

No. \_\_\_\_\_

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IN THE SUPREME COURT OF THE UNITED STATES

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MARTIN GUADALUPE CARDIEL-RUIZ,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

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

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APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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**FILED****NOT FOR PUBLICATION****UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**AUG 13 2024  
MOLLY C. DWYER, CLERK  
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

v.

MARTIN GUADALUPE CARDIEL-RUIZ,

Defendant-Appellee.

No. 21-10139

D.C. Nos.  
3:20-cr-00376-CRB-1  
3:20-cr-00376-CRB

MEMORANDUM\*

Appeal from the United States District Court  
for the Northern District of California  
Charles R. Breyer, District Judge, Presiding

Argued and Submitted August 6, 2024\*  
Pasadena, California

Before: WARDLAW, NGUYEN, and KOH, Circuit Judges.

The United States appeals the district court's order dismissing the indictment charging Defendant-Appellee Martin Guadalupe Cardiel-Ruiz with one count of illegal reentry after deportation in violation of 8 U.S.C. § 1326. The district court dismissed the indictment on the grounds that the underlying removal order entered against Cardiel-Ruiz was invalid pursuant to § 1326(d). We review the district

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

court's order de novo. *United States v. Gonzalez-Flores*, 804 F.3d 920, 926 (9th Cir. 2015). Because the district court's order relied on case law that has since been abrogated by intervening cases from our court and the Supreme Court, we vacate the district court's order and remand.

1. Cardiel-Ruiz argues that he may satisfy the two procedural requirements reflected in § 1326(d)(1) and (2) because the immigration judge's failure to properly advise him of his eligibility for voluntary departure rendered further administrative appeal and judicial review "unavailable." This argument is foreclosed by *United States v. Palomar-Santiago*, 593 U.S. 321 (2021), and *United States v. Portillo-Gonzalez*, 80 F.4th 910 (9th Cir. 2023). As the Supreme Court recognized in *Palomar-Santiago*, "[t]he immigration judge's error on the merits does not excuse the noncitizen's failure to comply with a mandatory exhaustion requirement if further administrative review, and then judicial review if necessary, could fix that very error." 593 U.S. at 328. We applied this rule in *Portillo-Gonzalez* which, like the present case, involved substantive errors by the immigration judge concerning the petitioner's eligibility for voluntary departure. In holding that Portillo-Gonzalez failed to satisfy § 1326(d)(1) and (2), we observed that "nothing about that substantive error 'can alone render further review of [that] adverse decision unavailable.'" *Portillo-Gonzalez*, 80 F.4th at 918 (quoting *Palomar-Santiago*, 593 U.S. at 328).

2. Cardiel-Ruiz further argues that direct appeal was rendered unavailable by the immigration judge’s misleading statement that the immigration judge was not making “any decision about granting or denying” voluntary departure. We have recently held that the *Ross v. Blake*, 578 U.S. 632 (2016), framework applies in § 1326 cases. *United States v. Valdivias-Soto*, No. 20-10415, slip op. at 29 (9th Cir. Aug. 9, 2024). So while Cardiel-Ruiz could satisfy § 1326(d)(1) and (2) by showing that the immigration judge made “misleading statements *as to the procedural steps for pursuing administrative remedies*,” *Portillo-Gonzalez*, 80 F.4th at 920, we find no such statements in this record. Here, the immigration judge apprised Cardiel-Ruiz of his right to appeal and asked Cardiel-Ruiz whether he wished to appeal the “decision.” Although the “decision” may have been ambiguous, an appeal of the immigration judge’s ultimate removal order would have permitted Cardiel-Ruiz to argue that the immigration judge erred by failing to consider his request for voluntary departure.

In sum, Cardiel-Ruiz cannot satisfy § 1326(d)(1) or (d)(2) based on the immigration judge’s substantive mistakes during his underlying removal proceedings.<sup>1</sup>

**VACATED and REMANDED for further proceedings consistent with**

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<sup>1</sup> The United States of America’s motion to file its supplemental brief one day late, Dkt. No. 54, is granted.

**this disposition.**

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IN THE UNITED STATES DISTRICT COURT  
6  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

7

8 USA,

9 Plaintiff,

10 v.

