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United States District Court
Eastern District of Washington
Hon. Wm. Fremming Nielsen

United States of America, Plaintiff, v. Jorge F. Virgen-Ponce, Defendant.	No. 2:18-cr-92-WFN Motion to Dismiss Indictment Spokane—With Oral Argument May 22, 2018 at 10:00 a.m.

Introduction

Jorge F. Virgen-Ponce is charged with one count of being an alien in the United States after deportation, in violation of 8 U.S.C. § 1326 (ECF No. 15). According to the indictment, Mr. Virgen-Ponce was found in the United States on May 24, 2018 after having been removed by an immigration judge on December 24, 2016 (*Id.*; *see also* Exhibit A—IJ Order). This indictment must be dismissed for two reasons.

First, the IJ lacked jurisdiction to enter an order of removal against Mr. Virgen-Ponce. For an IJ to have jurisdiction over a removal proceeding, the proceeding must have been commenced through the filing of a suitable notice to appear. *See* 8 C.F.R. § 1003.14(a) ("Jurisdiction vests, and proceedings before an Immigration Judge commence," only upon the filing of a notice to appear with the immigration court.). Here, however, the "notice to appear" did not confer jurisdiction onto the IJ because it did not specify the date and time where the removal hearing would occur—it merely stated that the hearing would occur at a date and time "[t]o be set" (Exhibit B—Notice to Appear). The Supreme Court has recently held that "[a] putative notice to appear that fails to designate the specific time or place of the noncitizen's removal proceedings is not a 'notice to appear . . . .'" at all because the omission of date, time or place information "deprive[s] the notice to appear of its essential character." *Pereira v. Sessions*, 2018 WL 3058276, at *7, *8, *10 (2018). The putative notice to appear filed in

Mr. Virgen-Ponce's case therefore did not give the IJ jurisdiction. This means his physical removal from the United States was unlawful, and the indictment must be dismissed.

Second, the IJ violated Mr. Virgen-Ponce's due process rights by failing to meaningfully advise Mr. Virgen-Ponce of his eligibility for voluntary departure or to give him the opportunity to develop equities in favor of that relief. Other than stating that it was a "privilege" and involved, in some way, "the favorable exercise of discretion," the IJ in this case did not explain what voluntary departure was. Nor did the IJ give Mr. Virgen-Ponce a chance to present positive equities supporting relief.

And these errors caused prejudice. Had the IJ followed the law, properly advised Mr. Virgen-Ponce about voluntary departure, and given him the opportunity to develop his equities, the IJ would have learned that Mr. Virgen-Ponce had lived for the past 10 years in Central Washington with virtually all of his immediate family and that he had amassed an impressive work history as an agricultural laborer. Notwithstanding Mr. Virgen-Ponce's criminal history, it is plausible that the IJ would have then granted Mr. Virgen-Ponce voluntary departure. Consequently, the IJ's violations of Mr. Virgen-Ponce's due process rights caused him prejudice, and the indictment must be dismissed.

Background[1]

On June 5, 2018, the grand jury charged Jorge F. Virgen-Ponce with one count of being an alien in the United States after deportation, in violation of 8 U.S.C. § 1326 (ECF No. 15).

Mr. Virgen-Ponce's sole prior removal from this country occurred after a December 24, 2016 hearing before an immigration judge. The procedural history of this immigration case was as follows. On October 11, 2016, an immigration officer personally served on Mr. Virgen-Ponce a documented titled "Notice to Appear." This documented stated a set of factual allegations against Mr. Virgen-Ponce (in essence, that he was unlawfully in the United States). It also stated the official charge against Mr. Virgen-Ponce—that he was an alien unlawfully in the United States, in violation of § 212(a)(6)(A)(i) of the Immigration and Nationality Act. But it ***did not*** state a date or time for Mr. Virgen-Ponce's deportation hearing. Instead, it said only that a time and date were "[t]o be set":

YOU ARE ORDERED to appear before an immigration judge of the United States Department of Justice at:
1623 E J Street #3 Tacoma WA 98421. EOIR Tacoma, WA
(Complete Address of Immigration Court, including Room Number, if any)
on To be set. *(Date)* at To be set. *(Time)* to show why you should not be removed from the United States based on the charge(s) set forth above.
MICHAEL GLADISH SDDO
(Signature and Title of Issuing Officer)
Date: October 11, 2016 Yakima, WA
(City and State)

[1] This background is based on the filings in this case, discovery provided by the government, and a declaration submitted by Mr. Virgen-Ponce.

