06-5412-cr

To Be Argued By:
JOHN H. DURHAM

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 06-5412-cr

UNITED STATES OF AMERICA,
Appellee,

-vs-

GONCALO RODRIGUES,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

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BRIEF FOR THE UNITED STATES OF AMERICA

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STATEMENT OF JURISDICTION

The defendant, Goncalo Rodrigues, appeals from the November 20, 2006, final judgment of conviction and sentence entered against him in the United States District Court for the District of Connecticut (Arterton, J.) following his earlier conditional guilty plea. This Court has jurisdiction over the defendant's appeal pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether under the "plain error" rule the defendant forfeited his right to make claims related to this Court's decisions in *Lopez, Calderon,* and *Copeland*.

II. Whether the district court erred in concluding that the defendant failed to establish his deportation proceedings improperly deprived him of the opportunity for judicial review where he was aware of the opportunity for such review and chose not to pursue it.

III. Whether the district court erred in concluding that the defendant failed to establish ineffectiveness of counsel.

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Preliminary Statement

The defendant, Goncalo Rodrigues, is a citizen of Portugal who on June 28, 1994, was convicted of an aggravated felony in the Connecticut Superior Court. In August 1997, after the effective date of the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"), federal immigration authorities initiated proceedings to remove him from the United States on the grounds that he was an aggravated felon. Rodrigues sought relief from being deported under the provisions of § 212(c) of the

Immigration and Nationality Act, 8 U.S.C. § 1182(c) (repealed 1996), but the Immigration Judge ("IJ") hearing the matter found that AEDPA rendered him ineligible for discretionary relief from deportation.

The IJ ordered Rodrigues removed, and on appeal the Board of Immigration Appeals ("BIA") affirmed. Despite having retained counsel who advised him that additional review of the deportation order was available, and notwithstanding the fact that he had the financial ability to pursue such a review, the defendant elected not to seek judicial review of the BIA's affirmance of the IJ's removal order.

After being physically removed from the United States on April 22, 1999, and illegally re-entering the country shortly thereafter, the defendant was arrested in Naugatuck, Connecticut and subsequently convicted of Attempted Assault on a Peace Officer, Conn.Gen.Stat. § 53a-167c. After Connecticut Department of Corrections officials advised immigration authorities that they had Rodrigues in their custody, he was indicted by a federal grand jury for Illegal Re-Entry of a Removed Alien, 8 U.S.C. § 1326(a) and (b)(2).

The defendant now challenges the district court's denial of his motion to dismiss the indictment based on its findings that the deportation proceeding did not improperly deny him the opportunity for judicial review and counsel was not ineffective.

This Court should affirm the district court's denial of the motion to dismiss because the defendant did not raise all but one of the claims he advances here and he failed to

establish before the district court that the deportation proceedings deprived him of the opportunity for judicial review. Indeed, the evidence presented to the district court established that the defendant was represented by retained counsel before both the IJ and BIA, that retained counsel advised him that further review was available, that retained counsel was prepared to continue in his representation of Rodrigues in connection with the filing of a petition for review or habeas corpus petition, and that retained counsel was prepared to aid the defendant in securing the assistance of other counsel for such purposes if the defendant desired him to do so. Having decided not to seek judicial review of the immigration proceedings either prior to his removal from the United States, or at anytime thereafter, on the facts of this case the district court's denial of his motion to dismiss was proper and should be affirmed by this Court.

Statement of the Case

On August 24, 2005, the Defendant was indicted by a federal grand jury in the District of Connecticut for Illegal Re-Entry of a Removed Alien following conviction for an aggravated felony, in violation of 8 U.S.C. § 1326(a) and (b)(2). JA 11.

On October 17, 2005, the defendant filed a motion to dismiss the indictment, claiming that he had been denied due process at his deportation hearing and, further, that his retained counsel provided ineffective assistance during the deportation proceedings.

On January 6, 2006, and February 23, 2006, the district court conducted hearings to allow the defendant the

opportunity to present evidence and argument in support of his motion. On May 30, 2006, the court issued a written ruling denying the defendant's motion to dismiss. JA 355. On June 2, 2006, the defendant filed a motion to reconsider, and on June 15, 2006, the district court filed a written ruling denying the motion for reconsideration. JA 371.

On July 25, 2006, pursuant to Fed.R.Crim.P. 11(a)(2), Rodrigues entered a conditional guilty plea to the one-count indictment charging him with Illegal Reentry. JA 386. On November 20, 2006, the district court sentenced Rodrigues to 13 months' incarceration to be followed by a supervised release period of 36 months. JA 426-428.

On November 22, 2006, the defendant filed a timely Notice of Appeal. JA 429.

Statement of Facts

A. Background

On July 16, 2002, the defendant, who on April 22, 1999, had been removed from the United States as an aggravated felon, JA 143, was arrested in Naugatuck, Connecticut for Attempted Assault in the 1st Degree after he attempted to run over a police officer with a motorcycle. JA 147-149, 351, 358. The Defendant ultimately entered an *Alford* plea to the charge of Attempted Assault on a Peace Officer, and on March 21, 2005, was sentenced to five years' incarceration, execution suspended after one year, and three years' probation.

On August 24, 2005, a federal grand jury sitting in New Haven, Connecticut returned a one-count indictment against Rodrigues charging him with Illegal Re-entry of a Removed Alien, in violation of 8 U.S.C. § 1326(a) and (b)(2). *United States v. Rodrigues,* Docket No. 3:05CR207 (JBA). The defendant moved to dismiss the indictment claiming in his memorandum of law in support of the dismissal motion that he had been denied due process at his deportation hearing and that his retained counsel, Attorney Carlos Santos, had provided him with ineffective assistance during the proceedings. GA 01-02; GA 03-27.

B. Appellant's Removal Proceedings and Election Not to Seek Judicial Review

During the formal removal hearing held before the IJ on January 12, 1998, Rodrigues conceded that he was an aggravated felon and a person involved with a crime of moral turpitude. JA 341. As reflected in his criminal record,[1] prior to January 12, 1998, and specifically in June 28, 1994, Rodrigues had been convicted in the Connecticut Superior Court in separate cases of Larceny in the 2d Degree and Larceny in the 4th Degree. On February 2, 1996, he was convicted of Reckless Endangerment in the 1st Degree. On that same date, he was found to be in violation of the probationary sentences he received on the June 28, 1994 larceny convictions. JA 139, 348-49; *see*

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[1] While not reflected on his criminal history sheet, the defendant testified that his first arrest occurred when he was a freshman at Crosby High School in Waterbury. Rodrigues brought a firearm to school and sold it knowing that his conduct was illegal. JA 133.

also JA 95-96. He was sentenced to a period of incarceration for violating his probation and served approximately 2½ years. JA 99-100.

Immigration charges were initiated against the defendant on or about April 29, 1996, when he was served an Order to Show Cause. GA 05; JA 100, 339. The defendant retained private counsel, namely Attorney Carlos Santos, to represent him in the immigration proceedings. JA 308. During the course of his representation before the IJ, Attorney Santos filed a Motion for Waiver of Deportation pursuant to § 212(c) of the INA. JA 302-303. The IJ ultimately denied the motion while issuing its order directing that the defendant be deported to Portugal. The IJ based the ruling on his belief that Rodrigues was statutorily ineligible for such relief. JA 339, 343-344, 350.

