No. 18-5191

IN THE SUPREME COURT OF THE UNITED STATES

JOSE PANIAGUA-PANIAGUA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

NOEL J. FRANCISCO
Solicitor General
Counsel of Record

BRIAN A. BENCZKOWSKI
Assistant Attorney General

AMANDA B. HARRIS
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether, when an alien collaterally attacks his prior removal proceeding under 8 U.S.C. 1326(d), alleging that the removal proceeding was "fundamentally unfair" because his prior crime was considered an aggravated felony and the immigration judge accordingly did not advise him that he could seek voluntary departure, courts should look to the law as it was understood at the time of the removal proceeding or the law as it currently stands.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A5) is not published in the Federal Reporter but is reprinted at 721 Fed. Appx. 700.

JURISDICTION

The judgment of the court of appeals was entered on January 29, 2018. A petition for rehearing was denied on April 6, 2018 (Pet. App. B1). The petition for a writ of certiorari was filed on July 5, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a bench trial in the United States District Court for the Southern District of California, petitioner was convicted of illegal reentry after removal from the United States, in violation of 8 U.S.C. 1326(a) and (b). Pet. App. A1; Presentence Investigation Report (PSR) ¶ 1; C.A. E.R. 5, 329. He was sentenced to 30 months of imprisonment, to be followed by three years of supervised release. C.A. E.R. 4-5. The court of appeals affirmed. Pet. App. A1-A5.

1. Petitioner is a citizen and national of Mexico. PSR ¶ 36. In 2007, officers in Washington State stopped petitioner for driving a stolen vehicle. C.A. E.R. 186. Officers recovered more than $1000 from petitioner's wallet and a digital scale, plastic baggies, and 75 grams of methamphetamine from inside a compartment in the car. PSR ¶ 25. Petitioner pleaded guilty to possessing with intent to deliver methamphetamine, in violation of Wash. Rev. Code § 69.50.401(2)(b) (2006), and taking a motor vehicle without permission, in violation of Wash. Rev. Code § 9A.56.075(1) (2006). PSR ¶ 24. He was sentenced to 12 months and one day of imprisonment on the methamphetamine conviction, as well as a concurrent term of five months of imprisonment on the stolen vehicle conviction. Ibid.

Later that year, the Department of Homeland Security served petitioner with a notice to appear for removal proceedings. C.A.

E.R. 144-146. The notice charged that petitioner was removable because he had entered the United States without inspection and he had been convicted of "illicit traffick[ing] in a[] controlled substance." Id. at 144, 146. On February 1, 2008, petitioner appeared before an immigration judge (IJ) and admitted that he was a citizen of Mexico who had unlawfully entered the United States in 1995 without inspection, and that he had been convicted of possession with intent to distribute methamphetamine. Id. at 321-322. The IJ concluded that petitioner's prior conviction constituted an "aggravated felony" under 8 U.S.C. 1227(a)(2)(A)(iii), namely, "illicit trafficking in * * * [a] controlled substance," 8 U.S.C. 1182(a)(2)(C)(i). C.A. E.R. 148. Petitioner was removed to Mexico the next day. Gov't C.A. Br. 5; see PSR ¶ 9.

Petitioner reentered the United States without permission in 2010. PSR ¶ 27. Petitioner was convicted of illegal reentry after removal, and he was removed to Mexico in June 2014. PSR ¶¶ 26-28, 36.

2. Later in 2014, United States Customs and Border Protection (CBP) officers found petitioner approximately five miles north of the Mexican border in Tecate, California. PSR ¶ 4. Although petitioner initially fled from the officers, they were able to apprehend him. Ibid. During a post-arrest interview, petitioner admitted that he was illegally present in the United

States following prior removal. Ibid. Petitioner was charged in a one-count information with illegal reentry into the United States, in violation of 8 U.S.C. 1326(a) and (b). C.A. E.R. 329-330.

Under 8 U.S.C. 1326, it is a criminal offense for a previously removed alien to reenter the United States unless the alien obtains the express prior consent of the Attorney General to reapply for admission (or an exception to the consent requirement applies). 8 U.S.C. 1326(a). Subsection (d), enacted after this Court's decision in United States v. Mendoza-Lopez, 481 U.S. 828 (1987),[1] allows defendants charged under Section 1326 to collaterally attack an underlying removal order under specified circumstances.

In particular, the alien must show that he "exhausted any administrative remedies that may have been available," that the "deportation proceedings at which the order was issued improperly deprived [him] of the opportunity for judicial review," and that "the entry of the order was fundamentally unfair." 8 U.S.C. 1326(d). "To establish fundamental unfairness, a defendant must show both that his due process rights were violated and that he suffered prejudice from the deportation proceedings." E.g., United States v. Arita-Campos, 607 F.3d 487, 493 (7th Cir. 2010).

