NO. 10-50615

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ALONSO CHAVEZ-GONZALEZ,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of California
Honorable Irma E. Gonzalez, District Judge Presiding

APPELLANT'S OPENING BRIEF

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IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	) U.S.C.A. No. 10CR1365-IEG
	)
Plaintiff-Appellee,	) U.S.D.C. No. 10-50615
	)
v.	)
	)
ALONSO CHAVEZ-GONZALEZ,	)
	)
Defendant-Appellant.	)
_____	)

I.

STATEMENT OF JURISDICTION

A. Basis for Subject Matter Jurisdiction in the District Court.

Defendant-Appellant Alonso Chavez-Gonzalez appeals from his conviction for violating 8 U.S.C. § 1326(a) & (b) entered on December 13, 2010, in the United States District Court for the Southern District of California. [CR 36, ER 2-5].[1] The district court had original subject matter jurisdiction pursuant to 18 U.S.C. § 3231.

B. Basis for Jurisdiction in the Court of Appeals.

This Court has jurisdiction to review a final order of the district court entered

[1] "CR" refers to the Clerk's Record for the case. "ER" refers to the Appellant's Excerpts of Record.

within the Ninth Circuit's geographical jurisdiction pursuant to 28 U.S.C. §§ 1291 and 1294(1). The Southern District of California is within the Ninth Circuit's geographical jurisdiction. 28 U.S.C. §§ 41, 84. This Court has jurisdiction over a timely appeal from the final order of a district court. See 28 U.S.C. § 1291; 18 U.S.C. § 3742. A judgment of conviction is a final order. Berman v. United States, 302 U.S. 211, 212-13 (1937).

C. The Notice of Appeal Was Timely Filed.

The final judgment and commitment was entered on December 13, 2010. [CR 36, ER 2-5]. Mr. Chavez timely filed a Notice of Appeal on December 17, 2010, [CR 37, ER 1], within the 14 days prescribed by Federal Rule of Appellate Procedure 4(b).

D. Bail Status.

Mr. Chavez is currently in the custody of the Federal Bureau of Prisons, serving a 77-month sentence. According to the Bureau of Prisons website, his projected release date is October 15, 2015.

II.

QUESTION PRESENTED FOR REVIEW

Whether the district court erred when it denied Mr. Chavez's motion to dismiss the indictment under 8 U.S.C. § 1326(d) because Mr. Chavez's two prior orders of removal are invalid because the record of conviction for Mr. Chavez's nolo

contendere plea to possession of a controlled substance for sale failed to establish by clear, unequivocal, and convincing evidence that the substance of conviction was a federally controlled substance and thus an aggravated felony under 8 U.S.C. § 1101(a)(43)(B).

III.

STATUTORY PROVISIONS

All relevant statutory and regulatory provisions are provided in the attached addendum pursuant to Circuit Rule 28-2.7.

IV.

STATEMENT OF THE CASE

On April 14, 2010, the United States filed a felony indictment against Mr. Chavez alleging that on March 14, 2010, he was a deported alien found in the United States in violation of 8 U.S.C. § 1326. [CR 10; ER 94-95]. On June 22, 2010, he filed a motion under 8 U.S.C. § 1326(d) attacking the validity of his underlying deportation and requesting that the indictment be dismissed. [CR 18; ER 49-93]. On July 26, 2010, the government filed a motion in response. [CR 20, ER 31-48]. On August 23, 2010, Mr. Chavez filed a reply to the government's response. [CR 22, ER 25-30] On August 30, 2010, the district court held a hearing and denied Mr. Chavez's motion to dismiss. [CR 23].

Mr. Chavez and the government then entered into a conditional plea agreement, where Mr. Chavez retained the right to appeal the denial of his motion to dismiss. [CR 28]. He pled guilty pursuant to this plea agreement on September 21, 2010. [CR 26, ER 6-10]. He was sentenced on December 6, 2010, [CR 35], and this appeal follows.

V.

STATEMENT OF FACTS

A. Mr. Chavez's Personal History

Alonso Chavez-Gonzalez was brought to this country by his parents when he was 16 or 17 years old. [ER 67]. He grew up in California, graduating from high school and working to support his family in Los Angeles. [ER 67-68]. His parents and three of his five siblings are currently lawful permanent residents or citizens of the United States. Id.

When he was 20, Mr. Chavez met and fell in love with a young woman named Martha Almarez, a United States citizen. [ER 68]. The two were in a committed relationship and lived together in Los Angeles for 12 years before Mr. Chavez was arrested and deported. Id. They had two daughters in the 1980s, Yvette and Yvonne, who are also both United States citizens. Id. Mr. Chavez was a loving father and worked hard to support his young family up until his arrest and deportation. Id.

B. Mr. Chavez's 1998 Criminal Conviction

In 1998, Mr. Chavez pled nolo contendere to a violation of California Health and Safety Code § 11351, Possession for Sale of a Controlled Sentence and was sentenced to four years in prison. The conviction record submitted to the district court includes: the abstract of judgment, the information, the minute order and the transcript of the nolo contendere plea colloquy and sentencing. [ER 45-48, 70-74].

While the criminal information charged Mr. Chavez with trafficking in a specific drug -- "to wit, cocaine," -- neither the abstract of judgment nor the minute order from the plea colloquy reflects the substance of conviction. During the plea colloquy, the following exchange took place:

> District Attorney: Alonzo Chavez, in case no. BA168782, to the charge in Count 1, a violation of Health and Safety Code Section 11351, a felony offense, the crime of possession for sale of a controlled substance, in this case cocaine; to this charge, sir, how do you plead?
>
> Chavez: No contest.
>
> DA: And do you understand that a no-contest plea is treated the same as a guilty plea?
>
> Chavez: Yes.

[ER 47].

C. Mr. Chavez's 2000 Deportation Proceeding

Mr. Chavez has been removed in immigration proceedings twice. In August 2000, he appeared before an Immigration Judge who concluded that his conviction under § 11351 was a drug trafficking conviction and an aggravated felony.

