No. _____

9th Cir. No. 23-2654
D.C. No. 2:22-cr-00574-JJT-1

IN THE

Supreme Court of the United States

JUNIOR STANDLY MARTINEZ-MARTINEZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ of Certiorari
To The United States Court of Appeals, Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether The Denial Of Mr. Martinez's Motion To Dismiss The Indictment Was Erroneous?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page. There is no corporate disclosure statement required in this case under Rule 29.6.

RELATED CASES

- *United States v. Isaias Delgado*, No. 2:22-cr-00574-JJT-1, U.S. District Court for the District of Arizona. Judgment entered September 25, 2023.

- *United States v. Junior Standly Martinez-Martinez*, No. 23-2645, U.S. Court of Appeals for the Ninth Circuit. Judgment entered October 17, 2024.

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IN THE SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner, Junior Martinez-Martinez ("Martinez"), prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The Order of the United States Court of Appeals for the Ninth Circuit denying Mr. Martinez's Petition for Panel Rehearing and Petition for Rehearing En Banc was not published, but is annexed as Appendix C. The Memorandum Disposition of the United States Court of Appeals for the Ninth Circuit affirming Mr. Martinez's conviction and sentence was not published, but is annexed as Appendix A. The Judgment of the United States District Court for the District of Arizona was not published, but is annexed as Appendix B.

JURISDICTION

The United States Court of Appeals, Ninth Circuit decided this case on October 17, 2024. The Petition for Panel Rehearing and Petition for Rehearing En Banc was denied on November 18, 2024. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. 8 U.S.C. § 1326

(a) In general

Subject to subsection (b), any alien who—

(1) has been denied admission, excluded, deported, or removed or has departed the United States while an order of exclusion, deportation, or removal is outstanding, and thereafter

(2) enters, attempts to enter, or is at any time found in, the United States, unless (A) prior to his reembarkation at a place outside the United States or his application for admission from foreign contiguous territory, the Attorney General has expressly consented to such alien's reapplying for admission; or (B) with respect to an alien previously denied admission and removed, unless such alien shall establish that he was not required to obtain such advance consent under this chapter or any prior Act,

shall be fined under title 18, or imprisoned not more than 2 years, or both.

(b) Criminal penalties for reentry of certain removed aliens

Notwithstanding subsection (a), in the case of any alien described in such subsection—

(1) whose removal was subsequent to a conviction for commission of three or more misdemeanors involving drugs, crimes against the person, or both, or a felony (other than an aggravated felony), such alien shall be fined under title 18, imprisoned not more than 10 years, or both;

(2) whose removal was subsequent to a conviction for commission of an aggravated felony, such alien shall be fined under such title, imprisoned not more than 20 years, or both;

(3) who has been excluded from the United States pursuant to section 1225(c) of this title because the alien was excludable under section 1182(a)(3)(B) of this title or who has been removed from the United States pursuant to the provisions of subchapter V, and who thereafter, without the permission of the Attorney General, enters the United States, or attempts to do so, shall be fined under title 18 and imprisoned for a period of 10 years, which sentence shall not run concurrently with any other sentence. Or

(4) who was removed from the United States pursuant to section 1231(a)(4)(B) of this title who thereafter, without the permission of the Attorney General, enters, attempts to enter, or is at any time found in,

the United States (unless the Attorney General has expressly consented to such alien's reentry) shall be fined under title 18, imprisoned for not more than 10 years, or both.

For the purposes of this subsection, the term "removal" includes any agreement in which an alien stipulates to removal during (or not during) a criminal trial under either Federal or State law.

(c) Reentry of alien deported prior to completion of term of imprisonment

Any alien deported pursuant to section 1252(h)(2) [2] of this title who enters, attempts to enter, or is at any time found in, the United States (unless the Attorney General has expressly consented to such alien's reentry) shall be incarcerated for the remainder of the sentence of imprisonment which was pending at the time of deportation without any reduction for parole or supervised release. Such alien shall be subject to such other penalties relating to the reentry of deported aliens as may be available under this section or any other provision of law.

(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.

2. 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.

3. U.S. Const. amend. VI

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

STATEMENT OF THE CASE

The Government alleged that on or about April 5, 2022, Junior Standly Martinez-Martinez ("Mr. Martinez"), was found in the United States after having been previously denied admission, excluded, deported, and removed from the U.S. on or about April 15, 2020 in violation of 8 U.S.C. §1326(a) and (b)(1). 2-ER-126. Mr. Martinez agreed to plead guilty and entered into a plea agreement on July 6, 2023. 2-ER-64.

