

No.

IN THE SUPREME COURT OF THE UNITED STATES

MARBIN REYES-RUIZ,

Petitioner,

-v-

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

SARAH R. WEINMAN
Federal Defenders of San Diego, Inc.
225 Broadway, Suite 900
San Diego, CA 92101
Telephone: (619) 234-8467
Facsimile: (619) 687-2666
Sarah_Weinman@fd.org

Attorneys for Petitioner

QUESTION PRESENTED FOR REVIEW

This petition presents a request for error correction. The Ninth Circuit held that the entry of a prior administrative-removal order against Petitioner was not fundamentally unfair because Petitioner lacked lawful status in the United States—even though he was not removable as charged and was not amenable to administrative-removal proceedings. Did the court of appeals err?

TABLE OF CONTENTS

| | <u>Page</u> |
|--|-------------|
| QUESTION PRESENTED FOR REVIEW | prefix |
| TABLE OF AUTHORITIES | ii |
| JURISDICTION..... | 1 |
| OPINION BELOW..... | 1 |
| STATEMENT OF THE CASE..... | 1 |
| I. District Court Prosecution | 1 |
| II. Appeal | 3 |
| REASONS FOR GRANTING THE PETITION..... | 4 |
| CONCLUSION..... | 8 |
| CERTIFICATE OF SERVICE | |

TABLE OF AUTHORITIES

| Federal Cases | Page(s) |
|--|----------------|
| <i>U.S. Court of Appeals for the Ninth Circuit, United States v. Reyes-Ruiz</i> , — F. App’x — , 2018 WL 4089604 (9th Cir. Aug. 28, 2018) | 1 |
| <i>United States v. Aguilera-Rios</i> , 769 F.3d 626 (9th Cir. 2014) | 5, 6 |
| <i>United States v. Camacho-Lopez</i> , 450 F.3d 928 (9th Cir. 2006) | 5, 6 |
| <i>United States v. Cisneros-Rodriguez</i> , 813 F.3d 748 (9th Cir. 2015) | 5, 7 |
| <i>United States v. Garcia-Martinez</i> , 228 F.3d 956 (9th Cir. 2000) | 5 |
| <i>United States v. Martinez</i> , 786 F.3d 1227 (9th Cir. 2015) | 5, 6, 7 |
| <i>United States v. Ochoa</i> , 861 F.3d 1010 (9th Cir. 2017) (per curiam) | 4, 5 |
| Federal Statutes | |
| 8 U.S.C. § 1101(a)(43)(F) | 2 |
| 8 U.S.C. § 1228(b) | 2, 5 |
| 8 U.S.C. § 1326 | 1, 2, 3, 4, 6 |
| 28 U.S.C. § 1254(1) | 1 |
| 28 U.S.C. § 1291 | 1 |
| Federal Regulations | |
| 8 C.F.R. § 238.1(b)(1)(iii) | 5 |

JURISDICTION

Petitioner was convicted of unlawful reentry in violation of 8 U.S.C. § 1326, in the United States District Court for the Southern District of California. The Ninth Circuit reviewed his conviction under 28 U.S.C. § 1291, affirmed the conviction on August 28, 2018, and denied Petitioner's petition for rehearing on October 19, 2019. The Court has jurisdiction to review the Ninth Circuit's decision under 28 U.S.C. § 1254(1).

OPINION BELOW

The opinion of the U.S. Court of Appeals for the Ninth Circuit, *United States v. Reyes-Ruiz*, --- F. App'x ----, 2018 WL 4089604 (9th Cir. Aug. 28, 2018), is reproduced in the appendix. *See* Pet. App. 1a-3a.

STATEMENT OF THE CASE

I. District Court Prosecution

In the mid-1980s, Petitioner left a life of extreme poverty in Honduras to come to the United States. Here, he found steady work as a construction laborer, roofer, and field worker. In 1997, Petitioner was convicted of simple unlawful restraint, aggravated unlawful restraint, and aggravated battery (battery on a public way). He was sentenced to 144 days in custody and, following a probation violation, to an additional 42 months.

