No. _____

IN THE

Supreme Court of the United States

JUAN ANTONIO GONZALEZ-URENA,

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

APPENDICIES TO PETITION FOR A WRIT OF CERTIORARI

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MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JUAN ANTONIO GONZALEZ-URENA, AKA John Anthony Gonzales, AKA John Antonio Gonzalez, AKA Johnny Gonzalez, AKA Juan Antonio Gonzalez, AKA Juan Antonio Urena, Defendant-Appellant.	No. 20-50044 D.C. No. 2:18-cr-00519-DSF-1 MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Dale S. Fischer, District Judge, Presiding

Submitted June 9, 2021**
Pasadena, California

Before: GRABER, CALLAHAN, and FORREST, Circuit Judges.

Juan Antonio Gonzalez-Urena, a Mexican national, appeals the district court's denial of his motion to dismiss his indictment for illegal reentry after

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

removal in violation of 8 U.S.C. § 1326(a). We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

Gonzalez-Urena has not shown that his predicate removal order was fundamentally unfair under 8 U.S.C. § 1326(d)(3), thereby warranting dismissal of his indictment. *See United States v. Valdez-Novoa*, 780 F.3d 906, 913 (9th Cir. 2015). To demonstrate fundamental unfairness, Gonzalez-Urena must show that he had a "plausible, rather than merely conceivable or possible" claim for relief at the time of his 2013 removal proceedings. *Id.* at 914. Gonzalez-Urena argues that he had a plausible claim under the Convention Against Torture (CAT) because his "mental condition has led to multiple arrests, convictions, and prison terms" and, therefore, if removed, it is likely that he would "come to the attention of Mexican law enforcement" and "then end up in an institution where he is more likely than not to suffer torture."[1] We review de novo the district court's denial of Gonzalez-Urena's motion, and we review its findings of fact for clear error. *United States v. Cisneros-Rodriguez*, 813 F.3d 748, 755 (9th Cir. 2015); *see also Guerra v. Barr*, 974 F.3d 909, 915 (9th Cir. 2020) ("[w]hat is likely to happen to a petitioner if deported" is a question of fact, not a legal conclusion).

The record supports the district court's finding that Gonzalez-Urena's

[1] We decline to address Gonzalez-Urena's argument, raised for the first time on appeal, that he is likely to be tortured in a Mexican prison if removed. *United States v. Hernandez-Arias*, 757 F.3d 874, 883 (9th Cir. 2014).

mental illnesses would not likely lead to his detention in a Mexican mental institution if he were removed to Mexico. *Cf. Guerra*, 974 F.3d at 915–16. Nor did the district court err in finding it unlikely that officials at such institutions (or healthcare providers to whom officials have acquiesced) would specifically intend to harm Gonzalez-Urena if he were institutionalized. *See Villegas v. Mukasey*, 523 F.3d 984, 988–89 (9th Cir. 2008). Accordingly, the district court did not err in concluding that Gonzalez-Urena lacked a plausible claim to relief under the CAT.

AFFIRMED.

FILED

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JUAN ANTONIO GONZALEZ-URENA, AKA John Anthony Gonzales, AKA John Antonio Gonzalez, AKA Johnny Gonzalez, AKA Juan Antonio Gonzalez, AKA Juan Antonio Urena, Defendant-Appellant.	No. 20-50044 D.C. No. 2:18-cr-00519-DSF-1 Central District of California, Los Angeles ORDER

Before: GRABER, CALLAHAN, and FORREST, Circuit Judges.

Defendant-Appellant Juan Antonio Gonzalez-Urena requests that we defer submission of this case pending the outcome of en banc activity in *United States v. Bastide-Hernandez*, No. 19-30006, Dkt. 55 (9th Cir. Mar. 2, 2021), or, alternatively, order supplemental briefing regarding *Niz-Chavez v. Garland*, 141 S. Ct. 1474 (2021). *See* Dkt. 54. We deny both requests. *Bastide-Hernandez* concerns issues unrelated to Gonzalez-Urena's appeal, and, contrary to Gonzalez-Urena's assertion, *Niz-Chavez* did not overrule *Aguilar Fermin v. Barr*, 958 F.3d 887, 893–95 (9th Cir. 2020).

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. JUAN ANTONIO GONZALEZ URENA, Defendant.	CR 18-519-DSF Order DENYING Defendant Juan Antonio Gonzalez Urena's Motion to Dismiss (Dkt. Nos. 32, 47)

Defendant Juan Antonio Gonzalez Urena moves to dismiss his indictment for illegal reentry on the grounds that his prior removal orders are invalid.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. Defendant's 1997 Conviction and 1998 Removal Proceedings

Defendant was born in Zacatecas, Mexico and first entered the United States in 1969. Declaration of Gabriela Rivera (Rivera Decl.), Ex. 1 at 1. He immediately enrolled in fourth grade in California, but shortly thereafter dropped out. Id. at 2. Defendant has a history of learning difficulties and continues to exhibit cognitive impairments. Id. at 1, 10-11. He is bilingual, speaking both Spanish and English. Id. at 7.

Defendant became a lawful permanent resident in 1989. Id., Ex. 6.

On or around July 1, 1997, Defendant was convicted of grand theft of personal property in violation of California Penal Code § 487(c) and sentenced to three years imprisonment. Declaration of Ian V. Yanniello (Yanniello Decl.), Ex. A ¶ 36; id., Ex. B.

On or around December 7, 1998, the Immigration and Naturalization Service served Defendant with a Notice to Appear (NTA). Rivera Decl., Ex. 7. The NTA charged that Defendant was subject to removal from the United States under Section 237(a)(2)(A)(iii) of the Immigration and Nationality Act, and identified the allegations supporting the charge as his grand theft conviction which, at that time, constituted an aggravated felony.[1] Id. On December 10, 1998, Defendant attended removal proceedings before an immigration judge (IJ). See id., Ex. 8. That day, pursuant to a final order by the IJ, Defendant was removed to Mexico. Id., Ex. 11.

B. Defendant's 2001 Conviction and 2005 Removal Proceedings

Defendant returned to the United States in 2001. See id., Ex. 12. On June 4, 2001, Defendant was convicted of theft and injury of vehicles in violation of California Penal Code § 10851(a) and was sentenced to five years imprisonment. Yanniello Decl., Ex. A ¶ 37.

On July 11, 2005, Defendant was served with an NTA that indicated Defendant was subject to removal due to his 2001

[1] The government and Defendant agree that the grand theft offense is no longer recognized as an aggravated felony, and therefore the 1998 removal order cannot serve as the predicate for the charges at issue here. Mot. (Dkt. 31) at 23-29; Opp. (Dkt. 36) at 3 n.3.

conviction, which was considered a crime involving moral turpitude. Rivera Decl., Ex. 12. Defendant appeared before an IJ on August 8, 2005 and was again ordered removed. Id., Ex. 15. The government does not defend the validity of this order. See Opp. at 14 n.5.

