

No. 20-6049

IN THE

Supreme Court of the United States

ISIDORO GONZALEZ-FERRETIZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

SUPPLEMENTAL BRIEF OF PETITIONER

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SUPPLEMENTAL BRIEF OF PETITIONER

Mr. Gonzalez submits this supplemental brief under this Court's Rule 15.8 to explain how this Court's opinion in *United States v. Palomar-Santiago*, --- S.Ct. ----, 2021 WL 2044540 (May 24, 2021) affects his arguments in support of a grant of certiorari.

Palomar-Santiago does not resolve the question presented. In fact, this case would be an ideal vehicle to follow *Palomar-Santiago* and to clarify when an administrative remedy is not "available" under 8 U.S.C. § 1326(d)(1) and an alien has been "deprived of the opportunity for judicial review" under § 1326(d)(2). Thus, this Court should grant Mr. Gonzalez's petition for certiorari. In the alternative, Mr. Gonzalez requests that the Court remand his case to the Fourth Circuit for further proceedings in light of *Palomar-Santiago*.

1. Isidoro Gonzalez-Ferretiz is a Mexican citizen, but speaks English fluently. App. 14a. He was encountered by immigration officers in 2008 and granted voluntary departure to Mexico. App. 9a. He returned to the United States, was encountered again in 2012 by ICE, gave a sworn statement, and was released without removal proceedings. App. 9a. In 2014, he was convicted of "theft from a motor vehicle" in Pennsylvania and received an indeterminate sentence with immediate parole. Then he was served with a Form I-851, which alleged that he was deportable and ineligible for relief because his conviction was an aggravated felony. The form provides two options – to contest or not contest the charges. A limited set of options is set out for noncitizens to contest the charges, none of which includes the option to contest whether the conviction is an aggravated felony:

<input type="checkbox"/> I Wish to Contest and/or to Request Withholding of Removal		
<input type="checkbox"/> I contest my deportability because: <i>(Attach any supporting documentation)</i>		
<input type="checkbox"/> I am a citizen or national of the United States. <input type="checkbox"/> I am a lawful permanent resident of the United States. <input type="checkbox"/> I was not convicted of the criminal offense described in allegation number 6 above. <input type="checkbox"/> I am attaching documents in support of my rebuttal and request for further review.		
<input type="checkbox"/> I request withholding or deferral of removal to _____ [Name of Country or Countries]:		
<input type="checkbox"/> Under section 241(b)(3) of the Act, 8 U.S.C. 1231(b)(3), because I fear persecution on account of my race, religion, nationality, membership in a particular social group, or political opinion in that country or those countries. <input type="checkbox"/> Under the Convention Against Torture, because I fear torture in that country or those countries.		
_____ <small>(Signature of Respondent)</small>	_____ <small>(Printed Name of Respondent)</small>	_____ <small>(Date and Time)</small>
<input checked="" type="checkbox"/> I Do Not Wish to Contest and/or to Request Withholding of Removal		
<input checked="" type="checkbox"/> I admit the allegations and charge in this Notice of Intent. I admit that I am deportable and acknowledge that I am not eligible for any form of relief from removal. I waive my right to rebut and contest the above charges. I do not wish to request withholding or deferral of removal. I wish to be removed to <u>Mexico</u>		
<input type="checkbox"/> I understand that I have the right to remain in the United States for 14 calendar days in order to apply for judicial review. I do not wish this opportunity. I waive this right.		
<u>Isidoro Gonzalez</u> <small>(Signature of Respondent)</small>	<u>Isidoro Gonzalez</u> <small>(Printed Name of Respondent)</small>	<u>6/3/2014 13:35</u> <small>(Date and Time)</small>
<u>Matt Garrison</u> <small>(Signature of Witness)</small>	<u>Matt Garrison</u> <small>(Printed Name of Witness)</small>	<u>6/3/2014 13:55</u> <small>(Date and Time)</small>

App. 19a. Mr. Gonzalez checked and signed the section indicating he did not wish to contest his removal.

In the district court, Mr. Gonzalez challenged his indictment under 8 U.S.C. § 1326(d). He pointed out that Form I-851 does not provide any avenue for a noncitizen to admit the fact of conviction, but challenge whether the conviction is an aggravated felony. App. 13a-15a. Therefore there were no administrative remedies to exhaust, and any waiver of the right to judicial review was not considered and intelligent under *Mendoza-Lopez*. *Id.*

The district court held that Mr. Gonzalez had failed to exhaust administrative remedies and was not deprived of judicial review because Mr. Gonzalez's general waiver of the right to appeal, even without being provided an

opportunity to challenge the classification of his conviction, was valid. App. 14a-15a.