11 MARTIN GUADALUPE CARDIEL-RUIZ,

12 Defendant.

Case No. 20-cr-00376-CRB-1**ORDER GRANTING MOTION TO  
DISMISS INDICTMENT**

Martin Guadalupe Cardiel-Ruiz moves to dismiss an indictment charging him with illegal reentry in violation of 8 U.S.C. § 1326. He argues that his underlying removal order was invalid because the Immigration Court lacked jurisdiction. He also argues that entry of the order was fundamentally unfair because Mr. Cardiel-Ruiz did not receive a genuine opportunity to pursue voluntary departure, for which he was eligible, during his immigration hearing and suffered prejudice as a result. The Court heard argument on April 7, 2021. The Court grants Mr. Cardiel-Ruiz's motion to dismiss because he has satisfied the Ninth Circuit's standard for collaterally attacking a removal order.

21 **I. BACKGROUND**

The government has charged Mr. Cardiel-Ruiz with being an alien in the country after deportation in violation of 8 U.S.C. § 1326. See Indictment (dkt. 18) at 3.<sup>1</sup> The indictment alleges that Mr. Cardiel-Ruiz was found in the United States after having been

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<sup>1</sup> The indictment alleges that Mr. Cardiel-Ruiz is subject to 8 U.S.C. § 1326(b)(1), which states that an alien who has violated § 1326(a) and whose conviction is “subsequent to a conviction for [the] commission of three or more misdemeanors involving drugs, crimes against the person, or both, or a felony (other than an aggravated felony) . . . shall be fined under title 18, imprisoned not more than 10 years, or both.”

1 removed several times—“on or about” July 15, 2011, July 20, 2011, May 30, 2012, and  
2 December 6, 2016. Indictment at 3.

3 Each removal traces back to a removal order entered on July 14, 2011. See Mot.  
4 (dkt. 32) at 4; Opp. (dkt. 34) at 5. At that time, Mr. Cardiel-Ruiz was 20 years old and had  
5 been living in the United States since he was three months old. See Record of Deportable  
6 Alien (dkt. 34-1 Ex. A) at 1–2; Mot. at 2; Opp. at 2. Immigration and Customs  
7 Enforcement (ICE) learned of his apparent unlawful status in April 2011 while Mr.  
8 Cardiel-Ruiz was incarcerated. See Record of Deportable Alien at 1–2. He had twice  
9 been convicted of being under the influence of a controlled substance in violation of  
10 California Health & Safety Code section 11550. See *id.*

11 On July 1, 2011, immigration authorities served Mr. Cardiel-Ruiz with a Form I-  
12 862 Notice to Appear. See NTA (dkt. 34-1 Ex. B) at 1–2. The Notice to Appear ordered  
13 Mr. Cardiel-Ruiz to appear before an immigration judge at an address in Florence,  
14 Arizona, but stated that the “Date” and “Time” of the hearing were “to be set.” *Id.* at 1.  
15 Although there is no evidence of a subsequent hearing notice specifying the date and time,  
16 see Chuang Decl. (dkt. 33) ¶ 5, Mr. Cardiel-Ruiz must have learned the date and time  
17 because he appeared for his hearing on July 14, 2011.

18 Near the beginning of that hearing, the Immigration Judge (IJ) informed Mr.  
19 Cardiel-Ruiz, who did not have a lawyer, that the IJ would ask “important questions to see  
20 if [Mr. Cardiel-Ruiz] may qualify for relief from deportation.” Chuang Decl. Ex. C (dkt.  
21 33-3) Track 3 at 00:17-00:23. The IJ noted that he would “consider” Mr. Cardiel-Ruiz “for  
22 voluntary departure.” *Id.* at 00:54–01:00. But the IJ clarified that he would “deny  
23 voluntary departure” if he found that Mr. Cardiel-Ruiz had “a bad criminal record, or a bad  
24 immigration record.” *Id.* at 01:28–01:33.<sup>2</sup> After Mr. Cardiel-Ruiz acknowledged that he  
25 entered the United States unlawfully, the IJ concluded that Mr. Cardiel-Ruiz was  
26 removable. *Id.* Track 4 at 00:31–00:50.

27  
28 <sup>2</sup> These initial advisements were made to a group of nine respondents, see Opp. at 2–3, which  
makes no difference to the Court’s analysis.