A change of plea hearing was held on July 17, 2023. 2-ER-40. Mr. Martinez was sworn in. *Id*. Mr. Martinez reviewed the consent of defendant form with his attorney, who signed the form on his behalf. 2-ER-42. Mr. Martinez agreed to proceed with his change of plea in front of the magistrate judge. *Id*.

Mr. Martinez did not have any drugs, alcohol, or mediation of any kind in the 48-hours preceding the hearing. 2-ER-42-43. Mr. Martinez had never been treated for or diagnosed with any mental illness. 2-ER-43. Counsel believed Mr. Martinez was competent to proceed. *Id*. Mr. Martinez reviewed the waiver of indictment form with his counsel, who signed it on his behalf. 2-ER-43-44. Mr. Martinez agreed that he wished to give up his right to proceed by a grand jury indictment. 2-ER-44. Mr.

Martinez also reviewed the information with his counsel, who explained the charge against him (reentry of removed alien). 2-ER-44-45.

Mr. Martinez identified his signature on the plea agreement. 2-ER-45. Mr. Martinez had reviewed the plea agreement with his attorney, who explained the agreement to him and answered all his questions. *Id*. Mr. Martinez was satisfied with his attorney's representation. 2-ER-46.

No one forced, threatened, or coerced Mr. Martinez into pleading guilty. *Id*. No one promised him anything outside of what was in the plea agreement. *Id*. Mr. Martinez understood that he did not have to plea guilty, but believed it was in his best interest to do so. *Id*. Mr. Martinez agreed that he was voluntarily pleading guilty. 2-ER-46-47.

Mr. Martinez plead guilty to the information, which charged him with a violation of 8 U.S.C. §1326(a), with possible sentencing enhancement under §1326(b)(1), attempted reentry of removed alien. 2-ER-47. The court reviewed the maximum sentence term and fines. 2-ER-47-48. Knowing the maximum penalties, Mr. Martinez still wished to proceed with a guilty plea. 2-ER-49.

The court reviewed the federal sentencing guidelines. 2-ER-49-51. The court then reviewed the sentencing stipulations in the plea agreement. 2-ER-51. The acceptance of responsibility stipulation stated that if Mr. Martinez made a full and complete disclosure, then the government would agree to a two-level reduction in the offense level (or a three-level reduction if the offense level is 16 or higher). *Id*. The stipulation regarding termination of supervised release stated the outstanding petition to revoke Mr. Martinez's supervised release in CR22-50136-PHX-JJT would be dismissed, and the

term of supervised release would be terminated at sentencing in this case. *Id*. Finally, the plea agreement stipulated that Mr. Martinez's sentence will not exceed the middle of the final adjusted sentencing guideline range. *Id*. Nothing in the plea agreement precluded Mr. Martinez from moving for a downward departure, variance, or sentence below the cap. 2-ER-51-52. Also, the indictment would be dismissed at the time of sentencing. 2-ER-52. The court explained the difference between stipulations and recommendations, and that the court could impose any reasonable sentence up to the maximum. 2-ER-52-53. Mr. Martinez again confirmed that he wished to go forward with the plea agreement. 2-ER-53.

The court warned Mr. Martinez that his guilty plea in this case could establish a violation of his supervised release in his other case, resulting in revocation and a separate prison sentence in that case. *Id*. Mr. Martinez was advised that if he committed a new crime int eh future, the conviction would be used to increase his sentence for the new crime, that if he was not a United States citizen he could be deported and denied citizenship, and that as a result of his felony conviction he would lose his right to vote and serve on a jury. 2-ER-53-54. Mr. Martinez stated he understood each of those admonitions. *Id*.

Next, the court advised Mr. Martinez of the constitutional rights he was giving up by pleading guilty. 2-ER-54-55. Mr. Martinez confirmed he understood his rights and that he was giving them up by pleading guilty. 2-ER-55. The court also advised Mr. Martinez that he was giving up his right to appeal or collaterally attack the judgment and sentence, except for the right to appeal the District Court's denial of his motion to

dismiss the indictment. 2-ER-56, 59. The plea agreement reserved Mr. Martinez's right to appeal the motion to dismiss as follows:

> "the District Court's denial of the defendant's Motion to Dismiss Indictment (Doc. 52) pursuant to 8 U.S.C. § 1326(d) on only the first ground the defendant raised in the motion to dismiss (Doc. 36 at 3-4) and amended reply (Doc. 48 at 1-2:22), which is the same ground on which the District Court denied the motion (see Doc. 52)." 2-ER-67-68.

