No. _____

IN THE SUPREME COURT OF THE UNITED STATES

SANTIAGO HUMBERTO RODRIGUEZ-APARICIO,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

A predicate element of an illegal-reentry offense under 8 U.S.C. § 1326 is that, before reentering, the defendant was deported while a removal order was outstanding. 8 U.S.C. § 1326(a)(1). If a defendant shows that the predicate removal order was obtained in violation of due process, then the prior-deportation element cannot be satisfied and the indictment must be dismissed. See United States v. Mendoza-Lopez, 481 U.S. 828, 842 (1987). After Mendoza-Lopez, a noncitizen being prosecuted for the crime of illegal reentry may challenge the validity of the underlying removal order by showing that, among other things, the "entry of the order was fundamentally unfair," 8 U.S.C. §1326(d)(3), or in other words, violated due process.

Petitioner challenged his illegal-reentry prosecution on the ground that the entry of his removal order was fundamentally unfair because he was deprived of the opportunity to seek discretionary relief from removal. Acknowledging a division in the circuits, the Fifth Circuit ruled that failure to inform an alien of his eligibility for discretionary relief from removal does not violate due process.

The question presented is:

Whether the failure to inform an alien of his eligibility for discretionary relief in a removal proceeding is a due process violation that can make the proceeding fundamentally unfair.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Santiago Rodriguez respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit, Pet. App. 1a-11a, is reported at 888 F.3d 189. The United States District Court for the Southern District of Texas did not issue a written opinion.

JURISDICTION

The judgment of the U.S. Court of Appeals for the Fifth Circuit was entered on April 23, 2018. This petition is filed within 90 days of that date and therefore is timely. See Sup. Ct. R. 13.1. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The text of the relevant constitutional and statutory provisions is set forth in the appendix. Pet. App. 12a-13a.

INTRODUCTION

The question presented—whether due process protections are implicated when an alien in a removal proceeding is not informed of his eligibility for discretionary relief—presents a recurring question that has not only divided the federal courts of appeals for a decade, but dictated two different results in two different criminal cases for petitioner Rodriguez-Aparicio ("Mr. Rodriguez") based solely on where he was found illegally present within the United States.

The Second and Ninth Circuits have held that an immigration judge's ("IJ") failure to inform an alien of his eligibility for discretionary relief from removal violates due process, and can render a removal proceeding fundamentally unfair. To the contrary, the Fifth Circuit below and eight other courts of appeals have held that such a failure can never violate due process.

The majority rule is impossible to square with this Court's longstanding due process precedents. This issue is critically important, as it arises in many thousands of criminal prosecutions for illegal reentry each year, as well as thousands more immigration proceedings. The Court's intervention is needed to ensure fair and uniform treatment of noncitizens across the country.

Mr. Rodriguez's own situation illustrates the necessity for the Court's intervention. When he was prosecuted for a 8 U.S.C. § 1326 violation within the Ninth Circuit, the charge was dismissed by the government after Mr. Rodriguez filed a motion to dismiss the indictment alleging due process defects in his underlying removal order. Ninth Circuit

precedent recognizes that an IJ's failure to advise an immigrant of discretionary relief from removal can violate due process. By contrast, when Mr. Rodriguez was prosecuted under § 1326 within the Fifth Circuit, based on the same prior removal order, his motion to dismiss the indictment was denied based on Fifth Circuit precedent holding that due process protections simply do not apply to eligibility for discretionary relief from removal. Opposite results for the same criminal defendant solely based on geography is precisely the type of unfairness that calls for this Court's intervention.

STATEMENT OF THE CASE

Santiago Rodriguez was admitted as a lawful permanent resident of the United States in 1994, at age 22, in Los Angeles, California. Pet App. 2a, 18a. Subsequently, in 2005, he pleaded no contest in California to a charge of having a concealed firearm in a vehicle, and was sentenced to 16 months of custody. Pet App. 18a-19a.

On February 1, 2007, Immigration and Customs Enforcement ("ICE") issued a Notice to Appear against Mr. Rodriguez, charging him with removability from the United States as an alien who had committed a firearms offense, under INA § 237(a)(2)(C)/8 U.S.C. § 1227(a)(2)(C). Pet App. 18a-19a, 28a-30a. The day after being served with the Notice to Appear, on February 7, 2007, Mr. Rodriguez was served with a second form titled "Stipulated Request for Removal Order and Waiver of Hearing Made By Respondent Who is Unrepresented," which he signed. Pet App. 19a, 32a-36a. The document included several statements indicating, among other things, that he conceded receipt of the Notice to Appear, waived his right to appear before an IJ, including the right to apply for relief, admitted the allegations in the Notice to Appear were true, chose El Salvador as the country of removal, and waived appeal of the written order to be issued by the IJ. Pet. App. 19a, 32a-36a. The form also required Mr. Rodriguez to declare that he had signed it voluntarily, knowingly, and intelligently. Pet. App. 19a, 35a. The next day, based on the Notice to Appear and the written stipulation, an IJ without a hearing, ordered Mr. Rodriguez removed to El Salvador. Pet. App. 19a, 39a, 41a-42a. On March 5, 2007, he was removed to El Salvador pursuant to the removal order. Pet. App. 19a.

In 2009, Mr. Rodriguez was indicted in the District of Nevada on a three-count indictment, including one count of unlawful reentry of a deported alien in violation of 8 U.S.C. § 1326. Pet. App. 2a, 18a. He filed a motion to dismiss the § 1326 count on due process grounds, arguing that the 2007 removal order was obtained in violation of due process and could not be used to satisfy the prior-deportation element of an illegal-reentry offense. Pet. App. 2a, 17a-42a. He argued that discretionary relief from removal was available to him specifically, voluntary departure, but that he was not advised of that option. Pet. App. 19a-25a. After the filing of that motion, the government chose to dismiss that count of the indictment. Pet. App. 43a-44a. Mr. Rodriguez was convicted of other charges and was again removed from the United States in February 2012, based on the original 2007 removal order. Pet. App. 2a.

In March 2015, Mr. Rodriguez was found within the United States near Hidalgo, Texas. Pet. App. 3a. On April 14, 2015, he was charged by a one-count indictment in the Southern District of Texas with illegally reentering the United States in violation of § 1326. Pet. App. 3a. He pleaded not guilty to the indictment. Pet. App. 3a.

On December 9, 2015, Mr. Rodriguez filed a motion to dismiss the indictment on the ground that the 2007 deportation order underlying the illegal-reentry charge was obtained in violation of due process, because the IJ never informed Mr. Rodriguez of his eligibility for voluntary departure. Pet. App. 14a-44a. The motion acknowledged that the issue was foreclosed by Fifth Circuit precedent holding that failure to inform an alien of

eligibility for discretionary relief from removal does not violate due process. Pet. App. 14a-16a. On March 21, 2016, the district court denied the motion to dismiss in an oral ruling.

Mr. Rodriguez requested to represent himself pro se, a request the district court granted after giving Mr. Rodriguez the necessary admonishments about the right to counsel and what would be required of him if he represented himself. Pet. App. 3a-4a. Mr. Rodriguez proceeded to trial. The government filed a motion in limine requesting that Mr. Rodriguez be precluded from introducing any evidence or argument regarding the legal validity of his prior deportation, which the district court granted. At the trial, Mr. Rodriguez did not put on any meaningful defense. Pet. App. 4a-5a. He was convicted by a jury of the illegal-reentry charge, and the district court imposed a sentence of 27 months of imprisonment. Pet. App. 5a. Mr. Rodriguez timely appealed. Pet. App. 5a.

On appeal to the Fifth Circuit, now represented by counsel, Mr. Rodriguez challenged the district court's denial of his motion to dismiss the § 1326 illegal-reentry charge. Pet. App. 2a, 11a. [1] He argued that the 2007 removal order underlying both of his prior deportations violated due process, because the IJ failed to inform him that he was eligible for voluntary departure in lieu of removal, and there was a reasonable probability that he would have received such relief. Pet. App. 2a, 11a. The Fifth Circuit affirmed, relying on its prior precedent holding that eligibility for discretionary relief "is not a liberty or property interest warranting due process protection." Pet. App. 11a (quoting United

[1] Mr. Rodriguez also raised a challenge to the district court's failure to correct an evident misunderstanding he had regarding his right to testify, but does not raise that issue in this petition.

States v. Lopez-Ortiz, 313 F.3d 225, 231 (5th Cir. 2002)). The court reiterated that "the failure to explain eligibility for discretionary relief does not rise to the level of fundamental unfairness, at least not in this circuit." Pet. App. 11a. The court recognized that its decision was at odds with the Second and Ninth Circuits. Pet. App. 11a. The Fifth Circuit did not address any of the remaining issues that Mr. Rodriguez briefed, such as whether Mr. Rodriguez could show prejudice from the IJ's failure to inform him about discretionary relief, whether he had exhausted administrative remedies or was excused from exhaustion, or whether he had been deprived of judicial review in the underlying removal proceeding.

REASONS FOR GRANTING THE PETITION

The Court should grant Mr. Rodriguez's petition for a writ of certiorari for the following reasons.

First, there is a deep and intractable circuit split on the question presented, with eight circuits adhering to the rule applied by the Fifth Circuit in this case, and the Second and Ninth Circuits applying a directly conflicting rule.

Second, the question presented is a legal issue of critical importance. Whether due process protections are implicated when an alien is not informed of his eligibility for discretionary relief in a removal proceeding is a question that impacts thousands of aliens in criminal prosecutions for illegal reentry, as well as in immigration proceedings across the country. The conflict among the federal appellate courts means that a defendant's criminal liability for illegal reentry, or a lawful permanent resident's ability to remain in the country, can (and often does) turn entirely on the location of the proceedings. Indeed, Mr. Rodriguez obtained opposite results in two different illegal-reentry prosecutions—one dismissal and one conviction—solely because of where he was prosecuted.

And, third, the Fifth Circuit's decision is manifestly incorrect and contrary to this Court's long-established due process precedents.

I. The circuit courts are deeply divided on whether the failure to inform an alien of his eligibility for discretionary relief in a removal proceeding violates due process.

As the Fifth Circuit acknowledged in its decision below, Pet. App. 11a, its holding that Mr. Rodriguez was foreclosed from showing that his removal order was obtained in violation of due process conflicts with decisions of the Second and Ninth Circuits.

In United States v. Copeland, 376 F.3d 61 (2d Cir. 2004), the Second Circuit held that an IJ's failure to inform an alien about the availability of discretionary relief—in that case, a waiver of removal under former INA § 212(c)—was a fundamental procedural error violating due process. Copeland, 376 F.3d at 71. The court concluded that even where the only relief available to the alien was discretionary and was "not constitutionally mandated," that did not preclude him from showing that the removal proceedings violated due process. Id. It found that the decisions of the "majority of circuits" holding that due process protections do not attach to eligibility for discretionary relief improperly collapse the "distinction between a right to seek relief and the right to that relief itself." Id. at 70-72 (citing Lopez-Ortiz, 313 F.3d at 231). Further, these courts "incorrectly assume" that, because the grant of ultimate relief is discretionary, the denial of an opportunity to seek that relief "cannot be a fundamental procedural error." Id. at 72.

