

No. _____

IN THE
Supreme Court of the United States

SLORNAVEED PATOLILLO GONZALEZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the modified categorical approach permits reliance on a charging document to which the defendant did *not* plead guilty to conclude that the offense to which he *did* plead guilty constitutes an aggravated felony.

TABLE OF CONTENTS

	<u>Page</u>
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
PETITION FOR WRIT OF CERTIORARI	1
OPINIONS BELOW	1
JURISDICTION.....	1
STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE.....	1
REASONS FOR GRANTING THE PETITION	5
I. The Decision Below Creates a Split With the Five Other Circuits That Have Considered the Issue.	5
II. The Ninth Circuit’s Approach Conflicts With This Court’s Precedents and the Immigration and Nationality Act.	7
A. The decision below revives the fact-based approach this Court rejected in <i>Descamps</i> and conflicts with the plain text of the INA.....	7
B. The decision below raises serious constitutional, practical, and fairness concerns.	10
C. The decision below usurps the role of the States in interpreting and executing State law.....	12
III. The Question Presented Is Recurring and Important.....	13
IV. This Case Is an Ideal Vehicle.	13
CONCLUSION.....	14

APPENDIX

Appendix A

Opinion of the United States Court of Appeals for the Ninth Circuit, *United States v. Gonzalez*, No. 15-10529 (June 30, 2017)..... 1a

Appendix B

Order of the United States Court of Appeals for the Ninth Circuit Denying Petition for Rehearing or Rehearing En Banc, *United States v. Gonzalez*, No. 15-10529 (Aug. 8, 2017)..... 7a

Appendix C

Order of the United States District Court for the District of Arizona Denying Motion to Dismiss, *United States v. Gonzalez*, No. 15-285-cr (July 20, 2015) 8a

Appendix D

Order of the United States District Court for the District of Arizona Denying Motion to Reconsider Order Denying Motion to Dismiss, *United States v. Gonzalez*, No. 15-285-cr (August 5, 2015)..... 13a

Appendix E

Statutory Provisions: Excerpts from A.R.S. §§ 13-1201, 13-1203, 13-1204 (West 2002–2003) 15a

TABLE OF AUTHORITIES

Cases	<u>Page</u>
<i>Apprendi v. New Jersey</i> , 530 U.S. 466 (2000)	11
<i>Barefoot v. Estelle</i> , 463 U.S. 880 (1983)	12
<i>Boykin v. Alabama</i> , 395 U.S. 238 (1969)	11
<i>Carachuri-Rosendo v. Holder</i> , 560 U.S. 563 (2010)	9, 12
<i>Custis v. United States</i> , 511 U.S. 485 (1994)	12
<i>Descamps v. United States</i> , 133 S. Ct. 2276 (2013)	6, 8, 10, 12
<i>Erie R. Co. v. Tompkins</i> , 304 U.S. 64 (1938)	12
<i>Evanson v. Att’y Gen. of U.S.</i> , 550 F.3d 284 (3d Cir. 2008)	6
<i>Johnson v. United States</i> , 559 U.S. 133 (2010)	8
<i>Mathis v. United States</i> , 136 S. Ct. 2243 (2016)	10, 11, 14
<i>Moncrieffe v. Holder</i> , 133 S. Ct. 1678 (2013)	9, 12
<i>People v. West</i> , 477 P.2d 409 (Cal. 1970) (en banc)	13
<i>Prudencio v. Holder</i> , 669 F.3d 472 (4th Cir. 2012)	6
<i>Shepard v. United States</i> , 544 U.S. 13 (2005)	7, 8
<i>State v. Buckley</i> , 734 P.2d 1050 (Ariz. Ct. App. 1987)	3, 13
<i>State v. Pena</i> , 104 P.3d 873 (Ariz. Ct. App. 2005)	14

<i>Taylor v. United States</i> , 495 U.S. 575 (1990)	12
<i>United States v. Bonilla</i> , 524 F.3d 647 (5th Cir. 2008)	6
<i>United States v. Castleman</i> , 134 S. Ct. 1405 (2014)	8
<i>United States v. Gardner</i> , 649 F.3d 437 (6th Cir. 2011)	6
<i>United States v. Lopez-Patino</i> , 391 F.3d 1034 (9th Cir. 2004)	14
<i>United States v. Martinez</i> , 756 F.3d 1092 (8th Cir. 2014)	6, 8, 9
<i>United States v. Vidal</i> , 504 F.3d 1072 (9th Cir. 2007) (en banc)	6

Statutes and Rules

8 U.S.C. § 1101(a)(43)(F)	3
8 U.S.C. § 1101(a)(48)(A)	9
8 U.S.C. § 1227(a)(2)(A)(iii)	9
8 U.S.C. § 1228(b)	3, 4
8 U.S.C. § 1326(a)	2
8 U.S.C. § 1326(b)(1)	2
8 U.S.C. § 1326(d)	4
8 U.S.C. § 1326(d)(3)	4
18 U.S.C. § 16(a)	3
28 U.S.C. § 1254(1)	1
A.R.S. § 13-1201	3, 4, 10
A.R.S. § 13-1203(A)(2)	2, 4, 5
A.R.S. § 13-1204	3, 4, 5, 10
A.R.S. § 13-1204(A)(1)	13
A.R.S. § 13-1204(A)(2)	2, 4, 5, 13
A.R.S. § 13-1204(A)(11)	13
A.R.S. § 13-1204(C)	13

A.R.S. § 13-1204(D)(2)	14
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PETITION FOR WRIT OF CERTIORARI

Petitioner Slornaveed Patolillo Gonzalez respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a–6a) is unreported, as is the court of appeals’ order denying rehearing or rehearing en banc (App. 7a). The orders of the district court denying the motion to dismiss (App. 8a–12a) and denying reconsideration of the motion to dismiss (App. 13a–14a) are also unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 30, 2017. A petition for rehearing was denied on August 8, 2017 (App. 7a). On October 5, 2017, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including December 21, 2017. On December 21, 2017, Justice Kennedy further extended that time to and including January 5, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are reproduced in an appendix to this petition. App. 15a–16a.