Eventually, a removal hearing was scheduled for December 24, 2016. The IJ handled this hearing in a group-style format. This means that a group of aliens were present in the courtroom, and the IJ addressed them (through a court interpreter) *en masse* before proceeding to briefly discuss each individual's case.[2] Both during the group advisements and in the individual discussion he had with Mr. Virgen-Ponce, this was the sum of the IJ's explanation of voluntary departure: "You have the right to apply for voluntary departure. Voluntary departure is a privilege. You must show that you merit a favorable exercise of discretion by the court." (Tape 2 at 1:45-1:57).

The IJ took the following steps when he heard Mr. Virgen-Ponce's case. First, he found him removable and ineligible for asylum or withholding of removal. Then, he entered into the following discussion:

> *The court:* When was your first entry into the United States?
> *Mr. Virgen-Ponce:* In 2006.
>
> . . .
>
> *The court:* Are you married?
>
> *Mr. Virgen-Ponce:* No.
>
> *The court:* Are your parents lawful permanent residents or citizens of the United States?
>
> *Mr. Virgen-Ponce:* No.
>
> *The court:* You have any children?

[2] Tapes of the IJ hearing will be lodged with the court separately.

Mr. Virgen-Ponce: No.

The court: Have you ever been the victim of a violent crime here in the United States?

Mr. Virgen-Ponce: No.

The court: Has anyone ever filed a visa petition for you so you can get your papers and stay in the United States permanently?

Mr. Virgen-Ponce: No.

The court: Sir, I do not find that you are eligible for any form of relief other than voluntary departure.

The court: The government's records indicate here that in 2014 you were convicted of driving without a license, reckless driving, drug paraphernalia, and driving under the influence. They say that in April 2015, you were arrested, and convicted in July of that year, for driving while license suspended (three counts). They say that in September 2015, you were arrested in Quincy, Washington, and later convicted in January 2016, for an ignition interlock violation and driving while license suspended. And then on August 30, 2016, it says you were convicted of possession of methamphetamine. Is that true sir?

Mr. Virgen-Ponce: Yes.

The court: Is there anything else you would like to tell me about your case?[3]

Mr. Virgen-Ponce: No. I'd just like to get my voluntary departure.

The court: Well, sir, I'm considering voluntary departure, but in light of your criminal history and your lack of positive equities, I'm not going to give you voluntary departure. You haven't shown that you deserve voluntary departure. You've committed many crimes in this country. I'm going to order you removed.[4]

The December 24, 2016 removal order is Mr. Virgen-Ponce's sole deportation.

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[3] This question was misleading. It suggested that the IJ was asking for information about Mr. Virgen-Ponce's immigration history—"your case." Coming, as it did, on the heels of a series of disconnected, leading questions about lawful permanent residency and immigration status, the question did not naturally convey an open-ended invitation to fill the IJ in on Mr. Virgen-Ponce's general background, his work history, his family history, or any other equities.

[4] Tape 6 at 2:51-5:01; Tape 7 at 0:00-0:33.

Argument

"In a criminal prosecution under [8 U.S.C.] § 1326, the Due Process Clause of the Fifth Amendment requires a meaningful opportunity for judicial review of the underlying deportation." *United States v. Zarate-Martinez*, 133 F.3d 1194, 1197 (9th Cir. 1998) (overruled on other grounds). What this means is that a person charged with illegal reentry may launch a collateral attack on his prior deportation order. To prevail, the person must show (1) that he exhausted any administrative remedies through which he could have challenged the order in the deportation proceeding (or was excused from the exhaustion requirement); (2) "[t]he deportation proceedings at which the order was issued improperly deprived the alien of judicial review" (or he was excused from seeking judicial review); and (3) "the entry of the order was fundamentally unfair." *United States v. Ramos*, 623 F.3d 672, 680 (9th Cir. 2010).