The Ninth Circuit adheres to the same rule as the Second. See United States v. Lopez-Velasquez, 629 F.3d 894, 897 n.2 (9th Cir. 2010) (en banc) (stating that the Second and Ninth Circuits both have held that failure to inform an alien of possible eligibility for discretionary relief from removal violates due process, which is different than the rule applied in "most other circuits"); United States v. Ubaldo-Figueroa, 364 F.3d 1042, 1048

(9th Cir. 2004) (holding that due process applied to a removal proceeding where the only "plausible challenge to [the alien's] removal order" was "the fact that he was eligible for relief under former INA § 212(c)," a form of discretionary relief).

The Fifth Circuit, by contrast, has long held that "eligibility for discretionary relief is not a liberty or property interest warranting due process protection." Pet. App. 11a (quoting Lopez-Ortiz, 313 F.3d at 231). A majority of circuits, including the First, Third, Fourth, Sixth, Seventh, Eighth, Tenth, and Eleventh Circuits, have all adopted the Fifth Circuit's sweeping rule.

The First, Third, Sixth, Seventh, and Tenth Circuits have held that the failure to inform an alien of eligibility for discretionary relief from removal does not implicate due process, specifically in the context of evaluating an indictment for illegal reentry. See, e.g., United States v. Estrada, 876 F.3d 885, 887-88 (6th Cir. 2017), cert. denied, No. 17-1233, 2018 WL 1173864 (U.S. June 11, 2018); United States v. Soto-Mateo, 799 F.3d 117, 123 (1st Cir. 2015); United States v. De Horta Garcia, 519 F.3d 658, 661 (7th Cir. 2008); United States v. Chavez-Alonso, 431 F.3d 726, 728-29 (10th Cir. 2005); United States v. Torres, 383 F.3d 92, 104-05 (3d Cir. 2004). Numerous circuits have acknowledged that the majority rule conflicts with decisions of the Second and Ninth Circuits. See Pet. App. 11a; Estrada, 876 F.3d at 888; Lopez-Velasquez, 629 F.3d at 897 n.2; De Horta Garcia, 519 F.3d at 661; Chavez-Alonso, 431 F.3d at 728. And, the Fourth, Eighth, and Eleventh Circuits have applied the same rule that due process does not apply to eligibility for discretionary relief to preclude challenges to Bureau of Immigration Appeals decisions

regarding removability. See e.g., Smith v. Ashcroft, 295 F.3d 425, 429-31 (4th Cir. 2002); Oguejiofor v. Attorney Gen. of the United States, 277 F.3d 1305, 1309 (11th Cir. 2002); Escudero-Corona v. INS, 244 F.3d 608, 615 (8th Cir. 2001).

This division among the circuits, between the Second and Ninth Circuits on one side, and the First, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Tenth, and Eleventh Circuits, on the other, is clear. The courts of appeals have themselves acknowledged that a conflict exists on the question presented. See supra at 9-10. Given that eleven courts of appeals have weighed in on the question presented, no further percolation would be helpful. Accordingly, the Court should grant this petition to resolve the intractable split.

II. The question presented is exceptionally important and could affect thousands of criminal and immigration proceedings, in which uniformity is a substantial concern.

The question presented is one of great practical importance, both for criminal defendants facing prosecution for illegal reentry after removal and for noncitizens in removal proceedings.

The question presented has profound consequences for noncitizens being prosecuted for a charge of illegal reentry under § 1326. For an alien to challenge an indictment for illegal reentry under § 1326(d) and this Court's decision in United States v. Mendoza-Lopez, 481 U.S. 828 (1987), he must show that his underlying removal order violated due process and was fundamentally unfair. This showing is possible only where due process protections in fact apply to the removal proceeding. See Mendoza-Lopez, 481 U.S. at 839-40. The majority rule has effectively gutted Mendoza-Lopez's dictate requiring "some meaningful review of the administrative proceeding" when a determination made in

that proceeding "play[s] a critical role in the subsequent imposition of a criminal sanction." Id. at 837-38. This undermining of Mendoza-Lopez is demonstrated by the fact that the Fifth Circuit appears to have no published opinions dismissing an indictment under § 1326(d).

Due to the circuit split, the availability of essential defenses to an illegal-reentry charge is currently dependent solely on geography. This result is exacerbated by the fact that the circuits who handle most illegal-reentry prosecutions are themselves split on the question presented. In fiscal year 2013, [2] 18,498 federal illegal-reentry cases were prosecuted in the United States. U.S. Sentencing Commission, Illegal Reentry Offenses, at 8 (Apr. 2015). Of the top five districts adjudicating these cases, two were located in the Fifth Circuit[3] and one was located in the Tenth Circuit, [4] both of which hold that failure to inform an alien of eligibility for discretionary relief in a removal proceeding does not violate due process. See supra, at 9-10. The remaining two of the top five districts were located in the Ninth Circuit,[5] which recognizes that eligibility for discretionary relief does implicate due process and can render a removal proceeding fundamentally unfair. Consequently, a person prosecuted in the Ninth Circuit has an additional due-process defense to an illegal-reentry charge that a person prosecuted in the Fifth or Tenth Circuits does not have, even if the prosecutions are based on the same exact prior removal

[2] 2013 is the most recent year for which statistics are available.
[3] Southern Texas (3,853, or 20.8%) and Western Texas (3,200, or 17.3%)
[4] New Mexico (2,837, or 15.3%)
[5] Arizona (2,387, or 12.9%) and Southern California (1,460, or 7.9%)

proceeding.

Indeed, for Mr. Rodriguez, the Fifth Circuit's rule that eligibility for discretionary relief does not implicate due process left him with no defense to the charge in the instant case at all, though he had successfully wielded the Ninth Circuit's contrary law to obtain a government dismissal of the charge in his prior Nevada case. Mr. Rodriguez's situation, in which he obtained opposite results in two different illegal-reentry prosecutions in different circuits precisely illustrates the unfairness resulting from allowing the circuit split to persist.

Noncitizens in civil removal proceedings are similarly affected. In fiscal year 2017, ICE initiated over 81,000 "interior removals" against noncitizens residing in the United States. U.S. Immigration & Customs Enf't, FY 2017 ICE Enforcement Removal Operations Report, at Figure 13. For many of those people, the only possible means of avoiding the serious penalty of removal is to pursue discretionary relief. See Padilla v. Kentucky, 559 U.S. 356, 363-64 (2010) (noting that "if a noncitizen has committed a removable offense ... , his removal is practically inevitable but for the possible exercise of limited remnants of equitable discretion vested in the Attorney General"). Nearly all forms of relief from removal are discretionary, including asylum, cancellation of removal, waiver of admissibility, and former INA § 212(c) relief, among others. See 8 U.S.C. § 1158(b)(1)(A) (asylum); id. § 1182(h) (waiver of admissibility); id. § 1229b(a) (cancellation of removal). By contrast, the only forms of mandatory relief are withholding of removal, 8 U.S.C. § 1231(b)(3), and relief under the Convention Against Torture, 18

U.S.C. §§ 2340 & 2340A.

Unless the Court affirms that due process protections apply to a noncitizen's opportunity to pursue statutorily available discretionary relief from removal, many noncitizens will be improperly deprived of their only chance to remain in this country lawfully. Although it may appear that the Second and Ninth Circuits are on the short side of the split, judged in terms of the number of affected cases, the effect is substantial. The Second and the Ninth Circuits together resolve over 70% of all immigration appeals. U.S. Courts, Judicial Business 2017—U.S. Courts of Appeals (2017).

Just as it is unfair that the outcome of an illegal-reentry prosecution can depend on geography, it is highly problematic that the disposition of a removal proceeding might depend on the judicial circuit in which the proceeding occurs. See Gerbier v. Holmes, 280 F.3d 297, 311 (3d Cir. 2002). "Fundamental fairness dictates that permanent resident aliens who are in like circumstances, but for irrelevant and fortuitous factors, be treated in a like manner." Id. (quoting Francis v. INS, 532 F.2d 268, 273 (2d Cir. 1976)).

The Court should grant review in this case to ensure national uniformity in the treatment of noncitizens prosecuted for reentry or facing removal who were improperly deprived of the opportunity to seek relief from removal.

III. The decision below is wrong and conflicts with this Court's precedent.

The Fifth Circuit's rule—that due process protections do not apply to eligibility for discretionary relief in immigration proceedings—is obviously incorrect. The position adopted by the Fifth Circuit incorrectly "collapse[s] th[e] distinction" between "a right to

seek relief and the right to that relief itself." Copeland, 376 F.3d at 72; accord De Horta Garcia, 519 F.3d at 662-663 (Rovner, J., concurring).

This distinction is evident and well established in this Court's precedent. In INS v. St. Cyr, 533 U.S. 289 (2001), a noncitizen brought a habeas petition challenging the retroactive elimination of his eligibility "for a waiver of deportation at the discretion of the Attorney General" under INA § 212(c). St. Cyr, 533 U.S. at 292-293. As part of its analysis finding jurisdiction to hear the habeas petition, this Court noted that "[t]raditionally, courts recognized a distinction between eligibility for discretionary relief, on the one hand, and the favorable exercise of discretion, on the other hand." Id. at 307. The Court elaborated: "Eligibility that was 'governed by specific statutory standards' provided 'a right to a ruling on an applicant's eligibility,' even though the actual granting of relief was 'not a matter of right under any circumstances, but rather is in all cases a matter of grace.'" Id. at 307-308 (quoting Jay v. Boyd, 351 U.S. 345, 353-354 (1956)). The Court also drew on United States ex rel. Accardi v. Shaughnessy, 347 U.S. 260, 268 (1954), where it had held that "even though the actual suspension of deportation authorized by §19(c) of the Immigration Act of 1917 was a matter of grace, ... a deportable alien had a right to challenge the Executive's failure to exercise the discretion authorized by the law." St. Cyr, 533 U.S. at 308.

The Fifth Circuit has dismissed St. Cyr on the ground that its "holding was not grounded in § 212(c) relief having the status of a constitutionally protected interest; rather, it was based on the Court's interpretation" of a statute. Lopez-Ortiz, 313 F.3d at 231. But that distinction fails to grapple with the point recognized by the Second and Ninth Circuits:

even if the relief is based in a statute rather than the Constitution itself, due process protections still apply to the procedures affecting the noncitizen's ability to pursue that available discretionary relief under the statutory standards. See Copeland, 376 F.3d at 72-73; Ubaldo-Figueroa, 364 F.3d at 1048.