The defendant reserved his right to appeal the deportation order, JA 344, 350, and, in fact, appealed the decision through his retained counsel to the Board of Immigration Appeals ("BIA"). On or about February 2, 1998, Attorney Santos filed the defendant's "Reasons for Appeal," JA 309-313, which focused specifically on the issue of whether it was proper to apply the Anti-Terrorism and Effective Death Penalty Act ("AEDPA") limitations on § 212(c) relief retroactively. The Defendant, through Attorney Santos, also filed a brief in support of his appeal arguing that the retroactive application of § 440(d) of AEDPA, which eliminated § 212(c) relief for persons who found themselves in deportation proceedings, but not those who had been placed in exclusion proceedings, violated principles of due process and equal protection of the law. JA 330-334.

While awaiting the BIA's decision, Rodrigues completed his state sentence, and on March 18, 1998, was released from custody after posting a $10,000 cash bond with the Immigration Court. JA 54, 100, 314-316.

On January 12, 1999, the BIA issued a written opinion denying Rodrigues' appeal from the IJ's deportation order. In doing so, the BIA upheld the IJ's finding that the defendant-appellant was statutorily ineligible for such relief because he was an "alien who [was] deportable by reason of having committed an[] offense covered in 241(a)(2)(A)(iii), (B), (C), or (D) . . . without regard to the date of [its] commission . . . ." JA 336-337. (citing *Matter of Soriano*, Interim Decision 3289 (A.G., Feb. 21, 1997); *Matter of Cazares-Alvarez*, Interim Decision 3262 (BIA 1996, 1997; A.G. 1997); and *Matter of Ponce de Leon-Ruiz*, Interim Decision 3261 (BIA 1996, 1997; A.G. 1997)).

After receiving the BIA opinion, Attorney Santos engaged in additional research efforts regarding the legal issues involved, spoke with the American Civil Liberty Union, the Connecticut Civil Liberties Union, the Legal Aid Society, and an experienced immigration lawyer who had been providing earlier assistance to Attorney Santos, namely Attorney James Swaine. JA 29, 32-33, 34, 42. Attorney Santos conducted the additional research and spoke with these various entities and attorneys prior to discussing additional options for judicial review with Rodrigues. Attorney Santos also researched habeas corpus options, JA 45, and retrieved a lengthy petition for review filed in a case similar to Rodrigues's. JA 34.

Attorney Santos then met with the defendant to discuss the additional options available to him and their cost. JA 42, 56-57. He explained to Rodrigues that the BIA's decision was unfavorable in that it followed the decision in *Matter of Soriano, supra*. He also told the defendant that he had spoken with the CCLU and another attorney (Attorney Swaine) about pursuing judicial review of the decision which would cost approximately $3,500. JA 32-33, 55, 56. Attorney Santos was prepared at all times to seek judicial review of the IJ and BIA decisions via a petition for review or habeas relief, JA 68-69, or assist in finding other counsel to help the defendant in doing so, *Id*. at 69.

Rodrigues advised Attorney Santos that the firm was holding funds of his which should be sufficient to pay for the review of the BIA's decision, and Attorney Santos advised that Rodrigues would need to discuss the fee question with the partner in the firm who was handling Rodrigues's accounts, namely Attorney Ned Fitzpatrick. JA 33. Rodrigues proceeded to meet and have a falling out with Attorney Fitzpatrick over the question of fees. JA 35, 39, 59.

Attorney Santos did not hear from Rodrigues again, JA 58, 71, nor was he ever contacted by new counsel, JA 62, although it was his understanding that the defendant had hired another attorney who had requested the defendant's immigration file. JA 81. In this regard, at a point in time sometime after the fee dispute had arisen, the

defendant appeared unannounced at the law firm's offices and picked up his immigration file. JA 43.[2]

Despite the fact that Rodrigues testified before the district court that he had more than sufficient resources to pay for a judicial review of the IJ and BIA decisions, JA 157, 166, 177-178, 181, the defendant chose not to file for further review of the deportation order in either the immigration courts or the federal courts. JA 185-186.

Accordingly, on April 22, 1999, U.S. immigrations authorities deported him by a flight from JFK Airport in New York to Lisbon, Portugal. JA 323-325.

C. Indictment and Proceedings Before the District Court

Shortly after the defendant was deported on April 22, 1999, he illegally re-entered the country and was back in Connecticut in time for the birth of his girlfriend's child in June 1999. JA 105-106, 358. The defendant's presence, however, remained undetected by authorities until he was arrested on July 16, 2001, for attempting to run over a uniformed Naugatuck, Connecticut police officer with a motorcycle. JA 148-149, 358. Initially charged with Attempted Assault in the 1st Degree, he ultimately entered an *Alford* plea on March 21, 2005, to Attempted Assault

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[2] Rodrigues testified that he did not seek a second legal opinion until after he was deported and had been back in the United States for some time. JA 124, 128. The defendant elected not to call the attorney he consulted as a witness during the hearing conducted by the district court.

on a Peace Officer, Conn. Gen. Stat. § 53a-167c, for which he received a sentence of five years' incarceration, execution suspended after one year, three years' probation. JA 358.

On August 1, 2005, the Connecticut Department of Corrections advised immigration authorities that Rodrigues, an alien, was in its custody. GA 09. Immigration authorities investigated the matter and on August 24, 2005, a federal grand jury sitting in New Haven returned a one-count indictment against the defendant charging him with Illegal Re-entry of a Removed Alien, in violation of 8 U.S.C. § 1326(a) and (b)(2). JA 11.

Thereafter the defendant, represented by retained counsel, filed a motion to dismiss the indictment in which he asserted two claims: *first*, that the defendant's due process rights were violated by the rulings of the IJ and the BIA that he was ineligible for § 212(c) relief, and *second*, that his retained counsel was ineffective and the defendant was prejudiced by the ineffectiveness. GA 01-02. The defendant also submitted a legal memorandum in support of his two claims. GA 03-27.

On January 6, 2006 and February 15, 2006, the district court conducted an evidentiary proceeding on the defendant's motion. During those proceedings, the defendant called two witnesses in support of his claims: the defendant's previously retained counsel, Attorney Carlos Santos, of the firm then known as Fitzpatrick & Mariano, and the defendant. JA 16-91; 94-196, 209-217. Attorney Santos testified that prior to the defendant's immigration case, his firm had represented the defendant

in numerous criminal matters and automobile accident cases. JA 18. Attorney Santos personally had represented the defendant in one of the civil cases involving an automobile accident. JA. 18, 46.

Attorney Santos testified that because the defendant's immigration case was the first such matter he had handled, he conducted lengthy legal research to explore possible defenses to the deportation application and consulted with Attorney James Swaine, an experienced and highly regarded immigration attorney in New Haven. JA 22, 359. As a result of these efforts, the motion requesting a waiver of deportation and a brief addressing the § 212(c) question were prepared and filed on the defendant's behalf by Attorney Santos. JA 22, 49, 302-304.