C. Defendant's 2011 Conviction and 2013 Removal Proceedings

Defendant re-entered the United States on an unknown date. See Rivera Decl., Ex. 21. On June 17, 2011, he was convicted of grand theft in violation of California Penal Code § 487(a) and was sentenced to 32 months imprisonment. Yanniello Decl., Ex. A at ¶ 40.

Defendant was again served with an NTA on April 1, 2013. Rivera Decl., Ex. 21. The NTA stated that the "Complete Address of Immigration Court" was "TO BE DETERMINED" and the date and time of the proceeding was "to be set." Id. The Certificate of Service for the NTA states that Defendant was "provided oral notice in the [E]nglish language of the time and place of his or her hearing . . . ." Id. On April 5, 2013, DHS served Defendant with a Notice of Hearing that included the date, time, and address of the hearing. Yanniello Decl., Ex. C.

On April 1, 2013, Defendant also signed a Request for Disposition indicating that he "believe[d] [he] face[d] harm if [he] return[ed]" to Mexico. Rivera Decl., Ex. 22. And in the Defendant's Record of Sworn Statement for Reinstatement, he answered "yes" to the question "Do you have any fear of persecution or torture if you should be returned to Mexico." Id., Ex. 23.

Defendant appeared before an IJ on April 11, 2013 and was ordered removed. Id., Ex. 27. At the removal proceeding, Defendant informed the IJ that he was "hard of hearing" and had

"a learning disability." Id., Ex. 25 at 1. The IJ responded "Okay. Sure" but did not ask any questions about Defendant's claimed learning disability. Id.

The IJ also asked if Defendant had "any fear of harm or persecution in Mexico" and the Defendant said yes. Id. at 4. The IJ then explained the "three forms of Refugee Protection" and asked if Defendant wanted to apply for relief. Id. Defendant responded, "The way you said it, I mean, you said, like, I don't qualify for that." Id., Ex. 26 at 21:01-09.[2] But after the IJ explained that he was not allowed to say that Defendant would not qualify, and it was up to Defendant if he wanted to apply or not, Defendant responded "Okay, I guess" and was given the appropriate form to fill out and was told that there would be a hearing on his application "in two or three weeks." Id., Ex. 25 at 4-5. However, Defendant did not submit any application prior to his removal, which occurred the day after the hearing. Id., Ex. 28 at 2.

After asking questions about other types of relief, and determining that Defendant was not eligible, the IJ ordered Defendant removed and asked if Defendant wanted to reserve or waive appeal. Id. at 8. After first responding "No that's fine," Defendant then stated, "I waive the appeal." Id.

On April 10, 2013, the immigration court received a letter from the ACLU advising the immigration court that Defendant "appear[ed] to be a member of the class certified in Franco-Gonzales v. Holder, No. CV 10-02211 DMG (C.D. Cal. 2011)" and therefore Defendant "may have additional rights in connection with his removal proceeding beyond those of other detainees,"

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[2] The transcript, which both parties quote, incorrectly transcribes Defendant's response as: "The way you said it, I mean, I don't qualify for that." Id., Ex. 25 at 4.

including "competency evaluations," "appointed counsel," and "bond hearings." Yanniello Decl., Ex. D at 1-2. However, it appears from handwritten notes on the letter that the IJ who presided over Defendant's hearing did not see the letter until after the removal order was entered. Id. at 1. Those same handwritten notes indicated that the IJ saw "[n]o indicia of incompetency at time of hearing." Id.

D. Defendant's 2015 Conviction and Current Offense

At some point following his removal, Defendant reentered the United States. On August 20, 2015, an immigration enforcement agent interviewed Defendant at his home and issued a Notice of Intent/Decision to Reinstate Prior Order. Id., Ex. 29 at 4; id., Ex. 30 at 1.

On August 24, 2015, Defendant applied for admission into the United States and was paroled into the United States pending criminal arraignment for violation of 8 U.S.C § 1326. Id., Ex. 33 at 2-3. Defendant pleaded guilty to violating 8 U.S.C § 1326 on December 2, 2015, including that he was "lawfully excluded, deported and removed from the United States to Mexico on or about August 20, 2015." Yanniello Decl., Ex. I at 3. When Defendant completed his sentence in April 2018, DHS issued a Notice of Intent/Decision to Reinstate Prior Order and Defendant was removed. Rivera Decl., Exs. 34, 35.

A few months later, Defendant reentered the United States, and in July 2018 was charged with the current illegal reentry offense. Dkt. 1.

II. LEGAL STANDARD

"For a defendant to be convicted of illegal reentry under 8 U.S.C. § 1326, the Government must establish that the defendant 'left the United States under order of exclusion, deportation, or

removal, and then illegally reentered.'" United States v. Raya-Vaca, 771 F.3d 1195, 1201 (9th Cir. 2014) (quoting United States v. Barajas-Alvarado, 655 F.3d 1077, 1079 (9th Cir. 2011)). A defendant charged with illegal reentry "has a Fifth Amendment right to collaterally attack his removal order because the removal order serves as a predicate element of his conviction." United States v. Ubaldo-Figueroa, 364 F.3d 1042, 1047 (9th Cir. 2004).

To succeed in such a challenge, a defendant must demonstrate that: (1) he "exhausted any administrative remedies that may have been available to seek relief against the order; (2) the deportation proceedings at which the order was issued improperly deprived [him] of the opportunity for judicial review; and (3) the entry of the order was fundamentally unfair." 8 U.S.C. § 1326(d). "To satisfy the third prong – that the order was fundamentally unfair – the defendant bears the burden of establishing both that the 'deportation proceeding violate[d] [his] due process rights' and that the violation caused prejudice.'" Raya-Vaca, 771 F.3d at 1201-02 (alteration in original) (quoting United States v. Leon-Leon, 35 F.3d 1428, 1431 (9th Cir. 1994)).

III. DISCUSSION

Defendant moves to dismiss the Indictment by collaterally attacking the validity of the 2013 removal order.[3] First, Defendant argues that the immigration court lacked jurisdiction because the charging document did not comply with the governing regulations, and therefore, the immigration court lacked subject matter jurisdiction over the removal proceedings, rendering the removal order void. See Mot. at 16-21. Second, Defendant argues

[3] Defendant's motion initially challenged the 1998, the 2005, and the 2013 removal orders. See Mot. at 1. At the hearing, the government agreed it was relying only on the 2013 removal order. Therefore, the Court addresses only that order.

that the IJ violated his due process rights during the removal proceedings by 1) failing to provide an opportunity to apply for relief and 2) failing to impose adequate safeguards. Mot. at 31-38.

A. Jurisdiction of the Immigration Court

Defendant argues that the immigration court did not have subject matter jurisdiction to enter the 2013 removal order because the NTA did not include the address of the immigration court where the NTA would be filed, as required by the relevant regulations. See Mot. at 16-20. Defendant further argues that because lack of jurisdiction renders the removal order a "legal nullity," the requirements of § 1326(d) need not be met. See Mot. at 21 (citing Noriega-Lopez v. Ashcroft, 335 F.3d 874, 884 (9th Cir. 2003)).