Seventeen years later, in 2014, immigration authorities issued an immigration charging document titled, "Notice of Intent to Issue a Final Administrative Removal

Order” (“Notice of Intent”). As a general matter, the Notice of Intent initiates an abbreviated removal proceeding that allows an immigration officer to expeditiously remove non-legal permanent resident aliens who have convictions that qualify as “aggravated felonies” under immigration law. *See* 8 U.S.C. § 1228(b). In this case, the Notice of Intent alleged that Petitioner was removable because his Illinois aggravated battery and aggravated unlawful restraint convictions qualified as “an aggravated felony defined in . . . 8 U.S.C. 1101(a)(43)(F).” Section 1101(a)(43)(F) defines an aggravated felony as “a crime of violence (as defined in section 16 of title 18) . . . for which the term of imprisonment [is] at least one year[.]” 8 U.S.C. § 1101(a)(43)(F).

Less than two weeks after the Notice of Intent was issued, another immigration officer “f[ou]nd that [Petitioner] ha[s] a final conviction for an aggravated felony as defined in section 101(a)(43)(F) of the Immigration and Nationality Act (Act) as amended, 8 U.S.C. 1101(a)(43)(F), and [was] ineligible or any relief from removal that the Secretary of Homeland Security, [*sic*] may grant in an exercise of discretion.” The immigration officer therefore determined that Petitioner was “deportable as charged” and ordered him removed.

About a year and a half later, Petitioner attempted to return to the United States. He was apprehended just north of the U.S.-Mexico border. Because he had been ordered removed before, the government filed an information charging him with being a removed alien who had attempted to enter the United States without permission, in violation of 8 U.S.C. § 1326.

Petitioner moved to dismiss the information under 8 U.S.C. § 1326(d), arguing that his prior administrative-removal order (the basis of the illegal-reentry charge) was invalid because his Illinois convictions were not aggravated felonies as the immigration officer had found. He explained that courts apply the “categorical approach” to determining whether a prior state conviction qualifies as a predicate offense under federal immigration law. Applying the categorical approach, Petitioner argued that the elements of the Illinois aggravated battery alleged in the Notice of Intent were broader than the generic “crime of violence” definition under federal law. Accordingly, he explained, he was not removable as charged, and the administrative removal-order against him was fundamentally unfair.

The district court denied the motion. The court determined that “[t]he subject removal order was not fundamentally unfair and survives this collateral attack. So, for those reasons, it appears to the court that the motion must be respectfully denied.”

Petitioner waived his right to a jury trial and stipulated to certain facts and testimony. During a bench trial, the district court found him guilty of attempted illegal reentry under § 1326. The court ultimately sentenced Petitioner to fourteen months in custody and three years of supervised release.

II. Appeal

On appeal, Petitioner established that entry of the removal order against him was fundamentally unfair because he was not removable as charged and the administrative removal order entered against him prejudiced him. The Ninth Circuit, without the benefit of oral argument, issued a memorandum opinion affirming the conviction. The panel held that even if there had been a defect in the

proceeding, there was no prejudice because Petitioner “did not have any lawful status in the United States” at the time the administrative removal order was entered against him. Pet. Appx at 3a. Petitioner filed a petition for rehearing, which the court denied on October 19, 2018.

REASONS FOR GRANTING THE PETITION

The Court should either grant this petition or summarily reverse the court of appeals. The court of appeals’ conclusion is incorrect and resulted in a wrongful affirmance of Petitioner’s conviction.

“A defendant charged with illegal reentry pursuant to 8 U.S.C. § 1326 has the right to bring a collateral attack challenging the validity of his underlying removal order, because that order serves as a predicate element of his conviction.” *United States v. Ochoa*, 861 F.3d 1010, 1014 (9th Cir. 2017) (per curiam). A defendant successfully brings a collateral attack when he demonstrates that: (1) he has “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.” 8 U.S.C. § 1326(d). The Ninth Circuit has held that a defendant who “was not convicted of an offense that made him removable under the [Immigration and Nationality Act] to begin with . . . is excused from proving the first two requirements.” *Ochoa*, 861 F.3d at 1015. An order is “fundamentally unfair” under the third prong of § 1326(d) if the defendant’s due-process rights were violated by defects in the underlying removal proceeding and (2)

the defendant suffered prejudice as a result of the defects. *See United States v. Garcia-Martinez*, 228 F.3d 956, 960 (9th Cir. 2000).