The Immigration Judge, however, ruled against the defendant, finding him ineligible for § 212(c) relief and ordering him deported to Portugal. JA 343-344. Attorney Santos explained that he consulted further with Attorney Swaine, and he (Attorney Santos) then prepared and filed with the Board of Immigration Appeals a statement of "Reasons for Appeal," JA 311-313, and, subsequently, a brief in support of the defendant's arguments. JA 330-335, 50-51. Again he argued that the defendant was entitled to § 212(c) relief and, further, that the retroactive application of the AEDPA provisions relating to such discretionary relief violated principles of equal protection and due process. JA 332-334.

Attorney Santos testified that when the Board of Immigration Appeals rejected the defendant's claims and affirmed the deportation order issued by the Immigration

Judge, he continued in his efforts on the defendant's behalf. JA 28. He not only did additional research into the alternatives of filing a petition for review and/or habeas relief, he also contacted the ACLU, CCLU, Legal Aid and Attorney Swaine about possible representation of the defendant in the next stages of review. JA 29.

Attorney Santos met soon thereafter with the defendant to discuss the Board of Immigration Appeal's decision and the next steps in the process which could be pursued. JA 41, 42. After beginning the discussion of the options available to him, including what Mr. Santos testified he would have referred to as an "appeal to the U.S. District Court," when speaking with the defendant, JA 56-57, and the cost of such an undertaking, the defendant said Mr. Santos' firm was holding adequate funds belonging to him to cover the cost. JA 57. Attorney Santos stated that the defendant became upset about the discussion of fees and he told the defendant the fee aspects of the representation was a matter he should take up with a partner in the firm, Attorney Fitzgerald. *Id.* The defendant decided to do so, and Attorney Santos learned that there had been a falling out over the question of fees between the defendant and Attorney Fitzgerald, the result of which was that the defendant never requested or directed Attorney Santos to pursue any form of judicial review on his behalf. At a later point in time, the defendant came and picked up his immigration file from the law firm. JA 59-60.

Finally, Attorney Santos expressly testified that he never told the defendant he should abandon thoughts of pursuing further review of the deportation order, JA 68, and, again, if the defendant had requested him to seek

judicial review of the matter, he would have done whatever was necessary to accomplish that task. *Id*.

The defendant's testimony before the district court was largely self-serving and suffered from a serious lack of credibility. For example, the defendant asserted during his direct examination that he did not recall even being in the courtroom to hear the IJ issue his deportation order. JA 112. Yet when confronted with the transcript of the proceeding on cross-examination, Rodrigues corrected his testimony and admitted he was in fact present in court at the time the verbal order was issued. Further, at that time his right to appeal the IJ's ruling was placed on the record in his presence. JA 211-213.

In apparent support of his ineffectiveness claim, the defendant also testified that he did not remember Attorney Santos ever filing an appeal of the IJ's deportation ruling. JA 115. Further, the defendant stated that after the IJ ruled, Attorney Santos merely told him "the laws are locked" and there was nothing that could be done. JA 114. The defendant had to correct his testimony regarding no appeal being filed with the BIA when his lawyer refreshed his recollection with a copy of the appeal papers.
JA 116. As to his assertion that Attorney Santos told him there was nothing that could be done because "the laws [were] locked," the district court found that the testimony was not credible. JA 367.

The defendant conceded during cross-examination that he in fact had been made aware of the BIA's decision and he had the money to pursue further judicial review of the

decision.[3] JA 185-186. Rodrigues also admitted that he decided not to hire another lawyer to represent him, or to seek judicial review of the BIA's ruling. JA 187.

The district court ultimately found that Attorney Santos took appropriate steps to properly prepare the defendant's case. He attended seminars, consulted with an experienced, capable immigration attorney, obtained model pleadings, and filed a brief with the immigration authorities which raised and discussed the very issue the defendant argues should have been raised by way of judicial review, that is, the non-retroactive applicability of § 440(d) of AEDPA. JA 366. In addition, the district court credited the testimony of Attorney Santos that the reason he did not undertake further legal action on behalf of Rodrigues was the unresolved fee dispute. JA 317. Further, the district court noted that the defendant did not dispute the sworn testimony of Mr. Santos regarding the fee dispute, or that he (Rodrigues) never contacted Attorney Santos after February 1999. JA 367.

Finally, the district judge, who observed the defendant testify on January 6, 2006, and February 15, 2006, found "lacking in persuasiveness" the defendant's testimony that

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[3] The defendant insisted that he had the money to seek a review of the deportation order, including large sums from automobile accident payouts, JA 90, 151, 180-181, his employment, JA 124-125, 179, and the financial support of his father and sister. JA125. There is no dispute that, at a minimum, the defendant had available the $10,000 in cash he used to post the bond in his immigration case. JA 107-108, 177, 314-316.

Attorney Santos told him the "laws were locked" and there were no further legal steps worth taking. *Id.*

SUMMARY OF ARGUMENT

Defendant argues that his deportation proceedings deprived him of the opportunity for judicial review of the deportation order, and, therefore, the district court should have dismissed the Illegal Re-Entry indictment brought against him. In doing so, Rodrigues for the most part relies on a line of cases and arguments not advanced before the district court in his written submissions, presentation of evidence, or oral argument.

1. The defendant failed to raise the *Lopez-Calderon-Copeland* line of cases before the district court in support of his argument that the instant indictment should have been dismissed because he was improperly deprived of the opportunity for judicial review under 8 U.S.C. § 1326(d)(2). Accordingly, under the "plain error" standard of review, the defendant should be deemed to have forfeited his right to have all but his last claim reviewed on appeal.

2. The defendant argued before the district court that the indictment should be dismissed because he was denied his Fifth Amendment right to due process in his immigration hearing and he received ineffective assistance of counsel. The district court specifically found that the defendant did not pursue further appeals because of a fee dispute with his lawyers. The court's finding squarely places the responsibility for the failure to seek habeas relief on the defendant. Accordingly, Rodrigues is quite

unlike the defendants in *Lopez, Calderon,* and *Copeland* who can be said to have been constructively deprived of the realistic opportunity for judicial review by the actions of third parties.

3. Since the defendant chose not to avail himself of the opportunity for judicial review of his immigration proceedings, despite having been advised of that opportunity by his retained counsel and his having the financial resources to pursue such a review, he did not satisfy the second prong of the 8 U.S.C. § 1326(d) test for dismissal of the instant indictment. Accordingly, the district court correctly concluded based on the record before it that the defendant had failed to establish that his deportation proceeding improperly deprived him of the opportunity for judicial review of the deportation order or that his retained counsel was ineffective.

ARGUMENT

I. An Extension of The Decisions in *Lopez*, *Calderon*, and *Copeland* Is Not Supported By The Record In The Instant Case[4]

A. Statement of Facts

On January 12, 1998, Rodrigues was ordered deported by the IJ based on his status as an aggravated felon. During the proceedings before the IJ, defendant's retained

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[4] *United States v. Lopez*, 445 F.3d 96 (2d Cir. 2006); *United States v. Calderon*, 391 F.3d 370 (2d Cir. 2004); *United States v. Copeland*, 376 F.3d 61 (2d Cir. 2004).

counsel filed a Motion for Waiver of Deportation and a legal memorandum addressing the availability of relief under § 212(c) of the INA. JA 302-303. Prior to issuing the deportation order, the IJ advised the defendant and counsel that the defendant was statutorily ineligible for such relief. JA 399, 343-343, 350.