An immigration court is vested with jurisdiction "when a charging document is filed with the Immigration Court by the Service." 8 C.F.R. § 1003.14(a). A "[c]harging document" includes a "Notice to Appear." 8 C.F.R. § 1003.13. An NTA "must" contain "[t]he address of the Immigration Court where the Service will file" the NTA, 8 C.F.R. § 1003.15(b)(6), and "must" include "a certificate showing service on the opposing party pursuant to § 1003.32 which indicates the Immigration Court in which the charging document is filed," 8 C.F.R. § 1003.14(a). Unlike the other requirements set out in 8 C.F.R. § 1003.15(a) and (c), sub-section (b) does not include a disclaimer that failing to meet the requirements does not "provide the alien with any substantive or procedural rights." Further, the NTA should include the "time, place and date of the initial removal hearing, where practicable" and "[i]f that information is not contained in the Notice to Appear, the Immigration Could shall be responsible for . . . providing notice to the government and the alien of the time, place, and date of hearing." 8 C.F.R. § 1003.18(b).

The question here is whether "jurisdiction vests" even if the charging document fails to include the required information listed in 8 C.F.R. § 1003.15(b).

The Ninth Circuit recently addressed a separate, but related question regarding the failure of an NTA to include the time and date of the removal hearing. Karingithi v. Whitaker, 913 F.3d 1158 (9th Cir. 2019). In Karingithi, "[t]he notice to appear specified the location of the removal hearing," but not the date or time of the hearing, and the defendant "was issued a notice of hearing, which provided the date and time of the hearing" the same day. Id. at 1159. After analyzing the regulations, the Ninth Circuit differentiated between the "plain, exhaustive list of requirements in the jurisdictional regulations," that is § 1003.15(b), and the requirements, such as the time and the date of the hearing, not included in that section. Id. at 1160. The Ninth Circuit then held that "[a] notice to appear" that "met the regulatory requirements . . . vested jurisdiction in the IJ." Id. However, the Ninth Circuit did not hold the opposite to be true, that is, that a failure to include any of the information listed in Section 1003.15(b) would deprive the immigration court of jurisdiction. Further, there is no indication from the Ninth Circuit that its reference to "jurisdiction" was to subject matter jurisdiction. As the Supreme Court has recently noted, "Courts, including this Court, it is true, have been less than meticulous in this regard; they have more than occasionally used the term 'jurisdictional' to describe emphatic time prescriptions in rules of court." Kontrick v. Ryan, 540 U.S. 443, 454 (2004).

The Court has not located any circuit decisions that considered this precise issue,[4] however, other circuits have

[4] All but one of the cases cited by the government, Opp. at 15 n.6, address only the time, date, and place information described in 8 C.F.R § 1003.18, and

recently held that the word "jurisdiction" in 8 C.F.R § 1003.14 does not mean "subject matter jurisdiction," but is rather a claim-processing rule. See United States v. Cortez, 930 F.3d 350, 358 (4th Cir. 2019), as amended (July 19, 2019) ("8 C.F.R. § 1003.14(a)[] is an internal docketing rule, not a limit on an immigration court's 'jurisdiction' or authority to act"); Pierre-Paul v. Barr, 930 F.3d 684, 691 (5th Cir. 2019) ("8 C.F.R. § 1003.14 is not jurisdictional but is a claim-processing rule"); Ortiz-Santiago v. Barr, 924 F.3d 956, 963 (7th Cir. 2019), reh'g denied (July 18, 2019) ("A failure to comply with the statute dictating the content of a Notice to Appear is not one of those fundamental flaws that divests a tribunal of adjudicatory authority. Instead, just as with every other claim-processing rule, failure to comply with that rule may be grounds for dismissal of the case.").

The district courts in this circuit have not treated the word "jurisdiction" uniformly. Compare United States v. Gutierrez-Ramirez, No. 18-CR-00422-BLF-1, 2019 WL 3346481, at *6 (N.D. Cal. July 25, 2019) (granting motion to dismiss indictment

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do not address the requirements of 8 C.F.R § 1003.15(b). See Banegas Gomez v. Barr, 922 F.3d 101, 110 (2d Cir. 2019) (holding that "an NTA [that] omits a hearing time or place does not "void *jurisdiction*"); Nkomo v. Attorney Gen. of United States, 930 F.3d 129, 133 (3d Cir. 2019) (rejecting argument that jurisdiction was lacking where an NTA did not include "time and place information"); Soriano-Mendosa v. Barr, 768 F. App'x 796, 802 (10th Cir. 2019) ("we see no jurisdictional significance in the failure to include a date and time in the notice to appear"); Leonard v. Whitaker, 746 F. App'x 269, 269-70 (4th Cir. 2018) (holding that the recent Supreme Court case addressing failure to include time and place of hearing in an NTA did not apply to questions about jurisdiction over removal proceedings); Hernandez-Perez v. Whitaker, 911 F.3d 305, 315 (6th Cir. 2018) ("jurisdiction vests with the immigration court where, as here, the mandatory information about the time of the hearing, *see* 8 U.S.C. § 1229(a), is provided in a Notice of Hearing issued after the NTA").

"[b]ecause Defendant's Notice to Appear did not include 'the address of the Immigration Court,'" and therefore "did not satisfy one of these enumerated criteria and thus did not vest the Immigration Judge with jurisdiction"), United States v. Martinez-Aguilar, No. 5:18-CR-00300-SVW, 2019 WL 2562655, at *3 (C.D. Cal. June 13, 2019) (granting motion to dismiss indictment because "jurisdiction did not properly vest with the Immigration Court in light of Defendant's Notice to Appear which was deficient under [the address requirement set out in] § 1003.15(b)(6)"), and United States v. Ramos-Urias, No. 18-CR-00076-JSW-1, 2019 WL 1567526, at *3 (N.D. Cal. Apr. 8, 2019) (denying government's motion to reconsider dismissed indictment because the NTA "did not include the address of the Immigration Court where the NTA would be filed . . . jurisdiction failed to vest with the Immigration Court"), with United States v. Medina, No. CR 18-653-GW, 2019 WL 4462701, at *13 (C.D. Cal. Sept. 4, 2019) (denying motion to dismiss indictment for failing to include the address of the Immigration Court in the NTA because "the Immigration Court's subject matter jurisdiction was not impacted by any alleged deficiency in the NTA herein."), United States v. Arteaga-Centeno, No. 18-CR-00332-CRB-1, 2019 WL 3207849, at *5 (N.D. Cal. July 16, 2019) (denying motion to dismiss indictment because, "[t]hough this question is close, the Court holds that the requirement that an NTA include the address of the Immigration Court is not a jurisdictional one, and thus the failure of the NTA that Arteaga received to include the Immigration Court's address did not prevent jurisdiction from vesting with the IJ"), and United States v. Mendoza, No. 18-CR-00282-HSG-1, 2019 WL 1586774, at *3 (N.D. Cal. Apr. 12, 2019) (denying motion to dismiss indictment because Defendant's "argument that his NTA was jurisdictionally deficient because it did not include address information [is] inconsistent with the reasoning of Karingithi and Deocampo").

