get yourself a lawyer and that you tell your lawyer that the Immigration attorney plans to bring a new

charge against you which is not on appeal. Do you understand that he plans to charge you for that, sir?

A Yes.

(Id. at 5).

At the conclusion of the hearing, Nunez asked the IJ, “If . . . I’m deported, will I get an early release?” (Id. at 6). The IJ responded that only the state authorities could determine when he would be released from custody on the 1995 conviction. (Id.).

The deportation hearing resumed in February 1997 (“February Hearing”), at which time the IJ granted the INS a further adjournment and administratively closed Nunez’s case until the INS could obtain the record of conviction for the 1992 conviction. (Id. at 9-10).

On or about August 19, 1997, the INS trial attorney filed a notice of “Additional Charges of Deportability” based upon the 1992 conviction. (Id. Ex. A at 31). Thereafter, the hearing resumed and was completed in September 1997 (“September Hearing”). (Id. Ex. B at 13). At the outset of the September Hearing, the IJ advised Nunez that the INS now also sought to deport him based on the 1992 conviction. (See id. at 14-15). The following colloquy then took place:

Q . . . Now Mr. Nunez, you have the right to have a lawyer represent you here at no expense to the Government. That means the Court will not give you a lawyer, but you must get your own if you get one. You may get a lawyer, either paying for one or trying to get one from the list that you’re already given to come and do it for nothing. If you cannot find your own lawyer, for whatever the reasons, you’re going to have to represent yourself with [sic] a lawyer in this court. Do you have a lawyer now, sir?

A No, I don't need a lawyer, I want to go back to my country.

Q Do you wish to waive the 14 days that you have before you can be made to answer this charge?

A Yes.

Q And, you wish to proceed today to be deported without a lawyer being present. Is that correct?

A Yes.

#### JUDGE FOR THE RECORD

Let the record reflect the respondent waived his right to counsel and also asked to be deported.

#### JUDGE TO MR. NUNEZ

Q Sir, I'm going to let you represent yourself. The other rights that you have is [sic] the right to present evidence, to object to evidence against you, to request any witnesses and appeal any final decision to the Board of Immigration Appeals.

(Id. at 15-16)(emphasis added).

After determining that Nunez had waived his right to counsel and wished to be deported before the expiration of the applicable 14-day waiting period, the IJ ruled that Nunez was an alien who could be deported based upon the 1992 conviction. (Id. at 17). The IJ then inquired whether Nunez wanted to appeal the deportation decision:

Q Now, Mr. Nunez, I'm going to order you deported this morning. Do you wish to go back to your native country?

A Yes.

Q You are hereby ordered deported to the Dominican Republic. Now, sir, . . . you may appeal my decision or you may accept it as final today. Do you accept it as final today?

A Yes, as final.

(Id. at 18).

On April 22, 1998, despite his previously expressed desire to waive any appeal, Nunez filed a pro se Notice of Appeal to the Board of Immigration Appeals (“BIA”). (Id. Ex. A at 17). In that notice, Nunez claimed he was denied his right to a full and fair hearing when the Immigration Judge failed to grant him an adjournment “to find an attorney willing to represent him and . . . prepare a defense to the charges.” (Id.). Nunez further alleged that he was denied due process by not being allowed to present evidence to establish his eligibility for relief, and that the IJ “abused his discretion by failing to properly weigh and balance positive factors in determining whether a waiver of inadmissibility was warranted . . . .” (Id.).

On May 29, 1998, the BIA dismissed Nunez’s appeal, finding that he had knowingly and intelligently waived his right to an appeal during the September Hearing, and, therefore, that “[t]he Immigration Judge’s decision became administratively final upon the respondent’s waiver of his right to appeal.” (Id. Ex. A at 14). The BIA further held that it “lack[ed] jurisdiction over this case” based upon that waiver. (Id. (citing Matter of Shih, 20 I & N Dec. 697 (BIA 1993)(holding that decision of IJ is final after alien is notified of right to appeal and waives that right)).

On October 16, 1998, Nunez moved to have the BIA reopen or reconsider his case. (Id. at 5). On March 8, 1999, the BIA, denied both branches of Nunez’s motion. (Id. at 2). The BIA noted that, under 8 C.F.R. § 3.2, a motion to reconsider must be filed within thirty days,

and a motion to reopen within ninety days, of a final administrative decision. The BIA concluded that Nunez had not met either deadline. (Id. at 2).

C. Petition

On March 26, 1999, Nunez filed his Petition which alleges that he was deprived of due process because he did not receive a full and fair hearing. More specifically, Nunez contends that his waiver of counsel was ineffective because he was not properly informed of his right to counsel. (Pet. at 8-9). Nunez further contends that his waiver of any appeal during the September Hearing was not considered and intelligent because he was “angry and confused” and, therefore, acted “inadvertently.” (Pet. at 7-8, 11).