The incorrectness of the current majority rule has led a number of judges in these circuits to call for reevaluation of their precedents. In De Horta Garcia, Judge Rovner authored a concurring opinion "to note [her] reservations about those precedents" applying the rule because they "fail[ ] to properly distinguish the right to seek relief ... from the right to the relief itself." De Horta Garcia, 519 F.3d at 662. She opined that the Second Circuit in Copeland, "has the better of the debate among the circuits on this point," and encouraged the Seventh Circuit to reexamine its position. De Horta Garcia, 519 F.3d at 662-63. Similarly, in United States v. Zambrano-Reyes, 724 F.3d 761 (7th Cir. 2013), (now Chief) Judge Wood, writing for the court (a panel of herself, Judge Flaum, and Judge Hamilton) acknowledged Judge Rovner's concurring opinion and noted that there was "academic support for the position that the erroneous failure to consider an alien for Section 212(c) relief, or to advise an unrepresented alien of his eligibility for such relief, is sufficiently 'unfair' to satisfy Section 1326(d)(3) in a later reentry prosecution." Zambrano-Reyes, 724 F.3d at 765. The court left "this issue to another day," however, as it was not dispositive in that case. Id. at 766.

Judge Motz in the Fourth Circuit, too, in a concurring opinion in United States v. Wilson, 316 F.3d 506 (4th Cir. 2003), took issue with broad application of the majority

rule. Id. at 515. As she put it, "I take it to be quite clear that, regardless of the discretionary nature of relief available at a deportation proceeding, if a defendant's initial deportation, for example, had been ordered by a biased judge, relying on the knowing use of perjured testimony, or garnered under threat of mob violence, the defendant could collaterally attack this deportation in any subsequent prosecution in which deportation is an element of the crime." Id.

This Court should grant this petition to establish the correct rule throughout the country that the complete failure to inform an alien of his eligibility for discretionary relief in a removal proceeding violates due process and can render that proceeding fundamentally unfair.

CONCLUSION

This Court should grant the petition for certiorari.

Date: July 23, 2018

Respectfully submitted,

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REVISED May 11, 2018

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 17-40165

United States Court of Appeals
Fifth Circuit
FILED
April 23, 2018
Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

SANTIAGO HUMBERTO RODRIGUEZ-APARICIO,

Defendant - Appellant

Appeal from the United States District Court
for the Southern District of Texas

Before KING, HAYNES, and HIGGINSON, Circuit Judges.

KING, Circuit Judge:

Discontent with the services of his federal public defender, Santiago Humberto Rodriguez-Aparicio opted to represent himself. A two-day jury trial yielded a conviction on a charge of illegal reentry. On appeal, he argues that the district court effectively denied him the right to testify in his own defense. During a hearing focused on his waiver of the right to counsel, Rodriguez told the court that he understood he would receive "two more points" at sentencing if he testified. According to his argument on appeal, that triggered a duty to set him straight and explain that the penalty was not, in fact, automatic. Under the circumstances, we hold that there was no such duty. Rodriguez also

contends that the district court should have dismissed his indictment based on defects in his removal proceedings. But he concedes that our precedent forecloses this argument. As a result, we AFFIRM his conviction and sentence.

I.

A.

Santiago Humberto Rodriguez-Aparicio is a citizen of El Salvador. He was admitted into the United States as a lawful permanent resident in 1994. Thirteen years later, in 2007, U.S. Immigration and Customs Enforcement ("ICE") sought to remove him from the country based on a California firearm conviction. *See* 8 U.S.C. § 1227(a)(2)(C) (providing for removal of "[a]ny alien who at any time after admission is convicted under any law of . . . possessing[] or carrying . . . a firearm"). ICE served Rodriguez with a document titled "Stipulated Request for Removal Order and Waiver of Hearing Made By Respondent Who is Unrepresented." Rodriguez signed the stipulation. In doing so, he admitted to the facts alleged by ICE. He also waived his right to an attorney, a hearing, discretionary relief, and any appeal of the immigration judge's order. An immigration judge then ordered Rodriguez removed. ICE dispatched him to El Salvador by plane the next month.

In 2009, Rodriguez was charged in the District of Nevada with illegal reentry and illegal possession of a firearm and ammunition. He moved to dismiss the indictment, arguing that the immigration judge's failure to advise him of his eligibility for voluntary departure violated his right to due process. The Government declined to respond and instead moved to dismiss the illegal reentry count of the indictment. Rodriguez was convicted following a jury trial on the remaining counts and sentenced to 41 months' incarceration. He was removed from the United States two years later.

Rodriguez once again turned up in the United States in March 2015, when U.S. Customs and Border Patrol ("CBP") apprehended him near the Rio Grande River.

B.

A grand jury in the Southern District of Texas returned an indictment charging Rodriguez with illegally reentering the United States, in violation of 8 U.S.C. § 1326(a), (b). Rodriguez pleaded not guilty.

During pretrial proceedings, Rodriguez repeatedly aired his dissatisfaction with his federal public defender. According to Rodriguez, his attorney was resisting his request to file a motion to dismiss the indictment based on defects in his removal proceedings. Rodriguez's counsel ultimately complied with his request. In the motion, counsel argued that the immigration judge's failure to advise Rodriguez of his eligibility for voluntary departure violated his due process rights but conceded that the issue was foreclosed in the Fifth Circuit. The district court denied the motion.

Rodriguez's dissatisfaction with his attorney did not abate in the months leading up to trial. He ultimately requested that he be allowed to represent himself. The district court advised him against doing so. Rodriguez responded that he believed he would lose regardless and preferred to represent himself. Said Rodriguez, "I've already been to trial once before and I think I can do it." The court explained the charges, the maximum punishments, the immigration consequences, and the sentencing procedures. It advised Rodriguez that it would expect him to hew to the Federal Rules of Evidence and Criminal Procedure. If he decided to take the witness stand, the court told him that he would be required to ask himself questions and could not testify in narrative form. The court next informed Rodriguez that if he represented himself, the court would not give him legal advice, except to stop him from presenting inadmissible evidence or improper arguments.

The district court strongly urged Rodriguez not to represent himself in light of the "serious penalty" he might be facing. In response to that remark, Rodriguez asked, "The punishment, will it be higher if I have an attorney or if I represent myself?" The court responded as follows:

> [T]here are some things that an attorney can advise somebody as to how the sentencing guidelines might be different whether somebody goes to trial or not go to trial and all those other things *and whether a person takes the stand and whether they don't take the stand*, all those things that might affect a sentence. . . .
>
> And so if you decide to do that, well, you're running—making that decision without having benefit of a lawyer advising you as to what, if anything, under the factors that the Court has to consider would make an effect on the sentence. A lawyer knows that, but you don't. . . .
>
> I'm not here to give you legal advice and so that's not my role.

(Emphasis added). Rodriguez then offered, "I understand that if I testify I will get two more points." The court responded, "I'm not here to give you that advice either." Rodriguez confirmed that he understood and reaffirmed his desire to represent himself.

The court ruled that Rodriguez had knowingly and voluntarily waived his right to counsel. It appointed Rodriguez's public defender as standby counsel. The court explained to Rodriguez that standby counsel would not be representing him but would be available for legal questions.

C.

The jury trial lasted two days. During his opening statement, Rodriguez told the jury, "My name is Santiago Rodriguez-Aparicio. I have been in this country for over 20 years as a legal resident." The court stopped Rodriguez, explaining that he could not make a personal statement but was instead limited to summarizing what the evidence would show at trial. Rodriguez

continued, "I do not have very much in the way of evidence but I will try to do what I can and to speak and to present my defense. That's all."

The Government presented its case through four witnesses: two CBP agents, a fingerprint examiner, and a custodian of records for the U.S. Customs and Immigration Services. Rodriguez's efforts to present a defense were limited. He cross-examined only some of the Government's witnesses—with little success. The court twice inquired about whether Rodriguez planned to call any defense witnesses. On both occasions, Rodriguez indicated that he planned to present evidence to challenge his prior removals. But the court forbade him from doing so. Rodriguez consulted with standby counsel and ultimately decided not to call any witnesses.

Rodriguez began his closing statement by telling the jury, "I am my own lawyer, my own defendant, because as the law says, I always wanted to have a fair trial. . . . I have been in this country since I was not of legal age." The Government objected to Rodriguez's attempt to testify, and the court sustained the objection. Rodriguez continued, telling the jury that he did not have any evidence to disprove the Government's charges because he had not been allowed to present it. The court interrupted once again to tell Rodriguez that he could not make arguments about evidence not presented to the jury. Rodriguez resumed his closing argument, observing that "beyond a reasonable doubt, no one has testified that they have seen me leave this country." He wrapped up by telling the jury, "[T]he decision is yours."

The jury returned a verdict of guilty. The court imposed a sentence of 27 months' incarceration. Rodriguez appeals.

II.

On appeal, Rodriguez argues that the district court denied him his right to testify by failing to correct his misconception that he would receive an automatic sentencing enhancement for doing so. As the Government notes,

Rodriguez never raised this claim in the district court. Rodriguez nonetheless argues that applying plain error would be "absurd" because he represented himself and did not understand the law. We decline to resolve this dispute because Rodriguez's argument "fails even under the de novo standard he advocates." *United States v. Compian-Torres*, 712 F.3d 203, 206 (5th Cir. 2013).

"Every criminal defendant is privileged to testify in his own defense, or to refuse to do so." *Rock v. Arkansas*, 483 U.S. 44, 53 (1987) (quoting *Harris v. New York*, 401 U.S. 222, 225 (1971)); *see also* 18 U.S.C. § 3481 ("[T]he person charged shall, at his own request, be a competent witness."). This right is personal to the defendant: only he, not counsel, may make the choice. *See United States v. Mullins*, 315 F.3d 449, 452 (5th Cir. 2002). And he must do so knowingly and voluntarily. *Id.* Even so, "[a]n overwhelming majority of the circuits have held that a district court generally has no duty to explain . . . [the] right to testify or to verify that the defendant . . . has waived the right voluntarily." *United States v. Brown*, 217 F.3d 247, 258 (5th Cir. 2000) (citing *United States v. Leggett*, 162 F.3d 237, 246 (3d Cir. 1998) (collecting cases)), *vacated on other grounds sub nom. Randle v. United States*, 531 U.S. 1136 (2001).[1] In reaching that conclusion, courts have recognized that requiring the trial court to do so "could inappropriately influence the defendant to waive his constitutional right *not* to testify, thus threatening the exercise of this other, converse, constitutionally explicit, and more fragile right." *Siciliano v. Vose*, 834 F.2d 29, 30 (1st Cir. 1987) (Breyer, J.); *accord Brown*, 217 F.3d at 258.

Some courts have recognized that the district court may nonetheless have such a duty "in exceptional, narrowly defined circumstances." *United*

[1] On remand from the Supreme Court and after granting panel rehearing, the panel affirmed its original holding that the district court generally has no duty to explain the right to testify and confirm the defendant's waiver of that right. *See United States v. Randle*, 304 F.3d 373, 378–79 & n.4 (5th Cir. 2002).