The Court is persuaded by the opinions holding that "jurisdiction," as used in 8 C.F.R § 1003.14, does not refer to subject matter jurisdiction.

"[F]or agencies charged with administering congressional statutes[,] [b]oth their power to act and how they are to act is authoritatively prescribed by Congress." City of Arlington, Tex. v. F.C.C., 569 U.S. 290, 297 (2013). In the case of immigration courts, the "power to act" is "prescribed by Congress" in the Immigration and Nationality Act (INA), which provides that "[a]n immigration judge shall conduct proceedings for deciding the inadmissibility or deportability of an alien." 8 U.S.C § 1229a(a)(1). This is the only limit set by Congress on the authority of immigration courts to act.

The INA gives the Attorney General the power to "establish such regulations . . . as the Attorney General determines to be necessary for carrying out this section." 8 U.S.C § 1103(g)(2). Pursuant to that statute, the Attorney General has promulgated the regulations discussed above, which are contained in a Subpart titled "Immigration Court—Rules of Procedure." 8 C.F.R § 1003, Subpart C. The first regulation under that Subpart defines the "[s]cope of rules" and states "[t]hese Rules are promulgated to assist in the expeditious, fair, and proper resolution of matters coming before Immigration Judges." 8 C.F.R. § 1003.12. This description is consistent with the Supreme Court's characterization of claim-processing rules as "rules that seek to promote the orderly progress of litigation." Henderson ex rel. Henderson v. Shinseki, 562 U.S. 428, 435 (2011). Against this backdrop, the most logical interpretation of 8 C.F.R. § 1003.14(a) is that the phrase "jurisdiction vests" describes the procedural steps that need to be taken for the immigration court to invoke its statutorily granted jurisdictional authority over a particular matter.

This reading is consistent with a recent concurring opinion in the Ninth Circuit that addressed whether an "appeal-waiver rule properly goes to the BIA's *jurisdiction*." Garcia v. Lynch, 786 F.3d 789, 797 n.2 (9th Cir. 2015) (Berzon, J., concurring) (emphasis in original). Judge Berzon explained that "'the question whether [a court has] the power to decide [a case] at all' . . . is particularly inapt where, as here, the agency disclaims authority based only on its own regulation." Id. (first alteration in original) (citing City of Arlington, 569 U.S. at 297; see also Ortiz-Santiago, 924 F.3d at 963 ("While an agency may adopt rules and processes to maintain order, it cannot define the scope of its power to hear cases."). Cf. Kontrick, 540 U.S. at 453 (It is "axiomatic" that procedural rules prescribed by the Court, rather than by Congress, "do not create or withdraw federal jurisdiction" (citing Owen Equipment & Erection Co. v. Kroger, 437 U.S. 365, 370 (1978))). Because the regulation "is, in effect, the Attorney General *telling himself* what he may or may not do . . . such regulations are more like a court's internal rules, such as our own standing orders, than external constraints that could properly be conceived of as jurisdictional." Garcia, 786 F.3d at 797 n.2. In other words, the regulation at issue here is not a "grant of authority," but rather a description of when that authority is triggered.

This interpretation also makes sense in light of the regulation's history. Before the first version of 8 C.F.R § 1103.14 was adopted, "the INS had the authority both to initiate deportation proceedings and to 'terminate [those] proceedings at any time prior to the actual commencement of the hearing.'" Cortez, 930 F.3d at 361 (alteration in original) (citing Aliens and Nationality; Rules of Procedure for Proceedings Before Immigration Judges, 50 Fed. Reg. 51,693, 51,693 (Dec. 19, 1985)). In adopting the jurisdictional regulation, the intent was to "give immigration courts control over their own calendars, allowing for

'optimal scheduling' to expedite hearings, by providing for the certainty of a filed document — the 'charging document' — and limiting the authority of the INS to 'cancel' a proceeding once a charging document had been filed." Id. Rather than limit the immigration court's power to preside over a case, 8 C.F.R § 1103.14(a) was adopted to clarify when the immigration court, rather than the INS (or DHS), was "in charge" of a proceeding.

This does not mean that immigrants have no basis to challenge NTAs that do not comply with 8 C.F.R § 1103.15(b).[5] To the contrary, omission of the information listed in 8 C.F.R § 1103.15(b) can be raised at the removal proceeding, or if applicable, on appeal. For example, if a defendant timely challenges an NTA for failing to contain the address of the immigration court, the DHS could be required to issue an amended NTA, restarting the 10-day minimum period between service of an NTA and removal proceedings. See 8 U.S.C. § 1229(b)(1) ("[T]he hearing date shall not be scheduled earlier than 10 days after the service of the notice to appear, unless the alien requests in writing an earlier hearing date."). Similarly, if an NTA lists the "statutory provisions alleged to have been violated," but then the removal order is granted based on a different provision, the removal order can be appealed. See

[5] As the government notes, "it is common for litigation rules to trigger proceedings through the filing of a document and separately to provide requirements for the contents of such documents." Supp. Opp. (Dkt. 45-2) at 2; see Ortiz-Santiago, 924 F.3d at 965 (describing requirements to appeal a federal court decision and noting that although the "rules specify what a notice of appeal must include," failure to do so "is a curable lapse rather than a jurisdictional flaw"); Supp. Opp. at 2 n.2 (noting that the Federal Rules of Civil Procedure require certain information to be contained in a complaint, but "the absence of such required information does not deprive the court of the power to hear the case . . . it merely permits the opponent to make a motion challenging the defective pleading.").

Cardoso-Tlaseca v. Gonzales, 460 F.3d 1102, 1107 (9th Cir. 2006) (rejecting government's argument that a conviction "not alleged in the NTA" can "sustain the removal order"); Chowdhury v. I.N.S., 249 F.3d 970, 975 (9th Cir. 2001) (rejecting the government's argument that the court could uphold the removal order based on an aggravated felony that was not alleged in the NTA).

But because they are not jurisdictional requirements, they can also be waived. See Ortiz-Santiago, 924 F.3d at 963 ("[A]s with every other claim-processing rule, failure to comply with that rule may be grounds for dismissal of the case[,] . . .[b]ut such a failure may also be waived or forfeited by the opposing party."); Medina, 2019 WL 4462701, at *5 ("any substantive and/or procedural defects stemming from the alleged deficiency in the NTA were waived when Defendant failed to raise the issue(s) in the underlying proceedings").

The Court holds that DHS's failure to comply with 8 C.F.R § 1003.15(b) does not divest the immigration court of subject matter jurisdiction, and therefore the immigration court had the power to issue the 2013 removal order.[6]

[6] It is undisputed that Defendant did not raise this issue during the underlying proceeding, see Rivera Decl., Ex. 25, and therefore waived any challenge to the contents of the NTA. To the extent Defendant claims that any such waiver was invalid due to the purported due process violations addressed below, a collateral challenge fails under 8 U.S.C § 1326(d) because there can be no showing of actual prejudice. Four days after the NTA was served on Defendant, and a week before his removal proceeding, Defendant was provided the address of the Immigration Court, Yanniello Decl., Ex. C, and Defendant in fact attended the hearing, see Rivera Decl., Ex. 25.