II. Discussion

A. Subject Matter Jurisdiction

In 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”), Pub. L. No. 104-132, 110 Stat. 1214, et seq. (1996), which was signed into law by the President on April 24, 1996. Section 440(a) of the AEDPA added a subsection, codified at § 106(a)(10) of the Immigration and Naturalization Act (“INA”), 8 U.S.C. § 1105(a)(a)(10), which precludes “review by any court” of any “final order of deportation against an alien who is deportable by reason of having committed [an aggravated felony] covered in [INA] section 241(a)(2)(A)(iii). . . .” See Hincapie-Nieto v. INS, 92 F.3d 27, 29 (2d Cir. 1996). Additionally, Section 401(e) of the AEDPA repealed former INA § 106(a)(10), which had permitted an alien held in custody under an order of deportation to obtain judicial review of that determination pursuant to a habeas corpus proceeding. “The explicit goal of the AEDPA was to enhance ‘the ability of the United States to deport criminal aliens.’” St. Cyr. v. INS, 229 F.3d

406, 411 (2d Cir. 2000)(quoting H.R. Conf. Rep. No. 104-518, at 119 (1996), reprinted in 1996 U.S.C.C.A.N. 924, 952), petition for cert. filed, \_\_\_ U.S.L.W. \_\_\_ (U.S. Nov. 13, 2000) (No. 00-767).

Several months later, Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (“IIRIRA”), Pub. L. No. 104-208, 110 Stat. 3009-546, et seq. (1996), in a further effort to reform the INA.<sup>1</sup> IIRIRA contains a set of: (i) “transitional rules” (not codified in the United States Code) which apply to deportation proceedings commenced on or before April 1, 1997, against a person as to whom a final order of deportation is entered on or after October 31, 1996; and (2) “permanent rules” which apply to removal proceedings commenced after April 1, 1997. See IIRIRA § 309(c)(4). The transitional rules apply in this case because Nunez’s deportation proceedings were commenced before April 1, 1997, and the final deportation order was issued after October 1996.

IIRIRA also included a successor provision to AEDPA § 440(a) barring judicial review of removal orders when a person is found deportable based upon an aggravated felony conviction. See 8 U.S.C. § 1252(a)(2)(c).<sup>2</sup>

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<sup>1</sup> Prior to the passage of IIRIRA, the INA provided for aliens to be expelled from the United States pursuant to “exclusion” and “deportation” proceedings. For cases commenced after April 1, 1997, there is now only a single “removal” proceeding. See 5 Charles Gordon, et al., Immigration Law and Procedure § 64.01[1] (2000). Although Nunez’s deportation proceedings were commenced before April 1, 1997, this Report and Recommendation uses the terms “deportation” and “removal” interchangeably.

<sup>2</sup> Under IIRIRA, the definition of an “aggravated felony” was amended to include “a theft offense . . . or burglary offense for which the term of imprisonment [is] at least one year[.]” 8 U.S.C. § 1101(a)(43)(G). See generally United States v. Pacheco, 225 F.3d 148, 152-53 (2d Cir. 2000).

Despite these changes, the Second Circuit has held that the general power to grant writs of habeas corpus pursuant to 28 U.S.C. § 2241 authorizes the federal courts to continue to review deportation orders. See Henderson v. INS, 157 F.3d 106, 122 (2d Cir. 1998) (“[W]e hold that the federal courts have jurisdiction under § 2241 to grant writs of habeas corpus to aliens when those aliens are ‘in custody in violation of the Constitution or laws or treaties of the United States.’”), cert. denied sub nom. Navas v. Reno, 526 U.S. 1004, 119 S. Ct. 1141, 143 L. Ed. 2d 209 (1999); Jean-Baptiste v. Reno, 144 F.3d 212, 220 (2d Cir. 1998) (“[W]e join other courts in holding that § 2241 habeas review survives the amendments to the INA enacted by [IIRIRA.]”), reh’g denied, 175 F.3d 226 (2d Cir. 1999); see also Calcano-Martinez v. INS, \_\_\_ F.3d \_\_\_, \_\_\_, 2000 WL 1336611, at \*2 (2d Cir. Sept. 1, 2000) (“We . . . hold 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.”); Oliva v. INS, No. 98 Civ. 6526, 1999 WL 61818, at \*3 (S.D.N.Y. Feb. 10, 1999)(Koeltl, J.) (“In the absence of further clarification from the Supreme Court or the Court of Appeals for the Second Circuit, this Court has jurisdiction to entertain a petition for habeas corpus under § 2241 to determine whether the continued custody of [a] petitioner is in violation of the Constitution or laws of the United States.”). Accordingly, notwithstanding the jurisdiction-stripping provisions of the AEDPA and IIRIRA, this Court can entertain Nunez’s habeas corpus petition.