Entry of a removal order is "fundamentally unfair," in turn, when (1) the "alien's due process rights were violated by defects in the underlying deportation proceeding," and (2) the alien "suffered prejudice as a result of the defects." *Id.* To demonstrate prejudice, an alien "need not conclusively demonstrate that he or she would have received relief." *Id.* at 684. Instead, the alien need only establish "***some*** evidentiary basis on which relief could have been granted." *United States v. Reyes-Bonilla*, 671 F.3d 1036, 1050 (9th Cir. 2012) (emphasis added).

Here, the IJ's removal order is invalid for two reasons: (1) the IJ lacked

jurisdiction to conduct removal proceedings, and (2) the IJ did not give Mr. Virgen-Ponce meaningful notice of his right to apply for voluntary departure or a genuine opportunity to develop the equities in favor of that form of discretionary relief.

1. Mr. Virgen-Ponce's removal order was invalid because the IJ had no jurisdiction to conduct removal proceedings—and his indictment, which is predicated on the IJ's order, must be dismissed.

This section proceeds in two parts. First, it explains why the IJ lacked jurisdiction to enter a removal order against Mr. Virgen-Ponce at the December 24, 2016 removal proceeding—rendering that removal fundamentally unfair. It then explains why both the jurisdictional nature of the IJ's due process violation, and the state of the law at the time of Mr. Virgen-Ponce's removal proceeding, means that Mr. Virgen-Ponce is excused from the administrative exhaustion and judicial review requirements.

A. Mr. Virgen-Ponce's removal was fundamentally unfair.

i. The removal order, entered without jurisdiction, violated Mr. Virgen-Ponce's due process rights.

The filing of a suitable notice to appear is a jurisdictional prerequisite to commencing an immigration case. The regulations governing IJ removal proceedings state that "[j]urisdiction vests, and proceedings before an Immigration Judge commence," only upon the filing of a notice to appear. 8 C.F.R. § 1003.14(a); *see also Gonzales-Caraveo v. Sessions*, 882 F.3d 885, 890 (9th Cir. 2018) ("Once a notice to

appear is filed with the Immigration Court . . . jurisdiction over the individual's immigration case vests with the IJ."); *Martinez-Garcia v. Ashcroft*, 366 F.3d 732, 734 (9th Cir. 2004) ("[R]emovals are commenced by the filing of a Notice to Appear, pursuant to INA § 239(a)(1), 8 U.S.C. § 1229(a).").

The problem is that not just anything qualifies as a notice to appear. Instead, 8 U.S.C. § 1229(a) defines a "notice to appear" as a document specifying "[t]he time and place at which the [removal] proceedings will be held." 8 U.S.C. § 1229(1)(a)(G)(i). And the Supreme Court has recently held that the requirement that a notice to appear specify the time and place of the removal proceedings is "definitional." *Pereira v. Sessions*, 138 S. Ct. 2105, 2018 WL 3058276, at *8 (2018). Section 1229(a) "speak[s] in definitional terms" and uses "quintessential definitional language." *Id.* at *8, *10. For this reason, a document satisfies the definition of a "notice to appear" in an immigration case ***only if*** that document states the specific place ***and time*** of the removal proceedings. "A putative notice to appear that fails to designate the specific time or place of the noncitizen's removal proceedings is not a 'notice to appear under section 1229(a)'" at all. *Id.* at *3 (quoting 8 U.S.C. § 1229b(d)(1)(A)).

That is precisely what happened here. The "notice to appear" filed in Mr. Virgen-Ponce's removal proceedings contained no information regarding the date or time of his immigration hearing (Exhibit B). Because the document lacked this critical

information, it did not meet the definition of a "notice to appear" under § 1229(a)(1)(G). In effect, there was no notice to appear filed in Mr. Virgen-Ponce's case. This means the IJ never acquired jurisdiction to commence removal proceedings under 8 C.F.R. § 1003.14(a). Thus, the IJ lacked jurisdiction to issue a removal order, and immigration authorities unlawfully took Mr. Virgen-Ponce to Mexico in violation of his due process rights.