B. Collateral Attack on the Removal Order

1. Administrative Exhaustion and Deprivation of Judicial Review

A defendant "is barred from collaterally attacking the validity of an underlying deportation order if he validly waived the right to appeal that order during the deportation proceedings." United States v. Reyes-Bonilla, 671 F.3d 1036, 1043 (9th Cir. 2012) (quoting United States v. Gonzalez, 429 F.3d 1252, 1256 (9th Cir. 2005)). A defendant's waiver of the right to appeal "must be both considered and intelligent in order to be valid." Id. If the defendant "did not validly waive his right of appeal, the first two requirements under § 1326(d) will be satisfied." Id.; see also United States v. Gomez, 757 F.3d 885, 892 (9th Cir. 2014) ("A defendant can establish the first two prongs of § 1326(d) by showing that he was denied judicial review of his removal proceeding in violation of due process.").

"The government bears the burden of proving valid waiver in a collateral attack of the underlying removal proceedings." United States v. Ramos, 623 F.3d 672, 680 (9th Cir. 2010). However, once "the government introduces official records which on their face show a valid waiver of rights in connection with a deportation proceeding, the burden shifts to the defendant to come forward with evidence tending to prove the waiver was invalid." Reyes-Bonilla, 671 F.3d at 1043 (citing United States v. Galicia-Gonzalez, 997 F.2d 602, 604 (9th Cir. 1993). Here, the record demonstrates that Defendant explicitly waived his right to appeal at the hearing on his 2013 removal. Rivera Decl., Ex. 25 at 8. Therefore, the burden shifts to Defendant to show that the waiver was invalid. Defendant has this standard backwards and argues that "given Mr. Gonzalez's mental health problems and the failures of Due Process in his removal proceeding, the government cannot prove that his waiver was considered and intelligent."

Mot. at 38. Nevertheless, as discussed below, Defendant has put forth evidence that he "never had a genuine opportunity to apply for" relief under CAT "or to present evidence of the factors favoring this relief" and that therefore "his waiver of appeal was neither 'considered' nor 'intelligent,' and it is therefore invalid." See United States v. Melendez-Castro, 671 F.3d 950, 954 (9th Cir. 2012).[7]

The government also argues that Defendant's challenge to the 2013 removal order is not timely because it could have been raised in his 2015 criminal proceedings. Opp. at 12-14. However, failure to seek a permissible form a relief cannot be characterized as a "considered and intelligent" waiver. This argument has been persuasively rejected by another district court in this circuit. United States v. Lopez-Hernandez, No. CR 06-00645 WHA, 2007 WL 608111 (N.D. Cal. Feb. 23, 2007). In Lopez-Hernandez, the government argued that the defendant forfeited his a right to challenge a prior deportation order because he previously pleaded guilty to illegal reentry based on that order. Id. at *3.[8] The court rejected that argument, noting that the plea agreement limited the defendant's ability to challenge his conviction, but not the deportation order. Id. After noting that the Ninth Circuit does not permit the use of collateral estoppel in criminal cases to "establish, as a matter of law, an element of an offense or to conclusively rebut an affirmative defense on which the

[7] The government does not address the appeal waiver at the 2013 hearing.

[8] This reasoning is even more persuasive here, where the removal order conceded in the 2015 plea agreement is not the same order on which the government bases its claims here. See Yanniello Decl., Ex. I. at 3 ("Defendant was lawfully excluded, deported and removed . . . ***on or about August 20, 2015***") (emphasis added).

Government bears the burden of proof beyond a reasonable doubt," the court found that "the government may not claim that Lopez-Hernandez here is estopped as a matter of law from contesting the validity of the 1997 deportation order." Id. (citing United States v. Smith-Balthier, 424 F.3d 913, 920 (9th Cir. 2005)).

2. Fundamentally Unfair

a. Safeguards for Competency

"Aliens in immigration proceedings are presumed to be competent and, if there are no indicia of incompetency in a case, no further inquiry regarding competency is required." Salgado v. Sessions, 889 F.3d 982, 987 (9th Cir. 2018) (citing Matter of M-A-M-, 25 I. & N. Dec. 474, 477 (BIA 2011)). "The test for determining whether [a noncitizen] is competent to participate in immigration proceedings is whether he or she has a rational and factual understanding of the nature and object of the proceedings, can consult with the attorney or representative if there is one, and has a reasonable opportunity to examine and present evidence and cross-examine witnesses." Matter of M-A-M-, 25 I. & N. Dec. at 479. "When there are indicia of incompetency, an Immigration Judge must take measures to determine whether a respondent is competent to participate in proceedings." Id. at 480. A non-exhaustive list of potential indicia of incompetency includes:

- "the inability to understand and respond to questions"
- "the inability to stay on topic"
- "evidence [in the record] of mental illness or incompetency"

- "school records regarding special education classes or individualized education plans"
- "reports or letters from teachers, counselors, or social workers"
- "evidence of participation in programs for persons with mental illness"
- "affidavits or testimony from friends or family members."

Id. at 479–80. "After determining whether the applicant is competent, the IJ must 'articulate that determination and his or her reasoning.'" Mejia v. Sessions, 868 F.3d 1118, 1121 (9th Cir. 2017) (citing Matter of M-A-M-, 25 I. & N. Dec. at 481).

Defendant arguably raised the issue of competence when he informed the IJ that he was hard of hearing and had a "learning disability." Rivera Decl., Ex. 25 at 1. Although the IJ then spoke slowly and clearly, he asked no follow up questions to ascertain whether Defendant's claimed learning disability would affect his ability to understand the proceedings and present evidence. See Calderon-Rodriguez v. Sessions, 878 F.3d 1179, 1183–84 (9th Cir. 2018) (Although "there are many types of mental illness that, even though serious, would not prevent a respondent from meaningfully participating in immigration proceedings," it is the IJ's responsibility "to evaluate whether [an immigrant's] current mental illness prevented him from meaningfully participating in his . . . immigration proceedings" (citing Matter of M-A-M-, 25 I. & N. Dec. at 480)). It is also unclear from the record whether DHS satisfied its "obligation to provide the court with relevant materials in its possession that would inform the court about the respondent's mental competency." Id. at 1182. There are several documents, such as Defendant's California Department of

Corrections and Rehabilitation records and Lynwood Unified School District Records, that contain potential indicia of incompetence including evidence of mental illness and cognitive challenges, see, e.g., Rivera Decl., Ex. 3 at 16, 85; Ex. 4, but it is unclear if DHS possessed these documents and, if so, whether they were provided to the IJ. It is also unclear whether DHS was aware Defendant was on the Franco-Gonzales list. [9]

As the government points out, Defendant engaged in a lengthy discussion with the immigration judge, providing detailed answers to questions. At times Defendant appeared to be confused. But it is not a sign of incompetence that Defendant did not understand the question, "[W]hen you entered the United States were you admitted or paroled after inspection by an immigration officer?" Id., Ex. 25 at 2. He either did not hear or did not understand the IJ's question about whether certain documents "relate[d]" to him. Id. at 3. Neither alternative suggests he was not competent. In fact, he was able to provide specific details about his original illegal entry into the United States, which he correctly stated was in 1969, id. at 2-3, and a subsequent illegal reentry when he simply pretended to be a citizen, id. at 2-3, 7, as well as details about his 2011 grand theft conviction, id. at 3-4. He stated that he became a citizen in 1989 or 1986 through amnesty, id. at 5. He actually became a lawful permanent resident in 1989. Id., Ex. 1 at 6.