The removal proceedings were initiated by way of a Notice to Appear, alleging that Mr. Chavez was "convicted in the Superior Court of California, County of Los Angeles for the offense of Possession of Cocaine for Sale, in violation of Section 11351 of the Health and Safety Code of California." [ER 76-77]. The immigration judge ordered that "the respondent is subject to removal on the charge(s) in the Notice to Appear." [ER 79]. Mr. Chavez was then removed to Mexico pursuant to the warning that "you have been convicted of a crime designated as an aggravated felony," [ER 81].

The following excerpts from the audio recording of the 2000 hearing were provided to the district court:

> Immigration Judge: Were you convicted on December 10, 1998 in Los Angeles County, California Superior Court, for possession of cocaine for sale?
>
> Chavez: Yes.
>
> IJ: Is there anything you would like to tell me about your case?
>
> Chavez: No, Your Honor.

> IJ: Did you file any appeal in the Criminal Court of Appeals regarding your conviction?
>
> Chavez: No.
>
> IJ: Do you have any fear to return to Mexico?
>
> Chavez: No.
>
> IJ: Based on what you've told me today, you are subject to removal from the United States... [unintelligible] drug trafficking conviction [unintelligible].

[ER 42-43]. Accordingly, the immigration judge ordered Mr. Chavez deported and removed and did not advise him that he was eligible for any relief.

D. Mr. Chavez's 2005 Deportation Proceeding

Mr. Chavez was also placed in expedited removal proceedings in May 2005. He was subjected to a Final Administrative Order of Removal, again on the grounds that he was an aggravated felon by virtue of his conviction of possession for sale of a controlled substance. [ER 86-89].

E. Mr. Chavez's Motion to Dismiss the Indictment

On August 30, 2010, the district court denied Mr. Chavez's motion to dismiss the indictment on the instant case. [ER 24]. Mr. Chavez raised arguments attacking the validity of both of his underlying removals. He argued that the 2000 order of removal was invalid because first, the district court erroneously concluded that Mr. Chavez was an aggravated felon and precluded from applying for available relief

because of his prior conviction for possession of a controlled substance for sale; and second, that Mr. Chavez was denied his right to counsel. [ER 53-62]. He also argued that the 2005 expedited removal was invalid because he was erroneously removed as an aggravated felon by virtue of his possession for sale conviction. [ER 62-64].

The district court denied his motion, finding that the conviction records submitted by the government sufficiently showed that Mr. Chavez's prior conviction was an aggravated felony, and finding that the record from Mr. Chavez's 2000 removal proceedings showed that Mr. Chavez was not denied the right to counsel. [ER 13-24].

VI.

SUMMARY OF ARGUMENT

Mr. Chavez was improperly removed as an aggravated felon in 2000 and 2005. Both prior deportations are invalid because immigration officials erroneously concluded that Mr. Chavez's prior conviction for possession of a controlled had been convicted was an aggravated felony. This Court has held that California statutes that criminalize controlled substance offenses are overbroad and not categorically aggravated felonies under the Immigration and Nationality Act. See Ruiz-Vidal v. Gonzalez, 473 F.3d 1072, 1077-78 (9th Cir. 2007). In Mr. Chavez's case, the record of conviction is insufficient to establish by clear and convincing evidence that the

substance of conviction was a federally controlled substance; therefore this conviction fails to meet the definition of an aggravated felony under 8 U.S.C. § 1101(a)(43)(B).

While the plea colloquy and the information from Mr. Chavez's 1998 conviction specify the substance as "cocaine," these records fail to satisfy Ruiz-Vidal because Mr. Chavez pled nolo contendere, and this Court has held that "a plea of nolo contendere... is first and foremost, not an admission of factual guilt. It merely allows the defendant so pleading to waive a trial and authorize the court to treat him as if he was guilty." United States v. Nguyen, 465 F.3d 1128, 1130 (9th Cir. 2006); accord United States v. Vidal, 504 F.3d 1072, 1089 (9th Cir. 2007) (en banc).

Additionally, Mr. Chavez's uncounseled concession at his 2000 removal hearing that he had been convicted for possession of cocaine for sale cannot be relied upon to establish the substance of the offense. This Court has rejected the contention that a defendant's oral, uncounseled admissions before an immigration judge could be used to prove the type of drug in a controlled substance offense when the statute of conviction is categorically overbroad. See Cheuk Fong S-Yong v. Holder, 600 F.3d 1028, 1035 (9th Cir. 2010).

Mr. Chavez was prejudiced by the immigration judge's erroneous conclusion that he was an aggravated felon because he was precluded from applying for available

relief, specifically pre-conclusion voluntary departure. Mr. Chavez had exceptionally strong ties to the United States, including a United States citizen common-law wife and two United States citizen daughters. He was brought to the United States by his parents as a teenager and graduated from high school in Los Angeles. He speaks, reads, and writes fluent English, and has always considered this country to be his home. Thus he had plausible grounds for relief.

The district court correctly held that the statute of Mr. Chavez's conviction was categorically overbroad because § 11351 covers substances that are not controlled under the federal controlled substances acts. However, the court erred in finding that the conviction records submitted by the government established by clear, unequivocal, and convincing evidence that the substance of conviction was a federally-controlled substance. Accordingly, the district court erred when it concluded that Mr. Chavez was an aggravated felon and thus that his prior deportations were valid, and erred in denying Mr. Chavez's motion to dismiss the indictment under 8 U.S.C. § 1326(d).

VII.

ARGUMENT

THE DISTRICT COURT ERRED IN DENYING THE MOTION TO DISMISS THE INDICTMENT UNDER 8 U.S.C. § 1326(d) BECAUSE MR. CHAVEZ WAS IMPROPERLY REMOVED -- TWICE -- AS AN AGGRAVATED FELON

A. STANDARD OF REVIEW

A motion to dismiss based on collateral attack of an underlying order of removal is reviewed de novo. See United States v. Leon-Paz, 340 F.3d 1003, 1004 (9th Cir. 2003) (citing United States v. Muro-Inclan, 249 F.3d 1180, 1182 (9th Cir. 2001)). Whether an offense constitutes an aggravated felony is a question of law and reviewed de novo. Martinez-Perez v. Gonzales, 417 F.3d 1022, 1025 (9th Cir. 2005).