On appeal, Mr. Gonzalez reiterated his claims. The Fourth Circuit agreed with the district court; in particular, it held that, in order for a waiver of appeal to be “considered and intelligent” under *Mendoza-Lopez*, a noncitizen need only be aware in general of the right to appeal. App. 5a (“Gonzalez understood that he could seek judicial review in his immigration proceedings as the I-851 form clearly set forth[.]”). It rejected the assertion that a noncitizen’s waiver of appeal could be invalid due to limitations on the issues he was permitted to contest. App. 4a-5a.

2. Mr. Gonzalez’s petition presented one question: “whether a pro se alien’s waiver of the right to appeal is ‘considered and intelligent’ under *Mendoza-Lopez* in the absence of an opportunity to dispute whether his prior conviction is an aggravated felony.” Pet. i.

Form I-851, used in all administrative removals, provides no avenue to challenge whether the noncitizen’s conviction is an aggravated felony. Instead it provides an exclusive checklist that forecloses that option. App. 22a. Most circuits that have examined Form I-851 agree that disputing the legal characterization of the prior conviction is not an available option in administrative removal proceedings. *Etienne v. Lynch*, 813 F.3d 135, 141-42 (4th Cir. 2015); *Valdiviez-Hernandez v. Holder*, 739 F.3d 184 (5th Cir. 2013); *United States v. Valdivia-Flores*, 876 F.3d 1201, 1205-06 (9th Cir. 2017); *Victoria-Faustino v. Sessions*, 865 F.3d 869, 873 (7th Cir. 2017); *but see Malu v. Atty. Gen.*, 764 F.3d 1282, 1289 (11th Cir. 2014).

But the circuits are split on whether that limitation deprives the alien of the opportunity for judicial review under § 1326(d)(2), and what advice must be provided to a *pro se* alien in order for him to make a “considered and intelligent” decision about the right to appeal. *See* Pet. 6-10 (outlining split).

3. *Palomar-Santiago* does not resolve that split. First, the administrative removal proceedings used in the case below stand in stark contrast to the immigration court hearing that Mr. Palomar-Santiago enjoyed, where the noncitizen can “proffer defenses . . . including that the conviction identified in the charging documents is not a removable offense.” *Id.* at *2. In Mr. Gonzalez’s case no such option was provided; therefore *Palomar-Santiago* should not determine whether there were available administrative remedies or judicial review.

Second: like in *Mendoza-Lopez*, and unlike in *Palomar-Santiago*, this case presents a *procedural* question concerning whether a waiver of appeal can be “considered and intelligent” when a noncitizen is precluded from disputing the classification of his conviction. This question is “distinct” from the “substantive validity” of the order itself. *Palomar-Santiago*, 2021 WL 2044540 at *4. In other words, Mr. Gonzalez did not have the opportunity for judicial review because ICE told him he could not dispute the classification of his conviction, and not simply because they reached the wrong result on the merits.

In *United States v. Mendoza-Lopez*, 481 U.S. 828 (1987), the noncitizens waived appeal on the record at their deportation hearings. This Court held that the noncitizens were “deprived of their rights to appeal” because “the only relief for

which they would have been eligible was not adequately explained to them[.]” *Id.* at 842. This rendered their waivers of the right to file an administrative appeal “not considered or intelligent[.]” *Id.*

Palomar-Santiago does not purport to overrule *Mendoza-Lopez* and its direct holding on the deprivation-of-judicial-review requirement, which § 1326(d)(2) adopted without alteration. This Court reserves to itself the “prerogative . . . to overrule one of its precedents[.]” *Bosse v. Oklahoma*, 137 S.Ct. 1, 3 (Thomas, J., concurring) (citations omitted). Thus existing precedent from the courts of appeals analyzing whether a purported waiver of appeal was “considered or intelligent” under *Mendoza-Lopez* will stand. The holding of *Palomar-Santiago* on this point is that a legal error on deportability does not alone render a waiver of appeal invalid, where an alien was provided an opportunity to dispute the allegation of deportability. *Palomar-Santiago*, 2021 WL 2044540 at *4 (“§ 1326(d)’s first two procedural requirements are not satisfied just because a noncitizen was removed for an offense that did not in fact render him removable.”). *Palomar-Santiago* did not resolve the question of what information a noncitizen must have to make a “considered and intelligent” decision on whether to file a petition for review. Here, the procedures used never provided Mr. Gonzalez an *opportunity* to dispute deportability – he invokes a *procedural* deficiency, not a substantive one. Therefore, this case and this circuit split continue to be governed by *Mendoza-Lopez* rather than *Palomar-Santiago*.

For all of these reasons, *Palomar-Santiago* does not control this case, and the split of authority Mr. Gonzalez invoked will be persist unless this Court intervenes.

The Court should grant the petition for certiorari .

Respectfully submitted,

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