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[1] Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 441, 110 Stat. 1279.

Petitioner moved to dismiss the information by collaterally attacking his removal order under Section 1326(d). Pet. App. A1; C.A. E.R. 229-265. He contended that the underlying 2008 removal order was fundamentally unfair on the ground that his 2007 Washington methamphetamine conviction was not an "aggravated felony," and that the IJ therefore committed prejudicial error in failing to advise petitioner of his right to seek the Attorney General's permission for voluntary departure without entry of a formal removal order. C.A. E.R. 245-265; see 8 U.S.C. 1229c(a)(1) (permitting the Attorney General to allow such voluntary departure in certain cases not involving aggravated felonies under 8 U.S.C. 1227(a)(2)(A)(iii)). The district court denied petitioner's motion, finding that petitioner's methamphetamine conviction was an aggravated felony, which rendered him ineligible for voluntary departure. C.A. E.R. 107-108.

The case proceeded to a bench trial at which petitioner was convicted of illegal reentry. Pet. App. A1; PSR ¶ 2. The district court sentenced petitioner to 30 months of imprisonment, to be followed by three years of supervised release. C.A. E.R. 3-5. Petitioner completed his term of imprisonment and, according to the CBP, was removed on November 29, 2016.

3. The court of appeals affirmed petitioner's conviction in an unpublished decision. Pet. App. A1-A5. The court found that petitioner had not shown that his underlying order of removal was

"fundamentally unfair" under Section 1326(d)(3). Id. at A5. The court agreed with petitioner that under current Ninth Circuit law, his Washington methamphetamine conviction would not qualify as an aggravated felony, on the view that "Washington's definition of aiding and abetting liability is broader than the generic federal definition and that the implicit nature of aiding and abetting liability in every criminal charge renders Wash. Rev. Code § 69.50.401 categorically overbroad." Id. at A3. The court also viewed the statute as "indivisible, thus precluding application of the modified categorical approach," which allows consultation of a limited class of record documents regarding a prior conviction to determine the particular form of the offense underlying it. Ibid.; see Mathis v. United States, 136 S. Ct. 2243, 2249 (2016).

The court of appeals observed, however, that petitioner's prior conviction would have qualified as an aggravated felony under the precedent that governed when petitioner was removed in 2008. Pet. App. A3-A4. Petitioner therefore was "statutorily ineligible for voluntary departure under 8 U.S.C. § 1229c" "under the law controlling at the time of his deportation proceedings." Id. at A4. Because petitioner had been ineligible for voluntary departure, he was "not prejudiced by the [IJ's] failure to advise him of that relief." Ibid. "Consequently," petitioner "ha[d] not shown that the deportation proceedings were fundamentally unfair, and his motion to dismiss was properly denied." Id. at A5.

ARGUMENT

Petitioner contends (Pet. 8-19) that the court of appeals erred in determining that he had not made the requisite showing of prejudice to support a collateral challenge to his prior removal order under 8 U.S.C. 1326(d). He asserts that the court should have looked to current law, rather than the understanding of the law at the time of his removal, to determine whether his prior conviction was for an aggravated felony, and thus whether he was prejudiced by the IJ's failure to inform him of the possibility of seeking voluntary departure. Review of that question is not warranted. The court of appeals' unpublished decision is correct, and its decision does not conflict with the decision of any other court of appeals. This Court recently denied a petition for a writ of certiorari raising the same question. See Lopez-Collazo v. United States, 137 S. Ct. 628 (2017) (No. 16-6251). The same result is warranted here.

1. a. The court of appeals correctly determined that petitioner failed to establish the prejudice necessary to collaterally attack his removal order. Section 1326 prohibits any alien who "has been denied admission, excluded, deported, or removed" from reentering the United States without the express consent of the Attorney General. 8 U.S.C. 1326(a). Because the order of removal is an element of the crime of unlawful reentry, a defendant charged with violating Section 1326 is permitted to

collaterally attack the underlying removal order. 8 U.S.C. 1326(d); United States v. Mendoza-Lopez, 481 U.S. 828, 837-838 (1987). To do so, the alien must show that (1) he "exhausted any administrative remedies that may have been available," (2) the "deportation proceedings at which the order was issued improperly deprived [him] of the opportunity for judicial review," and (3) "the entry of the order was fundamentally unfair." 8 U.S.C. 1326(d). "To establish fundamental unfairness, a defendant must show both that his due process rights were violated and that he suffered prejudice from the deportation proceedings." United States v. Arita-Campos, 607 F.3d 487, 493 (7th Cir. 2010); see, e.g., United States v. Charleswell, 456 F.3d 347, 360-361 (3d Cir. 2006); United States v. Luna, 436 F.3d 312, 319 (1st Cir. 2006); United States v. El Shami, 434 F.3d 659, 664 (4th Cir. 2005); United States v. Fernandez-Antonia, 278 F.3d 150, 159 (2d Cir. 2002).