[9] The protections set forth in Franco-Gonzalez v. Holder, No. CV 10-02211 DMG (DTBX), 2013 WL 3674492, at *9 (C.D. Cal. Apr. 23, 2013) are not applicable to the removal proceedings here, which occurred 12 days prior to the Franco decision. Cf. Gomez, 757 F.3d at 899 ("[W]e look to the law at the time of the deportation proceedings to determine whether an alien was eligible for relief from deportation").

Considering that Defendant first came to the United States in 1969 and has numerous convictions and voluntary and involuntary removals, it is not surprising that the experienced IJ apparently saw no particular "red flags" raised by Defendant's answers to the IJ's sometimes admittedly confusing questions.[10] Nevertheless, the Court assumes for this purpose that it was a violation of due process for the IJ not to 1) further inquire of Defendant before concluding that he was competent to participate in proceedings and 2) make findings of competence on the record.[11]

However, for the reasons described below, Defendant suffered no actual prejudice from this failure and therefore his collateral attack on the 2013 removal order fails.

b. Application for Relief

An alien who enters the United States is guaranteed Due Process protections. Raya-Vaca, 771 F.3d at 1203. "The Due Process Clause of the Fifth Amendment requires . . . providing an alien with the opportunity to apply for relief" and "to present evidence in support of the claim." Melendez-Castro, 671 F.3d at 954 (citing United States v. Arrieta, 224 F.3d 1076, 1079 (9th Cir. 2000)).

At the 2013 removal proceeding, Defendant said he wished to apply for relief under the Convention Against Torture. Rivera

[10] The IJ repeated or reworded some questions that Defendant appeared not to hear or not to understand. Id., at 2, 3, 4.

[11] The Court gives no weight to the handwritten notes, apparently made by the IJ four days after the removal proceeding, that he saw "[n]o indicia of incompetency at time of hearing." Yanniello Decl., Ex. D at 1. These notes have not been authenticated.

Decl., Ex. 25 at 4-5.[12] Although Defendant was provided the proper form to fill out, the IJ stated at the end of the hearing that Defendant would be "removed to Mexico at the earliest possible moment. Probably today or tomorrow." Id. at 8. In fact, Defendant was removed the following day. Id., Ex. 28 at 2. Defendant contends that the relevant form is "12 pages long and the instructions for completing the form are 14 pages"; therefore, he could not have filled out and turned in the form prior to his removal. Reply at 9. The government does not appear to dispute this. Opp. at 15-20 (addressing only the "actual prejudice" prong of the analysis). Therefore, the Court assumes Defendant has established that the deportation proceeding violated his due process rights by failing to provide him with an opportunity to apply for relief or present evidence in support of his claim. See Melendez-Castro, 671 F.3d at 954 (Because the defendant "never had a genuine opportunity to apply for voluntary departure or to present evidence of the factors favoring this relief . . . his waiver of appeal was neither 'considered' nor 'intelligent,' and it is therefore invalid.").

Moving to the second prong, actual prejudice, a defendant "does not have to show that he actually would have been granted relief." Ubaldo-Figueroa, 364 F.3d at 1050. "Instead, he must only show that he had a 'plausible' ground for relief from deportation." Id. (quoting Arrieta, 224 F.3d at 1079). "Plausible" means that relief was more than possible, but does not require that it was probable. United States v. Cisneros-Rodriguez, 813

[12] After the IJ explained the forms of refugee protection, Defendant believed either that he did not qualify for protection or that the IJ had said Defendant did not qualify – it is not clear from the transcript or audio what Defendant meant by his response. The IJ then explained that he was not allowed to tell Defendant that he didn't qualify and asked again if Defendant wished to apply. Defendant responded: "Okay, I guess." Id. at 4-5.

F.3d 748, 761 (9th Cir. 2015) (internal citations omitted). A defendant must also provide "some evidentiary basis on which relief could have been granted, not merely a showing that some form of immigration relief was theoretically possible." Reyes-Bonilla, 671 F.3d at 1049-50.

Defendant contends he had a plausible basis for relief because, absent the due process violations, he would have applied for relief under the Convention Against Torture (CAT), and it is plausible he could have received deferral of removal under CAT.

"An applicant is eligible for CAT relief if he establishes that 'it is more likely than not that he or she would be tortured if removed to the proposed country of removal.'" Madrigal v. Holder, 716 F.3d 499, 508 (9th Cir. 2013) (citing 8 C.F.R. § 208.16(c)(2)). The regulations define torture as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person . . . by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." 8 C.F.R. § 208.18(a)(1). "In determining whether an individual will more likely than not be tortured, 'all evidence relevant to the possibility of future torture shall be considered.'"[13] Cole v. Holder, 659 F.3d 762, 770 (9th Cir. 2011) (citing 8 C.F.R. § 1208.16(c)(3)). "[W]here torture is sufficiently likely, 'CAT "does not permit any discretion or provide for any exceptions,"'" including for defendants "convicted of an aggravated felony." Id. (quoting Edu v. Holder, 624 F.3d 1137, 1145 (9th Cir. 2010)).

An immigrant can demonstrate plausible grounds for relief through evidence that immigrants "with similar circumstances

[13] The government points to numerous occasions when Defendant indicated he had no fear of returning to Mexico. Opp. at 20. Because Defendant's competence on each of those occasions is in question, the Court declines to consider those statements.

received relief." Cf. United States v. Rojas-Pedroza, 716 F.3d 1253, 1263 (9th Cir. 2013). "[T]he existence of a single case that is arguably on point means only that it is 'possible' or 'conceivable' that a similarly situated alien would be afforded" relief. United States v. Valdez-Novoa, 780 F.3d 906, 920 (9th Cir. 2015); see also United States v. Barajas-Alvarado, 655 F.3d 1077, 1091 n.17 (9th Cir. 2011) (concluding defendant failed to make a showing of plausibility where there were "two cases in which an alien who presented false documents . . . was granted withdrawal" but those "cases involve[d] aliens in very different factual circumstances").

Defendant provides several examples where "Mexican nationals with mental illness" received deferral of removal under CAT in immigration court, see Rivera Decl., Ex. 36, and asserts that this satisfies his burden to show plausibility, Mot. at 37-38. However, Defendant has not shown that the immigrants in those cases had "similar circumstances" to Defendant, beyond the fact of asserted mental illness. See United States v. Valverde-Rumbo, 766 F. App'x 534, 536–37 (9th Cir. 2019) (rejecting evidence that "identifies several applicants with felony convictions who also have been granted waivers" because "many crimes of varying seriousness are felonies" and none of the identified cases involved the same crime as defendant's).[14]

Defendant asserts that he is likely to be tortured because "IJs have found that Mexicans with severe mental illnesses like schizophrenia were likely to end up in a public hospital because of lack of outpatient treatment and family support." Mot. at 37. However, Defendant does not explain what record evidence shows that he personally would be likely to end up in a public hospital.