The defendant, through his retained counsel, reserved his right to appeal the order to the BIA, JA 344, 350, and then did in fact appeal the order of deportation. In setting forth the reasons for appeal and in the defendant's brief in support of the appeal, counsel argued that the IJ erred in applying the provisions of the AEDPA retroactively so as to make the defendant ineligible for § 212(c) discretionary relief. JA 309-313, 330-334.

On January 12, 1999, the BIA affirmed the IJ's deportation order finding that the IJ was correct in its determination that the defendant was statutorily ineligible for § 212(c) relief. JA 336-337.

Following the denial of the appeal of the IJ's deportation order, Attorney Santos engaged in additional legal research concerning other legal avenues available to the defendant (including petitions for review and habeas petitions), met with representatives of the ACLU, CCLU, the Legal Aid Society and experienced immigration counsel to discuss legal representation of the defendant. Mr. Santos also obtained relevant model pleadings. JA 29, 32-33, 45. Counsel then met with the defendant, which was "soon" after the decision was received, JA 41, to discuss the next steps available to the defendant for review. Attorney Santos testified before the district court

that he would have characterized the next step to the defendant as "an appeal to the U.S. District Court." JA 56-57. Attorney Santos also discussed the financial cost of proceeding down that road which was estimated at $3,500. JA 33, 56. The defendant advised him that the firm had enough of his funds to cover the cost. JA 33, 42. When Attorney Santos told the defendant he would needed to see a partner in the firm to discuss the fee situation, the defendant met with Attorney Ned Fitzpatrick. JA 33.

With respect to the costs involved, Rodrigues repeatedly testified before the court below that the had the financial resources to pay the necessary legal fees. The source of his funds included cash recoveries received from several automobile accidents, JA 90, 151, 180-181, his $400-$600/week employment income, JA 124-125, 179, and assistance as needed from his father and sister. JA 125, 126-127. The defendant also had available to him the $10,000 in cash he had used to post bond with the Immigration Court, JA 107-108, 177, 314-316. Despite this fact, the defendant ended up in a fee dispute with Attorney Fitzpatrick, the partner in Attorney Santos's law firm who handled much of the defendant's legal business. A falling out between the defendant and the firm resulted from this financial disagreement. JA 35, 39.

As a consequence of the fee dispute, Rodrigues did not ask or direct Attorney Santos to take any further action on his behalf. In fact, while Attorney Santos was prepared to take whatever steps were necessary to seek judicial review on behalf of the defendant, Attorney Santos never heard from the defendant again concerning judicial review of the BIA's decision. JA 58. He later learned that the

defendant and the partner in Attorney Santos's law firm had a falling out over fees. JA 35, 59. At some point thereafter the defendant appeared unannounced at the firm and retrieved his immigration file. JA 43, 62, 87. It was Attorney's Santos's understanding that Rodrigues had obtained new counsel and his new counsel had asked Rodrigues to retrieve the file.[5] JA 62, 81.

On April 22, 1999, more than fourteen weeks after the BIA's decision was handed down, the defendant voluntarily submitted to deportation. On that date Rodrigues was flown from JFK Airport in New York to Portugal. JA 323-324.

B. Governing Law and Standard of Review

Because the defendant failed to present all but one of his current legal arguments to the court below, this Court should analyze his claims only for "plain error." Under the "plain error" standard of review, "relief is not warranted unless there has been (1) error, (2) that is plain, and (3) affects substantial rights." *Jones v. United States*, 527 U.S. 373, 389 (1999). Moreover, even "[i]f all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." *Johnson v. United States*, 520 U.S. 461, 467, 117 S.Ct. 1544 (1997) (citing

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[5] The defendant testified that he retrieved the file for new counsel occurred years later. JA 127-128. The defendant, however, failed to call the other attorney as a witness during the proceedings before the district court.

United States v. Olano, 507 U.S. 725, 732 (1993) (internal quotation marks omitted)).

This Court has made clear that "plain error" review "is a very stringent standard requiring a serious injustice or a conviction in a manner inconsistent with fairness and integrity of judicial proceedings." *United States v. Walsh*, 194 F.3d 37, 53 (2d Cir. 1999) (internal quotation marks omitted). Indeed, "the error must be so egregious and obvious as to make the trial judge and prosecutor derelict in permitting it, despite the defendant's failure to object." *United States v. Plitman*, 194 F.3d 59, 63 (2d Cir. 1999) (internal quotation marks omitted).

For purposes of evaluating the first prong of plain error review – that is, whether there was any error at all – the Court must consider factors set forth in 8 U.S.C. § 1326(d). A successful collateral attack of a prior deportation order under 8 U.S.C. § 1326(d) requires that a defendant demonstrate that:

> (1) he 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 denied the alien of the opportunity for judicial review; and
>
> (3) the entry of the order was fundamentally unfair.

8 U.S.C. § 1326(d). These requirements are conjunctive and, therefore, a defendant must establish all three in order

to successfully challenge his removal order. *United States v. Fernandez-Autonia*, 278 F.3d 150, 157 (2d Cir. 2001).[6]

This Court reviews *de novo* a district court's ruling on a motion to dismiss involving a collateral attack on a deportation order under § 1326(d). *United States v. Lopez*, 445 F.3d at 94; *United States v. Scott* 394 F.3d 111, 116 (2d Cir. 2005).

C. Discussion

1. The "Plain Error" Rule Requires the Court to Disregard All But the Last Argument of the Defendant-Appellant

On October 17, 2005, the defendant filed a written motion to dismiss the indictment returned against him. In that motion he set forth as grounds for dismissal (1) a general denial of his due process rights, and (2) ineffectiveness of counsel which resulted in the defendant being prejudiced. GA 01. On or about that same date, the

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[6] As in the district court, the Government concedes that the defendant has satisfied the first and third factors, GA 31, 34. As to § 1326(d)(1), the defendant exhausted his administrative remedies by appealing his deportation order to the BIA, where he argued against the retroactive application of AEDPA to bar his eligibility for § 212(c) relief. As to § 1326(d)(3), this Court's decision in *Copeland*, 376 F.3d at 71-72 establishes that the entry of the order can be fundamentally unfair, insofar as AEDPA was improperly applied retroactively to a defendant's case and the defendant was thereby prejudiced.

defendant filed a "Defendant's Memorandum of Law in Support of Motion to Dismiss." GA 03-27.

On January 6, 2006, and February 15, 2006, the district court held evidentiary hearings on the defendant's motion. The defense presented the testimony of Attorney Santos and the defendant in support of his motion to dismiss. JA 16-91; 94-196, 209-217, respectively. Following the defendant's presentation of evidence, his counsel was heard by the district court in oral argument. JA 218-295. Nowhere in the defendant's motion to dismiss, memoranda of law, or oral presentation to the district court was a reference to or legal claim raised under the *Lopez-Calderon-Copeland* line of cases regarding the issue under review, that is, the second prong of the § 1326(d)(2) test relating to the improper deprivation of the opportunity for judicial review. (While the district court made a brief reference to the decisions in *Lopez* and *Calderon* in its written ruling denying the defendant's motion, JA 368-369, the court addressed itself principally to the actual legal claims raised, briefed and argued by the defendant in the court below.)