The court of appeals correctly found that petitioner was not prejudiced by the IJ's failure to advise him about the possibility of voluntary departure. No court would have granted petitioner voluntary departure "[a]t the time of [his] 2008 deportation proceedings," because at that time, "convictions under Wash. Rev. Code § 69.50.401 were treated as aggravated felonies." Pet. App. A3. Furthermore, "Ninth Circuit law at the time also permitted application of the modified categorical approach for overbroad

statutes." Id. at A4. Thus, at the time of petitioner's removal proceedings, courts would have been permitted to consult "documents underlying [petitioner's] Washington drug-trafficking conviction," which would have "confirm[ed] that [petitioner] was convicted as a principal and not as an accomplice," thereby obviating the overbreadth that the Ninth Circuit later perceived as to accomplice liability. Ibid. Accordingly, "[a]s an aggravated felon under the law controlling at the time of his deportation proceedings, [petitioner] was statutorily ineligible for voluntary departure," and "was not prejudiced by the [IJ's] failure to advise him of that relief." Ibid.

b. Petitioner contends (Pet. 8-21) that the court of appeals erred in analyzing whether his removal proceeding was flawed under Section 1326(d) by looking to the law as it was understood at the time of that proceeding, rather than the law as it is understood today. But looking to the law as it existed at the time of the removal order in assessing prejudice makes logical sense. Had petitioner requested voluntary departure in 2008, courts evaluating that request would have applied the law as it then stood. If petitioner would have lost under then-current law, any potential due process violation could not have caused him prejudice, because it would not have any effect on the ultimate entry of the removal order.

Such an approach also is consistent with this Court's due process precedent. In Brady v. United States, 397 U.S. 742, 757 (1970), this Court evaluated conduct that was challenged as a due process violation under the law that existed at the time of the conduct, not after a subsequent change in the law. It concluded that a guilty plea that was voluntary under existing law did not become involuntary because a provision of the law was later struck down such that the government's case would have been weaker. Ibid. ("[A] voluntary plea of guilty intelligently made in the light of the then applicable law does not become vulnerable because later judicial decisions indicate that the plea rested on a faulty premise.").

2. a. Contrary to petitioner's assertion (Pet. 9-14), the unpublished decision below does not conflict with any decision of another court of appeals. To the contrary, the court of appeals' approach -- under which prejudice is determined based on the law at the time of removal, not on a subsequent change in the law -- is consistent with the decisions of other courts of appeals. See United States v. Lopez-Collazo, 824 F.3d 453, 467 (4th Cir. 2016), cert. denied, 137 S. Ct. 628 (2017); United States v. Baptist, 759 F.3d 690, 697-698 (7th Cir. 2014); United States v. Villanueva-Diaz, 634 F.3d 844, 852 (5th Cir.), cert. denied, 565 U.S. 823 (2011); see also United States v. Soto-Mateo, 799 F.3d 117, 123 (1st Cir. 2015) ("A waiver of rights based on a reasonable

interpretation of existing law is not rendered faulty by later jurisprudential developments."), cert. denied, 136 S. Ct. 1236 (2016); Pet. 13-14 (discussing these cases).

Petitioner errs (Pet. 11-12) in contending that the decision below conflicts with the Tenth Circuit's decision in United States v. Rivera-Nevarez, 418 F.3d 1104 (2005), cert. denied, 547 U.S. 1114 (2006). In Rivera-Nevarez, the alien was charged with violating Section 1326 based on his removal following a 1997 conviction for driving under the influence that qualified as an aggravated felony under the law at the time of his removal in 1999, but that no longer qualified based on this Court's subsequent decision in Leocal v. Ashcroft, 543 U.S. 1 (2004). On appeal, the Tenth Circuit stated that Leocal's holding was "retroactively applicable to the time of Rivera-Nevarez's removal hearing." Rivera-Nevarez, 418 F.3d at 1107; see ibid. (relying on the principle that "[d]ecisions of statutory interpretation are fully retroactive because they do not change the law, but rather explain what the law has always meant"). But that statement does not represent a definitive holding on the separate prejudice inquiry that could create a conflict, because the court went on to "[a]ssum[e], without deciding, that Rivera-Nevarez c[ould] demonstrate that his removal proceeding was fundamentally unfair." Id. at 1109. The actual holding of the case was that the defendant had failed to "meet his burden * * * to show that he was deprived

of the opportunity for judicial review." Ibid. Accordingly, the holding of Rivera-Nevarez does not conflict with the prejudice analysis at issue here.