[14] The Court agrees with Defendant however, that the "similar circumstances" test does not "turn on whether the respondent was diagnosed with any particular disability." Reply at 16.

See United States v. Martinez, 679 F. App'x 641, 642 (9th Cir. 2017) ("[T]he country conditions reports . . . describing gang violence in Guatemala do not, without more, indicate that Martinez himself was likely to be a target of the violence"). In fact, Defendant has purportedly been removed eight times, Dkt. 1 at 2-3, yet there is no evidence that he was institutionalized at any time while he was in Mexico. See id. ("[T]he record suggests that Martinez lived in Guatemala without incident for some time after the [death] threats were made.").

The neuropsychological evaluation report prepared by Dr. Carlos A. Flores (Flores Report) describes some potentially relevant evidence, but the record fails to make clear if these factors would lead to institutionalization:

- "In 2008, Mr. Gonzalez reported psychotic symptoms (auditory hallucinations), was feeling 'down,' and attempted suicide by cutting his wrists."
- Defendant reported that he was "able to get a job" but "he was not able to perform his usual and customary job responsibilities due to memory problems and difficulties with attention and concentration. He was consequently fired from several jobs, became homeless, and had to resort to stealing to survive."
- Defendant stated, "he did not have anyone in Mexico and that returning there was very difficult for him."

Rivera Decl., Ex. 1 at 2; see also Reply at 14.

In one of the removal proceedings cited by Defendant, a Mexican national presented evidence that he specifically would be targeted because "his 'abnormal behavior' will attract the attention of police." Rivera Decl., Ex. 36 at 8; see also id. at 21 ("Within the past four years, Respondent has been admitted to

[the hospital] for intoxication on four separate occasions[] [and] [o]n two of those occasions, Respondent had to be physically restrained because he was combative and uncooperative with the medical staff"); id. at 22 ("[W]ithout appropriate services and treatment, Respondent most likely would continue to live on the streets, behave erratically, and continue to be subject to victimization and violence"); id. at 46 (Respondent was hospitalized while in jail and prior to being detained and on one occasion he "approached a police officer in Salt Lake City to report he was being followed by members of the Sinaloa Cartel and the officer took him to a psychiatric hospital").[15] Here, in contrast, the Flores Report noted that "[i]t is not uncommon for individuals with cognitive profiles similar to [Defendant's] to go unrecognized or undiagnosed, despite their significant cognitive challenges." Id., Ex. 1 at 10. In fact, the Flores Report notes that Defendant "possesses average verbal skills, and he presents himself as a charming and hyper-talkative individual," which "allow[s] him to conceal his cognitive limitations, whether intentionally or otherwise." Id. at 10-11. It does not appear from the record that that Defendant would likely be brought to the attention of the Mexican authorities because of his mental health issues. Quite the contrary.

Further, although the evidence shows that Defendant has had difficulties staying employed, he was able to obtain employment, unlike the defendant in the removal proceeding cited by Defendant who had submitted evidence that he "cannot take care of himself." Id., Ex. 36 at 3. Finally, although there is evidence that Defendant has no family in Mexico, there is no evidence that he relies on his family in the United States to

[15] Defendant acknowledges that the immigration courts in the cases he cites considered "whether the respondent's mental health disability would bring him to the attention of Mexican authorities." Reply at 16.

survive, a factor the order cited by Defendant found relevant. Id. (Immigrant "has no family in Mexico to support him[] and relies on his family who live in the United States in order to survive."). Therefore, the Court finds that Defendant's asserted history of mental illness, without more, does not establish that his case is sufficiently similar to those cited by Defendant. He has not shown it was plausible that he might have won deferral of removal.

Even if Defendant had evidence that he would be institutionalized after returning to Mexico, he must also show that the conditions in public hospitals amount to torture under CAT. However, the Ninth Circuit has rejected this notion explaining that "[w]hile . . . a variety of evidence showed that Mexican mental patients are housed in terrible squalor, nothing indicates that Mexican officials (or private actors to whom officials have acquiesced) created these conditions for the specific purpose of inflicting suffering upon the patients." Villegas v. Mukasey, 523 F.3d 984, 989 (9th Cir. 2008); see also Cayetano-Hernandez v. Whitaker, 744 F. App'x 500, 502 (9th Cir. 2018) (same).

Defendant argues that the situation has changed since 2008 when Villegas was decided, because a 2010 Disability Rights Report "documented the same horrifying conditions." Reply at 17. To support this position, Defendant cites to a Decision of the Board of Immigration Appeals from September 2014 that acknowledged Villegas, but noted that it "was rendered before the 2010 DRI report" which contained discussion regarding "the use of long-term physical restraints, and how the physical pain caused by such use may constitute torture" and a statement that the use of such long-term restraints "'over a life-time can meet the intent requirement [of the CAT] because staff knowingly places a person in this condition.'" Rivera Decl., Ex. 36 at 187. Similarly, another IJ cited by Defendant distinguished Villegas by noting that the record contained evidence that employees of mental health

institutions "subject patients to permanent physical restraints, physical and sexual abuse, and heavy sedation in order to control their behavior" and that the purpose of these behaviors was to "discriminat[e] against people with disabilities or to punish patients for being 'dangerous.'" Id. at 9 n.2. But the Ninth Circuit relied on Villegas in its 2018 decision in Cayetano-Hernandez. And a similar argument had made, and rejected, in another unpublished Ninth Circuit opinion, Chavarin v. Sessions, 690 F. App'x 924 (9th Cir. 2017). There, the Ninth Circuit rejected the argument that "the fact that the Mexican government has been on notice of the conditions in mental health facilities and that those conditions have not meaningfully improved has transformed what was mere negligence into a specific intent to cause severe pain and suffering." Id. at 926. Instead, the court noted that because "progress has been made[,] [t]he IJ was permitted on the record to conclude that this progress defeats any notion that the Mexican government intends to cause severe pain and suffering, and substantial evidence thus supports the finding that there is no such intent." Id.

In any event, even if "specific instances of assault, restraint, and involuntary surgery" meet the standard of torture, Defendant must also be able to show that he "in particular is more likely than not to be a victim of these abuses." See Perez-Gutierrez v. Sessions, 730 F. App'x 556, 557 (9th Cir. 2018); see also Eneh v. Holder, 601 F.3d 943, 948 (9th Cir. 2010) ("[T]he thrust of Eneh's argument is not just that the conditions in Nigerian prisons are torturous generally, but that Nigerian prison officials would single him out for mistreatment."). Defendant cannot plausibly make that showing. Notably, Defendant concedes that "the primary reason for institutionalization is Mexico's lack of community-based services," Reply at 15-16, and not an intent to harm individuals with mental disabilities.