1       The IJ then said he would ask “some other questions to see if [Mr. Cardiel-Ruiz]  
2 may qualify for any relief.” Id. at 00:55–00:60. The IJ asked Mr. Cardiel-Ruiz how long  
3 he had lived in the United States, his age, how old he was when he entered the United  
4 States, whether he had legal permission to be in the United States, whether anyone had  
5 ever attempted to get him lawful status in the United States, whether his parents had lawful  
6 status in the United States, whether he was married, how long he had been married,  
7 whether his wife was a U.S. citizen, whether he had any children, and whether his wife had  
8 petitioned for legal permanent resident status on his behalf. Id. at 01:03–03:58.<sup>3</sup> After Mr.  
9 Cardiel-Ruiz indicated that he had been in the country since he was three months old, had  
10 been married to a U.S. citizen for four months, and had a step-daughter, the IJ stopped his  
11 questioning and explained the general process through which Mr. Cardiel-Ruiz’s wife  
12 could file a petition to get him a green card, and how Mr. Cardiel-Ruiz could pick up the  
13 green card in Mexico. Id. 02:35–03:22.

14       The IJ then told Mr. Cardiel-Ruiz that he had “two choices.” Id. 03:59–04:01. Mr.  
15 Cardiel-Ruiz “could seek” either “cancellation of removal” or “voluntary departure.” Id.  
16 04:01–5:00. The IJ explained the eligibility requirements for cancellation of removal,  
17 including the requirement that Mr. Cardiel-Ruiz did not have “any drug convictions.” Id.  
18 He then explained that Mr. Cardiel-Ruiz could seek voluntary departure, which “avoids a  
19 deportation and allows you to go back to Mexico and wait until your wife files the papers.”  
20 Id. Track 5 00:00–00:24. The IJ did not explain the eligibility requirements for voluntary  
21 departure, but Mr. Cardiel-Ruiz immediately said “I’ll do that.” Id. 00:22–00:24.

22       After Mr. Cardiel-Ruiz expressed his desire to pursue voluntary departure, the  
23 government notified the IJ that Mr. Cardiel-Ruiz had “two controlled substances  
24 convictions,” which would “weigh heavily on whether he was *prima facie* eligible for

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27       <sup>3</sup> Although the government suggests that the IJ asked Mr. Cardiel-Ruiz about the “nature of his  
28 relationship” with his step-daughter, see Opp. at 4, that is true only to the extent that the IJ asked  
Mr. Cardiel-Ruiz whether his step-daughter was his wife’s “daughter who is also a U.S. Citizen,”  
to which Mr. Cardiel-Ruiz answered “yes, sir,” Chuang Decl. Ex. C Track 4 at 02:12–02:23.

1 42B," meaning cancellation of removal (not voluntary departure). Id. 00:25–00:33.<sup>4</sup> The  
2 following exchange, touching on both cancellation of removal and voluntary departure,  
3 then occurred:

4 IJ: And that could interfere with two things for you. One, if you have drug  
5 convictions, that would disqualify you from cancellation. If they're drug  
6 convictions for possession or use or drug paraphernalia involving one of the,  
sort of, illegal federal drugs—

7 C-R: I was under the influence.

8 IJ: And if that was . . . an illegal federal drug, even if the conviction was in state  
9 court . . . then that presents a problem because you probably can't get  
10 cancellation. You probably aren't going to get voluntary departure. And if  
11 you've got two convictions, you might not be able to get both  
12 of them taken off your record. If you only have one conviction, or if it's one  
13 case that has, like, using or being under the influence and drug paraphernalia  
14 that's connected on the same day, then they might count as sort of the same  
15 case, and a State judge can take one drug conviction off your record . . . and  
16 then it doesn't count any more . . . then it's gone and then that would make  
17 you eligible to adjust your status. It would make you, you know, able to have  
18 your wife get you a green card. As long as you have an active drug  
19 conviction, they probably won't grant a green card, so that's kind of a  
20 problem. If you'd like a couple of weeks to talk it over with an attorney or  
with the Florence Project, I'd be glad to do that.

21 C-R: No your honor, I would rather go to Mexico.

22 IJ: And, government counsel, does it appear from your records that he actually  
23 has drug convictions?

24 G: Two of them on two separate dates. Yes sir.

25 IJ: So are you opposing voluntary departure for that reason?

26 G: Yes sir, based on that.

27 IJ: Well, sir, I'm not going to grant voluntary departure. So your choice is  
28 either stay here and figure out if you want to file, or are eligible for any other

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<sup>4</sup> 42B is the application form for cancellation of removal. See U.S. Dep't of Justice, List of  
Downloadable EOIR Forms, <https://www.justice.gov/eoir/list-downloadable-eoir-forms> (last  
visited March 25, 2021).

1 relief, or I'll have to make a deportation order today.

2 C-R: I'll take the deportation order.

3 IJ: Then I'll enter an order that you be deported today to Mexico. Since you  
4 didn't really ask for voluntary departure, I won't make any decision about  
5 granting or denying it. I'll just make an order that you be deported today to  
Mexico.