STATEMENT OF THE CASE

This case presents an ideal opportunity for the Court to clarify the circumstances in which a charging document may be considered to narrow a defendant’s prior state offense within generic limits. Specifically, it asks whether a

court performing the modified categorical approach may rely on a pre-amendment or otherwise superseded indictment where the defendant pleaded guilty. In holding in the decision below that such reliance is permissible, the Ninth Circuit created a conflict with the five other courts of appeals that have addressed the issue. The need for clarity on an issue of such nationwide importance merits this Court's review.

1. Initially identified by Immigration and Customs Enforcement, Petitioner Slornaveed Patolillo Gonzalez was arrested and charged in 2015 in the District of Arizona with being an alien found in the United States after having been previously deported, in violation of 8 U.S.C. §§ 1326(a) and (b)(1).

Petitioner was 32 years old at the time of his arrest. He is married to a United States citizen, with whom he has three United States citizen daughters. Petitioner was born in Mexico but had lived undocumented in the United States, in Arizona, since he was four. He had attended elementary and high school in Phoenix, but was forced to drop out so that he could work to support his mother and younger siblings.

In 2002, at age 18, petitioner was charged in an Arizona court with, as count 2, an offense identified in the indictment as aggravated assault, a class 3 felony, in violation of A.R.S.¹ §§ 13-1204(A)(2) and 13-1203(A)(2). It is undisputed here that

¹ A.R.S. refers to the Arizona Revised Statutes.

such a crime is an aggravated felony under the Immigration and Nationality Act (“INA”).²

Petitioner pled guilty to count 2 pursuant to a plea agreement. The plea agreement stated that it “serve[d] to amend the complaint or information, to charge the offense to which the Defendant pleads, without the filing of any additional pleading.” Under Arizona law, the inclusion of this language converted the plea agreement itself into the charging document and “conform[ed] any previously filed documents to the terms of the plea[.]” *State v. Buckley*, 734 P.2d 1047, 1050 (Ariz. Ct. App. 1987). Unlike the indictment, the plea agreement identified count 2 as in violation of A.R.S. § 13-1204 and, strangely, § 13-1201—which identifies the wholly separate crime of reckless endangerment. It is undisputed that the plea agreement and judgment, standing alone, do *not* establish that petitioner was convicted of an aggravated felony.³

The state court entered judgment pursuant to the terms set forth in the plea agreement and sentenced petitioner to 3.5 years in state prison. In 2005, upon completion of his sentence, petitioner was deported to Mexico in expedited proceedings reserved for aggravated felons, 8 U.S.C. § 1228(b). He returned to the United States shortly thereafter.

² 8 U.S.C. § 1101(a)(43)(F) defines an “aggravated felony,” as, inter alia, “a crime of violence (as defined in section 16 of Title 18, but not including a purely political offense) for which the term of imprisonment at least one year [sic].” As relevant here, “crime of violence” means “an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another[.]” 18 U.S.C. § 16(a).

³ That is so because § 13-1201 is not an aggravated felony, and, additionally, because § 13-1204 is overbroad.

2. Petitioner moved to dismiss the 2015 indictment on the ground that the 2005 deportation order was invalid pursuant to 8 U.S.C. § 1326(d). He argued that the entry of the order was fundamentally unfair, § 1326(d)(3), because it was premised on the erroneous assumption that his state conviction was an “aggravated felony,” and that the Government consequently had lacked jurisdiction to deport him by the expedited means set forth in 8 U.S.C. § 1228(b).

The district court denied the motion. It disagreed with the parties’ consensus that the aggravated felony issue was a necessary threshold question. Instead, the district court held that it did not matter whether the prior offense qualified as an aggravated felony because, it believed, petitioner would have had to concede that legal issue to an immigration judge to qualify for relief. App. 10a–12a.

3. The Ninth Circuit affirmed, but on a different theory than was embraced by the district court (which theory the Government did not defend on appeal). App. 1a–5a. The panel majority “acknowledge[d] the discrepancy between” the statutes listed in the indictment—§§ 13-1204(A)(2) and 13-1203(A)(2) (which the parties agreed constituted an aggravated felony)—and the statutory violations stated in the plea agreement and judgment—§§ 13-1204 and 13-1201 (which petitioner argued was not an aggravated felony because it was undisputed that § 13-1201 was not, and because § 13-1204 was overbroad). App. 4a. Noting, however, “that the plea agreement specifically stated that Gonzalez agreed to plead guilty to ‘COUNT 2, AGGRAVATED ASSAULT, CLASS 3 FELONY,’” and that “[t]he Arizona court adjudged Gonzalez guilty of ‘Count 2: Aggravated Assault[,]” the majority held that

the specific reference to “Count 2” in the plea agreement and judgment permitted it to “look to Count 2 in the state court indictment to identify the particular statutes to which Gonzalez pleaded guilty.” App. 5a. It accordingly “conclude[d] that Gonzalez pleaded guilty to, and was adjudged guilty of, aggravated assault in violation of A.R.S. §§ 13-1204(A)(2) and 13-1203(A)(2)” despite the contrary recital in the plea agreement and judgment. *Id.* The majority then held that the conviction qualified as an aggravated felony pursuant to circuit precedent. *Id.*

Judge Schroeder concurred in the result. She disagreed that the court could “look through the plea agreement to this indictment in this particular case ... because the plea agreement stated it was amending the charging document.” App. 6a. Instead, Judge Schroeder would have held that that petitioner “must have admitted to violating either subsections (a)(1) or (a)(2)” of § 13-1204, since he “pleaded guilty to a class 3 felony in violation of § 13-1204[.]” *Id.* Because both of those subsections qualified as aggravated felonies at the time of petitioner’s deportation under circuit precedent, Judge Schroeder concluded that the conviction was necessarily an aggravated felony. *Id.*