The court reviewed the elements of the crime. 2-ER-56-57. The court set forth the following factual basis. Mr. Martinez is not a citizen or national of the United States. 2-ER-57. He was previously removed from the United States through Alexandria, Louisiana, on April 15, 2020. *Id*. Mr. Martinez knowingly and intentionally attempted to reenter the United States at or near Yuma, Arizona, on April 5, 2022, by crossing the border from Mexico into the United States at a place other than a designated port of entry. *Id*. It was Mr. Martinez's intention to avoid apprehension by immigration authorities and reenter the United States free from official restraint. *Id*. Mr. Martinez did not obtain the express consent of the United States government to reapply for admission prior to returning to the United States. *Id*. For sentencing purposes, Mr. Martinez was convicted of illegal reentry after removal, a felony, on December 13, 2019, in the U.S. District Court, Eastern District of Virginia, and he was on supervised release in that case when the present offense was committed. 2-ER-57-58. Mr. Martinez admitted all those facts were true. 2-ER-58. The Government agreed with the factual basis. *Id*.

Mr. Martinez agreed that he understood everything stated during the hearing. 2-ER-60. Mr. Martinez stated he was pleading guilty to the crime of attempted reentry of

removed alien in violation of 8 U.S.C. §1326(a), with a possible sentencing enhancement under §1326(b)(1). *Id*. Mr. Martinez agreed he was pleading guilty because he was guilty of the crime. 2-ER-60-61. The court then entered findings that Mr. Martinez was competent and capable of entering an informed plea, that he was aware of the nature of the charge and consequences of pleading guilty, that he understood his rights, and that he plea of guilty was knowingly, voluntarily, and intelligently made and supported by a factual basis. 2-ER-61. The court recommended the District Judge accept the plea of guilty and set a sentencing date. *Id*.

Sentencing and an admit/deny hearing was held on September 25, 2023. 2-ER-18. The court entered judgement that Mr. Martinez was guilty of violating 8 U.S.C. §1326(a) and (b)(1). 2-ER-19. Defense counsel reviewed the presentence report with Mr. Martinez and provided him with a copy. *Id*. Mr. Martinez understood the presentence report and was satisfied with his lawyer's representation. 2-ER-20. Neither the defense nor the government had any objections to the presentence report. 2-ER-20-21.

The base offense level for reentry is eight. 2-ER-21. There was a four-level upward adjustment due to Mr. Martinez having at least one prior reentry felony conviction. 2-ER-21-22. There was an additional six-level upward adjustment for a 2014 conviction for passport fraud. 2-ER-22. There was a three-level downward adjustment for acceptance of responsibility. *Id.* Therefore, the final offense level was 15 with a criminal history category of IV. *Id*. This resulted in a range of 30-37 months incarceration, a term of supervision of 1-3 years, a fine between $7,500-$75,000, and a special assessment of $100 per count. *Id*.

The court accepted the plea agreement. 2-ER-23. Pursuant to the stipulations in the plea agreement, the cap is 33 ½ months incarceration (the midpoint of the advisory guideline range). *Id*. In preparing for the sentencing hearing, the court reviewed and considered the charging document, the plea agreement, the presentence report, Mr. Martinez's sentencing memorandum, and character letters submitted for Mr. Martinez. 2-ER-24.

Defense counsel argued for a sentence of time served. 2-ER-24-26. Mr. Martinez addressed the court and agreed with his attorney's requested sentence. 2-ER-26-27. The Government argued for a sentence of 27-months incarceration. 2-ER-27-28.

The court considered the effect of the 3553(a) factors. 2-ER-29-31. After considering the factors, the court felt a sentence of 24 months was correct. 2-ER-31-32. The court also considered deterrence and the fact that the supervised release violation and supervision out of the Eastern District of Virginia was being dismissed. *Id*. Therefore, the court sentenced Mr. Martinez to 24 months' incarceration, with credit for time already served, followed by 36 months supervised release. 2-ER-32-33. Regarding the standard supervised release conditions adopted by General Order 17-18, defense counsel confirmed he reviewed those conditions with Mr. Martinez. 2-ER-33-34. The court reviewed the following general and special conditions with Mr. Martinez: you must not commit another federal, state, or local offense during the term of supervision; if not deported, within 72 hours of release you must report in person to the probation office in the district to which you are released; if deported, you must not re-enter the United States without legal authorization. 2-ER-34.