B. STANDARD FOR DISMISSING AN INDICTMENT DUE TO AN INVALID UNDERLYING ORDER OF REMOVAL

The Due Process Clause of the Constitution requires that "where a determination made in an administrative proceeding is to play a critical role in the subsequent imposition of a criminal sanction, there must be some meaningful review of the administrative proceeding." United States v. Mendoza-Lopez, 481 U.S. 828, 837-38 (1987); see also United States v. Ubaldo-Figueroa, 364 F.3d 1042, 1047-48 (9th Cir. 2004). Because a removal is an element of the crime of illegal reentry after

deportation, Mr. Chavez has a Fifth Amendment right to collaterally attack the prior removal order. See Mendoza-Lopez, 481 U.S. at 837-38.

To collaterally attack a deportation successfully, Mr. Chavez must demonstrate that: 1) he exhausted all administrative remedies available to him to appeal his removal order; 2) the underlying removal proceedings at which the order was issued improperly deprived him of the opportunity for judicial review; and, 3) the entry of the order was fundamentally unfair. See 8 U.S.C. § 1326(d); Ubaldo-Figueroa, 364 F.3d at 1048.

This Court has repeatedly held that in situations where a respondent in removal proceedings is not advised of his apparent eligibility for relief, the first two requirements are satisfied. See United States v. Gonzalez, 429 F.3d 1252, 1256 (9th Cir. 2005) ("[a] waiver 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 . . . of this possibility and [to provide an] opportunity to develop the issue"); Muro-Inclan, 249 F.3d at 1183. The final requirement -- fundamental unfairness -- is satisfied where the respondent shows that he was not advised of his apparent eligibility for relief, and that he had a plausible claim for receiving such release. See Ubaldo-Figueroa, 364 F.3d at 1048.

In this case, these three requirements are reduced to three questions:

1) Was Mr. Chavez statutorily eligible for pre-conclusion voluntary departure?

2) Was Mr. Chavez improperly advised regarding his eligibility for pre-conclusion voluntary departure?

3) Did Mr. Chavez have a plausible claim for pre-conclusion voluntary departure?

The answer to each question is yes.

C. THE INDICTMENT RELIES ON AN INVALID DEPORTATION FROM AUGUST 2000

Mr. Chavez was erroneously deported as an aggravated felon by virtue of his conviction under California Health and Safety Code § 11351, and therefore precluded by the immigration judge from applying for pre-conclusion voluntary departure. Not only was Mr. Chavez eligible for voluntary departure, but he stood a plausible chance of having his request granted had he known to apply.

1. Notwithstanding Mr. Chavez's Conviction for Possession for Sale of a Controlled Substance, He Was Statutorily Eligible for Voluntary Departure

In 1996, Congress created a form of voluntary departure known as pre-conclusion or pre-hearing voluntary departure. See 8 U.S.C. § 1229c(a)(1). The Ninth Circuit has characterized these as "fast track" voluntary departures because the departure occurs before the completion of removal proceedings. United States v.

Ortiz-Lopez, 385 F.3d 1202, 1204 n.1 (9th Cir. 2004). The statute sets forth qualifications for who is eligible to apply. It states in pertinent part:

> The Attorney General may permit an alien voluntarily to depart the United States at the alien's own expense under this subsection, in lieu of being subject to proceedings under section 1229a of this title or prior to the completion of such proceedings, if the alien is not deportable under section 1227(a)(2)(A)(iii) or section 1227(a)(4)(B) of this title.

8 U.S.C. § 1229c(a)(1). Thus, only two classes of aliens are *per se* ineligible for voluntary departure: those who have been convicted of an aggravated felony under 8 U.S.C. § 1227(a)(2)(A)(iii) or of terrorist activities under 8 U.S.C. § 1227(a)(4)(B).

Mr. Chavez was not charged with being removable on national security or terrorist-related grounds. [ER 76]. Accordingly, the only possible bar to a grant of pre-conclusion voluntary departure would be an aggravated felony. The only felony specified in the Notice to Appear was Mr. Chavez's prior conviction under California Health and Safety Code § 11351, and the district court erred in finding that that conviction was an aggravated felony.

a. California Health and Safety Code § 11351 Is Categorically Overbroad to Be an Aggravated Felony Under the Immigration and Nationality Act

Mr. Chavez's 1998 conviction under § 11351 is not an aggravated felony as defined in 8 U.S.C. § 1101(a)(43)(B) because the California schedules for "controlled substances" are broader than corresponding federal schedules in the Controlled

Substances Act (CSA). This Court has held that because California criminal statutes (like § 11351) which rely on the California schedules are overbroad, something more than a simple record of judgment and conviction is required to prove removability.

In Ruiz-Vidal, which dealt with a similar California drug statute, California Health and Safety Code § 11377(a), this Court held that "in order to prove removability, the government must show that Ruiz-Vidal's criminal conviction was for possession of a substance that is not only listed under California law, but also contained in the federal schedules of the CSA." 473 F.3d at 1077-78. The Court further found that California schedules encompassed more controlled substances than did the corresponding CSA schedules, making it possible to be convicted under the state law without having violated a federal trafficking provision.

> We note that California law regulates the possession and sale of numerous substances that are not similarly regulated by the CSA. For instance, the possession of apomorphine is specifically excluded from Schedule II of the CSA, *see* 21 C.F.R. § 1308.12(b)(1), but California's Schedule II specifically includes it. *See* Cal. Health & Safety § 11055(b)(1)(G). Cal. Health & Safety Code § 11033 punishes the possession of optical and geometrical isomers; the CSA, in contrast, generally punishes the possession of optical isomers alone. 21 C.F.R. § 1300.01(b)(21). We must, therefore, conclude that the Immigration judge was in error in stating that "any substance listed in 11377 are [sic] included within the federal ambit of Section 102 of the Controlled Substances Act[;]" the simple fact of a conviction under Cal. Health & Safety Code § 11377 is insufficient.