4. The panel denied rehearing, and the Ninth Circuit denied rehearing en banc. App. 7a. This petition followed.

REASONS FOR GRANTING THE PETITION

I. The Decision Below Creates a Split With the Five Other Circuits That Have Considered the Issue.

In holding in this case that reliance on an inoperative charging document is permissible in implementing the modified categorical approach, the Ninth Circuit

diverged from “every other circuit to address this question.” *United States v. Martinez*, 756 F.3d 1092, 1093 (8th Cir. 2014). *See, e.g., id.* at 1093–97; *Evanson v. Att’y Gen. of U.S.*, 550 F.3d 284, 293 (3d Cir. 2008); *Prudencio v. Holder*, 669 F.3d 472, 485–86 (4th Cir. 2012); *United States v. Bonilla*, 524 F.3d 647, 652–53 (5th Cir. 2008); *United States v. Gardner*, 649 F.3d 437, 444 (6th Cir. 2011). This Court’s review is warranted to resolve the conflict.

The Eighth Circuit’s decision in *Martinez* illustrates the majority position. There, the Eighth Circuit rejected the Government’s invitation to rely on the pre-amendment information, which supplied the statutory subsection missing from the Arizona plea agreement and judgment, because the defendant “did not plead guilty to th[e] charge” in that initial pleading. 756 F.3d at 1096. “Whatever specific sawed-off shotgun violation the original information *alleged*, Lopez Martinez was only *convicted* of an unspecified (ergo categorically non-qualifying) violation.” *Id.* at 1097. Reliance on the pre-amendment information would constitute a prohibited “look to [the information] to discover what the defendant actually did. ” *Id.* (quoting *Descamps v. United States*, 133 S. Ct. 2276, 2287 (2013)). Because that fact-based approach had been rejected by this Court in *Descamps*, the Eighth Circuit held that the pre-amendment information could not be considered. *Id.*

Although the Ninth Circuit once subscribed to the unanimous conclusion of its sister circuits, *see Martinez*, 756 F.3d at 1093 (citing *United States v. Vidal*, 504 F.3d 1072 (9th Cir. 2007) (en banc)), that correct determination was eroded and ultimately abrogated by subsequent circuit authority. As a result, the Ninth Circuit

stands alone in holding, with the decision below, that the modified approach permits reliance on a pre-amendment or superseded indictment. The five-to-one division warrants this Court's intervention.

II. The Ninth Circuit's Approach Conflicts With This Court's Precedents and the Immigration and Nationality Act.

A. The decision below revives the fact-based approach this Court rejected in *Descamps* and conflicts with the plain text of the INA.

In *Shepard v. United States*, 544 U.S. 13 (2005), this Court articulated the seminal rule governing application of the modified categorical approach to a prior conviction entered upon a plea of guilty. It held that only those “judicial record[s]” demonstrating the elements that the defendant “necessarily admitted” could be considered in the inquiry. *Id.* at 26. Those records were limited, the Court held, to the “conclusive records made or used in adjudicating guilt,” *id.* at 21—namely, the charging document, the plea agreement or “transcript of the plea colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or to some comparable judicial record of this information,” *id.* at 26. It thus rejected the Government's call to permit consideration of police reports or complaint applications, because the defendant would not have assented to the elements of any offenses stated therein by pleading guilty. *See id.* at 16.

It goes without saying that a pleading defendant does not necessarily admit to any facts supporting the elements of an offense charged in an indictment that was not the basis for his plea. Such a pleading is not a “conclusive record[] made or used in adjudicating guilt,” as *Shepard* requires. *Id.* at 21. It ineluctably follows

that a charging document that is later modified or superseded—and that is thus no longer the operative pleading—ceases to be the charging document for *Shepard* purposes. It therefore cannot be considered in determining the version of the offense to which the defendant pleaded guilty.

Shepard's restriction on the documents pertinent to the modified categorical approach has been a focal point in this Court's decisions rejecting a fact-based analysis. See *Descamps*, 133 S. Ct. at 2284. A court may rely on the "restricted set of materials" described in *Shepard* "not to determine 'what the defendant and state judge must have understood as the factual basis for the plea,' but only to assess" the version of the crime to which the defendant pleaded guilty. *Id.* (quoting *Shepard*, 544 U.S. at 25–26).

The Eighth Circuit expressly recognized in *Martinez* that reliance on a pre-amendment indictment would constitute a return to the forbidden fact-based approach. See 756 F.3d at 1097. It explained:

Under the elements-based inquiry, the sole permissible purpose of the modified categorical approach is "to determine which statutory phrase was the basis for *the conviction*." *Johnson v. United States*, 559 U.S. 133, 144 (2010) (emphasis added). To this end, a district court may "consult[] the indictment *to which [the defendant] pleaded guilty* in order to determine whether his *conviction* did entail the elements necessary to" qualify for a sentencing enhancement. *United States v. Castleman*, 134 S. Ct. 1405, 1414 (2014) (emphasis added). "Applied in that way—which is the only way [the Supreme Court] ha[s] ever allowed—the modified approach merely helps implement the categorical approach when a defendant was *convicted* of violating a divisible statute." *Descamps*, 133 S. Ct. at 2285 (emphasis added).

Id. at 1097 (citations shortened). The only information that can be gleaned from an indictment to which the defendant did *not* plead guilty is “what the defendant actually did”—which is precisely the information the modified approach forbids a court from considering. *Id.* (quoting *Descamps*, 133 S. Ct. at 2287).

The Eighth Circuit’s analysis is sound, and, unlike the decision below, it is consistent with the INA. As this Court has explained, a federal court assessing whether a prior state conviction constitutes aggravated felony begins by “look[ing] to the conviction itself[.]” *Carachuri-Rosendo v. Holder*, 560 U.S. 563, 576 (2010). “The reason is that the INA asks what offense the noncitizen was ‘convicted’ of, 8 U.S.C. § 1227(a)(2)(A)(iii), not what acts he committed.” *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1685 (2013); *see also id.* (quoting *Carachuri-Rosendo*, 560 U.S. at 580 (“[C]onviction’ is ‘the relevant statutory hook.’”)).