B. Exhaustion of Remedies

The Government maintains that, notwithstanding its general habeas authority, this Court lacks subject matter jurisdiction to review the INS deportation order because Nunez did not exhaust his administrative remedies. It is, of course, settled law that a failure to exhaust such available remedies divests a court of jurisdiction. See, e.g., Bastek v. Federal Crop Ins. Co., 145

F.3d 90, 93-95 (2d Cir. 1998); Howell v. INS, 72 F.3d 288, 291 (2d Cir. 1995); Salazar v. Reich, 940 F. Supp. 96, 98 (S.D.N.Y. 1996). Indeed, IIRIRA contains an express provision to that effect. See 8 U.S.C. § 1252(d)(1)(“A court may review a final order of removal only if - (1) the alien has exhausted all administrative remedies available to the alien as of right”).

As noted above, during the September Hearing, Nunez waived his right to appeal and consented to his immediate deportation. (Patel Decl. Ex. B at 15-18). The Government argues that he consequently has not exhausted his administrative remedies, a step which is a necessary prerequisite to review of his claims. See United States v. Sanchez-Peralta, No. 97 Cr. 536, 1998 WL 63405, at \*11 (S.D.N.Y. Feb. 13, 1998)(Preska, J.)(alien who “validly waived his right to all direct review of his deportation order . . . failed to exhaust administrative remedies”); Carr v. McElroy, No. 97 Civ. 7810, 1998 WL 315475, at \*1 (S.D.N.Y. June 16, 1998)(Koeltl, J.)(by waiving appeal of IJ’s ruling, “petitioner has failed to exhaust his administrative remedies and his petition for habeas corpus before this Court is therefore precluded”).

The wrinkle in this case is that Nunez contends that he cannot be bound by his waiver of the right to appeal because it was not made knowingly and intelligently. Such an attack on the finality of a removal order arises most frequently in the context of criminal prosecutions of aliens who are charged under 8 U.S.C. § 1326(a) with the crime of reentering this country without the consent of the Attorney General after previously having been deported. See, e.g., U.S. v. Mendoza-Lopez, 481 U.S. 828, 830-31, 107 S. Ct. 2148, 2151, 95 L. Ed. 2d 772 (1987); United States v. Fares, 978 F.2d 52, 55 (2d Cir. 1992); Sanchez-Peralta, 1998 WL 63405, at \*1. Although careful judicial scrutiny plainly is warranted when an alien faces criminal prosecution on the basis of a prior deportation proceeding, the case law under Section 1326(a) also illuminates the issues that the Court should consider in this civil proceeding to determine whether Nunez’s

attack on his deportation proceeding implicates constitutional issues. As Your Honor suggested in Sanchez-Peralta, 1998 WL 63405, at \*8-9, an alien seeking to challenge a deportation order despite his failure to file an administrative appeal should be required to establish either that he was not warned of his right to appeal or that his waiver of that right was not knowing, intelligent and voluntary. See also United States v. Loaisiga, 104 F.3d 484, 487 (1st Cir. 1997)(collateral attack on final deportation order requires showing of prejudice “in the sense of a reasonable likelihood that the result would have been different if the error in the deportation proceeding had not occurred”).

In this case, Nunez advances both arguments. In an effort to overcome his clear failure to exhaust his administrative remedies, Nunez contends that he (i) did not receive adequate notice of his right to appeal and (ii) could not have engaged in a considered waiver of that right since he lacked the assistance of counsel.

C. Notice of Right to Appeal

Turning to the first of these contentions, INS procedures require an IJ to provide an alien with written notice of his right to appeal. See 8 C.F.R. § 240.48(a)(at opening of hearing, IJ “shall ascertain that the respondent has received . . . a copy of Form I-618, Written Notice of Appeal Rights”). In keeping with that requirement, the original INS order to show cause contained a notice in English and Spanish indicating that Nunez would “have the right to appeal” and that the IJ would provide him with his appeal rights. (Patel Decl. Ex. A at 43). At the January Hearing, Nunez acknowledged receiving a copy of that order to show cause. (Id. Ex. B at 2). In addition, in accordance with the order to show cause and the requirements of the C.F.R., the IJ began the January Hearing by instructing Nunez to take a copy of his written appeal rights from the table in front of him, stating that these were the rights that would apply “in case

you ever get deported by this or any other Immigration Court.” (Id.). Finally, at the September Hearing, the IJ again noted that he had “just had the officer hand Nunez . . . a copy of [his] written appeal rights,” and instructed him, “You keep that paper and if you ever need it, it tells you how to appeal your case if you’re ever ordered deported by any judge.” (Id. at 14-15).