For the foregoing reasons, the Court finds it is not plausible that Defendant would have received relief under CAT. Therefore, he was not actually prejudiced by any due process errors in his removal proceeding.

IV. CONCLUSION

Although Defendant's due process rights were violated in his removal proceedings because he was deprived of the opportunity to apply for relief, Defendant was not actually prejudiced by this due process violation because it is not plausible that Defendant would have obtained relief under CAT.

The motion to dismiss the indictment is DENIED.

IT IS SO ORDERED.

Date: October 2, 2019

Dale S. Fischer
United States District Judge

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

AUG 24 2021

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JUAN ANTONIO GONZALEZ-URENA, AKA John Anthony Gonzales, AKA John Antonio Gonzalez, AKA Johnny Gonzalez, AKA Juan Antonio Gonzalez, AKA Juan Antonio Urena, Defendant-Appellant.	No. 20-50044 D.C. No. 2:18-cr-00519-DSF-1 Central District of California, Los Angeles ORDER

Before: GRABER, CALLAHAN, and FORREST, Circuit Judges.

The panel has voted to deny the petition for panel rehearing and to deny the petition for rehearing en banc. The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. The petition for panel rehearing and the petition for rehearing en banc are denied.

8 U.S.C. § 1229(a) provides:

(a) *Notice to appear*

(1) *In general*

In removal proceedings under section 1229a of this title, written notice (in this section referred to as a "notice to appear") shall be given in person to the alien (or, if personal service is not practicable, through service by mail to the alien or to the alien's counsel of record, if any) specifying the following:

(A) The nature of the proceedings against the alien.

(B) The legal authority under which the proceedings are conducted.

(C) The acts or conduct alleged to be in violation of law.

(D) The charges against the alien and the statutory provisions alleged to have been violated.

(E) The alien may be represented by counsel and the alien will be provided (i) a period of time to secure counsel under subsection (b)(1) and (ii) a current list of counsel prepared under subsection (b)(2).

(F) (i) The requirement that the alien must immediately provide (or have provided) the Attorney General with a written record of an address and telephone number (if any) at which the alien

may be contacted respecting proceedings under section 1229a of this title.

(ii) The requirement that the alien must provide the Attorney General immediately with a written record of any change of the alien's address or telephone number.

(iii) The consequences under section 1229a(b)(5) of this title of failure to provide address and telephone information pursuant to this subparagraph.

(G) (i) The time and place at which the proceedings will be held.

(ii) The consequences under section 1229a(b)(5) of this title of the failure, except under exceptional circumstances, to appear at such proceedings.

(2) *Notice of change in time or place of proceedings*

(A) *In general*

In removal proceedings under section 1229a of this title, in the case of any change or postponement in the time and place of such proceedings, subject to subparagraph (B) a written notice shall be given in person to the alien (or, if personal service is not practicable, through service by mail to the alien or to the alien's counsel of record, if any) specifying –

(i) the new time or place of the proceedings, and

(ii) the consequences under section 1229a(b)(5) of this title of failing, except under exceptional circumstances, to attend such proceedings.

(B) *Exception*

In the case of an alien not in detention, a written notice shall not be required under this paragraph if the alien has failed to provide the address required under paragraph (1)(F).

(3) *Central address files*

The Attorney General shall create a system to record and preserve on a timely basis notices of addresses and telephone numbers (and changes) provided under paragraph (1)(F).

8 U.S.C. § 1326(d) provides:

(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.

8 C.F.R. § 1003.13 provides:

As used in this subpart:

Administrative control means custodial responsibility for the Record of Proceeding as specified in § 1003.11.

Charging document means the written instrument which initiates a proceeding before an Immigration Judge. For proceedings initiated prior to April 1, 1997, these documents include an Order to Show Cause, a Notice to Applicant for Admission Detained for Hearing before Immigration Judge, and a Notice of Intention to Rescind and Request for Hearing by Alien. For proceedings initiated after April 1, 1997, these documents include a Notice to Appear, a Notice of Referral to Immigration Judge, and a Notice of Intention to Rescind and Request for Hearing by Alien.

Filing means the actual receipt of a document by the appropriate Immigration Court.

Service means physically presenting or mailing a document to the appropriate party or parties; except that an Order to Show Cause or Notice of Deportation Hearing shall be served in person to the alien, or by certified mail to the alien or the alien's attorney and a Notice to Appear or Notice of Removal Hearing shall be served to the alien in person, or if

personal service is not practicable, shall be served by regular mail to the alien or the alien's attorney of record.

8 C.F.R. § 1003.14(a) provides:

(a) Jurisdiction vests, and proceedings before an Immigration Judge commence, when a charging document is filed with the Immigration Court by the Service. The charging document must include a certificate showing service on the opposing party pursuant to § 1003.32 which indicates the Immigration Court in which the charging document is filed. However, no charging document is required to be filed with the Immigration Court to commence bond proceedings pursuant to §§ 1003.19, 1236.1(d) and 1240.2(b) of this chapter.

8 C.F.R. § 1003.15(a) & (b) provide:

(a) In the Order to Show Cause, the Service shall provide the following administrative information to the Executive Office for Immigration Review. Omission of any of these items shall not provide the alien with any substantive or procedural rights:

(1) The alien's names and any known aliases;

(2) The alien's address;

(3) The alien's registration number, with any lead alien registration number with which the alien is associated;

(4) The alien's alleged nationality and citizenship;

(5) The language that the alien understands;

(b) The Order to Show Cause and Notice to Appear must also include the following information:

(1) The nature of the proceedings against the alien;

(2) The legal authority under which the proceedings are conducted;

(3) The acts or conduct alleged to be in violation of law;

(4) The charges against the alien and the statutory provisions alleged to have been violated;

(5) Notice that the alien may be represented, at no cost to the government, by counsel or other representative authorized to appear pursuant to 8 CFR 1292.1;

(6) The address of the Immigration Court where the Service will file the Order to Show Cause and Notice to Appear; and

(7) A statement that the alien must advise the Immigration Court having administrative control over the Record of Proceeding of his or her current address and telephone number and a statement that failure to provide such information may result in an in absentia hearing in accordance with § 1003.26.

8 C.F.R. § 1003.18 provides:

(a) The Immigration Court shall be responsible for scheduling cases and providing notice to the government and the alien of the time, place, and date of hearings.

(b) In removal proceedings pursuant to section 240 of the Act, the Service shall provide in the Notice to Appear, the time, place and date of the initial removal hearing, where practicable. If that information is not contained in the Notice to Appear, the Immigration Court shall be responsible for scheduling the initial removal hearing and providing notice to the government and the alien of the time, place, and date of hearing. In the case of any change or postponement in the time and place of such proceeding, the Immigration Court shall provide written notice to the alien specifying the new time and place of the proceeding and the consequences under section 240(b)(5) of the Act of failing, except under exceptional circumstances as defined in section 240(e)(1) of the Act, to attend such proceeding. No such notice shall be required for an alien not in detention if the alien has failed to provide the address required in section 239(a)(1)(F) of the Act.