The INA defines a “conviction” (as pertinent here) as “a formal judgment of guilt of the alien entered by a court” 8 U.S.C. § 1101(a)(48)(A). Accordingly, a federal court’s starting place for performing the categorical approach the offense set forth in the *judgment*—not an offense charged in an early charging paper that was no longer operative when the defendant entered his plea.

An apparent ambiguity or inconsistency in the conviction is not cause to construe the conviction other than as written. That is so because a court “must presume that the conviction rested upon [nothing] more than the *least* of the acts criminalized.” *Moncrieffe*, 133 S. Ct. at 1684 (citation and internal quotation marks omitted). Thus, unless the offense of conviction is divisible or unambiguously an

aggravated felony, ambiguity “means that the conviction did not ‘necessarily’ involve facts that correspond” to an aggravated felony. *Id.* at 1687; *see, e.g., id.* at 1686–87 (conviction was not an aggravated felony in light of ambiguity as to whether conviction corresponded to federal Controlled Substances Act felony or misdemeanor).

Here, the conviction is ambiguous insofar as it states a single offense in violation of both A.R.S. §§ 13-1204 *and* 13-1201, which the parties agree appears internally inconsistent under state law. Yet, rather than begin its analysis with the conviction itself, the Ninth Circuit majority defined the offense by reference to an indictment that was later superseded by and conformed to the plea agreement. That approach cannot be reconciled with the INA or this Court’s precedent interpreting it, and ultimately reflects a return to the fact-based analysis rejected in *Descamps*. Review is necessary to clarify, yet again, that the elements-based approach is the correct course, and that that approach rests on the *conviction*.

B. The decision below raises serious constitutional, practical, and fairness concerns.

In relying on an inoperative charging document to narrow the offense of conviction, the decision below resurrects the same three constitutional, practical, and fairness problems that the elements-only inquiry was intended to rectify. *See Mathis v. United States*, 136 S. Ct. 2243, 2252 (2016).

First, the Ninth Circuit’s rule is unfair because it “will deprive some defendants of the benefits of their negotiated plea deals.” *Descamps*, 133 S. Ct. at 2289; *see also Mathis*, 136 S. Ct. at 2253. No evidence suggests petitioner

understood that he was, in fact, pleading guilty to the offense set forth in the indictment rather than that in his plea agreement; indeed, the plea agreement itself expressly reflects otherwise and the court entered judgment in accordance with the plea. Nor does the record otherwise reflect that he admitted to the elements of the crime identified in the indictment. Moreover, because he pled guilty pursuant to the terms of the plea agreement—which explicitly differed from the terms of the indictment—he had no incentive to say anything whatsoever about the charges in the indictment. *See Mathis*, 136 S. Ct. at 2253 (“At trial, and still more at plea hearings, a defendant may have no incentive to contest what does matter under the law”). The court of appeals’ assumption that the statutory recital in the plea agreement and judgment are wrong on their face and can be disregarded in favor of the pre-amendment indictment thus raises the spectre that petitioner’s plea was not made knowingly, voluntarily, and intelligently, as the Due Process Clause requires. *See Boykin v. Alabama*, 395 U.S. 238, 243–44 (1969).

Second, because reliance on an inoperative indictment reflects a return to a fact-based approach, it jeopardizes a defendant’s Sixth Amendment right to trial by jury under *Apprendi v. New Jersey*, 530 U.S. 466 (2000). *See Mathis*, 136 S. Ct. at 2252 (a federal judge “can do no more, consistent with the Sixth Amendment, than determine what crime, with what elements, the defendant was *convicted* of”) (emphasis added).

Third, the Ninth Circuit’s approach eviscerates Congress’ “deliberate decision to treat every conviction of a crime in the same manner.” *Descamps*, 133 S. Ct. at

2287 (citing *Taylor v. United States*, 495 U.S. 575, 601 (1990)); see *Moncrieffe*, 133 S. Ct. at 1693 n.11 (“[D]efendants whose convictions establish the same facts will be treated consistently, and thus predictably, under federal law [under an elements-based analysis]. This was *Taylor*’s chief concern in adopting the categorical approach.”). Under the Ninth Circuit’s rule, different courts addressing identical judgments may reach opposing conclusions as to the offense of conviction, resulting in the inconsistent treatment of offenders who pled guilty to the very same offense, in the very same jurisdiction.

The decision below revives the very problems this Court recently put to bed. Review is needed.

C. The decision below usurps the role of the States in interpreting and executing State law.

It is black-letter law that federal courts must defer to the state courts on questions of state law. See *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). A federal court’s finding that the state court’s judgment is flawed because—in the federal court’s estimation, with no evidence presented—the state plea agreement and state court judgment reflect an error of state law denies comity to the state court and ignores the federalism doctrine that undergirds our judicial system. See *Custis v. United States*, 511 U.S. 485, 497 (1994); *Barefoot v. Estelle*, 463 U.S. 880, 887 (1983). It further usurps the role of the state prosecutor in executing state law and her discretion with respect to charging decisions and plea offers. Cf. *Carachuri-Rosendo*, 560 U.S. at 579 (“Were we to permit a federal immigration judge to apply his own recidivist enhancement after the fact so as to make the noncitizen’s offense

‘punishable’ as a felony for immigration law purposes, we would denigrate the independent judgment of state prosecutors to execute the laws of those sovereigns.”). The Ninth Circuit’s usurpation of the role of the States warrants course-correction.

III. The Question Presented Is Recurring and Important.

The question presented is important and constantly arises in federal criminal as well as immigration cases. Numerous federal statutes require application of the categorical approach, and it is not uncommon to find that the information or indictment in a state court file is not the final version or, as here, that it does not or may not reflect the same offense to which the defendant pleaded guilty. In some states—California and Arizona, for example—a guilty plea is not confined to the offenses charged or even to their lesser-includes. *See People v. West*, 477 P.2d 409, 420 (Cal. 1970) (en banc); *Buckley*, 734 P.2d at 1049–50. The need for uniform treatment of similarly-situated defendants and the prevalence of the issue warrant this Court’s attention.