b. Petitioner's collateral attack on his prior order of removal would face additional hurdles in most other courts of appeals, all of which would be alternative grounds supporting the judgment below. First, most courts have held that the failure to inform an alien about the possibility of purely discretionary relief does not deprive the alien of due process, and therefore cannot render removal proceedings "fundamentally unfair." See, e.g., United States v. Estrada, 876 F.3d 885, 887-888 (6th Cir. 2017), cert. denied, 138 S. Ct. 2623 (2018); Soto-Mateo, 799 F.3d at 123; United States v. Alegria-Saldana, 750 F.3d 638, 642 (7th Cir. 2014); United States v. De Horta Garcia, 519 F.3d 658, 661 (7th Cir.), cert. denied, 555 U.S. 997 (2008); United States v. Torres, 383 F.3d 92, 105-106 (3d Cir. 2004); United States v. Aguirre-Tello, 353 F.3d 1199, 1204-1205 (10th Cir. 2004) (en banc); United States v. Lopez-Ortiz, 313 F.3d 225, 231 (5th Cir. 2002), cert. denied, 537 U.S. 1135 (2003). But see United States v. Lopez-Velasquez, 629 F.3d 894, 897 n.2 (9th Cir. 2010); United States v. Copeland, 376 F.3d 61, 70-73 (2d Cir. 2004).

Second, although the Ninth Circuit has "long held that, when an IJ erroneously informs an alien that he or she is ineligible for discretionary relief, the first two prongs of § 1326(d) are

satisfied," United States v. Ochoa, 861 F.3d 1010, 1020 (9th Cir. 2017) (Graber, J., concurring), other circuits would require petitioner to demonstrate, as the text of Section 1326(d) requires, that he exhausted administrative remedies and was deprived of his ability to seek judicial review. See 8 U.S.C. 1326(d)(1)-(2). Petitioner could not make that showing here. See C.A. E.R. 120-126.

Third, no other court of appeals has adopted the type of reasoning the court of appeals employed here: that because Washington's separate statutory "definition of aiding and abetting liability is broader than the generic federal definition" and is "implicit * * * in every criminal charge," the Washington methamphetamine statute under which petitioner was convicted is overbroad. Pet. App. A3; see Valdivia-Flores, 876 F.3d at 1212-1214 (Rawlinson, J., dissenting).

c. Petitioner's contention (Pet. 9-10, 14-19) that the decision below creates a conflict within the Ninth Circuit also lacks merit. As an initial matter, any such intra-circuit conflict would not warrant this Court's review. See Wisniewski v. United States, 353 U.S. 901, 902 (1957) (per curiam). In any event, the Ninth Circuit has held that, but for one "narrow exception," in evaluating prejudice from an error in a removal proceeding, courts should look "to the law at the time of the deportation proceedings to determine whether an alien was eligible for relief from

deportation." United States v. Gomez, 757 F.3d 885, 899 (9th Cir. 2014); see, e.g., United States v. Vidal-Mendoza, 705 F.3d 1012, 1021 (9th Cir. 2013) (rejecting defendant's collateral attack on his removal order because he was not eligible for discretionary relief "under the applicable law at the time of his [removal] . . . hearing") (quoting United States v. Lopez-Velasquez, 629 F.3d 894, 897 (9th Cir. 2010) (en banc)) (brackets in original).

As Gomez noted, 757 F.3d at 899 n.11, the Ninth Circuit has looked to current law in evaluating a particular type of Section 1326(d) claim, but it has explicitly limited that holding to cases in which the change in law made the alien not "removable at all." United States v. Aguilera-Rios, 769 F.3d 626, 631 (2014). Where, as here, the only issue is the alien's eligibility for discretionary relief, the Ninth Circuit requires that courts apply the law as it stood at the time of removal. See, e.g., Gomez, 757 F.3d at 899. Cf. Pet. 9-10 (recognizing this distinction). Petitioner's reliance (Pet. 10) on United States v. Valdivia-Flores, 876 F.3d 1201 (9th Cir. 2017), underscores the distinction. In Valdivia-Flores, the court of appeals looked to current law to determine whether the defendant was removable at all. See id. at 1206 (noting that classification of prior offense as an aggravated felony was "alleged in the [government's] Notice of Intent as the sole basis for [the defendant's] removal without a hearing before

an immigration judge"). And to the extent petitioner contends (Pet. 14-19) that the disposition below reflects incorrect or inconsistent application of the court of appeals' distinction between eligibility for removal and eligibility for discretionary relief, that contention does not warrant review in this Court. See Wisniewski, 353 U.S. at 902.