Id. at 1078 (footnote omitted).[2] The government was unable to produce acceptable documentation narrowing Ruiz-Vidal's actual conviction to a substance listed in the CSA, because, although the charging document alleged the substance was methamphetamine, the conviction document did not so specify, and the statute of conviction differed from that charged. See id. at 1079. As one could only "speculate" whether the substance which Ruiz-Vidal was convicted of possessing fell within the CSA definition, the government had failed to establish a prior, deportable offense. Id.

In Mielewczyk, the petitioner likewise argued that the overbreadth of the California schedules rendered his conviction under Cal. Health & Safety Code § 11352(a) for transporting heroin categorically overbroad. Mielewczyk v. Holder, 575 F.3d 992 (9th Cir. 2009). Citing Ruiz-Vidal, the Court held that the state statute was overbroad, because it applied to substances not falling under the definition in 21 U.S.C. § 802(6): "Because the statutory definition of the crime in section 11352(a) embraces activity related to drugs both listed in the CSA and not listed in the CSA,

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[2] In the omitted footnote, Ruiz-Vidal notes eight additional substances that are "punishable only under California law." Id. at 1078 n.6. These additional substances are not included within the ambit of § 11351, which targets only narcotic substances included in California Schedule III. However, in addition to those substances cited in Ruiz-Vidal, California criminalizes acetylfentanyl and the thiophene analog of acetylfentanyl, Cal. Health & Safety Code § 11054(b)(45) & (46), but no federal schedule includes them.

an alien convicted under this statute is not categorically removable under 8 U.S.C. § 1227(a)(2)(B)(i)." 575 F.3d at 995. However, unlike Ruiz-Vidal, the record established that Mielewczyk indeed pled guilty to offering to transport heroin, which appears on both the state and federal schedules. See id. at 995-96.

Most recently, in Yong, the Court again followed Ruiz-Vidal to hold that Cal. Health & Safety Code § 11379 was categorically overbroad, due to its including non-CSA substances in its scope, and therefore that the petitioner was improperly deported.

> We have previously found that California law regulates the possession and sale of many substances that are not regulated by the CSA, Ruiz-Vidal, 473 F.3d at 1078, and therefore that Section 11379 is "categorically broader" than Section 1227(a)(2)(B)(i) of the INA. See Sandoval-Lua v. Gonzales, 499 F.3d 1121, 1124 (9th Cir.2007). This means that a conviction under Section 11379 does not necessarily entail a "controlled substance offense" under Section 1227(a)(2)(B)(i) of the immigration statute, and we must look further to determine whether Yong's conviction renders him removable.

Yong, 600 F.3d at 1034 (9th Cir. 2009). Also like Ruiz-Vidal, the Court found that the government's showing on the modified categorical analysis fell short, as no record documents whatever established the identity of the substance underlying the California conviction. See id. at 1035. Yong's judicial admissions to the immigration judge did not fill that gap in the record. See id. at 1035-36. The removal order was therefore vacated.

This line of cases establishes that the drugs referenced in the broader, California schedules do not qualify as "controlled substances" as defined in the CSA. Thus, where the federal drug schedules are the touchstone for immigration purposes, California offenses not tied specifically to substances covered by 21 U.S.C. § 802(6) will render those crimes categorically overbroad.

Just as this Court has held that other California drug statutes are overbroad, § 11351 is similarly overbroad because it "controls" a broader range of substances than does federal law. Section 11351 applies to:

> . . . . (1) any controlled substance specified in *subdivision (b), (c), or (e) of Section 11054,* specified in paragraph (14), (15), or (20) of subdivision (d) of Section 11054, or specified in subdivision (b) or (c) of Section 11055, or specified in subdivision (h) of Section 11056, or (2) any controlled substance classified in *Schedule III*, IV, or V which is a narcotic drug . . . .

Cal. Health & Safety Code § 11351 (emphasis added). In turn, California Health & Safety Code § 11054(b) (schedule I) identifies the following as prohibited:

> (45) Any substance which contains any quantity of acetylfentanyl (N-[1-phenethyl-4-piperindinyl] acetanilide) or a derivative thereof.
> (46) Any substance which contains any quantity of the thiophene analog of acetylfentanyl (N-[1-[2-thienyl)ethyl]-4-piperidinyl] acetanilide) or a derivative thereof.

Cal. Health & Safety Code § 11054(b)(45)-(46). California Health & Safety Code § 11056(b) (schedule III) identifies "Mazindol" as prohibited. These substances are

not "controlled substances" under the relevant federal law.[3] See 21 U.S.C. § 802(6) (defining "controlled substance" to include substances "included in schedule I, II, III, IV, or V of part B of this subchapter"); 21 U.S.C. § 812 (containing schedules I, II, III, IV, and V, and not identifying these substances as prohibited); 21 C.F.R. § 1308.11 (modifying schedule I and not identifying these substances as prohibited); 21 C.F.R. § 1308.13 (modifying schedule III and not identifying these substances as prohibited). Because the alleged § 11351 conviction could have involved a substance not "controlled" by federal law, the § 11351 conviction is too broad to be an aggravated felony. Simply put, Mr. Chavez could have sustained a § 11351 conviction without ever possessing a federally controlled substance.

b. The Conviction Records Do Not Support an Individualized Finding That Mr. Chavez Was Convicted of Trafficking in a Federally Listed Substance

The district court correctly held that Mr. Chavez's § 11351 conviction was not categorically an aggravated felony under the above-cited 9th Circuit precedent. Specifically, the court stated, "I think everyone agrees that it's not categorically an aggravated, that this California statute, you have to look at other things to decide

[3] Mr. Chavez does not mean to suggest that these substances are the only substances controlled by the relevant California, but not federal, law. There likely are others. He cites these substances by way of example.

whether it was an aggravated felony. So the modified categorical approach is what controls here." [ER 18].