Indeed, the defense advised the district court at the conclusion of the evidentiary hearings that, "Rodrigues primarily relies on his written motion to dismiss . . . that is our principal reliance." JA 218-219. Consistent with this representation, the defendant made a general due process argument to the court, based largely on § 212(c) factors, JA 219-232, and then focused the court's attention on what it suggested was the "much more fundamental" issue, JA 232, or the "core of the issue," JA 273-274, namely his asserted ineffective assistance of counsel claim.

In the brief filed by Rodrigues with this Court by successor counsel, however, only the last of his four arguments is addressed to the "fundamental" or "core" issue he presented to the court below. The forum in which to have raised arguments in support of extending the reach of such cases as *Lopez*, *Calderon, and Copeland* was, in the first instance, the district court. Having failed to present his primary arguments to the district judge, under the "plain error" rule the defendant should be deemed to have forfeited the right to have them heard before this Court.

For the reasons set forth in greater detail below, the district court did not commit error in denying the defendant's motion to dismiss. Indeed, Rodrigues's case involves facts and circumstances that clearly distinguish it from prior decisions of this Circuit.

2. The Defendant's Deportation Proceedings Did Not Improperly Deny Him of the Opportunity for Judicial Review

Rodrigues argues that because the IJ and BIA erroneously informed him that he was statutorily ineligible for discretionary relief under § 212(c) of the INA, and then physically deported him more than fourteen weeks after the BIA denied his appeal,[7] judicial review was not realistically possible for the defendant. Def. Brief at 13. In advancing this argument, he principally relies on the

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[7] The defendant's brief suggests the period of time was "only twelve weeks." Def. Brief at 13.

decisions of this Court in *United States v. Lopez*, 445 F.3d 90 (2d Cir. 2006), *United States v. Calderon*, 391 F.3d 370 (2d Cir. 2004), and *United States v. Copeland*, 376 F.3d 61 (2d Cir. 2004). Each of these cases, however, involves a completely different factual scenario than is presented in the instant case, and, therefore, is clearly distinguishable.

As noted by the district court, the only § 1326(d) factor at issue below in this case related to whether the defendant's deportation proceedings improperly deprived him of the opportunity for judicial review of the deportation order. "Ruling in Defendant's Motion to Dismiss," JA 356; *see also* JA 14. The evidentiary hearings conducted by the court established that during his immigration proceedings Rodrigues was represented by retained counsel who asserted before both the IJ and BIA that the provisions of § 440(d) of the Antiterrorism and Effective Death Penalty Act should not be applied retroactively so as to make the defendant ineligible for discretionary relief under § 212(c) of INS. JA 303-307, 309-313, 330-335.

The record before the district court further established that after the BIA affirmed the IJ's deportation order, Rodrigues's retained counsel met with him and advised him of the opportunity of judicial review of the deportation order, which was characterized for the defendant "as an appeal to the U.S. District Court." JA 41, 56-57. Further, the record established that while his retained counsel was fully prepared to pursue appropriate avenues of judicial review concerning the deportation order, JA 68-69, the defendant never asked or directed him to do so. JA 58, 71.

Finally, the record before the district court supported its factual finding that the reason the defendant chose not to seek judicial review of the deportation order was not because of the IJ's or BIA's erroneous decision that he was statutorily ineligible for § 212(c) relief, but rather because of a fee dispute with a partner in his retained counsel's law firm. JA 367. This factual finding was based in part on credibility assessments made by the district court after hearing live testimony, including her determination that the defendant's claims to the contrary "lacked persuasiveness." The defendant does not challenge that factual finding on appeal, and in any event it is not clearly erroneous. *See Hernandez v. New York*, 500 U.S. 352, 365-366 (1991) (noting that, while "the precise formula used for review of fact findings . . . depends on the context, Federal Rule of Civil Procedure 52(a) . . . permits factual findings to be set aside only if clearly erroneous" and "the same standard should apply to review of findings in criminal cases in issues other than guilt.")

The facts involved in such cases as *United States v. Lopez, supra* and others cited in the defendant's brief are far removed from the instant case. *Lopez* involved a *pro se* defendant who admitted the grounds for his deportation and conceded his deportability. 445 F.3d at 92. During his hearing before the IJ, Lopez was told he was not eligible for any relief against deportation, including relief under § 212(c) of the Immigration and Nationality Act. *Ibid.* at 93. Lopez, who had been advised of his right to appeal to the BIA, sought review of the IJ's deportation order. But his appeal was denied by the BIA based on its retroactive application of § 440(d) of AEDPA to an aggravated felony conviction which Lopez had incurred pre-AEDPA. *Id.*

Lopez was deported from the United States some twenty months after the BIA's decision was handed down. *Ibid*. at 102.

Unlike the facts of this case, there is no indication in *Lopez* that he was ever advised by anyone that judicial review of the deportation order was available to him. Thus, the Court in *Lopez* concluded on the facts of that case that since the *pro se* litigant had been advised erroneously by the IJ and BIA that he was ineligible for any type of relief, he had been denied "a realistic opportunity for judicial review within the meaning of § 1326(d)(2)." *Id*. at 100. Here, however, Rodrigues can make no such claim because he was specifically advised by his retained counsel that judicial review was available - a review which Attorney Santos testified he was prepared to initiate on behalf of the defendant.

In *United States v. Calderon*, the defendant was put into removal hearings after the effective date of AEDPA based on an aggravated felony conviction which had occurred prior to AEDPA's enactment. During the proceedings before the IJ, Calderon was advised by the court that he was ineligible for § 212(c) relief based on the then-prevailing but erroneous belief that the provisions of § 440(d) of AEDPA were to be applied retroactively. 391 F.3d at 372-373. His counsel advised that the IJ and, if an appeal were taken from the deportation order, the BIA were required to apply the provisions of § 440(d) of AEDPA, and, while available, a petition for a writ of habeas corpus would be expensive and take a long time (during which time Calderon would have to remain in custody). On June 6, 2000, defense counsel notified

immigration authorities that the defendant had chosen not to appeal the deportation order to the BIA. *Ibid*. at 373. Calderon was then removed frm the United States just short of a month later. *Id.*

Rodrigues's case is clearly distinguishable from *Calderon*. Not only did Rodrigues exhaust his administrative remedies through his counsel, but Attorney Santos was prepared to seek appropriate judicial review on the defendant's behalf of what Santos and other attorneys strongly believed was an illegal retroactive application of § 440(d) of AEDPA. JA 44. In addition, the defendant's counsel never told him he should waive his right to appeal to the BIA or suggest to Rodrigues that judicial review of the deportation order would be "expensive," "take a substantial amount of time," and require that he "remain in custody." In fact, the fees discussed with Rodrigues were relatively modest ($3,500), JA 33, 55, 56 and he repeatedly asserted before the district court that he had ample financial resources available to pay for the judicial review of the immigration proceedings, JA 90, 124-125, 125-126, 151, 180-181. In addition, he was at liberty on a $10,000 cash bond. JA 107-108, 177, 314-316. Because there is no indication that Rodrigues was somehow deterred by the court or counsel for pursuing judicial review - whether in terms of wrongly anticipated retroactively on his liberty or otherwise, Rodrigues is not similarly situated to the defendant in *Calderon*.