The court ordered that Mr. Martinez's supervised release from the Eastern District of Virginia, 22-50136, be terminated unsuccessfully and dismissed the petition to revoke supervised release in that case. *Id*. The court then reviewed defendant's appellate waiver and appellate rights. 2-ER-35-36.

Judgment was entered on September 25, 2023. 1-ER-2. Mr. Martinez timely filed a notice of appeal on October 9, 2023. 2-ER-128. On October 17, 2024, the Ninth Circuit affirmed Mr. Martinez's conviction and sentence. On November 18, 2024, the Ninth Circuit denied Mr. Martinez's petition for rehearing and suggestion for rehearing en banc.

REASONS FOR GRANTING THE WRIT

I. The Denial Of Mr. Martinez's Motion To Dismiss The Indictment Was Erroneous.

Mr. Martinez is a citizen of Honduras, and in August 1992 became a Lawful Permanent Resident of the United States. 1-ER-6. In October 1997, Mr. Martinez was convicted in New York State Supreme Court of grand larceny in the fourth degree, in violation of New York Penal Law §155.30. 1-ER-7. As a result, the Government initiated removal proceedings against Mr. Martinez. *Id*. On August 31, 1998, an Immigration Judge ordered Mr. Martinez be removed from the United States. *Id*. The Removal Order included a notation that Mr. Martinez's right to appeal was "RESERVED by alien/atty," with an appeal deadline of September 30, 1998. *Id*. Mr. Martinez's counsel filed a notice of appeal to the Board of Immigration Appeals on September 3, 1998. *Id*. However, the appeal was subsequently withdrawn by Mr. Martinez's attorney on March 26, 1999 and

no appeal was pursued. 2-ER-77, 119. Thereafter, Mr. Martinez was removed from the United States on May 20, 1999. 2-ER-117.

Mr. Martinez filed a Motion to Dismiss the Indictment in this case pursuant to 8 U.S.C. § 1326(d) arguing the 1998 Removal Order violated Mr. Martinez's due process rights under the Fifth Amendment by depriving him of judicial review and the removal proceeding was fundamentally unfair. 2-ER-119. After the issue had been fully briefed, the district court denied Mr. Martinez's Motion to Dismiss the Indictment on May 24, 2023. 1-ER-6. The district court found that Mr. Martinez had not satisfied the first and second requirements of 8 U.S.C. § 1326(d), and therefore did not reach Mr. Martinez's argument that he satisfied the third requirement.[1] 1-ER-10.

The Plea Agreement reserved Mr. Martinez's right to appeal the District Court's denial of the Motion to Dismiss Indictment, but only on the grounds that Mr. Martinez satisfied the first and second requirements of 8 U.S.C. § 1326(d) (the basis of the district court's denial of the motion). 2-ER-67-68. The Plea Agreement contained an appellate waiver of the right to appeal or collaterally attack the conviction or sentence on any other grounds. *Id*.

Pursuant to 8 U.S.C. § 1326(d), a removal order may be collaterally attacked by demonstrating the following:

[1] Although the district court did not reach the third requirement (8 U.S.C. § 1326(d)(3): the entry of the order was fundamentally unfair), Mr. Martinez maintains it was met as set forth in his motion to dismiss because his 1997 conviction for grand larceny in New York State (§155.30) was not an aggravated felony under INA §237(a)(2)(A)(iii). 2-ER-123-124; 2-ER-78-79.

(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.

Each of the statutory requirements of § 1326(d) is mandatory. *United States v. Palomar-Santiago*, 593 U.S. 321, 329 (2021). Since Mr. Martinez was charged with illegal reentry under 8 U.S.C. § 1326, he has a due process right to collaterally attack the 1998 Removal Order because the removal order serves as a predicate element of his conviction. *See Ubaldo-Figueroa*, 364 F.3d at 1047 (citing *United States v. Mendoza-Lopez*, 481 U.S. 828, 837-38 (1987)). A prior removal order may not be used to prove an element of an illegal reentry offense if defects in the underlying removal proceedings violated due process, resulted in prejudice, and effectively foreclosed judicial review. *Mendoza-Lopez*, 481 U.S. 828 (1987).