However, the district court erred in applying the modified categorical approach. The court concluded: "If you add the abstract of judgment, the minute order, the plea colloquy, the information, and [the colloquy] in front of the I.J., I find that there's overwhelming evidence... that this would qualify as [an aggravated felony] conviction under the Immigration and Nationality Act." [ER 22] This conclusion is wrong; the evidence does not establish by clear, unequivocal and convincing evidence that the substance of Mr. Chavez's conviction was a federally-controlled substance.

i. The Conviction Documents Do Not Satisfy the Modified Categorical Approach

The written record of conviction for the § 11351 is limited to the abstract of judgment, the minute order, and the information. Neither the abstract of judgment nor the minute order recording the plea colloquy makes any mention of the type of drug that Mr. Chavez possessed. [ER 70-73]. The only written mention of the type of drug, "to wit, cocaine," is found in the information, [ER 74], and the information alone is insufficient to prove that Mr. Chavez was guilty of a federal trafficking offense.

This Court has "repeatedly held" that charging documents alone are insufficient to establish the facts of a conviction. Vidal, 504 F.3d at 1088 (citing United States v. Snellenberger, 493 F.3d 1015, 1019 (9th Cir. 2007), which cites Ruiz-Vidal, 473 F.3d at 1078). Furthermore, "In order to identify a conviction as the generic offense through the modified categorical approach, when the record of conviction comprises only the indictment and the judgment, the judgment must contain 'the critical phrase "as charged in the Information."'" Vidal, 504 F.3d at 1088 (quoting Li v. Ashcroft, 389 F.3d 892, 898 (9th Cir. 2004)). This Court reasoned that without such critical language, there would be no way of knowing from the judgment whether the defendant assented to -- or was even aware of -- the facts in the charging document. See id. at 1087.

The judgment in Mr. Chavez's case indicates that he was convicted of Count One, but does not include the critical phrase, "as charged in the information." [ER 70]. Nor does the plea colloquy -- which will be discussed in detail below -- indicate that he was pleading "as charged in the information." [ER 45-47]. For this reason, the information and other written conviction documents are insufficient under the en banc decision in Vidal to establish by clear, unequivocal, and convincing evidence that the substance of conviction was a federally controlled substance.

ii. The Plea Colloquy Does Not Satisfy the Modified Categorical Approach

The plea colloquy's reference to the type of drug - "in this case, cocaine" - is similarly insufficient because Mr. Chavez pled no contest to the charge, [ER 47]. In entering this plea, Mr. Chavez did not adopt any of the facts alleged in the colloquy.

This Court has held that a plea of nolo contendere "is a special creature under the law. It is, first and foremost, not an admission of factual guilt. It merely allows the defendant so pleading to waive a trial and to authorize the court to treat him as if he were guilty." Nguyen, 465 F.3d at 1130; accord Vidal, 504 F.3d at 1089. In Nguyen, this Court held that a certified judgment of conviction was insufficient to prove that the defendant had actually committed the underlying criminal conduct because the plea was entered nolo contendere. See Nguyen, 465 F.3d at 1130. While the government wished to rely on the certified judgment to argue that the defendant had wilfully failed to abide by the conditions of his supervised release, this Court held that the law did not support the inference. Id. (cited with approval by Vidal, 504 F.3d at 1089); see also 1A Charles Alan Wright & Andrew D. Leipold, Federal Practice & Procedure § 175 (4th ed. 2010).

Just as the government in Nguyen could not rely on a certified judgment from a nolo contendere plea to infer that the defendant committed the underlying offense,

here the government cannot rely on Mr. Chavez's nolo contendere plea to prove that he committed the conduct set forth by the prosecutor in the plea colloquy (to wit, trafficking in cocaine). Therefore, the district court erred in relying on the plea colloquy to make an individualized determination of the type of drug involved in the offense.

iii. Mr. Chavez's Statements to the Immigration Judge Do Not Satisfy the Modified Categorical Approach

The district court erred in relying on Mr. Chavez's uncounseled admissions to the immigration judge to establish the substance of conviction. In Yong, this Court rejected the contention that an immigration judge could use a defendant's oral admissions to satisfy the modified categorical approach as to the type of controlled substance.

Yong was a lawful permanent resident charged with being deportable for a controlled substance offense. See Yong, 600 F.3d at 1030-31. Yong's alleged predicate state conviction was California Health and Safety Code § 11379(a), id., which is categorically overbroad. See Sandoval-Lua v. Gonzalez, 499 F.3d 1121, 1124 (9th Cir. 2007). To prove that Yong's conviction under § 11379(a) was in fact a controlled substance offense under the modified categorical approach, the government first showed the immigration judge an unspecified conviction document.

Yong, 600 F.3d at 1031-32. The immigration judge then asked Yong what the underlying substance had been, and used those admissions to find that Yong's § 11379(a) conviction fell within the ambit of controlled substance offenses as defined by the INA. Id. This Court found that the immigration judge's reliance on the defendant's oral admissions was improper:

> We have also rejected the argument the government makes here, that we should make an exception to the 'narrow, carefully circumscribed scope of *Taylor* inquiries' to permit consideration of alien's admissions to the immigration judge regarding the nature of his criminal conduct...the government argues that Yong's admissions alone constituted clear, convincing, and unequivocal evidence that he was removable. Our case law is explicitly to the contrary.

600 F.3d at 1035-36.

2. Mr. Chavez Was Never Advised of His Apparent Eligibility for Pre-Conclusion Voluntary Departure.

Since Mr. Chavez was eligible for voluntary departure at his 2000 removal hearing, the second question in the due process analysis is whether the immigration judge correctly advised him of his eligibility. This Court has repeatedly held that due process requires an immigration judge to inform an individual of his eligibility for potential relief. Ubaldo-Figueroa, 364 F.3d at 1050 (defendant eligible for INA § 212(c) relief); United States v.Gonzalez-Valerio, 342 F.3d 1051, 1054 (9th Cir. 2003) (defendant eligible for INA § 212(c) relief); Muro-Inclan, 249 F.3d at 1183-84 (defendant eligible for INA § 212(h) relief).