It is important to emphasize—as the Supreme Court did in *Pereira*—that the omission of date-and-time information from Mr. Virgen-Ponce's notice to appear is not "some trivial, ministerial defect." *Pereira*, 2018 WL 3058276, at *10. That's because failing to notify a person of the time or place of their hearing "unquestionably . . . deprive[s] [a] notice to appear of its essential character." *Id. Cf. United States v. Raya-Vaca*, 771 F.3d 1195, 1204 (9th Cir. 2014) ("[N]otice and [an] opportunity for [a] hearing appropriate to the nature of the case" are "the essential principle[s] of due process" (all but first alteration in original) (citation omitted)). *Pereira* means what it says: when a charging document does not contain the date and time of the removal hearing, it is not a "notice to appear" that triggers the commencement of removal proceedings.

Since *Pereira*, numerous immigration courts have begun terminating the removal proceedings of any noncitizen whose notice to appear lacks the date and time. (Exhibit C—Other IJ Orders). As these orders show, IJs in Phoenix and Seattle have concluded

that where "the NTA in the current proceedings is inadequate to meet the definition of an NTA" in § 1229(a)(1)(G)(i), "there is no valid charging document present in the record"—and the proceedings must be "terminated for lack of jurisdiction." *Id.* Multiple IJs agree with Mr. Virgen-Ponce that they have no jurisdiction to issue a removal order when the notice to appear lacks a date and time of the removal hearing.

ii. Mr. Virgen-Ponce was prejudiced by his unlawful removal.

Mr. Virgen-Ponce was unquestionably prejudiced by the removal order in his case. Given the IJ's lack of jurisdiction, Mr. Virgen-Ponce "was removed when he should not have been and clearly suffered prejudice." *United States v. Camacho-Lopez*, 450 F.3d 928, 930 (9th Cir. 2006); *see also Aguilera-Rios*, 769 F.3d at 630 ("If Aguilera 'was removed when he should not have been,' his 2005 removal was fundamentally unfair, and he may not be convicted of reentry after deportation." (quoting *Camacho-Lopez*)). Because Mr. Virgen-Ponce was removed when he should not have been, he suffered a due process violation that caused him prejudice, and his removal was "fundamentally unfair."

B. Mr. Virgen-Ponce was not required to exhaust his administrative remedies or seek judicial review

To prevail on in a collateral challenge to a prior deportation order, a defendant in a § 1326 case must ordinarily show both that he exhausted his administrative remedies in the underlying deportation proceeding and that he was unable to seek judicial review.

Supra pp. 7–8. There are, however, well-recognized exceptions to the requirement to exhaust administrative remedies and seek judicial review. "Exhaustion of administrative remedies is not required where the remedies are inadequate, inefficacious, or futile, . . . or where the administrative proceedings themselves are void." *United Farm Workers of Am., AFL-CIO v. Arizona Agr. Employment Relations Bd.*, 669 F.2d 1249, 1253 (9th Cir. 1982). Similarly, an alien is not required to seek judicial review when "confusion of the law at the time that [the alien] was ordered deported" meant that "it would have been futile for [the alien] to have sought relief in the courts." *United States v. Diaz-Nin*, 221 F. Supp. 2d 584, 588 (D.V.I. 2002).

Because the IJ lacked jurisdiction over Mr. Virgen-Ponce's immigration case, Mr. Virgen-Ponce's removal proceedings were void, and he was exempted from the requirement that he exhaust administrative remedies. *See United Farm Workers*, 669 F.2d at 1253 ("[E]xhaustion of administrative remedies is not required where . . . the administrative proceedings are themselves void); *see also Winterberger v. Gen. Teamsters Auto Truck Drivers & Helpers Local Union 162*, 558 F.2d 923, 925 (9th Cir. 1977) (a void proceeding is a "legal nullity" to which the requirement of administrative exhaustion does not apply). Given that the removal order is a legal nullity, Mr. Virgen-Ponce is excused from the administrative exhaustion and judicial review requirements, because the removal order never had legal force to begin with.

Additionally, it would have been futile for Mr. Virgen-Ponce to pursue

administrative exhaustion and judicial review. In *Matter of Camarillo*, the BIA held that a putative notice to appear has legal effect "regardless of whether the date and time of the hearing have been included in that document." 25 I. & N. Dec. 644, 651 (BIA 2011). And, in *Moscoso-Castellanos v. Lynch*, the Ninth Circuit adopted the *Camarillo* interpretation. 803 F.3d 1079, 1083 (9th Cir. 2015). Thus, at the time, administrative exhaustion and judicial review would have been futile.