Mr. Martinez satisfied the first and second requirements of 8 U.S.C. § 1326(d) because exhaustion was not available to Mr. Martinez, and he was deprived of the opportunity for judicial review. There is no dispute that the 1998 Removal Order clearly reserved Mr. Martinez's right to appeal the order. There is also no dispute that Mr. Martinez's counsel filed a notice of appeal on September 3, 1998. However, there is insufficient evidence that Mr. Martinez knowingly or voluntarily abandoned that appeal, which resulted in a waiver of his right to appeal.

Withdrawing an appeal is the functional equivalent of waiving an appeal, as both result in a defendant giving up his right to appeal. Therefore, the same standards should apply. A valid waiver of the right to appeal must be both "considered and

intelligent." *United States v. Ramos*, 623 F.3d 672, 680 (9th Cir. 2010); *See also United States v. Garcia-Contreras*, 2 F. App'x 755, 757 (9th Cir. 2001) (to be valid, a deportee's waiver of the right to appeal must be "knowing and voluntary"). The government bears the burden of proving valid waiver in a collateral attack of the underlying removal proceedings by clear and convincing evidence. *See Ramos*, 623 F.3d at 680 (district court erred in shifting the burden of proving valid waiver of the right to appeal to defendant); *See also United States v. Pallares-Galan*, 359 F.3d 1088, 1097 (9th Cir. 2004) (for waiver to be valid, the government must establish by clear and convincing evidence the waiver is considered and intelligent). The Court should "indulge every reasonable presumption against waiver," and should "not presume acquiescence in the loss of fundamental rights." *United States v. Lopez-Vasquez,* 1 F.3d 751, 754 (9th Cir. 1993).

There was not sufficiently clear and convincing evidence that Mr. Martinez knowingly waived his right to appeal. At best, the evidence is conflicting on whether Mr. Martinez consented to the abandonment of his appeal of the 1998 Removal Order. That does not rise to the level of clear and convincing. The Government asserted, and the district court agreed, that a handwritten note stating Mr. Martinez wished to withdraw his appeal, purportedly signed by Mr. Martinez (though no evidence was submitted in that regard) and provided to the Deportation Officer (not Mr. Martinez's own attorney), constituted sufficient evidence that Mr. Martinez failed to exhaust his administrative remedies. However, that note was insufficient to prove by clear and convincing evidence that Mr. Martinez knowingly and voluntarily withdrew his appeal. There was no evidence introduced that the handwriting or signature on the letter

matched that of Mr. Martinez. There was no evidence that Mr. Martinez wrote the letter voluntarily (or what any of the circumstances were). There was no evidence that anyone advised Mr. Martinez of the consequences of withdrawing the appeal, or that Mr. Martinez even spoke with either of his attorneys.

Mr. Martinez allegedly gave the note to the Deportation Officer, and not his immigration attorney or appellate attorney. The Government alleges the letter was subsequently given to Mr. Martinez's immigration attorney (Antonio Martinez), but there is no evidence it was provided to Mr. Martinez's appellate attorney (Pablo Polastri). Inexplicably, the Government alleges the Assistant District Counsel provided Mr. Martinez's letter to his immigration counsel (Antonio Martinez) but then instead spoke that same day with his appellate counsel, Mr. Polastri. There was no evidence the letter was ever provided to Mr. Polastri. According to the memorandum provided by the Government, Mr. Polastri responded that he was aware Mr. Martinez was thinking about withdrawing his appeal but was not aware that he had done so. 2-ER-91. This demonstrates appellate counsel never spoke with Mr. Martinez before the withdrawal of his appeal. Adding to the confusion, it was Mr. Martinez's immigration attorney (Antonio Martinez) and not his appellate counsel (Mr. Polastri) who later moved to withdraw the appeal.