The defendant in *United States v. Copeland*, 376 F.3d 61 (2d Cir. 2004), also found himself confronted with very different circumstances than those involved in Rodrigues's case. In *Copeland* the defendant appeared *pro se* before

the IJ and was told that because he had a prior narcotics conviction (in context, a conviction which occurred prior to the effective date of AEDPA), he was not eligible for any form of relief from deportation. The IJ informed Copeland that his ineligibility resulted from certain recent changes in the applicable law. 376 F.2d at 63-64. After the initial hearing was adjourned for Copeland to secure counsel, he reappeared *pro se* at the resumed hearing, at which time he admitted that he was a citizen of Jamaica and had been convicted of a state controlled substance offense (which pre-dated AEDPA). 376 F.3d at 64. Once again he was told by the IJ that there was no relief available to him because of recent changes in the immigration laws. When asked if he accepted the IJ's decision, or wished to appeal it, Copeland stated he accepted the decision and, in fact, no appeal was filed with the BIA. *Id.*

On the day before Copeland was to be released from service of his state prison sentence, he filed, through counsel, motions to reopen his deportation proceedings and to stay his actual deportation. The motion to reopen was based, in part, on the IJ's failure to advise Copeland of his eligibility for § 212(c) relief. The IJ denied the motions, and the defendant filed an appeal with the Board of Immigration Appeals. While the appeal was still pending before the BIA, Copeland was deported to Jamaica. 376 F.3d at 65.

It was the foregoing factual context, in which the exhaustion of administrative remedies and opportunity for judicial review were exceedingly complicated questions, and Copeland could not realistically be faulted for

pursuing relief through administrative reopening rather then immediately filing a habeas petition, that this Court found that Copeland's "opportunity for habeas relief was not sufficiently realistic" to prevent him from attacking the underlying deportation order.

The circumstances extant in *Copeland* provide little support for the defendant here. Again, no actions taken by the IJ in this case caused Rodrigues not to exhaust his administrative remedies. Clearly Rodrigues was not deported while his appeal was pending before the BIA, and there were and are no complications in exhaustion questions and/or the availability of an opportunity for judicial review of the immigration proceedings involved in this case.[8]

In short, cases such as *Copeland*, *Lopez* and *Calderon* involve completely different scenarios than that present here. Those cases dealt with § 1326(d)(2) determinations being made in the context in which third parties deprived a defendant of his opportunity for judicial review -- not where, as here, it is the defendant's unilateral decision that short-circuited the review process.[9]

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[8] Similarly, in *United States v. Sosa*, 387 F.3d 131, 134 (2d Cir. 2004), which the defendant cites in support of his claims, Def. Br. at 18, Sosa was a *pro se* defendant who was misinformed by the IJ of his eligibility for § 212(c) relief, admitted his deportability before the IJ and waived his right to appeal the deportation order to the BIA, and was then removed from the country within a month's time.

[9] There is not dispute about the fact that in light of *St.* (continued...)

Finally, the Government respectfully suggests that deprivation of judicial review is not to be lightly assumed in cases where, as here, a habeas petition would have been entertained. *See United States v. Gonzales-Roque*, 301 F.3d 39, 49-50 (2d Cir. 2002). In this regard, almost a full year prior to Rodrigues's actual deportation, this Court held that habeas relief was available to persons who found themselves in the defendant's circumstances. *Jean-Baptiste v. Reno*, 144 F.3d 212, 218 (2d Cir. 1998) ("[T]he availability of habeas to challenge deportation orders has long been recognized."); *see also United States v. Lopez*, 445 F.3d at 93.

Thus, the defendant was not deprived of a realistic opportunity for judicial review. Rather, as Judge Arterton found, he chose not to pursue such a review because of a fee dispute, a fact which makes his case very much distinguishable from the decisions on which his appeal is based.

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[9] (...continued)
Cyr the IJ was wrong in his belief that § 440(d) of AEDPA could be applied retroactively. However, to find that whenever such errors occur (assuming there is no exhaustion question involved) and the defendant is prejudiced by the error than the provisions of the three-pronged § 1326(d) test have been satisfied is to render the provisions of § 1326(d)(2) superfluous.

3. Any Error In The District Court's Denial Of The Defendant's Motion to Dismiss Was Not "Plain Error"

Even if the district court were to be found to have committed error in its ruling below, it was not "plain," in the sense of clear and obvious. *See Johnson*, 520 U.S. at 468. An error is generally not "plain" under Rule 52(b) unless there is binding precedent of this Court or the Supreme Court, except "in the rare case" where it is "so egregious and obvious as to make the trial judge and prosecutor derelict in permitting it, despite the defendant's failure to object." *United States v. Whab*, 355 F.3d 155, 158 (2d Cir. 2004) (internal quotation marks and citations omitted); *see United States v. Weintraub*, 273 F.3d 139, 152 (2d Cir. 2001) (holding that alleged instructional error was not "plain" where omitted instruction was mandated by existing precedent).

Accordingly, even if this Court were to find that the defendant should prevail on the question of "error" under the *Lopez*, *Calderon*, and *Copeland* line of cases, he can do so only by extending that line of cases, which is something courts generally do not do on plain error review. The Government acknowledges that "plain error" can exist even absent a case that involves identical facts, but the animating principle of *Lopez*, *Calderon*, and *Copeland* is that in extreme circumstances a defendant can be constructively deprived of an opportunity for judicial review by the actions of third parties. Because Judge Arterton found *as a factual matter* that it was a fee dispute (as opposed to misinformation) that caused no further

appeals to be filed, Rodrigues falls outside the circumstances outlined in those cases. For the Court to rule in the defendant's favor here would require it to significantly broaden the logic of *Lopez*, *Calderon*, and *Copeland* to encompass cases where it was a financial dispute, rather than misinformation, which caused no further appeals to go forward. As the Government has already argued, such an expansion would be unwarranted under § 1326(d). At a minimum, such an extension of *Lopez*, *Calderon*, and *Copeland* is not so "obvious" or "plain" to make Judge Arterton "derelict" in her ruling on the defendant's motion to dismiss.

Further, assuming arguendo that the Court were to find that the district court committed plain error which affects substantial rights of the defendant, the Supreme Court has instructed that lower courts can exercise their discretion to notice an otherwise forfeited error only if the error "seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." *Johnson*, 520 U.S. at 467 (citing *Olano*, 507 U.S. at 732 (internal quotation marks omitted)). Such is not the case here because the defendant's case involves a self-inflicted wound. Rodrigues could have helped himself in 1999 by a petition for judicial review, which, as the district court found, his counsel was prepared to do, but he failed to do so.

Thus, applying the "plain error" standard of review, which as this Court has noted is a "very stringent standard requiring a serious injustice or a conviction in a manner inconsistent with fairness and integrity of judicial proceedings," *Walsh*, 194 F.3d at 53 (internal quotations omitted), the defendant forfeited his right to be heard on

claims relating to the *Lopez-Calderon-Copeland* line of cases.