Mr. Chavez's removal proceeding was brief. [ER 42-43]. The immigration judge never mentioned voluntary departure and failed to advise Mr. Chavez of his eligibility for that form of relief. Id. This was error since he (a) was eligible, and (b) had readily available equities to present if asked.

3. Mr. Chavez Had a Plausible Claim for Pre-Conclusion Voluntary Departure

Next, Mr. Chavez must show that prejudice resulted from the failure to offer voluntary departure at his removal hearing. See United States v. Proa-Tovar, 975 F.2d 592, 595 (9th Cir. 1992). However, Mr. Chavez need not show that he would actually have been granted relief; he need only show that he had a "plausible" legal challenge to his removal order. Ubaldo-Figueroa, 364 F.3d at 1050. Mr. Chavez had a plausible claim for relief under 8 U.S.C. § 1229c(a).

The enactment of § 1229c(a) in 1996 created a new form of voluntary departure whose primary focus was minimizing administrative burdens associated with lawful physical expulsion of illegal aliens—by requiring waiver of the right to a complete hearing, eliminating the availability of judicial review and stays of the time period for departure. Compare 8 U.S.C. § 1229c(a) (relief available "in lieu of being subject to proceedings under section 1229a of this title or prior to the completion of such proceedings") with 8 U.S.C. § 1254 (1995) (repealed by Pub. L. 104-208 (Sept. 30,

1996)) (requiring a showing of good moral character but not waiver of proceedings).

Within the current immigration scheme, voluntary departure "reveals Congress' intention to offer an alien a specific benefit—exemption from the ordinary bars on subsequent lawful admission—in return for a quick departure." Banda-Ortiz v. Gonzales, 445 F.3d 387, 390 (5th Cir. 2006). Numerous courts have noted that immigration judges may look favorably upon applications for pre-conclusion voluntary departure because they permit quick and efficient disposition of numerous cases on the docket, where appropriate. See Zamudio-Pena v. Holder, 333 F. App'x 165, 168 (9th Cir. 2009); In re Arguelles-Campos, 22 I. & N. Dec. 811, 817 (BIA 1999).

Voluntary departure is a lesser form of relief than other forms of relief, such as waivers of inadmissibility or cancellation of removal. See United States v. Alcazar-Bustos, 382 F. App'x 568, 570 (9th Cir. 2010). The standard for obtaining such relief, therefore, is less stringent. Id. This Court recently overturned a district court's denial of an 8 U.S.C. § 1326(d) motion on the grounds of voluntary departure. Id. The unpublished memorandum succinctly sets forth the proper legal standard for evaluating prejudice with respect to voluntary departure:

> An IJ has broader authority to grant preconclusion voluntary departure than some other forms of immigration relief. On collateral attack, a court reviewing a removal order must determine whether the defendant has a plausible ground

> for relief. On the one hand, a defendant does not need to show that he would have been granted relief if his hearing had been error-free. On the other hand, a showing of the mere existence of factors favoring relief from deportation does not definitively establish that relief is plausible. In effect, removable aliens seeking voluntary departure fall on a continuum between those who have no criminal record at all and significant positive ties to the United States, and those who have serious records and no countervailing equities. For individuals between these extremes, the question of plausibility requires a closer examination of the facts and comparison with similar cases.

Alcazar-Bustos, 382 F. App'x at 570 (internal cites omitted).

The factors to be considered in a request for voluntary departure are well-established. See, e.g., Campos-Granillo v. I.N.S., 12 F.3d 849, 852 n.8 (9th Cir. 1993); Arguelles-Campos, 22 I. & N. Dec. at 817. Positive factors include family ties within the United States; residence of long duration here, especially if such residence began at a young age; hardship to the applicant's family if relief is not granted; a history of employment; and evidence of value and service to the community. See Campos-Granillo, 12 F.3d at 852 n.8. Negative factors include the existence, seriousness, and recency of any criminal record; the nature and circumstances of the deportation ground at issue; and any other information indicating bad character or undesirability. Id.

Mr. Chavez is a strong candidate for pre-conclusion voluntary departure. He was brought to the United States at the age of 16 or 17, at the behest of his parents. [ER 67-68]. He graduated from high school in Los Angeles and had worked at a local

factory for his entire adult life. Id. Mr. Chavez's entire extended family lived in California, including both of his parents and his five siblings. Id. By August 2000, many of his family members had obtained status to live legally in the United States. Id. Mr. Chavez was in a serious, committed relationship with a young woman who was a United States citizen, and the two would have gotten married in the future. Id. Together, they had two young citizen daughters. Id.

Mr. Chavez's wrongful deportation as an aggravated felon was particularly devastating because a grant of voluntary departure would have permitted him to reapply for admission to the United States at a future time. Had Mr. Chavez not been subject to deportation as an aggravated felon, he would have married his long-term girlfriend, [ER 68], and she could have applied for a fiancé visa on his behalf. Alternately, had Mr. Chavez been granted voluntary departure, any of his qualifying family members could have sought his admission into the United States by filing a Form I-130 Petition for Alien Relative. See 8 U.S.C. § 1182(a)(9)(A)(iii).

The equities in Mr. Chavez's case are similar to those in two recent unpublished memorandum opinions from this Court. As noted above, in Alcazar-Bustos, this Court overturned the district court's denial of a § 1326(d) motion. The Court applied the Ubaldo-Figueroa prejudice standard and ruled that "it is plausible that the IJ would have exercised discretion to grant voluntary departure." 382 F. App'x at 569.