IV. This Case Is an Ideal Vehicle.

This case is an ideal vehicle for consideration of the question presented. The facts are straightforward, and the concurrence’s simple misreading of the Arizona statutes precludes affirmance on its proposed alternative basis. The concurring Judge held that the conviction is reducible to A.R.S. § 13-1204(A)(1) or (2) due to its classification, in the plea agreement and judgment, as a class 3 felony. But those are not the *only* subsections of § 13-1204 that are class 3 felonies: subsection (A)(11), is, too, *see* § 13-1204(C), (D)(2), and subsection (A)(11) is not an aggravated

felony under Ninth Circuit law. *See United States v. Lopez-Patino*, 391 F.3d 1034, 1037 (9th Cir. 2004). Whether these three subsections are means, as indicated by state law, *see State v. Pena*, 104 P.3d 873, 876 (Ariz. Ct. App. 2005) (jury need not be unanimous as to *which* aggravator is present; subsections of § 13-1204 reflect the various “manners” of committing aggravated assault), or elements, as *Mathis* might otherwise suggest, *see* 136 S. Ct. at 2256, is immaterial, as petitioner admitted no facts that would indicate which of the three subsections was violated.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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APPENDIX A

FILED

JUN 30 2017

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

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

SLORNAVEED PATOLILLO
GONZALEZ,

Defendant - Appellant.

No. 15-10529

D.C. No. 2:15-cr-00285–SPL

MEMORANDUM*

Appeal from the United States District Court
for the District of Arizona
Steven P. Logan, District Judge, PresidingArgued and Submitted April 20, 2017
San Francisco, CaliforniaBefore: SCHROEDER and RAWLINSON, Circuit Judges, and STAFFORD,
District Judge.**

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The Honorable William H. Stafford, Jr., United States District Judge for the Northern District of Florida, sitting by designation.

Slornaveed (David) Patolillo Gonzalez appeals his conviction and sentence for illegal reentry after deportation in violation of 8 U.S.C. § 1326(a). Because we write for the parties, we assume their familiarity with the underlying facts and recite only what is necessary to explain our decision. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

I.

Gonzalez was deported in 2005 after he pleaded guilty to, and served time in prison for, aggravated assault in violation of Arizona law. In 2015, years after Gonzalez unlawfully reentered the United States, the government indicted Gonzalez for being an alien found in the United States after having been previously deported, a violation of 8 U.S.C. § 1326(a). Gonzalez moved to dismiss the federal indictment, arguing that his earlier deportation was fundamentally unfair because his predicate crime—aggravated assault—was erroneously categorized as an aggravated felony. *See* 8 U.S.C. § 1227(a)(2)(A)(iii) (“Any alien who is convicted of an aggravated felony at any time after admission is deportable.”) After the district court denied Gonzalez’s motion to dismiss, Gonzalez pleaded guilty to the federal charge pursuant to a plea agreement that preserved Gonzalez’s right to appeal the denial of his motion to dismiss. The district court sentenced Gonzalez to forty-one months’ imprisonment after applying a sixteen-level crime-of-violence

enhancement under U.S.S.G. § 2L1.2(b)(1)(A). Gonzalez thereafter filed this appeal, challenging (1) the district court's order denying his motion to dismiss, and (2) the district court's application of a sixteen-level sentencing enhancement for a prior crime of violence.

II.

“We review de novo the denial of a motion to dismiss an indictment under 8 U.S.C. § 1326 when the motion is based on alleged due process defects in an underlying deportation proceeding.” *United States v. Vega-Ortiz*, 822 F.3d 1031, 1034 (9th Cir. 2016) (quoting *United States v. Alvarado-Pineda*, 774 F.3d 1198, 1201 (9th Cir. 2014)). We review de novo whether a defendant's prior conviction qualifies as a “crime of violence” under U.S.S.G. § 2L1.2(b)(1)(A). *United States v. Rocha-Alvarado*, 843 F.3d 802, 806 (9th Cir. 2016).

The pivotal issue before us is whether Gonzalez's predicate aggravated-assault offense was correctly deemed a crime of violence, and therefore an “aggravated felony,” for immigration purposes. *See* 8 U.S.C. § 1101(a)(43)(F) (defining “aggravated felony” as, *inter alia*, “a crime of violence (as defined in section 16 of Title 18, but not including a purely political offense) for which the term of imprisonment [is] at least one year.”).

In 2002, the State of Arizona charged Gonzalez by indictment with

aggravated assault in violation of A.R.S. §§ 13–1204(A)(2) and 13–1203(A)(2). It is established in this circuit that “convictions under A.R.S. § 13–1204(A)(2) which incorporate A.R.S. § 13–1203(A)(2), constitute ‘crimes of violence’ under 18 U.S.C. § 16.” *United States v. Cabrera-Perez*, 751 F.3d 1000, 1007 (9th Cir. 2014). Consistent with circuit precedent, Gonzalez’s aggravated assault offense—as charged in Count 2 of the indictment—qualified as a “crime of violence” under 18 U.S.C. § 16, and therefore an aggravated felony, making him deportable under 8 U.S.C. § 1227(a)(2)(A)(iii). Indeed, at a hearing before the district court, Gonzalez’s attorney admitted that “the charging document without a doubt charges a crime of violence.”