II. The District Court Correctly Concluded The Defendant Failed to Establish That His Deportation Proceedings Improperly Deprived Him of the Opportunity for Judicial Review Due to Ineffective Assistance of Counsel

A. Statement of Facts

The facts and testimony established during the proceedings before the district court are set forth in detail above and therefore are not repeated in their entirety here. As particularly relevant to the defendant's ineffective assistance of counsel claim, however, the record reflects the following relevant facts:

The defendant retained Attorney Carlos Santos , an associate of the law firm which had represented Rodrigues in numerous civil and criminal matters, to represent him in the deportation proceedings which were brought against him. Once engaged as counsel for the defendant, Attorney Santos attended immigration seminars, consulted with experienced immigration counsel, and secured copies of model immigration pleadings and briefs. JA 366. "Ruling on Defendant's Motion to Dismiss Indictment," JA 366. Each of these steps was taken to insure proper preparation of the defendant's case before the immigration authorities.

In due course, counsel filed a Motion for Waiver of Deportation with the IJ. JA 302-304, and to be cautious, a Motion for Cancellation of Removal Proceedings, JA 305-306. While the IJ denied the defendant the requested relief and ordered him deported, JA 343, by filing the motions Attorney Santos preserved the issue.

Attorney Santos then consulted with more experienced immigration counsel about appealing the IJ's order, and subsequently filed a timely appeal with the BIA. In appealing the deportation order, retained counsel submitted a written "Reasons for Appeal," JA 309-313, and, subsequently, a brief in support of the appeal. JA 330-335. In his submission to the BIA, Attorney Santos identified and fully discussed issues relating to the retroactive application of § 440(d) of AEDPA, which he argued was constitutionally impermissible. *Id*. The BIA rejected the defendant's arguments on the non-retroactive applicability of AEDPA to his circumstances and affirmed the IJ's deportation order. JA 336-337.

Attorney Santos then undertook additional legal research on the issues involved, spoke with the ACLU and CCLU about becoming involved in the case, and again consulted with more experienced counsel on available avenues of review. JA 29, 32-33, 34, 42, 45. In addition, counsel obtained model pleadings from a case involving an individual in circumstances similar to those of Rodrigues. JA 34. Finally, Attorney Santos met with the defendant and discussed with him the BIA's ruling, the next steps which were available to him for challenging the decision, and the cost of pursuing such a challenge, that is approximately $3,500. JA 32-33, 55, 56-57.

In response to this information, the defendant told his counsel that the firm was holding a sufficient sum of his money to cover the cost of initiating judicial review proceedings. Rodrigues in turn was told that he needed to discuss the fee question with a partner in the firm, namely Attorney Ned Fitzpatrick, which he did. JA 33, 38, 39, 59.

Attorney Santos never heard from the defendant again about the matter, and he was never asked or directed by Rodrigues to file anything with the federal courts. JA 367. Later, Rodrigues came to the firm's offices unannounced and retrieved his immigration file. Attorney Santos understood that the defendant retrieved the file at the request of new counsel the defendant had consulted. JA 43, 81. Attorney Santos was never contacted thereafter by Rodrigues or new counsel. JA 58, 71, 81.

The district court affirmatively found that the reason Attorney Santos did not undertake further legal action on the defendant's behalf was due the unresolved dispute over fees (and not, as Rodrigues argued in the court below, due to the incompetence or ineffectiveness of counsel). "Ruling on Motion to Dismiss Indictment," JA 367. The court also found that the defendant had certain "infirmities in [his] recall and accuracy" while testifying, and concluded that Rodrigues's claim that Attorney Santos told him there were no additional legal steps which could be taken in his case "lacked persuasiveness." *Id*.

B. Governing Law and Standard of Review

In order for a defendant to prevail on a claim of ineffective assistance of counsel regarding a deportation

proceeding, "he must show that his counsel's performance was so ineffective as to have impinged upon the fundamental fairness of the hearing in violation of the fifth amendment due process clause." *Rabiu v. INS*, 41 F.3d 879, 882 (2d Cir. 1994) (citing *Saleh v. United States Dept. of Justice*, 962 F.2d 234, 241 (2d Cir. 1992)).

To establish "fundamental [un]fairness," a defendant is required to "allege facts sufficient to show 1) 'that competent counsel would have acted otherwise,' and 2) 'that he was prejudiced by his counsel's performance.'" *United States v. Perez*, 330 F.3d 97, 101 (2d Cir. 2003) (citing *Rabiu*, 41 F.3d at 882, quoting *Esposito v. INS*, 987 F.2d 108, 111 (2d Cir. 1998)).

In connection with the opportunity for a defendant to seek judicial review, a lawyer has the duty to consult with a client regarding the availability of review of an administrative or judicial decision, and a failure to do so can constitute ineffective assistance of counsel. *Roe v. Flores-Ortega*, 528 U.S. 470 (2000). In judging counsel's conduct, however, the reviewing court must "judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct, [*Strickland v. Washington*, 466 U.S. 668, 688-689 (1984)], and "[j]udicial scrutiny of counsel's performance must be highly deferential, *id.* at 689." *Flores-Ortega*, 528 U.S. at 477.

Finally, in the context of a criminal appeal, the Supreme Court has said that if counsel consults with the client about an appeal, then "[c]ounsel performs in a professionally unreasonable manner only by failing to

follow the defendant's express instructions with respect to an appeal." *Id.* at 478.

C. Discussion

The defendant failed to establish through the evidence and arguments he offered before the district court that the legal assistance rendered to him by Attorney Santos impinged upon the fundamental fairness of the proceedings before the IJ or the BIA. Rather, the record reflects that Attorney Santos, the defendant's retained counsel, attended immigration seminars, JA 47, conducted appropriate legal research, JA 212, and consulted with an experienced immigration lawyer in developing a legal strategy for defending the defendant in his deportation proceedings. JA 22, 46-47. Further, the record established that during the course of the deportation proceedings Attorney Santos filed competent pleadings before the IJ, JA 302-304, and later the BIA, JA 330-335, in which he identified the precise issue which the defendant suggests should have been the subject of judicial review, namely the improper retroactive application of § 440(d) of AEDPA to persons situated as was Rodrigues.

Unlike counsel in *Rabiu* and *Perez*, Rodrigues's attorney *did* file a § 212(c) motion with the IJ seeking a waiver of deportation. His counsel *did* reserve the right to appeal to the BIA, and, as noted above, in fact pursued that appeal. Further, the record before the district court makes it clear that Rodrigues's counsel was prepared to initiate proceedings for judicial review of the deportation order if the defendant had chosen to take that course. Instead, the defendant became embroiled in a fee dispute with a partner

in Attorney Santos's law firm, did not resolve the dispute, did not request or direct that further legal action be taken by Attorney Santos, and then voluntarily surrendered to the INS authorities for deportation. JA 367, 369.

While it is true that the IJ and BIA rejected Attorney Santos's arguments relating to the retroactive application of AEDPA to Rodrigues's file, it is also true that the rulings were consistent with the *Matter of Soriano*, 21 I & N Dec. 516 (BIA 1996), and the related cases on which the BIA relied. *See* JA 336-337. The fact that the efforts of Attorney Santos before the immigration authorities were unsuccessful, does not make them incompetent. Indeed Attorney Santos successfully preserved the issue regarding retroactive application of the AEDPA provisions for judicial review and was ready to seek judicial review of the deportation proceedings. It was the defendant Rodrigues who elected not to take advantage of this opportunity, instead getting into a dispute over legal fees notwithstanding the fact that by his own admissions he had the financial resources at his disposal to pursue judicial review of the underlying deportation order.