Defendant Alcazar was approximately 23 years old and had lived in the United States since infancy. See id. at 570. He was married to a United States citizen and had one citizen child. See id. His criminal record included three juvenile adjudications and two firearms convictions (from his teens) that resulted in prison sentences. See id.

Similarly, in United States v. Vasallo-Martinez, this Court overturned the district court's denial of a § 1326(d) motion, finding that the defendant had plausible grounds for voluntary departure and was therefore prejudiced by a stipulated removal. 360 F. App'x 731 (9th Cir. 2009). The court ruled, "We disagree with the district court's conclusion that it was not likely or plausible that the IJ would have exercised his discretion to grant Vasallo fast-track voluntary departure. The district court erroneously focused exclusively on Vasallo's four convictions for Driving Under the Influence and three unrelated misdemeanors in analyzing plausibility." Id. at 732. Defendant Vasallo entered the United States as a young child and lived here for 21 years. Id. at 733. He graduated from high school, attended church, and owned an automotive business. Id. His only family lived in the United States; he resided in California with his United States citizen wife of six years and their three-year-old citizen child. Id.

Particularly focusing on the issue of Vasallo's prior criminal history, this Court noted a number of cases where the BIA had affirmed the grant of voluntary departure

or remanded to the immigration judge to consider voluntary departure for aliens with significant criminal histories. See Vasallo-Martinez, 360 F. App'x at 732. These included cases where the alien had four convictions for assault, one conviction for resisting arrest, and numerous arrests, In re Gonzalez-Figeroa, 2006 WL 729784 (BIA Feb. 10, 2006); where the alien had six criminal convictions including battery, drunkenness, and a DUI, In re Pineda-Castellanos, 2005 WL 3833024 (BIA Nov. 16, 2005); where the alien had committed robbery, identity theft, use of a false name, and was arrested for DUI, In re Guillermo Ramirez, 2005 WL 698425 (BIA Mar. 8, 2005); and where the alien was convicted of DUI, burglary and disorderly conduct, In re Reyes-Jimenez, 2004 WL 2418597 (BIA Oct. 4, 2004). The lesson to be taken from these numerous remands in the face of criminal convictions is that courts are not to focus exclusively on criminal convictions in determining the plausibility of relief.

In United States v. Martinez-Zavala, the district court held that a defendant's due process rights were violated and he suffered prejudice when the immigration judge failed to advise of voluntary departure. 2009 WL 3248103 (S.D. Cal., Oct. 9, 2009). The factors in Mr. Martinez's favor were that his parents were lawful permanent residents and that he had lived 18 years in the United States, beginning at a young age. See id. at *5. His criminal history included juvenile adjudications for burglary and a possession of a firearm, and a very recent adult conviction for

possession of a concealed dagger. See id. The district court concluded its discussion by saying: "The Court cannot say with certainty how an IJ would have chosen to exercise his discretion. However, because Martinez-Zavala met both statutory requirements [not having been convicted of an aggravated felony or act of terrorism], and had favorable and unfavorable factors weighing relatively equally in his case, the Court finds that he has demonstrated 'plausible grounds for relief.'" Id.

The equities in Mr. Chavez's case support a finding that pre-conclusion voluntary departure was plausible. By precluding Mr. Chavez from applying for the relief for which he was eligible, the deportation proceeding prevented Mr. Chavez -- a hard-working father with strong ties to the United States -- from seeking readmission into the United States. Because the district court improperly held that the evidence clearly, unequivocally, and convincingly established his prior conviction as an aggravated felony, the district court improperly held that Mr. Chavez was ineligible for this relief, [ER 23].

D. THE INDICTMENT RELIES ON AN INVALID ADMINISTRATIVE REMOVAL FROM MAY 2005

In May 2005, Mr. Chavez was removed from the United States as an aggravated felon on account of his prior conviction for Possession for Sale of a Controlled Substance. [ER 86-89]. Mr. Chavez was removed pursuant to a Final

Administrative Removal Order under INA § 237(b), 8 U.S.C. § 1228(a), following an INS officer's finding that "you are deportable as an alien convicted of an aggravated felony pursuant to section 237(a)(2)(A)(iii) of the Act." [ER 89].

As noted above, any defendant in a 8 U.S.C. § 1326 prosecution must have the meaningful opportunity to attack the validity of the underlying orders of removal under the due process clause of the Fifth Amendment under Mendoza-Lopez, 481 U.S. at 838. This Court has held that a defendant may challenge an expedited removal under § 1326(d) as well as an order of deportation. See United States v. Garcia-Martinez, 228 F.3d 956 (9th Cir. 2000) (denying the defendant's challenge to his expedited removal on the merits); United States v. Hernandez-Vermudez, 356 F.3d 1011 (9th Cir. 2004) (reviewing the district court's grant of the defendant's § 1326(d) challenge to an expedited removal).

In Garcia-Martinez, this Court adopted a two-prong approach to a collateral challenge to an expedited removal. See 228 F.3d at 960. This Court held that in order to succeed on a § 1326(d) attack of an expedited removal, the defendant must show both a due process violation and prejudice (that is, plausible grounds for relief). See id. Mr. Garcia argued that his expedited removal was invalid because it was conducted by an inherently biased adjudicator, an officer of the Immigration and

Naturalization Service. See id. at 959. Ultimately this Court denied the motion on both prongs. See id. at 963.

An earlier case from this Court suggests that Mr. Chavez's challenge to his expedited removal may be subject to an even less stringent standard of proof than that required to collaterally attack a removal order by an immigration judge. Instead of showing a due process violation and prejudice, Mr. Chavez need only show that the administrative removal procedure followed in his case did not comply with agency regulations and that the lack of compliance prejudiced his interests in the proceedings. See United States v. Calderon-Medina, 591 F.2d 529, 531-32 (9th Cir. 1979). It is sufficient for Mr. Chavez to show that violation of the regulation "harmed [his] interests in such a way as to affect potentially the outcome" of the proceedings. Id. at 532. At least, then, the standard of proof to challenge an expedited removal is no higher than for any other relief, and may be lower.