Gonzalez challenges the aggravated-felony assessment by arguing that he was not convicted of aggravated assault as charged in Count 2 of the state court indictment. He points to his 2003 plea agreement that, for Count 2, listed §§ 13–1204 and 13–1201 as the statutes of conviction, not §§ 13–1204(A)(2) and 13–1203(A)(2). While we acknowledge the discrepancy in the listing of statutes, we note that the plea agreement specifically stated that Gonzalez agreed to plead guilty to “COUNT 2, AGGRAVATED ASSAULT, CLASS 3 FELONY.” The Arizona court adjudged Gonzalez guilty of “Count 2: Aggravated Assault.” Because the plea agreement and judgment specifically referred to “Count 2,” this

court may look to Count 2 in the state court indictment to identify the particular statutes to which Gonzalez pleaded guilty. *United States v. Torre-Jimenez*, 771 F.3d 1163, 1169 (9th Cir. 2014). Doing so, we conclude that Gonzalez pleaded guilty to, and was adjudged guilty of, aggravated assault in violation of A.R.S. §§ 13–1204(A)(2) and 13–1203(A)(2). Consistent with the law of this circuit, Gonzalez’s aggravated assault offense was properly categorized as an aggravated felony for purposes of 8 U.S.C. § 1227(a)(2)(A)(iii).

We find no error in the district court’s application of a sixteen-level enhancement to Gonzalez’s offense level under U.S.S.G. § 2L1.2(b)(1)(A)(ii) (2015). Such an enhancement applies when a defendant was previously deported after being convicted of a “crime of violence.” This court has held that a conviction for aggravated assault under A.R.S. § 13–1204, which incorporates a conviction under § 13–1203(A)(2), is a “crime of violence” for purposes of § 2L1.2(b)(1)(A)(ii). *United States v. Sahagun-Gallegos*, 782 F.3d 1094, 1100–01 (9th Cir. 2015). Because Gonzalez pleaded guilty to Count 2 of the indictment, which charged a violation of §§ 13–1204(A)(2) and 13–1203(A)(2), the district court’s application of the § 2L1.2(b)(1)(A)(ii) enhancement was proper.

AFFIRMED.

FILED

United States v. Gonzalez, 15-10529
SCHROEDER, Circuit Judge, concurring:

JUN 30 2017

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

I agree with the result. I write separately only because I do not believe we can look through the plea agreement to the indictment in this particular case. This is because the plea agreement stated it was amending the charging document. However, since the defendant pleaded to a class 3 felony in violation of A.R.S. § 13-1204, he must have admitted to violating either subsections (a)(1) or (a)(2). Each qualified as an aggravated felony under then binding Ninth Circuit precedent, *see United States v. Ceron-Sanchez*, 222 F.3d 1169, 1172–73 (9th Cir. 2000) *overruled by Fernando-Ruiz v. Gonzales*, 466 F.3d 1169, 1172–74 (9th Cir. 2006) (en banc).

FILED

APPENDIX B

UNITED STATES COURT OF APPEALS

AUG 08 2017

FOR THE NINTH CIRCUIT

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

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

SLORNAVEED PATOLILLO
GONZALEZ, AKA David Gonzalez
Pautillo, AKA David Paotillo Gonzalez,

Defendant-Appellant.

No. 15-10529

D.C. No.
2:15-cr-00285-SPL-1
District of Arizona,
Phoenix

ORDER

Before: SCHROEDER and RAWLINSON, Circuit Judges, and STAFFORD,*
District Judge.

The panel has voted to deny the Petition for Rehearing. Judge Rawlinson voted, and Judges Schroeder and Stafford recommended, to deny the Petition for Rehearing En Banc.

The full court has been advised of the Petition for Rehearing En Banc, and no judge of the court has requested a vote.

Appellant's Petition for Rehearing or Rehearing En Banc, filed on July 14, 2017, is DENIED.

* The Honorable William H. Stafford, Jr., United States District Judge for the Northern District of Florida, sitting by designation.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

United States of America,	}	No. CR-15-00285-PHX-SPL
Plaintiff,		
vs.		ORDER
Slornaveed Patolillo Gonzalez,		
Defendant.		

Before the Court is Defendant's Motion to Dismiss Indictment. (Doc. 17.) The Government filed a response (Doc. 20), and Defendant replied (Doc. 21). The Court held an evidentiary hearing on July 17, 2015.

I. Background

In 2002, Defendant was indicted on numerous charges, most notably for aggravated assault (Count 2), a class 3 dangerous felony, for "using a BASEBALL BAT, a deadly weapon or dangerous instrument, [to] intentionally place[] Armando Suchil in reasonable apprehension of imminent physical injury, in violation of A.R.S. §§ 13-1204(A)(2), (B), 13-1203(A)(2)...." (Doc. 17-5.) Count 2 was characterized as a dangerous felony because "the offense involved the discharge, use, or threatening exhibition of a BASEBALL BAT...." (Id.) On January 24, 2003, Defendant entered into a plea agreement on Count 2 and the State agreed to dismiss Count 3 and the allegation of dangerousness for Count 2. (Doc. 17-6 at 2.) The Court's judgment and conviction reflects this plea agreement, establishing a sentence of three and a half years. (Doc. 17-7.)

On September 20, 2004, while Defendant was serving his sentence, Immigration and Customs Enforcement (“ICE”) issued a Notice of Intent that Defendant was deportable pursuant to 8 U.S.C. § 1227(a)(2)(A)(iii) because he was convicted of an aggravated felony. (Doc. 17-2.)¹ On August 10, 2005, Defendant admitted the allegations. (Id.) In September 2005, after Defendant completed his sentence for aggravated assault, he was removed from the United States. (Doc. 17-4.) In 2015, Plaintiff was found in the United States, and now faces one count of Reentry of Removed Alien, 8 U.S.C. § 1326(a). (Doc. 9.)

Defendant moves to dismiss the Indictment on the basis that the Plea Agreement and the Judgment and Conviction lacked the detail necessary to designate the conviction as an aggravated felony. (Doc. 17 at 12-13.) Therefore, Defendant’s due process rights were violated because he was denied a hearing before an Immigration Judge (“IJ”) who had the discretion to grant pre-hearing voluntary departure. (Doc. 17 at 2.) Had this hearing been held, Defendant alleges that he could have presented a plausible claim for pre-conclusion voluntary departure and may not have been removed. (Id.) If he had voluntarily departed, the Government could not now charge him with Illegal Reentry. (Id.) The Government responds that Defendant was correctly categorized as an aggravated felon; was not eligible for any discretionary relief from removal; and, thus, Defendant did not have a plausible claim for relief. (Doc. 20 at 1, 3.)