The defendant not having shown that competent counsel would have acted differently, or that he was prejudiced by Attorney Santos's performance, he failed to establish before the district court that "counsel's performance was so ineffective as to have impinged upon the fundamental fairness of the deportation proceedings." *Rabiu*, 41 F.3d at 882. Accordingly, the district court correctly found that the defendant had failed to prove the deportation proceedings improperly deprived him of the opportunity for judicial review, as required under 8 U.S.C.

§ 1326(d)(2). Having failed in this regard, the court below properly denied the defendant's motion to dismiss the indictment.

CONCLUSION

For the foregoing reason, the United States respectfully requests that the judgment of the district court be affirmed.

Dated: March 28, 2007

Respectfully submitted,

KEVIN J. O'CONNOR
UNITED STATES ATTORNEY
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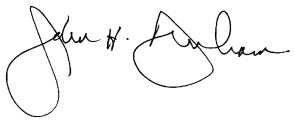

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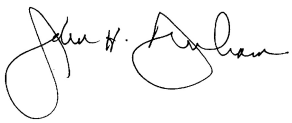
CERTIFICATION PER FED. R. APP. P.32(a)(7)(C)

This is to certify that the foregoing brief complies with the 14,000 word limitation requirement of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 9,769 words, exclusive of the Table of Contents, Table of Authorities, Addendum of Statutes and Rules, and this Certification.



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ADDENDUM

8 U.S.C. § 1182. Inadmissible aliens

(c) Repealed. INA § 212(C) (repealed 1996)

Aliens lawfully admitted for permanent resident who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of subsection (a) of this section (other than paragraphs (3) and (9)(c)). Nothing contained in this subsection shall limit the authority of the Attorney General to exercise the discretion vested in him under section 1181(b) of this title. The first sentence of this subsection shall not apply to 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.

§ 1326. Reentry of removed aliens

(a) In general

Subject to subsection (b) of this section, any alien who--

(1) has been denied admission, excluded, deported, or removed or has departed the United States while an order of exclusion, deportation, or removal is outstanding, and thereafter

(2) enters, attempts to enter, or is at any time found in, the United States, unless (A) prior to his reembarkation at a place outside the United States or his application for admission from foreign contiguous territory, the Attorney General has expressly consented to such alien's reapplying for admission; or (B) with respect to an alien previously denied admission and removed, unless such alien shall establish that he was not required to obtain such advance consent under this chapter or any prior Act,

shall be fined under Title 18, or imprisoned not more than 2 years, or both.

(b) Criminal penalties for reentry of certain removed aliens

Notwithstanding subsection (a) of this section, in the case of any alien described in such subsection--

(1) whose removal was subsequent to a conviction for commission of three or more misdemeanors involving drugs, crimes against the person, or both, or a felony (other than an aggravated felony), such alien shall be fined under Title 18, imprisoned not more than 10 years, or both;

(2) whose removal was subsequent to a conviction for commission of an aggravated felony, such alien shall be fined under such Title, imprisoned not more than 20 years, or both;

(3) who has been excluded from the United States pursuant to section 1225(c) of this title because the alien was excludable under section 1182(a)(3)(B) of this title or who has been removed from the United States pursuant to the provisions of subchapter V of this chapter, and who thereafter, without the permission of the Attorney General, enters the United States, or attempts to do so, shall be fined under Title 18 and imprisoned for a period of 10 years, which sentence shall not run concurrently with any other sentence. or

(4) who was removed from the United States pursuant to section 1231(a)(4)(B) of this title who thereafter, without the permission of the Attorney General, enters, attempts to enter, or is at any time found in, the United States (unless the Attorney General has expressly consented to such alien's reentry) shall be fined under Title 18, imprisoned for not more than 10 years, or both.

For the purposes of this subsection, the term "removal" includes any agreement in which an alien stipulates to removal during (or not during) a criminal trial under either Federal or State law.

(c) Reentry of alien deported prior to completion of term of imprisonment

Any alien deported pursuant to section 1252(h)(2) of this title who enters, attempts to enter, or is at any time found in, the United States (unless the Attorney General has expressly consented to such alien's reentry) shall be incarcerated for the remainder of the sentence of imprisonment which was pending at the time of deportation without any reduction for parole or supervised release. Such alien shall be subject to such other

penalties relating to the reentry of deported aliens as may be available under this section or any other provision of law.

(d) Limitation on collateral attack on underlying deportation order

In a criminal proceeding under this section, an alien may not challenge the validity of the deportation order described in subsection (a)(1) of this section or subsection (b) of this section unless the alien 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.

§ 53a-167c. Assault of public safety or emergency medical personnel

(a) A person is guilty of assault of public safety or emergency medical personnel when, with intent to prevent a reasonably identifiable peace officer, special policeman appointed under section 29-18b, firefighter or employee of an emergency medical service organization, as defined in section 53a-3, emergency room physician or nurse, employee of the Department of Correction, member or employee of the Board of Pardons and Paroles, probation officer, employee of the judicial branch assigned to provide pretrial secure detention and programming services to juveniles accused of the commission of a delinquent act, employee of the Department of Children and Families assigned to provide direct services to children and youths in the care or custody of the department, employee of a municipal police department assigned to provide security at the police department's lockup and holding facility or active individual member of a volunteer canine search and rescue team, as defined in section 5-249, from performing his or her duties, and while such peace officer, special policeman, firefighter, employee, physician, nurse, member, probation officer or active individual member is acting in the performance of his or her duties, (1) such person causes physical injury to such peace officer, special policeman, firefighter, employee, physician, nurse, member, probation officer or active individual member, or (2) such person throws or hurls, or causes to be thrown or hurled, any rock, bottle, can or other article, object or missile of any kind capable of causing physical harm, damage or injury, at such peace officer, special policeman, firefighter, employee, physician, nurse, member, probation officer or active individual member, or (3) such person uses or causes to be used any mace, tear gas or any like or similar deleterious agent against such peace

officer, special policeman, firefighter, employee, physician, nurse, member, probation officer or active individual member, or (4) such person throws or hurls, or causes to be thrown or hurled, any paint, dye or other like or similar staining, discoloring or coloring agent or any type of offensive or noxious liquid, agent or substance at such peace officer, special policeman, firefighter, employee, physician, nurse, member, probation officer or active individual member, or (5) such person throws or hurls, or causes to be thrown or hurled, any bodily fluid including, but not limited to, urine, feces, blood or saliva at such peace officer, special policeman, firefighter, employee, physician, nurse, member, probation officer or active individual member.

(b) Assault of public safety or emergency medical personnel is a class C felony. If any person who is confined in an institution or facility of the Department of Correction is sentenced to a term of imprisonment for assault of an employee of the Department of Correction under this section, such term shall run consecutively to the term for which the person was serving at the time of the assault.

ANTI-VIRUS CERTIFICATION

Case Name: U.S. v. Rodrigues

Docket Number: 06-5412-cr

I, Louis Bracco, hereby certify that the Appellee's Brief submitted in PDF form as an e-mail attachment to **briefs@ca2.uscourts.gov** in the above referenced case, was scanned using CA Software Anti-Virus Release 8.3.02 (with updated virus definition file as of 3/28/2007) and found to be VIRUS FREE.

Louis Bracco
Record Press, Inc.

Dated: March 28, 2007