6 Id. 00:33–03:48. Mr. Cardiel-Ruiz then waived his right to appeal the IJ's decision. Id.  
7 03:48–03:55.

8 The next day, on July 15, 2011, Mr. Cardiel-Ruiz was removed from the United  
9 States. See Opp. at 5. Since then, he has illegally reentered the United States four times  
10 and been removed three times. See id.

## 11 II. **LEGAL STANDARD**

12 In order to convict a defendant of violating 8 U.S.C. § 1326, the government must  
13 prove the following three elements beyond a reasonable doubt: (1) the defendant is a  
14 noncitizen; (2) the defendant was previously deported from the United States; and (3) the  
15 defendant was found in the United States without the consent of the Attorney General. See  
16 8 U.S.C. § 1326(a).

17 “Because the underlying removal order serves as a predicate element of an illegal  
18 reentry offense under § 1326, a defendant charged with that offense may collaterally attack  
19 the removal order under the due process clause.” United States v. Pallares-Galan, 359 F.3d  
20 1088, 1095 (9th Cir. 2004) (citing United States v. Mendoza-Lopez, 481 U.S. 828, 837–38  
21 (1987)).

22 The right to collaterally attack a removal order “is codified at 8 U.S.C. § 1326(d).”  
23 United States v. Cisneros-Rodriguez, 813 F.3d 748, 755 (9th Cir. 2015). To prevail, a  
24 defendant must show that “(1) the alien exhausted any administrative remedies that may  
25 have been available to seek relief against the order; (2) the deportation proceedings at  
26 which the order was issued improperly deprived the alien of the opportunity for judicial  
27 review; and (3) the entry of the order was fundamentally unfair.” 8 U.S.C. § 1326(d). The  
28 defendant bears the burden of proving each element. See United States v. Gonzalez-

1 Villalobos, 724 F.3d 1125, 1129 (9th Cir. 2013).

2 **III. DISCUSSION**

3 Mr. Cardiel-Ruiz argues that the Immigration Court lacked jurisdiction to enter the  
4 July 2011 removal order because the Notice to Appear did not specify the date and time of  
5 the removal hearing, and that omission was “not cured.” Mot. at 5. Mr. Cardiel-Ruiz also  
6 argues that his removal hearing was “fundamentally unfair” because the IJ “failed to  
7 meaningfully advise Mr. Cardiel-Ruiz of his right to seek pre-hearing voluntary  
8 departure,” “failed to give Mr. Cardiel-Ruiz a genuine opportunity to develop evidence  
9 supporting his application for pre-hearing voluntary departure,” and “failed to properly  
10 develop the record.” Id. at 12, 13, 15. Mr. Cardiel-Ruiz further argues that these errors  
11 prejudiced him, and that he need not make any additional showing to satisfy §§ 1326(d)(1)  
12 and (d)(2)’s exhaustion and judicial review requirements. Id. at 17, 19.

13 The Court rejects Mr. Cardiel-Ruiz’s jurisdictional argument because, as he  
14 acknowledges, Ninth Circuit precedent forecloses his contention that the Immigration  
15 Court lacked jurisdiction based on the Notice to Appear. But the Court grants Mr. Cardiel-  
16 Ruiz’s motion because the IJ did not clearly advise Mr. Cardiel-Ruiz of his eligibility for  
17 voluntary departure or give him a meaningful opportunity to pursue that relief, and the IJ’s  
18 failure to do so prejudiced Mr. Cardiel-Ruiz.

19 **A. Immigration Court Jurisdiction**

20 Federal regulations govern whether an Immigration Court has jurisdiction over  
21 removal proceedings. See Karingithi v. Whitaker, 913 F.3d 1158, 1158–59 (9th Cir.  
22 2019). Under 8 C.F.R. § 1003.14, jurisdiction vests “when a charging document is filed  
23 with the Immigration Court by . . . [s]ervice.” A “charging document” includes a “Notice  
24 to Appear,” and “[s]ervice means physically presenting or mailing a document to the  
25 appropriate party.” 8 C.F.R. § 1003.13.

26 Although a Notice to Appear (NTA) is required by regulation to include “the time,  
27 place and date of the initial removal hearing, where practicable,” 8 C.F.R. § 1003.18(b), “a  
28 defective NTA does not affect jurisdiction,” United States v. Bastide-Hernandez, 986 F.3d

1 1245, 1248 (9th Cir. 2021). Thus, “the jurisdiction of the immigration court vests upon the  
2 filing of an NTA, even one that does not at the time inform the alien of the time, date, and  
3 location of the hearing.” Id.