States v. Pennycooke, 65 F.3d 9, 12 (3d Cir. 1995); *see id.* at 13 (when defendant's counsel "is frustrating his or her desire to testify"); *see also United States v. Ly*, 646 F.3d 1307, 1317 (11th Cir. 2011) (when the defendant is pro se and it is clear to the court that he misunderstands the right); *United States v. Stark*, 507 F.3d 512, 516–17 (7th Cir. 2007) (when the court is aware of a conflict between counsel and the defendant as to whether the defendant will testify); *United States v. Webber*, 208 F.3d 545, 552 (6th Cir. 2000) (adopting the reasoning in *Pennycooke*); *United States v. Ortiz*, 82 F.3d 1066, 1071 (D.C. Cir. 1996) (when the court is aware of a conflict between counsel and the defendant, or the defendant's decision not to testify "threatens to jeopardize the defense case and there appears to be no rational explanation for the decision"); *United States v. Janoe*, 720 F.2d 1156, 1161 (10th Cir. 1983) (suggesting that the district court may be required to hold a hearing where there is evidence of disagreement between the defendant and counsel). Virtually all of these circumstances involve conflicts between the defendant and counsel. *See Stark*, 507 F.3d at 516–17; *Webber*, 208 F.3d at 552; *Pennycooke*, 65 F.3d at 12; *Janoe*, 720 F.2d at 1161. Only the Eleventh Circuit appears to have recognized a duty to correct a pro se defendant's evident misunderstanding of the right to testify. *See Ly*, 646 F.3d at 1317.

The defendant in *Ly* told the district court that he did not believe he could testify without a lawyer to ask him questions. *See id.* at 1311–12. As a consequence, he believed that if he testified, he would only be able to respond to cross-examination from the Government. *See id.* The district court did nothing to correct his misunderstanding. *See id.* at 1317. On appeal, the Eleventh Circuit held that the district court had a duty to do so. *See id.* It reasoned that a court is entitled to presume a knowing waiver only in the absence of evidence to the contrary. *See id.* But when the court "knows" that the defendant's waiver is based on a misunderstanding of the law, it has a duty

to inquire further. *See id.* The court declined, however, to "set out" all of "[t]he ways in which a district court could 'know' that a defendant is not intelligently or knowingly exercising his right to testify." *Id.* And it qualified its holding because it recognized that "[t]his area of the law is not well laid." *Id.* at 1318. It limited the duty to "instances in which the district court begins a colloquy regarding the defendant's right to testify" and to "requiring [the] district court to correct a *pro se* defendant's basic misunderstanding regarding his fundamental right to testify." *Id.*

We find no warrant to establish such a duty in this case. Here, unlike in *Ly*, the defendant's misunderstanding concerned the consequences of testifying, not the ability to do so. *See id.* at 1311 ("[W]ithout counsel, Your Honor, I can't testify."). And unlike *Ly*, this case does not involve a court-initiated inquiry during trial regarding the decision to testify. *See id.* at 1311, 1317–18. Rather, when Rodriguez made the statement regarding a sentence enhancement if he testified, the district court was in the process of holding a pre-trial hearing on Rodriguez's waiver of the right to counsel. The proceedings had not yet reached the point where Rodriguez was required to make that decision.

Nor are we confronted with a claim that the district court actively misinformed Rodriguez about the right. The decision to testify carries the possibility of a two-level sentence enhancement if the defendant commits perjury. *See* U.S.S.G. § 3C1.1; *United States v. Dunnigan*, 507 U.S. 87, 95 (1993). The district court simply told Rodriguez correctly that a lawyer could advise him as to how the decision to testify might affect his sentence—not that such a decision surely would. Moreover, the district court did not simply ignore Rodriguez's statement regarding the penalty for testifying. Instead, it told him that it could not offer legal advice, encouraged him to consult with a lawyer, and again emphasized the disadvantages of self-representation.

A requirement that the district court correct every misunderstanding relating to the right to testify would prove unworkable. The district court would be in the position of constantly monitoring the defendant's statements for evidence of such misunderstandings. If the district court erred in its effort to clear up a misunderstanding, it might have committed further error. Its explanation might itself require additional clarification, essentially putting the district court in the position of legal advisor to the defendant. By attempting to correct his misunderstanding, it might have inadvertently misstated the law, omitted a relevant consideration, or otherwise compounded his confusion. Further, it might have undercut the district court's disclaimer of a duty to offer legal advice, causing Rodriguez to think that, despite its disclaimer, the district court would correct his misunderstandings throughout trial. The court in this case took the more prudent course: it told Rodriguez that only a lawyer could advise him of the consequences of testifying and that it was not the court's role to do so. So admonished, Rodriguez nonetheless reaffirmed his commitment to self-representation.[2]

Once the district court accepted Rodriguez's waiver of his right to counsel, it appointed standby counsel and told Rodriguez to look to her for legal advice. Standby counsel is a safeguard, not an entitlement. *See United States v. Oliver*, 630 F.3d 397, 414 (5th Cir. 2011). "'[T]he wisdom of the trial judge' in appointing standby counsel lies in the fact that the pro se defendant will therefore have counsel available 'to perform all the services a trained advocate

[2] As we do not confront a claim that the defendant misunderstood his *ability* to testify, this opinion should not be read necessarily to dictate the same outcome in such a case. As explained earlier, the Eleventh Circuit has held that a district court has a duty to correct a pro se defendant's misunderstanding of his ability to testify when the court initiates a colloquy with the defendant regarding whether he will testify. *See Ly*, 646 F.3d at 1318. Whether such a duty exists under those circumstances remains an open question in this circuit.

would perform ordinarily[]' . . . ." *United States v. Padilla-Galarza*, 886 F.3d 1, 2018 WL 1444325, at *6 (1st Cir. 2018) (quoting *Mayberry v. Pennsylvania*, 400 U.S. 455, 467–68 (1971) (Burger, C.J., concurring)). Standby counsel was available to answer any legal questions, including about the procedure for testifying and the potential consequences of doing so. Indeed, the record reflects that Rodriguez consulted with standby counsel during trial despite their prior discord.[3]

Finally, Rodriguez argues that his attempts to testify in his opening and closing statements also demonstrate that he wanted to testify but misunderstood how to do so. These statements gave no indication that he had any desire to offer sworn testimony. Rather, they simply betray his confusion about proper argument in opening and closing statements. The district court explained to Rodriguez before trial that he could take the witness stand if he wished but would be required to ask himself questions. Rodriguez counters that this explanation only compounds any error because Rodriguez could have testified in narrative form. But the trial court had broad discretion to require testimony to be in question-and-answer, rather than narrative, form. *See* Fed. R. Evid. 611(a) advisory committee's note to 1972 proposed rules; *United States v. Beckton*, 740 F.3d 303, 306–07 (4th Cir. 2014); *Hutter N. Tr. v. Door Cty. Chamber of Commerce*, 467 F.2d 1075, 1078–79 (7th Cir. 1972). We find no error in the court's decision not to inquire about Rodriguez's desire to testify in light of his remarks in his opening and closing statements. Nor do we find error in the court's explanation of how Rodriguez could testify.

[3] This appears to be yet another point of distinction between this case and *Ly*, where there was no indication that the defendant had access to the advice of standby counsel during trial.

Accordingly, Rodriguez's possible misunderstanding of the consequences of testifying triggered no duty to explain the right to testify.[4]

III.

This leaves the district court's denial of Rodriguez's motion to dismiss the indictment. We review this claim, including "any underlying constitutional claims," de novo. *United States v. Cordova-Soto*, 804 F.3d 714, 718 (5th Cir. 2015). As Rodriguez properly concedes, our precedent forecloses his argument. To challenge a prior order of removal in a prosecution under 8 U.S.C. § 1326, a defendant must show (1) exhaustion of administrative remedies, (2) improper deprivation of the right to judicial review, and (3) fundamental unfairness. *See* 8 U.S.C. § 1326(d). This court has held that eligibility for discretionary relief "is not a liberty or property interest warranting due process protection." *United States v. Lopez-Ortiz*, 313 F.3d 225, 231 (5th Cir. 2002). Thus, the failure to explain eligibility for discretionary relief "does not rise to the level of fundamental unfairness," at least not in this circuit.[5] *Id.* The district court therefore correctly denied Rodriguez's motion.

IV.

For the foregoing reasons, we AFFIRM Rodriguez's conviction and sentence.

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[4] We need not consider whether the denial of the right to testify is structural error because we hold that there was no error, structural or otherwise.

[5] The Second and Ninth Circuits have held otherwise. *See United States v. Lopez-Velasquez*, 629 F.3d 894, 896–97 (9th Cir. 2010) (en banc); *United States v. Copeland*, 376 F.3d 61, 70–73 (2d Cir. 2004). They are, however, in the minority. *See Lopez-Velasquez*, 629 F.3d at 897 n.2 (collecting cases); *Copeland*, 376 F.3d at 70 (collecting cases). And their decisions do not free us of our obligation to follow our own precedent absent intervening action by Congress, the Supreme Court, or our court sitting en banc. *See Mercado v. Lynch*, 823 F.3d 276, 279 (5th Cir. 2016) (per curiam).

RELEVANT CONSTITUTIONAL PROVISIONS AND STATUTES

U.S. Const. amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

8 U.S.C. § 1326(d). Reentry of removed aliens

(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) or subsection (b) 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.

INA § 237(a)(2)(C)/8 U.S.C. § 1227(a)(2)(C). Deportable aliens

(a) Classes of deportable aliens

Any alien (including an alien crewman) in and admitted to the United States shall, upon the order of the Attorney General, be removed if the alien is within one or more of the following classes of deportable aliens:

* * *

(2) Criminal offenses

(C) Certain firearm offenses
Any alien who at any time after admission is convicted under any law of purchasing, selling, offering for sale, exchanging, using, owning, possessing, or carrying, or of attempting or conspiring to

purchase, sell, offer for sale, exchange, use, own, possess, or carry, any weapon, part, or accessory which is a firearm or destructive device (as defined in section 921(a) of Title 18) in violation of any law is deportable.

8 U.S.C. § 1229c(b). Voluntary departure

(b) At conclusion of proceedings

(1) In general

The Attorney General may permit an alien voluntarily to depart the United States at the alien's own expense if, at the conclusion of a proceeding under section 1229a of this title, the immigration judge enters an order granting voluntary departure in lieu of removal and finds that—

(A) the alien has been physically present in the United States for a period of at least one year immediately preceding the date the notice to appear was served under section 1229(a) of this title;

(B) the alien is, and has been, a person of good moral character for at least 5 years immediately preceding the alien's application for voluntary departure;

(C) the alien is not deportable under section 1227(a)(2)(A)(iii) or section 1227(a)(4) of this title; and

(D) the alien has established by clear and convincing evidence that the alien has the means to depart the United States and intends to do so.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
McALLEN DIVISION

UNITED STATES OF AMERICA	*	
v.	*	CR. NO. M-15-453
SANTIAGO HUMBERTO RODRIGUEZ-APARICIO	*	

DEFENDANT'S MOTION TO DISMISS THE INDICTMENT

Defendant, SANTIAGO HUMBERTO RODRIGUEZ-APARICIO, ("Mr. Rodriguez-Aparicio"), moves this Court to dismiss the indictment. The underlying deportation order that forms the basis of the instant prosecution violated due process. The underlying deportation was violative of due process because the immigration judge ("IJ") failed to advise Mr. Rodriguez-Aparicio of his eligibility for voluntary departure. The second deportation relates back to the original order. Counsel for Mr. Rodriguez-Aparacio recognizes that this argument is foreclosed by Fifth Circuit precedent, but simply asks for a ruling on this matter in order to preserve the issue for appeal. Mr. Rodriguez-Aparicio was previously prosecuted for illegal reentry in Nevada. However, that indictment was dismissed after a dispositive motion was filed as discussed in more detail below. The Court in Nevada subsequently granted the dispositive motion as to the illegal reentry count and the Government proceeded on the remaining firearm counts of the indictment.