3. In addition, this case would be a poor vehicle for considering the question presented. Irrespective of further review of that question, petitioner is unlikely to be able to demonstrate the prejudice required to succeed on his collateral challenge to his underlying order of removal. And even if he were able to make the necessary showing, petitioner's practical interest in the case is limited.

a. To succeed in collaterally attacking his removal order -- and thus to invalidate his conviction under Section 1326 -- the court of appeals would require petitioner to establish both that he was eligible for voluntary departure in 2008 because he did not have a prior conviction for an aggravated felony and that he suffered prejudice from the IJ's failure to inform him of his ability to apply for such discretionary relief. E.g., United States v. Ubaldo-Figueroa, 364 F.3d 1042, 1050 (9th Cir. 2004). To demonstrate prejudice, petitioner must "show[] that it is plausible, rather than merely conceivable or possible, that an IJ would have granted the relief for which he was apparently

eligible." United States v. Valdez-Novoa, 780 F.3d 906, 914 (9th Cir.), cert. denied, 135 S. Ct. 2913 (2015); see ibid. ("We expressly reject the contention that relief is 'plausible' whenever an IJ could have granted the relief at issue without abusing his discretion."); id. at 917 ("We reaffirm that the burden to show prejudice rests with the defendant."). Petitioner is unlikely to have been able to make that showing.[2]

In determining whether to grant voluntary departure of the sort petitioner would have requested, an immigration judge must consider factors both favorable and unfavorable to the alien. See Campos-Granillo v. INS, 12 F.3d 849, 852-853 & n.8 (9th Cir. 1993); In re Arguelles-Campos, 22 I. & N. Dec. 811, 817 (B.I.A. 1999). Although petitioner pointed in the district court to his 13-year period of residence in the United States and his U.S.-born children, see C.A. E.R. 262-264, petitioner also has a history of violent criminal offenses. See Campos-Granillo, 12 F.3d at 852 n.8 (listing "the existence, seriousness, and recency of any criminal record" among the unfavorable factors meriting consideration). Indeed, as of 2008, petitioner's criminal record included, in addition to the 2007 drug-trafficking and stolen-vehicle convictions, one conviction for domestic assault and another conviction for assault in violation of an order prohibiting

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[2] The government raised this issue in both the district court and the court of appeals. C.A. E.R. 140-142; Gov't C.A. Br. 27-30.

contact. PSR ¶¶ 17-22. Court records also note petitioner's "chemical dependency." PSR ¶ 22. Petitioner's criminal record renders implausible any assertion that he might have received discretionary relief in 2008 and thus that he suffered the prejudice necessary to collaterally attack his conviction. See, e.g., United States v. Alcon-Mateo, 538 Fed. Appx. 776, 777-778 (9th Cir. 2013) (no prejudice where prior convictions "for driving under the influence" and domestic violence prevented alien from having "a plausible case" for voluntary departure, "despite favorable factors"), cert. denied, 572 U.S. 1052 (2014).[3]

b. Moreover, even if petitioner could succeed on his collateral attack, invaliding his conviction under Section 1326 would have limited practical significance. Although convictions ordinarily have "collateral consequences adequate to meet Article III's injury-in-fact requirement," Spencer v. Kemna, 523 U.S. 1, 14 (1998), any collateral consequences in petitioner's case are attenuated. Petitioner has completed his prison sentence and has

[3] See also, e.g., In re Posadas-Posadas, A094 989 162, 2012 WL 371659 (B.I.A. Jan. 18, 2012) (affirming denial of voluntary departure where the alien was arrested twice for driving on a suspended license and once for driving under the influence, despite the alien's family ties and lengthy stay in the United States); In re Serna, 20 I. & N. Dec. 579, 580, 586 (B.I.A. 1992) (upholding denial of voluntary departure where the alien had a single conviction for the possession of an altered immigration document, where alien had been residing in the United States for seven years and intended to marry a United States citizen with whom he had a citizen child).

been removed from the United States. Petitioner's limited stake in the resolution of the question he raises is further reason that his case is a poor vehicle for review of that question.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

BRIAN A. BENCZKOWSKI
Assistant Attorney General

AMANDA B. HARRIS
Attorney

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