The indictment against Mr. Virgen-Ponce should be dismissed.

2. The IJ's multiple failures to follow the law regarding voluntary departure means the indictment must be dismissed.

Mr. Virgen-Ponce can collaterally attack his prior removal order for an additional reason—the IJ's failures to follow the law regarding voluntary departure rendered his deportation fundamentally unfair, excused him from the administrative exhaustion requirement, and excused him from the requirement that he seek judicial review.

A. The IJ's failures follow the law regarding voluntary departure violated Mr. Virgen-Ponce's due process rights and caused him prejudice.

The IJ committed two due process violations in the course of Mr. Virgen-Ponce's removal proceedings. First, he failed to "meaningfully advise[] [Mr. Virgen-Ponce] of his right to seek voluntary departure." *United States v. Melendez-Castro*, 671 F.3d 950, 954 (2012). Second, he failed to give Mr. Virgen-Ponce a "genuine opportunity . . . to present evidence of the factors favoring this relief." *Id.*

These due process violations prejudiced Mr. Virgen-Ponce because had he been

meaningfully advised of his eligibility for voluntary departure and given a genuine opportunity to develop his equities, it is plausible—there is "some evidentiary basis" for concluding—that he would have been granted voluntary departure. *Reyes-Bonilla*, 671 F.3d at 1050.

i. Due process violation: IJ did not meaningfully advise Mr. Virgen-Ponce of his right to seek voluntary departure.

The Due Process Clause requires that an alien in immigration proceedings be "made aware that he has a right to seek relief" from deportation. *United States v. Arrieta*, 224 F.3d 1076, 1079 (9th Cir. 2000). To make an alien aware of this right, however, requires more than barely stating that he is eligible for voluntary departure. Instead, the alien must be "***meaningfully*** advised of his right to seek voluntary departure." *Melendez-Castro*, 671 F.3d at 954; *see also United States v. Rodriguez-Arroyo*, 467 F. App'x 746, 747 (9th Cir. 2012) ("Rodriguez was deprived of due process during the 2005 deportation hearing because, like the defendant in *Melendez-Castro*, he was advised of the availability of voluntary departure, but 'was not meaningfully advised' of his right to seek such relief or to file an application seeking it."). And meaningfully advising an alien of his right to seek voluntary departure includes notifying the alien that he "has a right to present evidence in support of the claim"—notice that logically includes information about ***what evidence is relevant*** to support a claim for voluntary departure. *Melendez-Castro*, 671 F.3d at 954.

Here, the IJ did not meaningfully advise Mr. Virgen-Ponce of his right to seek voluntary departure. This was the sum total of the IJ's explanation of voluntary departure: "You have the right to apply for voluntary departure. Voluntary departure is a privilege. You must show that you merit a favorable exercise of discretion by the court" (Tape 2 at 1:45-1:57). Beyond stating that it was a "privilege," however, the IJ did not give Mr. Virgen-Ponce any information about the legal difference between voluntary departure and deportation. Nor did he explain what evidence he would consider in deciding whether to grant voluntary departure. While the IJ stated that Mr. Virgen-Ponce needed to "show that [he] merit[ed] a favorable exercise of discretion," the IJ was entirely silent about ***how*** Mr. Virgen-Ponce could establish that. Instead, Mr. Virgen-Ponce—a person with no legal training and a sixth-grade education—was left to puzzle through what he had to do to "show that [he] merit[ed] a favorable exercise of discretion" in the brief period of time between the group advisements and his own removal hearing.