ARGUMENT

The Fifth Circuit "has formulated a three part test that must be met by an alien seeking to challenge a prior deportation order in a prosecution for illegal reentry under § 1326: the alien must establish that 1) the prior hearing was "fundamentally unfair;" 2) the hearing effectively eliminated the right of the alien to challenge the hearing by means of judicial review of the order; and 3) the procedural deficiencies caused the alien actual prejudice." *United States v. Mendoza-Mata*, 322

F.3d 829, 832 (5th Cir. 2003).

The Fifth Circuit has made explicitly clear that "the decision concerning whether to grant voluntary departure is discretionary, and deportation errors involving discretionary relief do not violate due process." *United States v. Castelan-Jaimes*, 575 F. App'x 253, 255 (5th Cir. 2014). And, the Fifth Circuit has held that an IJ's failure to advise of an alien of discretionary relief does not "rise to the level of fundamental unfairness" necessary to collaterally attack a prior deportation order. *See United States v. Lopez-Ortiz*, 313 F.3d 225, 231 (5th Cir. 2002). The Fifth Circuit is joined by most of the Circuit Courts on this issue, but in the Ninth and Second Circuits, "an IJ's failure to inform an alien of possible eligibility for discretionary relief constitutes a due process violation . . . ." *United States v. Lopez-Velasquez*, 629 F.3d 894, 897 n. 2 (9th Cir. 2010). In other words, in Ninth and Second Circuits, a defendant charged with illegal reentry can successfully mount a collateral attack on her underlying deportation order if that order contained infirmities relating to an IJ failing to advise of the defendant's eligibility for discretionary relief.

Indeed, in the District of Nevada (which is part of the Ninth Circuit), Mr. Rodriguez-Aparicio was previously successful in collaterally attacking the underlying deportation order upon which the Government now relies. For example, after filing a "motion to dismiss based on a prior unlawful deportation,[1]" the Government in that case moved to dismiss the illegal reentry count of the indictment.[2] In that motion, Mr. Rodriguez-Aparicio argued that "relief was available to him of which he was not advised . . . [s]pecifically . . . that he was eligible for fast-track voluntary departure." Original Motion to Dismiss 5.

If Mr. Rodriguez-Aparacio had been apprehended in those states residing within the Ninth Circuit, he may have been successful in again collaterally attacking his underlying deportation

[1] *See* Attachment I (Original Motion to Dismiss with attached exhibits)
[2] *See* Attachment II (Government's Motion to Dismiss Count One of the Indictment)

orders. But he was not, and his argument is foreclosed by the Fifth Circuit's precedent. He submits this Motion to preserve the issue for appeal in case the Supreme Court decides to resolve this Circuit split.

Respectfully submitted,

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Texas State Bar No. 14003750
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By s/ Judy Pena-Morales
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CERTIFICATE OF SERVICE

I hereby certify that, on the 9th day of December, 2015, a copy of the Defendant's Motion To Dismiss The Indictment, of the defendant, **SANTIAGO HUMBERTO RODRIGUEZ-APARICIO** was hand delivered to Assistant U.S. Attorney, Joseph Leonard, Assistant U.S. Attorney's Office, all located at the Bentsen Tower Building, 1701 W. Business Hwy. 83, McAllen, Texas.

s/ Judy Pena-Morales
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Attorney for SANTIAGO HUMBERTO RODRIGUEZ-APARICIO

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

UNITED STATES OF AMERICA,

Plaintiff,

v.

SANTIAGO HUMBERTO RODRIGUEZ-APARICIO,

Defendant.

2:09-CR-0060-PMP-PAL

MOTION TO DISMISS BASED ON A PRIOR UNLAWFUL DEPORTATION

CERTIFICATION: This motion is timely filed.

COMES NOW the defendant, SANTIAGO HUMBERTO RODRIGUEZ-APARICIO, by and through his counsel of record, Franny A. Forsman, Federal Public Defender, and BRENDA WEKSLER, Assistant Federal Public Defender, and files his Motion to Dismiss Based on a Prior Unlawful Deportation. This pleading is based upon the attached Memorandum of Points and Authorities and all of the papers and pleadings on file herein.

DATED this 21st day of May, 2009.

FRANNY A. FORSMAN
Federal Public Defender

/s/ Brenda Weksler
By: _____
BRENDA WEKSLER
Assistant Federal Public Defender

ATTACHMENT I

POINTS AND AUTHORITIES

I. FACTUAL AND PROCEDURAL BACKGROUND

On February 18, 2009, the government filed a three-count indictment charging Mr. Santiago Humberto Rodriguez-Aparicio (hereinafter defendant or "Mr. Rodriguez") in Count I with Unlawful Reentry of a Deported Alien, in violation of 8 U.S.C. § 1326; in Count II with Unlawful Alien in Possession of a Firearm and Ammunition, in violation of 18 U.S.C. §§ 922(g)(5)(A) and 924(a)(2); and Count III with Convicted Felon in Possession of a Firearm and Ammunition, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). As to the violation of 8 U.S.C. § 1326, the indictment alleges that Mr. Rodriguez was previously deported and removed from the United States on or about March 5, 2007.[1] That removal occurred as follows.

On February 1, 2007, Immigration and Customs Enforcement (ICE)[2] issued a Notice to Appear against Mr. Rodriguez. Exhibit A (Notice to Appear). The Notice to Appear charged him with removability from the United States on the basis of the following allegations: (1) that he was not a citizen or national of the United States; (2) that he was a native and citizen of El Salvador; (3) that he was admitted to the United States at Los Angeles, California on or about February 20, 1994 as a lawful permanent resident; and (4) that on August 29, 2006, he was convicted in the Superior Court of California, County of San Luis Obispo, for the offense of Felony Having a Concealed Firearm in Vehicle, in violation of Section 12025(a)(1) of the California Penal

---

[1] In 1996, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIA"), Pub. L. No. 104-208, 110 Stat. 3009-546 (Sept. 30, 1996). In doing so, Congress created several new terms of art, one of which was "removal." See Rojas-Reyes v. INS, 235 F.3d 115, 120 (2d Cir. 2000). The creation of the term "removal" eliminated the previous legal distinction between deportation and exclusion proceedings and merged them into one unified procedure. See United States v. Lopez-Gonzalez, 183 F.3d 933, 934 (9th Cir. 1999). For the purposes of this motion, the terms "removal" and "deportation" should be viewed as constructively synonymous.

[2] The Homeland Security Act of 2002 abolished the Immigration and Naturalization Service (INS). See Pub.L. No. 107-296 § 471, 116 Stat. 2135 (2002). The Act initiated a mammoth governmental reorganization, transferring the majority of the INS's functions from the Department of Justice (DOJ) to the Department of Homeland Security (DHS), but leaving the Executive Office of Immigration Review (including the immigration judges and Board of Immigration Appeals (BIA)) under the auspices of DOJ. The majority of the functions of the former-INS were divided between Immigration and Customs Enforcement (ICE), the prosecutorial component, and Citizenship and Immigration Services (CIS), the immigration benefits component. Because some of the conduct relevant to this motion occurred prior to March 1, 2003, the acronym INS will appear in the documentation attached as exhibits.

Code. See Exhibit A. On the basis of these allegations, ICE charged Mr. Rodriguez with being removable under INA § 237(a)(2)(C), as an alien who has committed a firearms offense. Id.

The day after being served with the Notice to Appear, on February 7, 2007, Mr. Rodriguez was served with a second form titled "Stipulated Request for Removal Order and Waiver of Hearing Made By Respondent Who is Unrepresented" and he signed the form. Exhibit B (Stipulated Request for Removal Order and Waiver of Hearing). This document included several statements indicating, among other things, that the alien conceded receipt of the Notice to Appear, waived his right to appear before an Immigration Judge including the right to apply for relief, admitted the allegations in the Notice to Appear were true, chose El Salvador as the country to which he wished to be removed, and waived appeal of the written order to be issued by the Immigration Judge. Id. This form also had him declare that he had signed it voluntarily, knowingly, and intelligently. Id. Based upon the Notice to Appear and the written stipulation, without a hearing, on February 8, 2007, an Immigration Judge ordered Mr. Rodriguez removed to El Salvador. Exhibit C (Removal Order). On March 5, 2007, he was physically removed to El Salvador pursuant to the removal order. Exhibit D (Warrant of Removal/Deportation).

Mr. Rodriguez allegedly returned to the United States following that removal and was subsequently indicted for the instant matter. The Indictment alleges that the defendant was previously deported and removed from the United States on or about March 5, 2007. Defendant contends, however, that as he was foreclosed of the opportunity for proper judicial review during the proceedings which culminated in the issuance of this Removal Order, the resulting Removal Order was unlawfully obtained and the physical removal which resulted from that faulty Removal Order may not be used against him in the instant prosecution. As a result, this motion follows.

II. ARGUMENT

A. THE REMOVAL ORDER WAS OBTAINED UNLAWFULLY AND CANNOT BE USED AS AN ELEMENT OF AN ILLEGAL RE-ENTRY OFFENSE.

Mr. Rodriguez was removed from the United States on March 5, 2007 as the result of a single Removal Order which was issued against him on February 8, 2007. This Removal Order, however, was obtained

unlawfully and cannot be used as an element of an illegal re-entry offense. According to United States v. Mendoza-Lopez, 481 U.S. 828, 837-38 (1987),

> [W]here a determination made in an administrative proceeding is to play a critical role in the subsequent imposition of a criminal sanction, there must be some meaningful review of the administrative proceeding. This principle means at the very least that where the defects in an administrative proceeding foreclose judicial review of that proceeding, an alternative means of obtaining judicial review must be made available before the administrative order may be used to establish conclusively an element of a criminal offense.

As will be explained below, in the instant matter serious defects foreclosed proper judicial review of the administrative removal proceeding which resulted in the issuance of the Removal Order. In United States v. Arrieta, 224 F.3d 1076, 1078 (9th Cir. 2000), the Ninth Circuit set out the law regarding the validity of a collateral challenge of the deportation order.

> "In a criminal prosecution under § 1326, the Due Process Clause of the Fifth Amendment requires a meaningful opportunity for judicial review of the underlying deportation." United States v. Zarate-Martinez, 133 F.3d 1194, 1197 (9th Cir. 1998) cert. denied, 525 U.S. 849, 119 S.Ct. 123, 142 L. Ed.2d 99 (1998). If the defendant's deportation proceedings fail to provide this opportunity, the validity of the deportation may be collaterally attacked in the criminal proceeding. Id. The defendant "can succeed in this collateral challenge only if he is able to demonstrate that: (1) his due process rights were violated by defects in his underlying deportation proceeding, and (2) he suffered prejudice as a result of the defects." Id.

