No. 15-___

IN THE

Supreme Court of the United States

GABRIELA CORDOVA-SOTO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether due process applies to a removal proceeding where discretionary relief from removal is at issue.

PARTIES TO THE PROCEEDING

Petitioner is Gabriela Cordova-Soto, who was appellant in the court of appeals. Respondent is the United States of America, which was appellee in the court of appeals.

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The decision of the United States Court of Appeals for the Fifth Circuit (Pet. App. 1a-19a) is reported at 804 F.3d 714. The decision of the United States District Court for the Western District of Texas is not reported, but is reproduced at Pet. App. 20a-34a.

JURISDICTION

The judgment of the U.S. Court of Appeals for the Fifth Circuit was entered on October 23, 2015. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The text of the relevant statutory provisions is set forth in the appendix.

INTRODUCTION

This case squarely presents a recurring question that has divided the federal courts of appeals for a decade: whether the Fifth Amendment's Due Process Clause applies where an alien is seeking discretionary relief from removal in a federal immigration proceeding.

The Second and Ninth Circuits have held that it does. To the contrary, the Fifth Circuit below and eight other courts of appeals have held that due process is not offended where, for example, an immigration judge ("IJ") concludes that an alien is ineligible for discretionary relief from removal by wholly arbitrary means.

The majority rule is impossible to square with this Court's longstanding due process precedents.

Given that this critical issue is implicated in many thousands of criminal prosecutions for illegal reentry each year, as well as thousands more immigration proceedings, the Court's intervention is urgently needed to ensure fair and uniform treatment of aliens across the country.

STATEMENT OF THE CASE

A. Petitioner Gabriela Cordova-Soto entered the United States in 1978, when she was nine months old. Pet. App. 2a, 81a. In 1991, at the age of 13, Ms. Cordova became a lawful permanent resident. Pet. App. 2a. Ms. Cordova's husband is a U.S. citizen. Pet. App. 81a. She and her husband have four children, all of whom are U.S. citizens, as are all of Ms. Cordova's siblings. Pet. App. 81a-82a.

Ms. Cordova was convicted of misdemeanor theft in 2002, and the following year of giving a worthless check. Pet. App. 2a. Then, in 2005, she pled guilty to possession of methamphetamine, which was categorized as a felony offense in Kansas, and was sentenced to probation. Pet. App. 2a, 84a.

Immediately thereafter, Immigration and Customs Enforcement ("ICE") agents detained Ms. Cordova, and the government initiated removal proceedings against her. She was served with a Notice to Appear in October 2005. Pet. App. 40a. The notice alleged that she was removable on three grounds: (1) as an alien convicted of an aggravated felony, based on her 2005 methamphetamine conviction; (2) as an alien convicted of two crimes of moral turpitude, based on her 2002 and 2003 convictions for theft and giving a worthless check; and (3) as an alien convicted of violating a law relating to a con-

trolled substance, again based on her 2005 methamphetamine conviction. Pet. App. 94a-95a.

At the ICE processing center, an ICE agent handed Ms. Cordova a stipulation to removal form and advised her that she should sign it to be removed quickly. Pet. App. 2a, 42a-46a, 85a. Specifically, the ICE agent misinformed her that, regardless whether she signed the stipulation, she would be removed, and that any attempts to challenge her removal would serve only to prolong her detention. *Id*.

Ms. Cordova had powerful incentives to pursue any possible avenue for avoiding removal. Specifically, Ms. Cordova's youngest child was less than a year old, and her three other children all were under the age of ten. Pet. App. 81a-82a. Her children and their father all are U.S. citizens, and Ms. Cordova herself had lived in the United States since infancy. *Id*. Removal to Mexico thus would have separated Ms. Cordova from her family unless they left the country too. Either alternative, of course, promised extreme hardship for all of them. But notwithstanding the strength of Ms. Cordova's reasons to pursue avenues to avoid removal, the ICE agent told her that she had none. Pet. App. 2a.

Ms. Cordova waived her rights to an immigration hearing, to challenge the charges against her, and to appellate review, based on the misinformation provided by the ICE agent. Pet. App. 42a-46a. Six days later, the ICE agent countersigned the stipulation, attesting that he had explained the stipulation to Ms. Cordova. Pet. App. 47a.

The government submitted the *pro se* stipulation to removal to the Chicago immigration court. Pet.