1. Because Mr. Chavez Was Incorrectly Determined to Be an Aggravated Felon, He Was Not Removable As Charged

Only individuals who have a prior criminal conviction that is determined to be an aggravated felony may be placed in a Final Administrative Removal under §

1228(a).[4] The removals are executed by INS officers rather than by an immigration judge, and individuals in these proceedings are presumed to be removable. See 8 U.S.C. § 1228(c). Furthermore, no discretionary relief is available. See [ER 86-89].

In an immigration proceeding, the government must prove by "clear, unequivocal, and convincing evidence that the facts alleged as grounds of [removability] are true." Gameros-Hernandez v. INS, 883 F.3d 839, 841 (9th Cir. 1989). The strict requirements of the expedited removal statute mandate that "[t]he determination [of removability] shall be based only on evidence produced at the hearing." 8 U.S.C. § 1229a(c)(1)(A), (c)(3)(B).

Here, Mr. Chavez's due process rights were violated when he was improperly determined to be an aggravated felon. The Notice of Intent to Issue a Final Adminstrative Removal Order alleged that Mr. Chavez was deportable as an aggravated felon because of his prior conviction under "Section 11351 of the California Health and Safety Code" dated "December 10th, 1998." [ER 86]. However, as discussed above, § 11351 is categorically overbroad to be an aggravated felony under the Immigration and Nationality Act, and the conviction

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[4]Final Administrative Removals under 8 U.S.C. § 1228(a) are also known as Expedited Removals.

records from Mr. Chavez's case do not sufficiently narrow the offense to the generic crime.

2. Because Mr. Chavez Was Not Removable As Charged, He Was *Per Se* Prejudiced

Mr. Chavez's expedited removal constituted *per se* prejudice because he was not removable as charged. He was erroneously placed in expedited removal proceedings without the opportunity to speak to an immigration judge or apply for any form of relief. This situation parallels that addressed by this Court in United States v. Camacho-Lopez, where the defendant was incorrectly removed as an aggravated felon for a crime that was not actually an aggravated felony. 450 F.3d 928 (9th Cir. 2006). This court held: "Camacho's Notice to Appear charged him as removable only for having committed an aggravated felony; as discussed above, Camacho's prior conviction did not fit that definition. Thus, Camacho was removed when he should not have been and clearly suffered prejudice." Id. at 930.

The flawed 2005 removal denied Mr. Chavez two major rights: (a) a hearing, and (b) the right to seek relief. Both of these rights were denied on the erroneous premise that Mr. Chavez was an aggravated felon, and therefore Mr. Chavez suffered prejudice.

3. The 2005 Expedited Removal Is Essentially a Reinstatement of the 2000 Order of Removal and Fails on the Same Legal Grounds

The 2005 expedited removal is essentially analogous to a reinstatement of Mr. Chavez's original 2000 order of removal. 8 U.S.C. § 1231(a)(5) permits immigration officials to reinstate prior removal orders of aliens who illegally reenter the United States, without going through the formal administrative procedures of a deportation or consulting an immigration judge. See 8 U.S.C. § 1231(a)(5). This Court has described a reinstatement as "an administrative procedure... bypassing the procedural requirements, and protections, of a regular removal proceeding." United States v. Arias-Ordonez, 597 F.3d 972, 978 (9th Cir. 2010).

Mr. Chavez's 2005 expedited removal is comparable to a reinstatement of his 2000 removal order because on both occasions, Mr. Chavez was removed as an aggravated felon by virtue of his 1998 prior conviction. Each of the Notice to Appears in the 2000 and 2005 removals pointed to the same prior conviction for possession of a controlled substance for sale as the underlying convictions giving rise to the removal. The 2005 expedited removal thus relies on the same flawed premise as the 2000 removal order.

In Arias-Ordonez, this Court held that when "the original removal was statutorily and constitutionally flawed, so the reinstatements stand on no stronger legal basis." 597 F.3d at 978 (9th Cir. 2010). By this same logic, Mr. Chavez's expedited removal must fall on the same statutory and constitutional defects as the original 2000 order of removal.

VIII.

CONCLUSION

Mr. Chavez has twice been improperly removed because immigration officials believed that his prior conviction for possession of a controlled substance for sale constituted an aggravated felony. This Court's rulings have established the statute of Mr. Chavez's conviction to be categorically overbroad because it criminalizes trafficking in substances not contemplated by the federal controlled substance statutes. The district court erred in finding the record of Mr. Chavez's conviction sufficient to conclude that his prior conviction was an aggravated felony. Because of this error, Mr. Chavez was precluded from applying for voluntary departure in

2000, relief that would have plausibly been granted. And because of this error, Mr. Chavez was improperly placed in expedited removal proceedings with no available relief. For these reasons, Mr. Chavez's conviction should be reversed.

Respectfully submitted,

s/ Karen C. Lehmann

DATED: March 17, 2011

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CERTIFICATE OF RELATED CASES

Defense counsel is not aware of any related cases.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. 32(A)(7)(C) AND CIRCUIT RULE 32-1 FOR CASE NUMBER 10-50615

I certify that: (check appropriate options(s))

X 1. Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached opening appeal brief is

× Proportionately spaced, has a typeface of 14 points or more and contains 8,076 words (opening, ~~answering, and the second and third briefs filed in cross-appeals~~ must NOT exceed 14,000 words; reply briefs must NOT exceed 7,000 words),

3/17/2011
Date

s/ Karen C. Lehmann
KAREN C. LEHMANN, Esq.
Attorney for Mr. Chavez

Certificate of Service When All Case Participants Are CM/ECF Participants

I hereby certify that on *March 17, 2011*, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system. I have also served the EXCERPT OR RECORD to counsel for Plaintiff-Appellee by mailing a copy by U.S. First Class Mail, Postage Prepaid on March 17, 2011.

I certify the foregoing is true and correct.

s/ *Karen C. Lehmann*
KAREN C. LEHMANN