In this case, there were errors during the removal proceeding of which Mr. Rodriguez was not made aware. Had he been permitted the opportunity to apply for relief from removal, there is a real possibility that Mr. Rodriguez would have avoided the specter of a formal Removal Order. To sustain a collateral attack, the defendant must show 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 deprived [him] of the opportunity for judicial review; and
> (3) the entry of the order was fundamentally unfair.

8 U.S.C. § 1326(d). "An underlying removal order is 'fundamentally unfair' if: (1) a defendant's due process rights were violated by defects in his underlying deportation proceeding, and (2) he suffered prejudice as a result of the defects." United States v. Ubaldo-Figueroa, 364 F.3d 1042, 1048 (9th Cir. 2004) (internal quotation marks, citation, and alteration omitted). Because the removal hearing in this case did not comport

with essential principles of fairness, Mr. Rodriguez contends that his Removal Order was obtained unlawfully and cannot stand as a material element forming the basis of the charges against him. Id.

B. DUE PROCESS ERRORS OCCURRED DURING THE REMOVAL PROCEEDING AND HE SUFFERED PREJUDICE AS A RESULT OF THESE ERRORS.

By issuing a Notice to Appear, ICE placed Mr. Rodriguez in a standard removal proceeding. See 8 U.S.C. § 1229(a)(1). Usually, an alien with the type of charge of removability levied against Mr. Rodriguez must be placed in a removal hearing before an immigration judge. See 8 U.S.C. § 1229(a)(1) and (3). This type of proceeding is most commonly conducted in the presence of the alien. However, the statute permits the proceeding to occur without the presence of the alien so long as it is agreed to by the parties. See 8 U.S.C. § 1229a(b)(1)(A)(ii). In cases where both the alien and the government are in agreement, a stipulated removal order may be requested. See 8 U.S.C. § 1229a(d). The regulations implementing the procedure for stipulated removals are found at 8 C.F.R. § 1003.25.

Mr. Rodriguez did not then and does not now challenge the ground upon which it was determined that he was removable from the United States. He does, however, contend that relief was available to him of which he was not advised. Specifically, he contends that he was eligible for fast-track voluntary departure.[3] 8 U.S.C. § 1229c(a) outlines the requirements for this type of voluntary departure as follows:

> (1) In general
>
> The Attorney General may permit an alien voluntarily to depart the United States at the alien's own expense under this subsection, in lieu of being subject to proceedings under section 1229a of this title or prior to the completion of such proceedings, if the alien is not deportable under section 1227(a)(2)(A)(iii) or section 1227(a)(4)(B)of this title.

See In re Cordova, Int.Dec.3408 (BIA 1999)(en banc)(describing the statute). Mr. Rodriguez met these requirements in that he had never been accused in either the Notice to Appear nor at an point during this proceeding of being either a terrorist or an aggravated felon. See Exhibits A, B and C. As an alien who was neither an aggravated felon or a terrorist, Mr. Rodriguez was statutorily eligible for relief from removal through fast track voluntary departure.

---

[3] Although an alien granted voluntary departure relief is still required to leave the country, a voluntary departure is not considered a deportation, exclusion, or removal for § 1326 purposes. See Cunanan v. INS, 856 F.2d 1373, 1374 n. 1 (9th Cir. 1988).

Although the ICE officers and attorneys reviewing this matter as well as the Immigration Judge reviewing the documents submitted by ICE to the Immigration Court would have been aware that Mr. Rodriguez was eligible for relief, at no point did anyone inform Mr. Rodriguez that relief was available. See Exhibits A and B. Failure to inform an unrepresented alien in removal proceeding of available relief constitutes a due process violation. 8 C.F.R. § 1003.25(b) requires that, "If the alien is unrepresented, the Immigration Judge must determine that the alien's waiver is voluntary, knowing, and intelligent." 8 C.F.R. § 240.49(a) requires that during a removal proceeding, "The immigration judge shall inform the respondent of his or her apparent eligibility to apply for ... [a waiver of deportation] and shall afford the respondent an opportunity to make application therefor during the hearing." The Ninth Circuit has repeatedly held that this provision is "mandatory." See United States v. Muro-Inclan, 249 F.3d 1180,1183 (9th Cir. 2001); see also Arrieta, 224 F.3d at 1079; United States v. Arce-Hernandez, 163 F.3d 559, 563 (9th Cir.1998). The failure to inform an immigrant of possible eligibility for relief from removal is a denial of due process that invalidates the underlying deportation proceeding. See United States v. Ubaldo-Figueroa, 364 F.3d 1049, 1049-50 (9th Cir. 2004).

The Ninth Circuit has specifically determined that a waiver of appeal must be made personally and with complete information. "An alien cannot make a valid waiver of his right to appeal a removal order if an IJ does not ***expressly and personally*** inform the alien that he has the right to appeal." United States v. Ubaldo-Figueroa, 364 F.3d 1042, 1049 (9th Cir. 2004)(emphasis added). The Immigration Judge could never have been able to make a determination as to the validity of the waivers contained in the "Stipulated Request for Removal Order and Waiver of Hearing" because Mr. Rodriguez never appeared personally before the Immigration Judge in order for him to verify the validity of the waiver. In Ubaldo-Fiegueroa, the Ninth Circuit determined that a waiver of appeal made by an alien's attorney was not sufficient, even though the alien was physically present and standing next to his attorney when the waiver was made. Id. at 1049. In United States v. Zarate-Martinez, 133 F.3d 1194, 1197-98 (1998), the Ninth Circuit held that a waiver of appeal made directly by the alien to the Immigration Judge was invalid because it had been entered during a group removal proceeding in because the Immigration Judge did not specifically ascertain that the alien understood his right

to appeal and expressly chose to waive that right. A waiver of rights cannot be considered valid when the Immigration Judge has not specifically addressed the issue with the respondent alien and verified that the decision to waive his rights has been made in a "considered and intelligent" manner.

The Ninth Circuit has consistently held that waivers in removal proceedings must be "considered and intelligent" and this is especially so when a removal order in a civil removal proceeding is later to be used to sustain a criminal conviction. Based upon the information available to the Immigration Judge during the removal proceeding, it should have been determined that Mr. Rodriguez was eligible for relief through voluntary departure. Without being informed that relief was available to him and being given an opportunity to apply for such relief, any waivers made by Mr. Rodriguez regarding the waiver of the right to apply for relief and the waiver of the right to appeal were less than "considered and intelligent." This error was compounded by the Immigration Judge's failure to verify personally with Mr. Rodriguez that he had been fully informed of the relief available to him and the impact of his waivers.

C. MR. RODRIGUEZ HAD PLAUSIBLE GROUNDS FOR OBTAINING RELIEF THROUGH VOLUNTARY DEPARTURE.

In order to establish prejudice, Mr. Rodriguez does not have to show that he actually would have been granted relief. He must only demonstrate that he was statutorily eligible for relief and that he had "plausible" grounds for receiving relief from deportation. See Arce-Hernandez, 163 F.3d 559, 563 (9th Cir. 1998) (citing Jimenez-Marmolejo, 104 F.3d at 1086); see also Arrieta, 224 F.3d at 1079 (agreeing Arrieta had set forth plausible grounds that he could have received a § 212(h) waiver).

During the removal proceeding, it is clear that Mr. Rodriguez did not fall within either of the categories which prohibit a grant of relief through voluntary departure - terrorist and aggravated felon. Moreover, the Notice to Appear did allege that Mr. Rodriguez had been a lawful resident of the United States since February 20, 1994. See Exhibit A. The Immigration Judge and the ICE officers and attorneys would have been aware that as an alien who had resided lawfully in the United States for about thriteen years, Mr. Rodriguez would certainly have developed family ties and other equities in the United States in support of his claim for relief. Voluntary departure should have been explained and offered to Mr. Rodriguez, and he should have been permitted to make a clear record as to why relief should have been granted. As an alien in his first removal

proceeding and having resided lawfully in the United States for over a decade, with no other adverse immigration history, Mr. Rodriguez could have made a case for relief. He was eligible for voluntary departure and should have been allowed to make an application for this form of relief.

The information presented does not guarantee Mr. Rodriguez would have been granted relief from removal, but it outlines at least one avenue of relief that could have been granted to him. Mr. Rodriguez met the criteria for requesting voluntary departure. He could have possibly received this form of relief, had he been advised of his eligibility for relief. The defects in the removal proceeding violated his due process rights and render the single Removal Order against him invalid. Because of this, the Removal Order cannot now be used to sustain an element of the charged illegal reentry offense.

D. MR. RODRIGUEZ IS EXEMPTED FROM THE EXHAUSTION REQUIREMENTS OF 8 U.S.C. § 1326(D).

8 U.S.C. § 1326(d)(1) demands a defendant show exhaustion of administrative remedies before mounting a collateral challenge. Usually, however, exhaustion is excused barring a showing by the government the alien made a considered and intelligent choice about not seeking further administrative remedies. See United States v. Arrieta, 224 F.3d 1076, 1079 (9th Cir. 2000). "Courts should 'indulge every reasonable presumption against waiver,' and they should 'not presume acquiescence in the loss of fundamental rights.'" United States v. Lopez-Vasquez, 1 F.3d 751, 753-54 (9th Cir. 1993) (citing and quoting Brewer v. Williams, 430 U.S. 387, 415 (1977)). The Government bears the burden of proving a considered and intelligent waiver. See Lopez-Vasquez, 1 F.3d at 753-54; see also North Carolina v. Butler, 441 U.S. 369, 373 (1979) (explaining, in the context of waiver of the right against self incrimination that "[t]he courts must presume that a defendant did not waive his rights" and that in proving such a waiver, "the prosecution's burden is great").

The Ninth Circuit has determined, though, that a waiver cannot be deemed considered and intelligent when the alien has not been advised of the forms of relief available to him. See United States v. Ubaldo-Figueroa, 364 F.3d 1049 (9th Cir. 2004); see also Muro-Inclan, 249 F.3d at 1182 (holding that a waiver of appeal is invalid if the immigrant is not advised of possible eligibility for relief from deportation). Mr. Rodriguez was never advised that he was statutorily eligible for relief from removal through voluntary

departure. See Exhibits A and B. More importantly, the Immigration Judge failed to properly carry out his duties by not advising Mr. Rodriguez of available relief or, at the very least, ascertaining that the ICE officers who obtained the Stipulated Request from him had fully informed him of available relief. The Immigration Judge committed a much graver error in failing to verify that any waiver of appeal by Mr. Rodriguez was a fully informed decision.

The exhaustion and deprivation requirements in 8 U.S.C. § 1326(d) are therefore satisfied. See Ortiz-Lopez, 385 F.3d at 1204; cf. Mendoza-Lopez, 481 U.S. at 831-32 (respondents' appellate waivers were invalid because they did not understand the Immigration Judge's explanation of suspension of deportation); Muro-Inclan, 249 F.3d at 1182 (holding that a waiver of appeal is invalid if the immigrant is not advised of possible eligibility for relief from deportation); see also United States v. Pallares-Galan, 359 F.3d 1088, 1096-97 (9th Cir. 2004) (explaining an appellate waiver is not "considered and intelligent," and therefore invalid, when it is obtained without accurate apprisal of the direct consequences of the waiver).