Mr. Virgen-Ponce's case is similar to the fact pattern in *United States v. Rodriguez-Arroyo*. In *Rodriguez-Arroyo*, the Ninth Circuit dismissed a § 1326 indictment based on the IJ's inadequate explanation of voluntary departure. The IJ in that case "referred to [voluntary departure] during the group hearing and told the aliens about some of its benefits, but he did not explain the circumstances under which such relief was available." 467 F. App'x at 747. Nor did the IJ in *Rodriguez-Arroyo* explain the

factors he would consider in deciding whether to grant or deny voluntary departure—instead, the IJ "simply told the group that . . . he would ask questions about their 'equities'," without explaining what that meant. *Id.*

Here, the IJ gave even less information about voluntary departure than the IJ in *Rodriguez-Arroyo*. The IJ never advised Mr. Virgen-Ponce—or the group he was a part of—of any of the "benefits" of voluntary departure. Nor did he explain the circumstances under which voluntary departure was available. And, beyond stating that an alien needed to somehow show that he "merited a favorable exercise of discretion by the court," the IJ did not explain the factors he would consider in deciding whether to grant or deny voluntary departure. Thus, just like the IJ in *Rodriguez-Arroyo*, the IJ here failed to meaningfully advise Mr. Virgen-Ponce of his right to seek voluntary departure.

ii. Due process violation: IJ did not give Mr. Virgen-Ponce a genuine opportunity to develop evidence supporting an application for voluntary departure.

The IJ also failed to give Mr. Virgen-Ponce a genuine opportunity to develop his favorable equities. An alien who applies for voluntary departure must be given "a genuine opportunity . . . to present evidence of the factors favoring this relief." *Melendez-Castro*, 671 F.3d at 954 (citing *Campos-Granillo v. INS*, 12 F.3d 849, 852 n.8 (9th Cir. 1993). Among others, these favorable factors include "family ties within the United States," "residence of long duration in this country," and "a history of employment." *Campos-Granillo*, 12 F.3d at 852 n.8.

Mr. Virgen-Ponce was not given a genuine opportunity to present this favorable evidence. Instead, after he found Mr. Virgen-Ponce removable, the IJ asked a series of disconnected, leading questions about Mr. Virgen-Ponce's background: (1) when he first entered the country, (2) whether he was married, (3) whether his parents were lawful permanent residents of the United States, (4) whether he had any children, (5) whether he had ever been a victim of a violent crime, (6) whether he had any visa petitions pending, and (7) whether he acknowledged that his criminal convictions included driving offenses and simple drug possession. The IJ then asked "is there anything else you would like to tell me about your case?" Mr. Virgen-Ponce responded: "No. I'd just like to get my voluntary departure." The IJ then denied voluntary departure based on "your criminal history and your lack of positive equities."

The problem, of course, is that Mr. Virgen-Ponce wasn't given the opportunity to develop his "positive equities." The one open-ended question the IJ asked Mr. Virgen-Ponce was: "is there anything else you would like to tell me about your case?" Not "is there anything else you would like to tell me about your equities" or "about your ties to this country," or "about your personal or family background." Mr. Virgen-Ponce understandably interpreted this case-related question as asking him if he had anything else that he wanted to share ***about his immigration history***. And then, when Mr. Virgen-Ponce actually asked for voluntary departure, the IJ did not ask him about the favorable factors that *Campos-Granillo* requires an IJ to consider. Instead, he simply

denied voluntary departure because of Mr. Virgen-Ponce's criminal history and "your lack of positive equities"—equities Mr. Virgen-Ponce never got a chance to develop.

iii. The IJ's due process violations prejudiced Mr. Virgen-Ponce.

To establish that an IJ's due process violations caused prejudice, a defendant need only show that he had a "plausible" basis for relief from deportation—i.e., that there was "some evidentiary basis" to grant voluntary departure. *United States v. Reyes-Bonilla*, 671 F.3d 1036, 1050 (9th Cir. 2012).

But for the IJ's due process violations here, Mr. Virgen-Ponce would have been able to establish an evidentiary basis for voluntary departure. He would have been able to explain that the majority of his family was in the United States, and that he had lived here, with his family, for his entire adult life. Exhibit D (Virgen-Ponce Declaration ¶¶ 7–8). He also would have been able to explain his significant employment history, including the fact that he had previously worked for the same company—Morgan Orchard—for years. *Id.* ¶ 9. These "favorable factors" would have presented strong grounds for relief from deportation.