Further, there was no evidence that counsel consulted with Mr. Martinez about the withdrawal of his appeal. In fact, the evidence points to the opposite. Counsel has a constitutionally imposed duty under the Sixth Amendment to consult with the defendant about an appeal when there is reason to think either (1) that a rational

defendant would want to appeal (for example, because there are nonfrivolous grounds for appeal), or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing. *Roe v. Flores-Ortega,* 528 U.S. 470, 480 (2000). The Withdrawal of Appeals filed by Antonio Martinez only stated he was withdrawing Mr. Martinez's appeals. It did not state that counsel had consulted with Mr. Martinez before filing the withdrawal, that Mr. Martinez was advised of his rights and consequences of the withdrawal, that the withdrawal was being done at Mr. Martinez's direction or consent, that the decision to withdraw the appeal was voluntary, or any other indication that counsel had consulted with Mr. Martinez about the withdrawal of the appeal in any manner. 2-ER-116; *See United States v. Lopez-Chavez*, 757 F.3d 1033, 1041 (9th Cir. 2014) (ineffective assistance of counsel found where, in addition to counsel erroneously conceding defendant's removability and failure to pursue appellate proceedings, counsel first reserved the right to appeal and then failed to do so without advising the defendant of his rights or discussing the possibility of an appeal with him). The Government did not offer any affidavits or testimony by any witnesses with personal knowledge of the circumstances of the withdrawal of the appeal. Therefore, the evidence did not establish by clear and convincing evidence that Mr. Martinez's withdraw and waiver of his right to judicial review was considered and intelligent.

The district court also improperly shifted the burden of disproving a valid waiver to Mr. Martinez when it found, "While Defendant's questions about the evidence pertaining to the withdrawal of his appeal are not frivolous, his arguments effectively – and incorrectly – place the burden under § 1326(d)(1) on the government."

1-ER-11-12; *Ramos*, 623 F.3d at 680 (district court erred in shifting burden of proving valid waiver of right to appeal to defendant). Ultimately, the district court incorrectly concluded that Mr. Martinez "has not shown the withdrawal was invalid." 1-ER-12. It was not Mr. Martinez's burden to demonstrate that his appeal waiver was invalid, but the Government's burden to demonstrate that it was valid. The Government did not meet its burden to show that Mr. Martinez's withdrawal of the appeal – and therefore waiver of his right to judicial review – was considered and intelligent. Absent such a showing, this Court must conclude Mr. Martinez was improperly deprived of the opportunity for judicial review.

The Ninth Circuit Panel concluded that the reasoning of *United States v. Villavicencio-Burruel*, 608 F.3d 556 (9th Cir. 2010), forecloses Mr. Martinez's argument that the withdrawal of his appeal was the equivalent of an invalid waiver, and that Mr. Martinez failed to establish he was deprived of an opportunity for judicial review. However, in *Villavicencio-Burruel* the defendant never appealed the removal order. Whereas Mr. Martinez filed an appeal of his removal order, but that appeal was later withdrawn under questionable circumstances by Mr. Martinez's immigration attorney (Antonio Martinez) and not his appellate counsel (Mr. Polastri). Further, the Court in *Villavicencio-Burruel* left open the question whether a counsel's alleged ineffectiveness in not appealing the removal order requires a defendant be permitted to collaterally attack the order despite his noncompliance with §1326(d)'s exhaustion requirement. *Id*. at 560, fn 1. At a minimum, this Court should grant certiorari to address that issue.

Therefore, this Court should reverse Mr. Martinez's conviction and remand this

matter back to the district court with instructions to dismiss the indictment pursuant to 8 U.S.C. § 1326(d).

CONCLUSION

Mr. Martinez respectfully requests this Court grant certiorari because this case involves questions of exceptional importance involving federal statutory law (8 U.S.C. § 1326(d)) and constitutional law (5th & 6th Amendments). This case also involves unsettled law on the question of whether a counsel's alleged ineffectiveness in not appealing the removal order requires a defendant be permitted to collaterally attack the order despite his noncompliance with §1326(d)'s exhaustion requirement. *See Villavicencio-Burruel*, 608 F.3d 556, 560, fn 1 (9th Cir. 2010).

Mr. Martinez requests the Court vacate his conviction and remand his case to the District Court with a directive that the indictment be dismissed. At a minimum, the District Court should be instructed that Mr. Martinez has satisfied the first and second requirements of 8 U.S.C. § 1326(d), and the District Court shall make a determination regarding the third requirement.

RESPECTFULLY SUBMITTED this 2nd day of December 2024.

LAW OFFICE OF FLORENCE M. BRUEMMER, P.C.

/s/ Florence M. Bruemmer
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Junior Martinez-Martinez