The due process violations in the removal proceeding and the resulting faulty waiver of appeal excuse Mr. Rodriguez from the exhaustion requirements of 8 U.S.C. § 1326(d).

III. CONCLUSION

Mr. Rodriguez was deprived of the opportunity to be informed of his right to seek voluntary departure or any other type of relief for which he may have been eligible. The failings of the proceeding resulted in the foreclosure of proper judicial review and go to the very core of basic due process rights. Based on the above and forgoing and in the interests of justice and fairness, Mr. Rodriguez respectfully asks this Court to rule that his February 8, 2007 Removal Order which resulted in his physical removal from the United States on March 5, 2007, is legally incompetent to use as an element of an Illegal Reentry charge and to dismiss Count I of the Indictment pending against him.

Dated this 21ST day of May, 2009.

Respectfully submitted,

/s/ Brenda Weksler

By: _____
BRENDA WEKSLER
Assistant Federal Public Defender

CERTIFICATE OF ELECTRONIC SERVICE

The undersigned hereby certifies that she is an employee of the Law offices of the Federal Public Defender for the District of Nevada and is a person of such age and discretion as to be competent to serve papers.

That on May 21, 2009, she served an electronic copy of the above and foregoing **MOTION TO DISMISS,** by electronic service (ECF) to the person named below:

GREGORY A. BROWER
United States Attorney

ROBERT BORK
Assistant United States Attorney
333 Las Vegas Blvd. So., 5th Floor
Las Vegas, Nevada 89101

/s/ Bernadette Almeida
Employee of the Federal Public Defender

EXHIBIT "A"

EXHIBIT "A"

U. S. Department of Justice
Immigration and Naturalization Service

Notice to Appear

In removal proceedings under section 240 of the Immigration and Nationality Act

File No: A044 466 852
Case No: SAC0702000001

In the Matter of:

Respondent: Santiago Humberto RODRIGUEZ APARICIO currently residing at:

none provided
(Number, street, city state and ZIP code)

(831)385-2607
(Area code and phone number)

☐ 1. You are an arriving alien.
☐ 2. You are an alien present in the United States who has not been admitted or paroled.
☒ 3. You have been admitted to the United States, but are deportable for the reasons stated below.

The Service alleges that you:

See Continuation Page Made a Part Hereof

On the basis of the foregoing, it is charged that you are subject to removal from the United States pursuant to the following provision(s) of law:

See Continuation Page Made a Part Hereof

☐ This notice is being issued after an asylum officer has found that the respondent has demonstrated a credible fear of persecution or torture.

☐ Section 235(b)(1) order was vacated pursuant to: ☐ 8 CFR 208.30(f)(2) ☐ 8 CFR 235.3(b)(5)(iv)

YOU ARE ORDERED to appear before an immigration judge of the United States Department of Justice at: _____
(Complete Address of Immigration Court, including Room Number, if any)

on a date to be set (Date) at a time to be set (Time) to show why you should not be removed from the United States based on the charge(s) set forth above.

DAVID W. JENNINGS
SDDO
(Signature and Title of Issuing Officer)

Date: February 1, 2007

650 Capitol Mall Room 1-120, Sacramento, California 95814
(City and State)

See reverse for important information

Form I-862 (Rev. 3/22/99)N

00107

Notice to Respondent

Warning: Any statement you make may be used against you in removal proceedings.

Alien Registration: This copy of the Notice to Appear served upon you is evidence of your alien registration while you are under removal proceedings. You are required to carry it with you at all times.

Representation: If you so choose, you may be represented in this proceeding, at no expense to the Government, by an attorney or other individual authorized and qualified to represent persons before the Executive Office for Immigration Review, pursuant to 8 CFR 3.16. Unless you so request, no hearing will be scheduled earlier than ten days from the date of this notice to allow you sufficient time to secure counsel. A list of qualified attorneys and organizations who may be available to represent you at no cost will be provided with this Notice.

Conduct of the hearing: At the time of your hearing, you should bring with you any affidavits or other documents which you desire to have considered in connection with your case. If any document is in a foreign language, you must bring the original and a certified English translation of the document. If you wish to have the testimony of any witnesses considered, you should arrange to have such witnesses present at the hearing.

At your hearing you will be given the opportunity to admit or deny any or all of the allegations in the Notice to Appear and that you are inadmissible or deportable on the charges contained in the Notice to Appear. You will have an opportunity to present evidence on your own behalf, to examine any evidence presented by the Government, to object, on proper legal grounds, to the receipt of evidence and to cross examine any witnesses presented by the Government. At the conclusion of your hearing, you have a right to appeal an adverse decision by the immigration judge.

You will be advised by the immigration judge before whom you appear, of any relief from removal for which you may appear eligible including the privilege of departing voluntarily. You will be given a reasonable opportunity to make any such application to the immigration judge.

Failure to appear: You are required to provide the INS, in writing, with your full mailing address and telephone number. You must notify the Immigration Court immediately by using Form EOIR-33 whenever you change your address or telephone number during the course of this proceeding. You will be provided with a copy of this form. Notices of hearing will be mailed to this address. If you do not submit Form EOIR-33 and do not otherwise provide an address at which you may be reached during proceedings, then the Government shall not be required to provide you with written notice of your hearing. If you fail to attend the hearing at the time and place designated on this notice, or any date and time later directed by the Immigration Court, a removal order may be made by the immigration judge in your absence, and you may be arrested and detained by the INS.

Request for Prompt Hearing

To expedite a determination in my case, I request an immediate hearing. I waive my right to have a 10-day period prior to appearing before an immigration judge.

(Signature of Respondent)

Before: IEA

(Signature and Title of INS Officer)

Date: 2/6/07

Certificate of Service

This Notice to Appear was served on the respondent by me on _____, in the following manner and in (Date)

compliance with section 239(a)(1)(F) of the Act:

- ☒ in person ☐ by certified mail, return receipt requested ☐ by regular mail
- ☐ Attached is a credible fear worksheet.
- ☒ Attached is a list of organizations and attorneys which provide free legal services.

The alien was provided oral notice in the English/Spanish language of the time and place of his or her hearing and of the consequences of failure to appear as provided in section 240(b)(7) of the Act.

(Signature of Respondent If Personally Served)

IEA

(Signature and Title of Officer)

Form I-862 (Rev. 3/22/99)N

00108

U.S. Department of Justice
Immigration and Naturalization Service

Continuation Page for Form I-862

Alien's Name	File Number	Date
Santiago Humberto RODRIGUEZ APARICIO	Case No: SAC0702000001 A044 466 852	February 1, 2007

The Service alleges that you:

1) You are not a citizen or national of the United States;

2) You are a native of EL SALVADOR and a citizen of EL SALVADOR;

3) You were admitted to the United States at Los Angeles, California on or about February 20, 1994 as a lawful permanent resident (FX2);

4) You were, on August 29, 2006, convicted in the Superior Court of California, County of San Luis Obispo, for the offense of Felony Having Concealed Firearm In Vehicle, in violation of Section 12025(a)(1) of the California Penal Code.

On the basis of the foregoing, it is charged that you are subject to removal from the United States pursuant to the following provision(s) of law:

Section 237(a)(2)(C) of the Immigration and Nationality Act, as amended, in that, at any time after admission, you have been convicted under any law of purchasing, selling, offering for sale, exchanging, using, owning, possessing, or carrying, or of attempting or conspiring to purchase, sell, offer for sale, exchange, use, own, possess, or carry, in violation of any law, any weapon, part, or accessory which is a firearm or destructive device, as defined in Section 921(a) of Title 18, United States Code.

Signature	Title
DAVID W. JENNINGS	SDDO

3 of 3 Pages

Form I-831 Continuation Page (Rev. 6/12/92)

00109

EXHIBIT "B"

EXHIBIT "B"

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
SAN FRANCISCO, CALIFORNIA

IN THE MATTER OF: *En la Causa de:*	)	IN REMOVAL PROCEEDINGS *En Proceso De Expulsión*
RODRIGUEZ-Aparico, Santiago	)	FILE NO: **A44 466 852**
	)	*Archivo No:*
RESPONDENT *Compareciente*	)	

STIPULATED REQUEST FOR REMOVAL ORDER AND WAIVER OF HEARING MADE BY RESPONDENT WHO IS UNREPRESENTED
PETICIÓN DE ORDEN DE EXPULSIÓN ESTIPULADA Y RENUNCIA AL DERECHO DE AUDIENCIA PRESENTADA POR UN COMPARECIENTE SIN REPRESENTACIÓN LEGAL

I, Santiago Humberto Rodriguez-Aparicio, make the following statements and admissions:

Yo, Santiago Humberto Rodriguez-Aparicio, hago las siguientes declaraciones y admisiones:

1. **I am at least 18 years of age.**

   No soy menor de 18 años de edad.

2. **I have received a copy of the Notice to Appear (NTA) dated Feb. 1, 2007. The NTA contains my full, true, and correct name.**

   He recibido una copia de la Notificación de Compareciencia (NTA) con fecha de _____. La NTA contiene mis nombres y apellidos completos, verdaderos y correctos.

3. **I have also received the list of Free Legal Service Providers.**

   También he recibido la lista de Agencias de Servicios Legales Gratuitos.

4. **I have been advised of my right to be represented by an attorney of my choice, at my own expense, during these proceedings. I waive this right. I will represent myself in these proceedings.**

He sido avisado sobre mi derecho a tener representación legal de mi elección a costo propio durante este proceso. Renuncio voluntariamente a este derecho. Voy a representar a mi mismo en este proceso.

5. **I understand and agree that by signing this request, I will be giving up the following legal rights that I would have in a hearing before an Immigration Judge:**
a) the right to present and question witnesses;
b) the right to offer evidence and examine the government's evidence;
c) the right to require the government to prove my removability
Knowing this, I waive these rights and request that my removal proceedings be held without a hearing and that the Immigration Judge issue an order based solely on the written record.

Entiendo y acepto que al firmar esta petición, estaré abandonando voluntariamente los siguientes derechos legales a los cuales tendría derecho en una audiencia ante un Juez de Inmigración:
a) el derecho de presentar a testigos e interrogarlos;
b) el derecho de presentar evidencia y revisar la evidencia presentada por el gobierno;
c) el derecho de requerir que el gobierno demuestre que estoy sujeto/a a la expulsión
Teniendo esto presente, renuncio a estos derechos y pido que mi proceso se transmite sin audiencia y que el Juez de Inmigración expida una orden basada únicamente en las actas escritas.

6. **I admit that all the factual allegations contained in the NTA are true and correct. I also agree that I am removable as charged in the NTA. An immigration officer reviewed with me and explained to me each allegation and charge.**

Acepto que todos los alegatos que figuran en la NTA son verdaderos y correctos.
También estoy de acuerdo que estoy sujeto/a a la expulsión tal como consta en la NTA.
Un oficial de inmigración revisó y explicó cada alegato y cargo conmigo.