4 Here, no one disputes that a Notice to Appear was filed with the immigration court  
5 and served on Mr. Cardiel-Ruiz. See 8 C.F.R. § 1003.13. Therefore, the Immigration  
6 Court did not lack jurisdiction to enter Mr. Cardiel-Ruiz’s July 2011 removal order.  
7 Bastide-Hernandez, 986 F.3d at 1248. Indeed, Mr. Cardiel-Ruiz acknowledges that  
8 Bastide-Hernandez forecloses his jurisdictional argument. See Reply (dkt. 36) at 2. In  
9 urging the Court to adopt the dissent in that case, see id., he asks the Court to exceed its  
10 authority, see Yong v. INS, 208 F.3d 1116, 1119 n.2 (9th Cir. 2000) (“[O]nce a federal  
11 circuit court issues a decision, the district courts within that circuit are bound to follow  
12 it.”).

### 13 B. Opportunity to Seek Voluntary Departure

14 In certain circumstances, “[t]he Attorney General may permit an alien voluntarily to  
15 depart the United States.” 8 U.S.C. § 1229c(a)(1). When that happens, the alien avoids  
16 the consequences of having been deported under a removal order. See id. The Attorney  
17 General has promulgated rules governing when immigration judges may exercise their  
18 discretion to grant voluntary departure. See 8 C.F.R. § 1240.26(b)(1). In particular, the  
19 alien must not have been convicted of an aggravated felony, must request voluntary  
20 departure at or before the merits hearing, must not request any other relief, must concede  
21 removability, and must waive appeal. See id.

22 The parties agree that Mr. Cardiel-Ruiz was eligible for voluntary departure. See  
23 Mot. at 13; Opp. at 8. They disagree about whether Mr. Cardiel-Ruiz suffered a due  
24 process violation, i.e., whether the IJ properly advised Mr. Cardiel-Ruiz about his  
25 eligibility for this discretionary relief and gave Mr. Cardiel-Ruiz a genuine chance to seek  
26 it. See Mot. at 13–17; Opp. at 8–14. They also disagree regarding whether Mr. Cardiel-  
27 Ruiz suffered prejudice as the result of any due process violation. See Mot. at 17–19; Opp.  
28 at 14–16.

1       As discussed above, Mr. Cardiel Ruiz must show that “(1) [he] exhausted any  
2 administrative remedies that may have been available to seek relief against the order; (2)  
3 the deportation proceedings at which the order was issued improperly deprived [him] of  
4 the opportunity for judicial review; and (3) the entry of the order was fundamentally  
5 unfair.” 8 U.S.C. § 1326(d). The Court concludes that he has done so.

6       “In applying § 1326(d),” the Ninth Circuit has generally focused “on a single type  
7 of defect in a deportation hearing: the IJ’s failure to . . . inform the alien of his or her  
8 apparent eligibility to apply for” relief from removal and to “afford the alien an  
9 opportunity to make application during the hearing.” United States v. Gonzalez-Flores,  
10 804 F.3d 920, 926 (9th Cir. 2015) (quoting 8 C.F.R. § 1240.11(a)(2)) (internal quotation  
11 marks omitted). An IJ breaches this obligation when the IJ “erroneously tells the alien that  
12 no relief is possible.” Id. An IJ may also breach this obligation “by stating that the alien is  
13 eligible for relief, but immediately negating that statement so that it is as if he was told that  
14 he did not qualify . . . which puts the alien in the same position as one who is never made  
15 aware that he has a right to seek relief.” Id. (citation omitted).

16       A defendant who can show that such a breach occurred will get most of the way  
17 towards successfully collaterally attacking a removal order. First, the breach “relieves the  
18 alien of the burden of proving exhaustion of administrative remedies under § 1326(d)(1)  
19 because . . . the alien’s waiver of the right to an administrative appeal” was not sufficiently  
20 “considered and intelligent.” Id. at 927 (quoting United States v. Vidal-Mendoza, 705  
21 F.3d 1012, 1015 (9th Cir. 2013)). Second, the breach means that the alien was necessarily  
22 “deprived of the opportunity for judicial review pursuant to § 1326(d)(2), because ‘an alien  
23 who is not made aware that he has a right to seek relief necessarily has no meaningful  
24 opportunity to appeal the fact that he was not advised of that right.’” Id. (quoting United  
25 States v. Arrieta, 224 F.3d 1076, 1079 (9th Cir. 2000)). Finally, such a breach “violates  
26 the alien’s right to procedural due process.” Id. (citing United States v. Muro-Inclan, 249  
27 F.3d 1180, 1183–84 (9th Cir. 2001)).