Although the IJ never expressly stated that he was giving Nunez a copy of INS Form I-618, the record clearly indicates that the INS furnished him with two copies of its standard written advice of the right to appeal a deportation order. Moreover, Nunez has not alleged that either of the two forms that he received was deficient in any respect. Accordingly, the only reasonable inference is that, notwithstanding his protestations to the contrary, (see Pet. at 12), Nunez was given a copy of Form I-618 or its substantial equivalent. Nunez therefore has not adduced the sort of clear evidence needed to overcome the presumption of regularity that courts typically accord to the acts of public officers. See Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416, 91 S. Ct. 814, 824, 28 L. Ed. 2d 136 (1971), rev’d on other grounds sub nom. Califano v. Sander, 430 U.S. 99, 105, 97 S. Ct. 980, 984, 51 L. Ed. 2d 192 (1977); United States v. Chemical Found., 272 U.S. 1, 14-15, 47 S. Ct. 1, 6, 71 L. Ed. 131 (1926); United States v. Dercacz, 530 F. Supp. 1348, 1352 (E.D.N.Y. 1982)(Neaheer, J.)(applying presumption in action to revoke United States citizenship). There consequently is no basis for his claim that the IJ failed to advise him adequately concerning his right to appeal.

D. Right to Counsel

Nunez also argues that his waiver of the right to appeal was not considered and intelligent because he was inadequately advised of his right to counsel and did not have sufficient opportunity to seek legal advice. (Pet. at 10). In a deportation case, unlike a criminal proceeding, the accused alien does not have the right to be provided with counsel at the

Government's expense. See 8 C.F.R. §§ 3.16(b), 240.48(a). Nevertheless, INS regulations require that the IJ advise the alien at the start of the hearing of his or her right to secure counsel of the alien's choice at no expense to the Government and of the availability of free legal services through certain programs, organizations, and attorneys. 8 C.F.R. § 240.48(a). Following the rendering of such advice, the IJ must "require [the alien] to state then and there whether he . . . desires representation." Id.

In this case, the record establishes that Nunez received the proper advice concerning legal representation at the outset of the January Hearing and waived both the assistance of counsel and an adjournment to secure counsel. (Patel Decl. Ex. B at 3). Similarly, at the September Hearing, Nunez again was advised of his right to counsel, but cut the discussion short, stating, "No, I don't need a lawyer, I want to go back to my country." (Id. at 15). He went on to declare that he wanted to be deported that day without a lawyer being present to represent him. (Id. at 16).

Despite his contemporaneous statements, Nunez now contends that counsel was essential because he was confused by, among other things, the continued pendency of his appeal from the 1995 conviction at the time of the September Hearing. (See Pet. at 7)(petitioner was "confused" because he spent five hours getting to court and "angry" because the proceeding had previously been closed at the February Hearing). Contrary to this assertion, the record establishes that the IJ fully informed Nunez during the February Hearing of the INS's intention to rely on the 1992 conviction as a basis for deportation. (Patel Decl. Ex. B at 14-15). The IJ also took care to explain for a second time at the September Hearing that the INS was relying on the 1992 conviction as a basis for deportation, and Nunez stated that he understood. (Id.). Thereafter, Nunez volunteered, "I want to go back to my country" and he waived the 14-day period which

the INS otherwise would have had to wait before he could be required to answer the charge that he was deportable on the basis of the 1992 conviction. (Id. at 15-16). In short, the record establishes that Nunez was fully aware of the specific charges against him before he waived his right to appeal the deportation order.

### III. Conclusion

In sum, Nunez has not shown that he is being held in custody “in violation of the Constitution or laws or treaties of the United States.” 28 U.S.C. § 2241. His habeas petition consequently should be dismissed.

### IV. Notice of Procedure for Filing of Objections to this Report and Recommendation

The parties are hereby directed that if they have any objections to this Report and Recommendation, they must, within ten (10) days from today, make them in writing, file them with the Clerk of the Court, and send copies to the chambers of the Honorable Loretta A. Preska, United States District Judge, at the United States Courthouse, 500 Pearl Street, New York, NY 10007, to the chambers of the undersigned, at the United States Courthouse, 500 Pearl Street, New York, NY 10007, and to any opposing parties. See 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 6(a), 6(e), 72(b). Any requests for an extension of time for filing objections must be directed to Judge Preska. The failure to file timely objections will result in a waiver of those objections for purposes of appeal. See Thomas v. Arn, 474 U.S. 140, 106 S. Ct. 466, 88 L. Ed. 2d 435 (1985); 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 6(a), 6(e), 72(b).

Dated:           New York, New York  
                  December 12, 2000

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FRANK MAAS

United States Magistrate Judge

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