7. **I choose El Salvador as the country designated for removal.**

Elijo_____ como el país designado para la expulsión.

[RODRIGUEZ-APARICIO, Santiago Humberto A44 466 852]
[Page 2 of 5]

8. **I do not wish to apply for any relief from removal under the Immigration and Nationality Act or any other provision of law. Such relief may include voluntary departure, adjustment of status, changes of status, suspension or cancellation of removal, registry, and naturalization.**

No deseo solicitar ningún recurso legal ante la expulsión de acuerdo con la ley de Inmigración y Naturalización o cualquier otra provisión de ley. Tal recurso podría incluir la salida voluntaria, el ajuste de estatus, el cambio de estatus, la suspensión o la cancelación de la expulsión, la inscripción y la naturalización.

9. **I have no fear of returning to the country I designated in #7.**

No tengo ningún temor de regresar al país que designo en la declaración no. 7.

10. **I understand and agree that this written statement will be made part of the record for the Immigration Judge to review.**

Entiendo y estoy de acuerdo que esta declaración escrita formará parte de las actas para que el Juez de Inmigración las revise.

11. **I understand and agree that I will accept a written order for my removal as a final disposition of these proceedings. I do not wish to appeal the written order of the Immigration Judge.**

Entiendo y estoy de acuerdo que aceptaré una orden escrita para mi expulsión, la cual será la disposición final de este proceso. No quiero apelar la orden escrita del Juez de Inmigración.

12. **I understand that, depending upon the facts and circumstances of my case, I cannot return to the United States for a minimum of ten years, and possibly forever, without special permission from the Attorney General of the United States. I also understand that returning without proper permission could result in being removed again and/or being prosecuted for illegal reentry which may result in punishment of up to twenty years in prison.**

Yo entiendo que dependiendo los hechos y las circunstancias de mi caso, no puedo volver a los Estados Unidos por un plazo mínimo de diez años, y posiblemente nunca, sin obtener un permiso especial del Procurador General de los Estados Unidos. También entiendo que si vuelvo sin permiso podría ser enjuiciado por reentrada ilegal, lo cual puede resultar en un castigo de hasta veinte años en prisión.

/RODRIGUEZ-APARICIO, Santiago Humberto A44 466 852/
[Page 3 of 5]

Page 3 of 6

13. **_X_I have read or___I have had read to me in a language I understand, this entire document. I fully understand its consequences. I submit this request for removal voluntarily, knowingly, and intelligently. I realize that by signing this document, I will be removed from the United States.**

___He leído o ___me han leído, en un idioma que entiendo, este documento en su integridad. Entiendo completamente sus consecuencias. Presento esta petición de expulsión de manera voluntaria y conociendo cabalmente sus implicaciones. Me doy cuenta que al firmar este documento seré expulsado de los Estados Unidos.

14. **I certify that all the information I have given in this request is true and correct.**

Certifico que toda la información que he dado en esta petición es verdadera y correcta.

2/6/07
DATE/FECHA

RESPONDENT/COMPARECIENTE

2/6/07
DATE

Signature of DHS official serving as witness

Thanh Chuong, IEA
PRINTED NAME AND TITLE

[RODRIGUEZ-APARICIO, Santiago Humberto A44 466 852]
[Page 4 of 5]

Certification

X *I certify that I determined that the above referenced alien could read by asking the alien to read to me the following paragraph: (circle one) 1 3 6 10*

____ *I certify that this document was read to the alien in its entirety in the Spanish language.*

X *I certify that all of the information contained in the document above was made voluntarily by the respondent.*

2/6/07 Thanh Chuong
DATE / SIGNATURE

Thanh Chuong, IEA
PRINTED NAME AND TITLE

Upon review of respondent's administrative file and the attached documents, the Government concurs with respondent 's request pursuant to 8 C.F.R. sec. 1003.25(b) for the Immigration Judge to issue a stipulated removal order without holding a hearing.

2/7/07
DATE

ASSISTANT CHIEF COUNSEL

[RODRIGUEZ-APARICIO, Santiago Humberto A44 466 852]
[Page 5 of 5]

Page 5 of 6

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
SAN FRANCISCO, CALIFORNIA

In Re	)	
	)	
RODRIGUEZ-Aparicio, Santiago	)	File Number: A44 466 852
	)	
	)	In Removal Proceedings
	)	
Respondent	)	

MEMORANDUM AND ORDER

Upon review of the Notice to Appear, and the written stipulation of the respondent and the Department of Homeland Security pursuant to 8 C.F.R. 1003.25, the court waives the presence of the parties, finds that the respondent's stipulation and the waivers therein are made voluntarily, knowingly and intelligently. The court further finds that respondent's removability as charged in the Notice to Appear has been established by clear, unequivocal and convincing evidence. Respondent makes no applications for relief.

There being no factual or legal issues in dispute the following order is entered:

ORDER: The respondent is ordered removed to El Salvador. Both parties have waived appeal.

Dated: _____

Immigration Judge

CERTIFICATE OF SERVICE
THIS DOCUMENT WAS SERVED BY: MAIL [ ] PERSONAL SERVICE [ ]
TO: [ ] ALIEN [ ] ALIEN c/o Custodial Officer [ ] ALIEN'S ATTY/REP [ ] DHS
DATE:_____ BY: COURT STAFF_____
ATTACHMENTS: [ ] EOIR-33 [ ] EOIR-28 [ ] Legal Services List [ ] Other

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EXHIBIT "C"

EXHIBIT "C"

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
SAN FRANCISCO, CALIFORNIA

In Re)
)
RODRIGUEZ-Aparicio, Santiago) File Number: A44 466 852
)
) In Removal Proceedings
)
Respondent)

MEMORANDUM AND ORDER

Upon review of the Notice to Appear, and the written stipulation of the respondent and the Department of Homeland Security pursuant to 8 C.F.R. 1003.25, the court waives the presence of the parties, finds that the respondent's stipulation and the waivers therein are made voluntarily, knowingly and intelligently. The court further finds that respondent's removability as charged in the Notice to Appear has been established by clear, unequivocal and convincing evidence. Respondent makes no applications for relief.

There being no factual or legal issues in dispute the following order is entered:

ORDER: The respondent is ordered removed to El Salvador. Both parties have waived appeal.

Dated: 2/8/07

A S Murray
Immigration Judge

CERTIFICATE OF SERVICE
THIS DOCUMENT WAS SERVED BY: MAIL [X] PERSONAL SERVICE [ ]
TO: [ ] ALIEN [X] ALIEN c/o Custodial Officer [ ] ALIEN'S ATTY/REP [ ] DHS
DATE: FEB - 8 2007 BY: COURT STAFF NMC
ATTACHMENTS: [ ] EOIR-33 [ ] EOIR-28 [ ] Legal Services List [ ] Other

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00066

EXHIBIT "D"

EXHIBIT "D"

U.S. Department of Justice
Immigration and Naturalization Service

JPATS

Warrant of Removal/Deportation

File No: A44 466 852

Date: February 8, 2007

To any officer of the United States Immigration and Naturalization Service:

Santiago Humberto RODRIGUEZ APARICIO

AKA: RODRIGUEZ APARAICIO, Santiago Humberto
(Full name of alien)

who entered the United States at or near Los Angeles, California (Place of entry) on or about February 20, 1994 (Date of Entry)

is subject to removal/deportation from the United States, based upon a final order by:

- ☒ an immigration judge in exclusion, deportation, or removal proceedings
- ☐ a district director or a district director's designated official
- ☐ the Board of Immigration Appeals
- ☐ a United States District or Magistrate Court Judge

and pursuant to the following provisions of the Immigration and Nationality Act:

Section 237(a)(2)(C)

I, the undersigned officer of the United States, by virtue of the power and authority vested in the Attorney General under the laws of the United States and by his or her direction, command you to take into custody and remove from the United States the above-named alien, pursuant to law, at the expense of: the appropriation, "Salaries and Expenses, Immigration and Naturalization Service."

(Signature of INS official)

Nancy Alcantar District Director
(Title of INS official)

PLEASE RETURN EXECUTED
I-205/I-294 TO DRO Unit E
ROOM 7212

February 8, 2007 San Francisco, California
(Date and office location)

Form I-205 (Rev. 4-1-97) N 00035

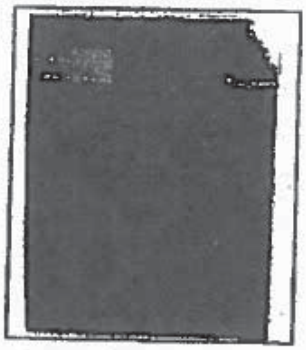
To be completed by Service officer executing the warrant:

Name of alien being removed:

RODRIGUEZ APARAICIO, Santiago Humbert

Port, date, and manner of removal:

PHOENIX ARIZONA
SKY HARBOR GATEWAY AIRPORT
DATE MAR 05 2007
VIA



Photograph of alien removed

Right index fingerprint of alien removed

(Signature of alien being fingerprinted)

(Signature and title of INS official taking print)

Departure witnessed by:

(Signature and title of INS official)

If actual departure is not witnessed, fully identify source or means of verification of departure:

If self-removed (self-deportation), pursuant to 8 CFR 241.7, check here. ☐

Departure Verified by:

(Signature and title of INS official)

Form I-205 (Rev. 4-1-97) N

00036

GREGORY A. BROWER
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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

-oOo-

UNITED STATES OF AMERICA, Plaintiff, v. SANTIAGO HUMBERTO RODRIGUEZ-APARICIO, Defendant.	No. 2:09-CR-060-PMP-PAL **GOVERNMENT'S MOTION TO DISMISS COUNT ONE OF THE INDICTMENT**

COMES NOW the United States of America, by and through GREGORY A. BROWER, United States Attorney, and ROBERT A. BORK, Assistant United States Attorney, and files this Motion for Leave to Dismiss Count One only, of the Indictment against Defendant **Santiago Humberto Rodriguez-Aparicio**. The defendant has filed a legal challenge to this Count and the Government will not respond to the motion to dismiss the 8 U.S.C. § 1326 charge in Count One of the Indictment.

WHEREFORE, the United States requests that this Court grant this Motion to Dismiss Count One of the Indictment.

DATED this 30th day of June, 2009.

GREGORY A. BROWER
United States Attorney

/s/ Robert A. Bork

ROBERT A. BORK
Assistant United States Attorney

ATTACHMENT II

CERTIFICATE OF SERVICE

UNITED STATES OF AMERICA, Plaintiff, v. SANTIAGO HUMBERTO RODRIGUEZ-APARICIO, Defendant.	No. 2:09-CR-060-PMP-PAL **GOVERNMENT'S MOTION TO DISMISS COUNT ONE OF THE INDICTMENT**

I, ROBERT A. BORK, do hereby certify that on June 30, 2009, a copy of the attached Government's Motion to Dismiss Count One of the Indictment was sent by electronic mail to the person hereinafter named:

Addressee: Brenda Weksler, AFPD
Counsel for defendant **Rodriguez-Aparicio**

/s/ Robert A. Bork
ROBERT A. BORK