II. Legal Standard

Defendant may move to dismiss an 8 U.S.C. § 1326 indictment on the basis of “alleged due process defects in an underlying deportation proceeding.” *United States v. Valdez-Novoa*, 780 F.3d 906, 912 (9th Cir. 2015). “Because the underlying removal order serves as a predicate element of a § 1326 illegal reentry offense, a defendant charged with

¹ 8 U.S.C. § 1227(a)(2)(A)(iii) provides that “[a]ny alien who is convicted of an aggravated felony at any time after admission is deportable.” An aggravated felony means a crime of violence for which the term of imprisonment is at least one year. 8 U.S.C. § 1101(a)(43)(F). A crime of violence is defined as “an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another...” 18 U.S.C. § 16(a).

1 that offense may collaterally attack the removal order under the due process clause.”
2 *United States v. Gonzalez-Corn*, -- F.3d --, 2015 WL 4385278, *3 (9th Cir. 2015)
3 (citation and brackets omitted). Failure to inform the alien of eligibility for voluntary
4 departure can form the basis of a collateral attack on the removal order. *Valdez-Novoa*,
5 780 F.3d at 913. The defendant must show that: “(1) he exhausted any administrative
6 remedies to appeal the order, (2) the deportation proceedings deprived him of the
7 opportunity for judicial review, and (3) the entry of the order was fundamentally unfair.”
8 *Gonzalez-Corn*, 2015 WL 4385278 at *3; 8 U.S.C. § 1326(d). At issue here, as agreed by
9 the parties at the evidentiary hearing, is whether Defendant’s deportation was
10 fundamentally unfair because ICE improperly characterized his felony conviction as an
11 aggravated felony. Fundamental unfairness requires (1) a violation of the alien’s due
12 process rights in the deportation proceeding and (2) prejudice to the alien as a result.
13 *United States v. Zarate-Martinez*, 133 F.3d 1194, 1197 (9th Cir. 1998) *overruled on other*
14 *grounds as recognized in United States v. Garcia-Santana*, 774 F.3d 528, 532-33 (9th
15 Cir. 2014).

16 **III. Analysis**

17 Defendant contends that the lack of subsections on the Plea Agreement and
18 Judgment and Conviction renders his conviction incapable of characterization as an
19 aggravated felony. Defendant further contends that the Court may not judicially examine
20 the Indictment to determine the nature of his charges because the charge in the Indictment
21 is not the same as the charge in the Plea Agreement and Judgment and Conviction
22 because: (1) the dangerousness allegation has been removed; (2) the latter documents
23 lack subsections; and (3) the Plea Agreement states that it amends the complaint. (Doc.
24 17 at 12-13.) However, before the Court engages in an aggravated felony analysis, the
25 Court first looks to the remainder of Defendant’s argument as it is dispositive of the
26 motion.

27 ///

28 ///

1 **A. Pre-Hearing Voluntary Departure²**

2 Defendant contends that had his felony conviction not been mischaracterized as an
3 aggravated felony, he may have been eligible for pre-hearing voluntary departure. Pre-
4 hearing voluntary departure is available subject to certain conditions. The first difficulty
5 Defendant encounters is that voluntary departure, whether pre- or post-hearing, is not
6 available to aliens who have been convicted of aggravated felonies. 8 U.S.C. §
7 1229a(a)(1), (b)(1)(C). Assuming however, for purposes of this argument only, that
8 Defendant was not convicted of an aggravated felony, Defendant faces other hurdles.

9 In order to receive pre-hearing voluntary departure, the alien must concede
10 removability, among other requirements. 8 C.F.R. § 1240.26(b)(1)(i)(C). Here, Defendant
11 was charged as an aggravated felon. (Doc. 17-2.) Accordingly, Defendant would have
12 had to concede to the IJ that he was an aggravated felon, which would have automatically
13 precluded him from relief under 8 C.F.R. § 1240.26(b)(1)(i)(E). *See also Arguelles-*
14 *Campos*, 22 I. & N. Dec. at 814-17 (conceding removability means that “he is deportable
15 as charged.”)

16 **B. Post-Hearing Voluntary Hearing**

17 If Defendant had chosen to challenge the Attorney General’s charge of
18 deportability, he also would not have been eligible for post-hearing voluntary departure.
19 To qualify for post-hearing voluntary departure, the alien must show, in part, that he has
20 been a person of good moral character for 5 years preceding his request. 8 U.S.C. §
21 1129a(b)(1)(B). A person cannot be of good moral character if he has been confined to a
22 penal institution for 180 days or more. 8 U.S.C. § 1101(f)(7). Here, Defendant was
23 confined for more than 180 days. Therefore, Defendant could not have met the good
24

25
26 ² Pre- and post-hearing voluntary departures are distinct types of relief. Pre-hearing
27 voluntary departure, by its nature, is designed to be a quick, efficient way to resolve cases
28 because the alien does not contest any issues, does not seek other forms of relief, and
waives his right to appeal. In exchange, the alien is allowed to meet a lower bar for
eligibility and faces less significant consequences. *See Garfais-Rodriguez v. Holder*, 702
F.3d 504, 537-39 (9th Cir. 2012) (citing *In re Arguelles-Campos*, 22 I. & N. Dec. 811,
814-17, 1999 WL 360383 (BIA 1999).

1 moral character requirement and he was ineligible for post-hearing voluntary departure,
2 regardless of whether his conviction was an aggravated felony.