28       But that violation will satisfy § 1326(d)(3)’s “fundamentally unfair” prong only if

1 the alien can also “prove prejudice.” Id. To establish prejudice, the defendant “must only  
2 show that he had a plausible ground for relief from deportation.” Muro-Inclan, 249 F.3d at  
3 1184 (quoting Arrieta, 242 F.3d at 1079). Although the alien must show “more than . . . a  
4 mere possibility” that he would have been granted relief, he need not “show that he  
5 actually would have been granted relief.” Id. (citation omitted).

6 In evaluating whether the defendant has established prejudice, first, the Court must  
7 “identify the factors relevant to the IJ’s exercise of the discretion for the relief being  
8 sought.” Id. at 917 (quoting United States v. Rojas-Pedroza, 716 F.3d 1253, 1263 (9th Cir.  
9 2013)). Second, the Court must “determine whether, in light of the factors . . . and based  
10 on the unique circumstances of the alien’s own case, it was plausible (not merely  
11 conceivable) that the IJ would have exercised his discretion in the alien’s favor.” Id.  
12 (quoting Rojas-Pedroza, 716 F.3d at 1263). “In assessing whether the alien carried this  
13 burden,” the Court must “focus on whether aliens with similar circumstances received  
14 relief,” Gonzalez-Flores, 804 F.3d at 928, though the existence of a “single case” on point  
15 is “plainly insufficient,” see United States v. Valdez-Novoa, 780 F.3d 906, 920–21 (9th  
16 Cir. 2015).

17 Here, Mr. Cardiel-Ruiz has shown both that the IJ breached his obligation to give  
18 Mr. Cardiel-Ruiz a genuine opportunity to apply for voluntary departure, and that Mr.  
19 Cardiel-Ruiz had a plausible ground for relief from deportation based on comparably  
20 situated aliens who have been granted voluntary departure.

21 For starters, Mr. Cardiel-Ruiz was “not meaningfully advised of his right to seek  
22 voluntary departure.” United States v. Melendez-Castro, 671 F.3d 950, 954 (9th Cir.  
23 2012). If an IJ tells an alien that he is eligible for voluntary departure, but then quickly  
24 tells the alien that “he would not get the relief if he applied for it because he ha[s] a  
25 criminal record,” the alien has not been adequately advised of his right to seek voluntary  
26 departure. Id. When that happens, the alien is effectively told that any “application would  
27 be futile” rather than advised that he can apply. Id. Here, after stating that he would deny  
28 an application for voluntary departure based on a “bad criminal record,” Chuang Decl. Ex.

1 C Track 3 at 01:28–01:33, and beginning to ask Mr. Cardiel-Ruiz various questions about  
2 his background, *id.* Track 4 at 00:55–03:58, the IJ told Mr. Cardiel-Ruiz that he could seek  
3 voluntary departure, *id.* Track 5 00:00–00:24, and Mr. Cardiel-Ruiz stated his desire to do  
4 so, *id.* 00:22–00:24. But without any further questioning, and upon learning that Mr.  
5 Cardiel-Ruiz had “two controlled substance convictions,” *id.* 00:25–00:33, the IJ stated  
6 that he was “not going to grant voluntary departure,” *id.* 02:50–03:03. The IJ did not  
7 explain the eligibility requirements for voluntary departure, indicate that Mr. Cardiel-Ruiz  
8 met those requirements (as he did), or give Mr. Cardiel-Ruiz “a genuine opportunity . . . to  
9 present evidence of the factors favoring this relief.” *Melendez-Castro*, 617 F.3d at 954. In  
10 substance, the IJ told Mr. Cardiel-Ruiz that any application would be futile based on his  
11 two drug convictions.<sup>5</sup> The IJ did not weigh the equities relevant to voluntary departure,  
12 and indeed could not weigh them having short-circuited the inquiry.