The IJ denied voluntary departure based on Mr. Virgen-Ponce's "criminal history." But his criminal history was not disqualifying. As the Ninth Circuit has observed, the Board of Immigration Appeals "has on several occasions affirmed the grant of voluntary departure or remanded for the IJ to consider voluntary departure relief to aliens with [similar] criminal histories." *United States v. Vasallo-Martinez*, 360

F. App'x 731, 732–33 (9th Cir. 2009) (collecting cases including (1) VD for a person with four assaults, resisting arrest, and numerous other arrests; (2) VD for a person with "six criminal convictions including battery, drunkenness, and DUI"; and (3) VD for a petitioner "convicted of domestic violence, possession of controlled substance, and DUI").

Because it is, at minimum, plausible that Mr. Virgen-Ponce would have been granted voluntary departure had he been able to put his equities before the IJ, the IJ's due process violations caused him prejudice. Entry of the removal order was fundamentally unfair.

B. Mr. Virgen-Ponce is excused from both the administrative exhaustion and judicial review requirements.

As this memorandum has explained, an alien ordinarily needs to exhaust administrative remedies and judicial review before he can collaterally attack a deportation order in a § 1326 case. These requirements are excused, however, if the alien was not adequately advised of his right to appeal. *See Ubaldo-Figueroa*, 364 F.3d at 1048 ("A waiver of the right to appeal a removal order does not comport with due process when it is not 'considered and intelligent'" and thus excuses both administrative exhaustion and judicial review). An appeal waiver is inadequate—i.e., is not "considered and intelligent"—when "the record contains an inference that the petitioner is eligible for relief from deportation, but the Immigration Judge fails to

advise the alien of this possibility and given him the opportunity to develop the issue." *United States v. Ortiz-Lopez*, 385 F.3d 1202, 1204 n.2 (9th Cir. 2004). And the government bears the burden of proving by clear and convincing evidence that a waiver of appeal was knowing and intentional. *Pallares-Galan*, 359 F.3d at 1097; *Ubaldo-Figueroa*, 364 F.3d at 1048. On collateral attack, a court must "indulge every reasonable presumption against waiver," and "not presume acquiescence in the loss of fundamental rights." *Ramos*, 623 F.3d at 680.

Mr. Virgen-Ponce's appeal waiver was not considered or intelligent for two reasons. First, he was not advised of his right to appeal ***the denial of voluntary departure***. Instead, the IJ's discussion of appellate rights during the group advisement suggested that aliens could only appeal from the IJ's decision regarding ***removability***—not from his discretionary decision regarding whether to grant voluntary departure. Specifically, during the group advisement, the IJ contrasted his "decision in your case"—from which the alien has "the right to appeal . . . to a higher court"—with the "right to apply for voluntary departure," which he described as a "privilege" (Tape 2 at 00:50-1:49). Consequently, because this discussion implied that the alien only had the right to appeal from the removability determination, not from the denial of voluntary departure, Mr. Virgen-Ponce did not know he had the right to appeal denial of voluntary departure.

Additionally, the IJ's failure to meaningfully advise Mr. Virgen-Ponce of his

eligibility for voluntary departure or give him a genuine opportunity to develop his favorable equities meant that his appeal waiver was not "considered and intelligent." "Where the record contains an inference that the petitioner is eligible for relief from deportation, but the IJ fails to advise an alien of this possibility and given him an opportunity to develop the issue, [the Ninth Circuit] do[es] not consider [the] alien's waiver of his right to appeal his deportation order to be considered and intelligent." *Pallares-Galan*, 359 F.3d at 1096. Mr. Virgen-Ponce's appeal waiver—i.e., his waiver of administrative appeal and judicial review—was not considered and intelligent, and it is therefore excused.

Conclusion

Mr. Virgen-Ponce respectfully asks the court to dismiss the indictment in this case. His prior removal is invalid because the IJ lacked jurisdiction to order him removed. Additionally, the IJ's failures (1) to meaningfully advise him of his right to seek voluntary departure and (2) to give him a genuine opportunity to develop his equities, make his removal fundamentally unfair. The December 24, 2016 removal is not a valid basis for prosecution under 8 U.S.C. § 1326—the indictment must be dismissed.

Dated: July 13, 2018.

By s/ Miles Pope
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Service Certificate

I certify that on July 13, 2018, I electronically filed the foregoing with the District Court Clerk using the CM/ECF System, which will send a filing notification to the following: Assistant United States Attorney Matt Duggan

s/ Miles Pope
Miles Pope