In this case, an immigration officer issued a charging document against Petitioner alleging that his prior convictions for Illinois aggravated battery and Illinois aggravated unlawful restraint were aggravated felonies. Because these prior convictions were allegedly aggravated felonies, Petitioner was placed in abbreviated, “administrative removal” proceedings—in which he was both charged and found removable by an immigration officer—rather than in formal removal proceedings in Immigration Court, before an Immigration Judge. *See United States v. Cisneros-Rodriguez*, 813 F.3d 748, 759–60 (9th Cir. 2015) (citing 8 U.S.C. § 1228(b) and holding that an immigration officer may place an alien in administrative-removal proceedings only if the alien is an aggravated felon); *see also* 8 C.F.R. § 238.1(b)(1)(iii). Petitioner established on appeal that neither of his prior state convictions in fact qualified as aggravated felonies, and the Ninth Circuit correctly assumed as much in its memorandum opinion. Pet. App’x at 2a. Thus, Petitioner was not removable as charged.

Petitioner further established that he suffered prejudice from the fact that an administrative-removal order was entered against him when he was in fact not removable as charged. This is so for two reasons.

First, the Ninth Circuit in a long line of decisions has held that entry of a removal order necessarily is fundamentally unfair when the defendant is not removable as charged. *See United States v. Martinez*, 786 F.3d 1227, 1232-33 (9th Cir. 2015); *United States v. Aguilera-Rios*, 769 F.3d 626, 637 (9th Cir. 2014); *United*

States v. Camacho-Lopez, 450 F.3d 928, 930 (9th Cir. 2006). Importantly, the defendants' legal status was not relevant to the analyses in those cases. *See Martinez*, 786 F.3d at 1232-33; *Aguilera-Rios*, 769 F.3d at 637; *Camacho-Lopez*, 450 F.3d at 930.

Nonetheless, in Petitioner's case, the Ninth Circuit erroneously determined that there was no prejudice because Petitioner lacked lawful status. This conclusion rests on the unsupported assumption that entry of a removal order is not fundamentally unfair if the defendant is otherwise removable. But the question under 8 U.S.C. § 1326(d) is not whether the defendant was *removable*. The question is whether the defendant can demonstrate that "entry of the [removal] *order* was fundamentally unfair." 8 U.S.C. § 1326(d)(3) (emphasis added). In other words, the inquiry is limited to whether the removal order that is being used as a predicate to the illegal-reentry charge is valid, not whether the person could have stayed in the United States as an LPR or in some other status. This means that once a defendant establishes that the removal order itself is invalid, the analysis ends. It doesn't matter if immigration officials could have entered some *other* type of removal order, because the order entered (and not some hypothetical alternative) is the only factor enhancing the defendant's liability from illegal entry to illegal reentry.

The Ninth Circuit's decision in *Martinez* shows why it erred here. In *Martinez*, the Ninth Circuit held that the defendant was not removable as charged. 786 F.3d at 1230-33 & n.2. There was, however, a non-charged, potential basis for removability as an aggravated felon. *Id.* at 1233. But the court never addressed that potential ground of removability; instead, it determined that an immigration

official deemed Martinez removable “*only* because he had committed an aggravated felony” on the originally charged aggravated-felony ground. *Id.* at 1233 n.2 (emphasis added). If all that mattered was whether the defendant was removable on *some* ground, *Martinez* would have addressed that alternative ground and affirmed. But it didn’t. That’s because non-charged grounds of removability simply don’t matter for purposes of determining the validity of a removal order. All that matters is how the defendant was charged. And because Petitioner, like the defendant in *Martinez*, was charged on non-removable grounds, his removal order prejudiced him.

Second, Petitioner suffered prejudice from the defect in his proceedings because the immigration officer who issued the administrative-removal order lacked jurisdiction over him. Rather than be subjected to administrative removal proceedings, Petitioner should have been placed in formal removal proceedings in the Immigration Court, where an Immigration Judge would have presided over his case and afforded additional procedural protections. *See Cisneros-Rodriguez*, 813 F.3d at 759-60. For this reason as well, the invalid charges prejudiced Petitioner. Petitioner thus has satisfied the “fundamental unfairness” prong, and this Court therefore should reverse the district court’s denial of his motion to dismiss.

CONCLUSION

This Court should grant this petition or summarily reverse the court of appeals.

Respectfully submitted,



Dated: January 17, 2019

SARAH R. WEINMAN
Federal Defenders of San Diego, Inc.
225 Broadway, Suite 900
San Diego, California 92101-5097
Telephone: (619) 234-8467
Sarah_Weinman@fd.org
Attorneys for Defendant-Appellant