13 The government’s contrary arguments are without merit. The government contends  
14 that the IJ did not “immediately negate the statement that [Mr.] Cardiel-Ruiz was eligible  
15 for relief.” Opp. at 10. But the IJ never clearly stated that Mr. Cardiel-Ruiz met the  
16 eligibility requirements for voluntary departure, and the IJ’s statements amounted to a  
17 cursory denial even if they mixed in some unrelated talk about green cards and  
18 cancellation of removal. The government also argues that “because almost anything could  
19 be construed as a positive or negative equity, an IJ could ask an alien 100 questions about  
20 his background and, under Mr. Cardiel-Ruiz’s logic, still assert that the immigration court  
21 committed a due process violation.” *Id.* at 14 n.3. That is not true. As discussed below,  
22 the Ninth Circuit has a well-established body of law regarding the factors relevant to  
23 granting or denying voluntary departure. The IJ merely must give the alien a genuine  
24 opportunity to present information bearing on those factors and may not prematurely end

25  
26 <sup>5</sup> The IJ appeared interested in helping Mr. Cardiel-Ruiz obtain a green card during the hearing,  
27 and the Court does not question the IJ’s intentions in any way. But the IJ’s later statement that  
28 Mr. Cardiel-Ruiz “didn’t really ask for voluntary departure,” *see Chuang Decl.* Track 5 at 03:30–  
03:48, is perplexing, *see id.* at 00:22–00:24 (“I’ll do that”), and reinforces that the IJ did not give  
Mr. Cardiel-Ruiz a genuine chance to present relevant information.

1 that process upon learning of two drug convictions. See Melendez-Castro, 671 F.3d at  
2 954.

3 Given this “breach” by the IJ, Mr. Cardiel-Ruiz is relieved from further proving his  
4 exhaustion of administrative remedies, and has shown that he was improperly deprived of  
5 a true opportunity for judicial review. See Gonzalez-Flores, 804 F.3d at 927 (citing 8  
6 U.S.C. §§ 1326(d)(1), (d)(2)). He has also shown that his due process rights were violated.  
7 See id.

8 The only remaining question is whether Mr. Cardiel-Ruiz has carried his burden of  
9 showing prejudice. See Valdez-Novoa, 780 F.3d at 916–17. The Court must first consider  
10 the positive and negative factors that an IJ would consider relevant to the discretionary  
11 decision whether to grant voluntary departure. See Gonzalez-Flores, 804 F.3d at 927.  
12 Those factors “are the alien’s negative and positive equities.” Valdez-Novoa, 780 F.3d at  
13 917. Negative equities include “the existence, seriousness, and recency of any criminal  
14 record . . . and other evidence of bad character.” Id. (citation omitted). Positive equities  
15 include “compensating elements such as long residence here, close family ties in the  
16 United States, or humanitarian needs.” Id. (citation omitted). Here, the record included  
17 Mr. Cardiel-Ruiz’s length of residence in the United States, his marriage to a U.S. citizen,  
18 the fact he had a stepdaughter, and his two drug convictions. But Mr. Cardiel-Ruiz points  
19 to additional positive equities that he could have raised. See Mot. at 17; Valdez-Novoa,  
20 780 F.3d at 917–18. For example, Mr. Cardiel-Ruiz had not provided his stepdaughter’s  
21 age, and could have “elaborate[d] further on . . . the importance of his presence in his 2-  
22 year-old stepdaughter’s life.” Mot. at 17. He also could have “explain[ed] that he had  
23 graduated from a Bay Area high school,” and informed the IJ “that he was participating in  
24 the San Jose Conservation Corps.” Id. Of course, further development of the record may  
25 also have revealed negative equities, namely that Mr. Cardiel-Ruiz had “six serious  
26 juvenile adjudications for offenses that would have been felonies if he had been an adult,”  
27 though the government has not elaborated regarding Mr. Cardiel-Ruiz’s juvenile record,  
28 Opp. at 16.

Having identified the relevant positive and negative equities, the Court must consider whether Mr. Cardiel-Ruiz has shown “that he had a plausible ground for relief from deportation.” Muro-Inclan, 249 F.3d at 1184. And that turns on whether he has shown that “aliens with similar circumstances received relief.” Gonzalez-Flores, 804 F.3d at 928 (quoting United States v. Rojas-Pedroza, 716 F.3d at 1263). The Court concludes that Mr. Cardiel-Ruiz has carried that burden. Other aliens with similar (and worse) equities have received voluntary departure. See id.; Mot. at 18. Indeed, the Ninth Circuit has previously concluded “that it was plausible a defendant would be granted voluntary departure where the defendant had lived in the United States since he was two months old and had a United States citizen wife and child, even though the defendant’s criminal history included firearm possession convictions, and showed association with gang members and prior drug use.” Gonzalez-Flores, 804 F.3d at 928 (citing United States v. Alcazar-Bustos, 382 F. App’x 568, 569–71 (9th Cir. 2010)). That alien had juvenile adjudications for burglary, battery, and vehicle theft, along with two adult felony convictions for possession of firearms. See United States v. Alcazar-Bustos, 2009 WL 1033785, at \*3 (S.D. Cal. Apr. 16, 2009), rev’d Alcazar-Bustos, 382 F. App’x at 569-71. And while no two cases are identical, Mr. Cardiel-Ruiz has cited numerous additional examples of IJs granting voluntary departure to aliens with arguably worse records and comparable positive equities. See Opp. 18 nn. 9, 10.<sup>6</sup> Based on these examples, it is plausible that Mr. Cardiel-Ruiz would have been granted voluntary departure had he been able to present additional positive equities to the Immigration Court.<sup>7</sup>