3 **C. Fundamental Unfairness and Prejudice**

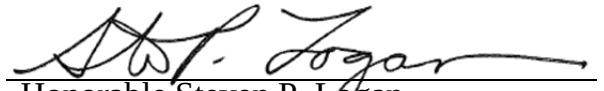
4 Fundamental unfairness requires the violation of Defendant's due process rights in
5 his deportation proceeding and actual prejudice to him as a result of the defect. *Zarate-*
6 *Martinez*, 133 F.3d at 1197. The defendant must make a plausible showing that "he
7 would have received some form of relief from removal had his rights not been violated in
8 the removal proceedings." *United States v. Gomez*, 757 F.3d 885, 898 (9th Cir. 2014).
9 Defendant must "show that he is not barred from receiving relief. If he is barred from
10 receiving relief, his claim is not 'plausible.'" *Id.* (citation omitted). Defendant bears the
11 burden of proving prejudice. *Valdez-Novoa*, 780 F.3d at 916.

12 Because Defendant is ineligible for pre- or post-hearing voluntary departure under
13 any scenario, he cannot make a plausible showing that he was eligible for relief and could
14 not have suffered any prejudice for the lack of a hearing before an IJ. Defendant has
15 failed to meet his burden. Therefore, Defendant's due process rights in his underlying
16 deportation proceedings were not violated.

17 Accordingly,

18 **IT IS ORDERED** that Defendant's Motion to Dismiss Indictment (Doc. 17) is
19 **denied**.

20 Dated this 20th day of July, 2015.

21 
22 Honorable Steven P. Logan
23 United States District Judge
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APPENDIX D

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56 IN THE UNITED STATES DISTRICT COURT
7 FOR THE DISTRICT OF ARIZONA8 United States of America,
9
10 Plaintiff,
11 vs.
12 Slornaveed Patolillo Gonzalez,
13 Defendant.
14

No. CR-15-00285-PHX-SPL

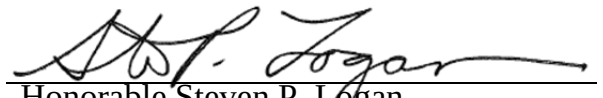
ORDER15 Before the Court is Defendant's Motion to Reconsider (Doc. 28) the Court's Order
16 denying its Motion to Dismiss (Doc. 27). For the following reasons, the motion will be
17 denied.18 On June 5, 2015, Defendant moved to dismiss the Indictment because he alleged
19 his due process rights were violated when he was denied a hearing before an Immigration
20 Judge ("IJ") who had the discretion to grant pre-hearing voluntary departure. (Doc. 17 at
21 2.) On July 20, 2015, this Court issued an Order denying Defendant's motion. (Doc. 27.)22 In asking the Court to reconsider its decision, Defendant cites to *United States v.*
23 *Martinez*, 786 F.3d 1227, 1230 (9th Cir. 2015), for the proposition that "[w]here a prior
24 removal order is premised on the commission of an aggravated felony, a defendant who
25 shows that the crime he was previously convicted of was not, in fact, an aggravated
26 felony, has established both that his due process rights were violated and that he suffered
27 prejudice as a result." However, that case is distinguishable; the defendant in *Martinez*
28 was a lawful permanent resident while Defendant Gonzalez was an illegal alien. As a

1 lawful permanent resident, Martinez was only removable because he was convicted of an
2 aggravated felony. The Ninth Circuit therefore found that the lack of an aggravated
3 felony conviction constituted a de facto finding of a due process violation and prejudice.
4 Here, a determination as to whether Defendant was an aggravated felon was not
5 dispositive to the issue of prejudice. Here, the aggravated felony analysis goes only to
6 whether Defendant *might* have been eligible for a pre-hearing voluntary departure, which
7 Defendant was not eligible for.¹ The Court's prior analysis is valid.

8 Therefore, the Court will deny Defendant's motion for reconsideration.
9 Accordingly,

10 **IT IS ORDERED** that Defendant's Motion to Reconsider Defendant's Motion to
11 Dismiss (Doc. 28) is **denied**.

12 Dated this 5th day of August, 2015.

13
14 
15 Honorable Steven P. Logan
16 United States District Judge
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25 ¹ Defendant's jurisdictional argument equally fails. *Noriega-Lopez v. Ashcroft*, 335
26 F.3d 874, 884 (9th Cir. 2003), to which Defendant cites, addresses the Court's
27 jurisdictional authority under 8 U.S.C. § 1252(a)(2)(C) to review a final order of removal
28 against an alien who is removable by reason of having committed a qualifying criminal
offense. Here, the Court does not review the order of removal under 1252(a)(2)(C), it
conducts its analysis under 8 U.S.C. § 1326(d).

APPENDIX E
—
STATUTORY PROVISIONS

**Citations from West 2002–2003*

Ariz. Rev. Stat. § 13-1201. Endangerment; classification.

- A. A person commits endangerment by recklessly endangering another person with a substantial risk of imminent death or physical injury.
- B. Endangerment involving a substantial risk of imminent death is a class 6 felony. In all other cases, it is a class 1 misdemeanor.

* * *

Ariz. Rev. Stat. § 13-1203. Assault; classification.

- A. A person commits assault by:
 - 1. Intentionally, knowingly or recklessly causing any physical injury to another person; or
 - 2. Intentionally placing another person in reasonable apprehension of imminent physical injury; or
 - 3. Knowingly touching another person with the intent to injure, insult or provoke such person.

* * *

Ariz. Rev. Stat. § 13-1204. Aggravated assault; classification; definition.

- A. A person commits aggravated assault if the person commits assault as defined in § 13-1203 under any of the following circumstances:
 - 1. If the person causes serious physical injury to another.
 - 2. If the person uses a deadly weapon or dangerous instrument.

* * *

- 11.If the person commits assault by any means of force which causes temporary but substantial disfigurement, temporary but substantial loss or impairment of any body organ or part, or a fracture of any body part.

* * *

B. Except pursuant to subsections C and D of this section, aggravated assault pursuant to subsection A, paragraph 1 or 2 of this section is a class 3 felony except if the victim is under fifteen years of age

C. . . . Aggravated assault pursuant to subsection A, paragraph 11 of this section committed on a peace officer while the officer is engaged in the execution of any official duties is a class 3 felony. . . .

D. Aggravated assault pursuant to:

* * *

2. Subsection A, paragraph 11 of this section is a class 3 felony if committed on a prosecutor.

* * *