App. 40a-41a. Based on Ms. Cordova's stipulation alone, and without holding a hearing, the IJ entered a removal order on November 8, 2005, and she was then removed to Mexico. *Id.*[1]

B. The government's representation that Ms. Cordova had no way to avoid removal was wrong. As this Court later explained, her state drug conviction for simple possession was not an "aggravated felony" for purposes of federal immigration law, so she could have applied for and received cancellation of removal. *See Lopez v. Gonzales*, 549 U.S. 47, 53-55, 57 (2006) (concluding state drug conviction is an aggravated felony for purposes of federal immigration law only where it would be a felony under federal law or falls within general term "illicit trafficking").[2] Thus, the primary ground for removal charged by the government—*i.e.*, conviction of an aggravated felony—was invalid. And, unlike an aggravated-felony conviction (for which a noncitizen is "conclusively presumed to be deportable," 8 U.S.C. § 1228(c)), the government's two other grounds for removal did not preclude Ms. Cordova from applying for and receiving cancellation of removal.

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[1] One consequence of this removal order is that Ms. Cordova is permanently inadmissible. *See* 8 U.S.C. § 1182.

[2] Of course, the Court's construction of the term "aggravated felony in *Lopez* in 2006 did not change the law from what it was when the ICE agent advised Ms. Cordova in 2005. *See Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 313 n.12 (1994). Rather, it "explain[ed] its understanding of what the statute has meant continuously since the date when it became law." *Id.*

In fact, the ICE agent's advice that Ms. Cordova was foreclosed from challenging removal was obviously incorrect even without the benefit of this Court's later decision so holding. At the time Ms. Cordova signed the stipulation, the Board of Immigration Appeals ("BIA") itself acknowledged that the question of whether simple possession constituted an aggravated felony was hotly disputed among the courts of appeals. *In re Yanez-Garcia*, 23 I. & N. Dec. 390, 394-97 (BIA 2002). And, the question was fully briefed and awaiting oral argument in the Seventh Circuit, *see Gonzales-Gomez v. Achim*, 441 F.3d 532 (7th Cir. 2006)—the circuit whose law governed Ms. Cordova's proceedings—and was also raised in the *Lopez* petition for certiorari, 549 U.S. 47 (filed Oct. 31, 2005).

C. Following reentry to the United States and reunification with her children, in 2010 Ms. Cordova was detected by local law enforcement in Kansas, arrested at home, and taken into custody by the Department of Homeland Security ("DHS"), which reinstated her original order of removal. Pet. App. 3a. Ms. Cordova was again removed to Mexico. *Id.*

In September 2012, Ms. Cordova was arrested in the Western District of Texas and indicted for illegal reentry in violation of 8 U.S.C. § 1326. Pet. App. 5a. She filed a motion to dismiss the indictment. Pet. App. 64a-79a. In that motion, pursuant to § 1326(d), Ms. Cordova sought to collaterally attack the removal order underlying her indictment by showing that (1) she exhausted administrative remedies available against the underlying removal order; (2) the removal proceedings deprived her of the opportunity for judicial review; and (3) the entry of the removal order

was fundamentally unfair in violation of due process. Pet. App. 71a-78a.

Specifically, Ms. Cordova asserted that the 2005 removal order underlying the indictment was invalid because an ICE agent told her that "she was going to be deported" regardless of her actions, without acknowledging "that the law concerning simple drug possession was in flux," and that this advice "persuaded Cordova to sign" the stipulation of removal. Pet. App. 67a. Based on these facts, Ms. Cordova argued that, had the IJ considered the validity of the stipulation, she would have concluded that the stipulation was invalid and would not have entered the removal order, making the entry of the removal order fundamentally unfair. Pet. App. 71a-74a.

The district court denied the motion. The court first rejected Ms. Cordova's reliance on the Ninth Circuit's standard for evaluating a § 1326(d) motion, concluding that "the various case law submitted by the Defendant emanating from the Ninth Circuit will not be accepted by this Court as particularly persuasive, in as much as it is in conflict with already-settled Fifth Circuit case law." Pet. App. 26a n.6. The court then held that Ms. Cordova had not demonstrated fundamental unfairness because the "Stipulation and initial order of removal comported with all due process considerations given to aliens in immigration court proceedings." Pet. App. 30a. The district court then added, "assuming, *arguendo*, that the Defendant could have sufficiently shown that the underlying removal order was fundamentally unfair and that she exhausted all opportunities for judicial review," she could not show prejudice. Pet. App. 31a. Specifically, the court reasoned that even if Ms. Cor-

dova had successfully challenged the aggravated felony charge, the government could have sought her removal "on the two other grounds." Pet. App. 33a-34a.