<sup>6</sup> See also United States v. Cuenca-Vega, 544 F. App’x 688, 690 n.3 (9th Cir. 2013) (holding that an alien who had been in the United States for ten years, since age 13; whose mother was a U.S. citizen; who had graduated from a California high school; and who had been employed for three years leading up to his removal; but who had been convicted of possession of methamphetamine “and some traffic offenses” would plausibly have been granted relief); In re Gonzales-Figeroa, 2006 WL 729784 (BIA Feb. 10, 2006) (affirming a grant of voluntary departure where the alien had four convictions for assault, a conviction for resisting arrest, and numerous other arrests, where the alien reported that he helped his mother with rent and medical expenses and no longer drank); In re Pineda-Castellanos, 2005 WL 3833024 (BIA Nov. 16, 2005) (affirming a grant of voluntary departure where the alien had six criminal convictions “for illegal entry, battery, drunkenness, threatening, a second battery, and driving under the influence”).

<sup>7</sup> Since the initial removal order was entered, Mr. Cardiel-Ruiz has been convicted of numerous

1       The government acknowledges that Mr. Cardiel-Ruiz presented cases where “other  
 2       IJs granted voluntary departure to other aliens,” but stresses that Mr. Cardiel-Ruiz “did not  
 3       cite a single case where his IJ granted voluntary departure to an alien with similar  
 4       circumstances.” Opp. at 15 (emphasis in original). This argument misconstrues the Ninth  
 5       Circuit’s plausibility standard, which simply asks “whether aliens with similar  
 6       circumstances received relief.” Gonzalez-Flores, 804 F.3d at 928; see also Muro-Inclan,  
 7       249 F.3d at 1184 (an alien need not show that he “actually would have been granted  
 8       relief”). The Ninth Circuit has never required analyzing that question on an immigration  
 9       judge-by-immigration judge basis.<sup>8</sup>

10      **IV. CONCLUSION**

11      For the foregoing reasons, Mr. Cardiel-Ruiz’s motion to dismiss the indictment is  
 12       granted.

13      **IT IS SO ORDERED.**

14      Dated: April 12, 2021



CHARLES R. BREYER  
United States District Judge

23      crimes (including five convictions for vehicle theft, two for evading, one for first-degree burglary,  
 24       and one for identity theft). See Opp. at 5. But the Court cannot consider Mr. Cardiel-Ruiz’s  
 25       subsequent criminal convictions, which have nothing to do with his original removal order’s  
 26       validity.

27      <sup>8</sup> Even if there were such a requirement, the IJ’s statements during the hearing do not show that  
 28       relief would have been implausible. The IJ stated that he would not grant relief if he found that  
 29       Mr. Cardiel-Ruiz had a “bad criminal record,” Chuang Decl. Ex. C. Track 1 at 01:28–01:33, but  
 30       never stated that two convictions for being under the influence of narcotics constituted a “bad  
 31       criminal record.” And the IJ’s statement that if Mr. Cardiel-Ruiz had “a drug conviction,” then  
 32       Mr. Cardiel-Ruiz “probably” would not “get voluntary departure,” id. Track 5 at 01:19–01:42, left  
 33       open the possibility that a person with one or more drug convictions could nonetheless be granted  
 34       voluntary departure.

**FILED**

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

NOV 19 2024

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

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

v.

MARTIN GUADALUPE CARDIEL-RUIZ,

Defendant-Appellee.

No. 21-10139

D.C. Nos.

3:20-cr-00376-CRB-1

3:20-cr-00376-CRB

Northern District of California,  
San Francisco

ORDER

Before: WARDLAW, NGUYEN, and KOH, Circuit Judges.

The panel has unanimously voted to deny the petition for panel rehearing and 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 rehearing and the petition for rehearing en banc are DENIED.