Ms. Cordova then entered a conditional guilty plea, preserving her right to appeal the denial of her motion to dismiss the indictment. Pet. App. 12a n.6. After being sentenced to time served, she was removed to Mexico. She timely appealed the decision to the U.S. Court of Appeals for the Fifth Circuit. Pet. App. 1a.

D. On October 23, 2015, the Fifth Circuit issued a published decision affirming the district court's denial of Ms. Cordova's motion to dismiss the indictment for illegal reentry. Pet. App. 1a.

The Fifth Circuit rejected Ms. Cordova's contentions that the removal order was fundamentally unfair, and also that she had exhausted administrative remedies and been denied judicial review. Pet. App. 8a-19a,

On the fundamental fairness question, the court concluded that the IJ's failure to make an express determination that Ms. Cordova's stipulation to removal was valid as required by 8 C.F.R. § 1003.25 did not violate due process. The court reasoned that she was provided the same procedures as the alien in *United States v. Benitez-Villafuerte*, 186 F.3d 651 (5th Cir. 1999), and the record supported an implicit finding that the IJ determined the waiver was valid because Ms. Cordova spoke English. Pet. App. 12a-14a.

Regarding her claim that the misinformation from the ICE agent rendered her stipulation to re-

moval invalid, and the removal order fundamentally unfair, the Fifth Circuit stated that plain error review applied. But it then held that, as a matter of law, the argument was squarely foreclosed by its precedent in *United States v. Lopez-Ortiz*, 313 F.3d 225 (5th Cir. 2002). Pet. App. 12a-13a. Specifically, Ms. Cordova could not show that her removal order was fundamentally unfair based on "misinformation about the possibility of obtaining relief" because an "alien's eligibility for discretionary relief from removal is not a liberty or property interest deserving of due process protection" and it was "undisputed that the cancellation of removal at issue in the instant case constitutes discretionary relief." Pet. App. 15a-16a (citing *Lopez-Ortiz*, 313 F.3d at 231). Because due process does not attach to proceedings where discretionary relief is at issue, the court explained, "an IJ's failure to explain the eligibility for such relief," (or, an immigration officer's failure to do the same) could not, as a matter of law, be fundamentally unfair. Pet. App. 16a.

The court acknowledged that the rule in *Lopez-Ortiz* conflicts with decisions of the Second and Ninth Circuits. Pet. App. 17a. It also noted that Ms. Cordova had preserved her right to challenge that rule before this Court. Pet. App. 17a.

The Fifth Circuit also held, for the same reasons that Ms. Cordova had not shown fundamental unfairness, she could not demonstrate prejudice from the ICE agent's "misinformation regarding her eligibility to avoid removal." Pet. App. 16a. She could not show "the agent's advice prejudiced her," the court opined, because there was "no reason to believe that the IJ would have given her different advice

with respect to her eligibility for cancellation of removal." Pet. App. 18a. The court further concluded that its determination that Ms. Cordova's removal was valid and not fundamentally unfair prevented her from establishing the other requirements of § 1326(d), that she exhausted her administrative remedies and was deprived of judicial review. Pet. App. 19a.

REASONS FOR GRANTING THE PETITION

The Court should grant Ms. Cordova's petition for a writ of certiorari.

First, there is a deep and intractable circuit split on the question presented, with eight circuits adhering to the rule applied by the Fifth Circuit in this case, and the Second and Ninth Circuits applying a directly conflicting rule.

Second, the question presented is a legal issue of critical importance. Whether due process applies to immigration proceedings where discretionary relief is at issue impacts countless aliens in criminal prosecutions for illegal reentry, as well as in immigration proceedings across the country. The square conflict among the federal appellate courts means that a lawful permanent resident's ability to remain in this country, or a defendant's criminal liability for illegal reentry, can (and often does) turn entirely on the location of the proceedings.

Third, this case is an excellent vehicle for resolving this question because it was fully developed below and is dispositive of Ms. Cordova's criminal liability.

And, *fourth*, and finally, the Fifth Circuit's decision is manifestly incorrect and contrary to this Court's long-established due process precedents.

I. THE LOWER COURTS ARE DEEPLY AND INTRACTABLY DIVIDED ON WHETHER DUE PROCESS APPLIES TO A REMOVAL PROCEEDING WHERE DISCRETIONARY RELIEF IS AT ISSUE

The Court should grant this petition to resolve the square conflict involving eleven federal appellate courts as to whether due process applies to an alien's removal proceeding where discretionary relief from removal is at issue.

A. As the Fifth Circuit acknowledged in its published decision below, its holding that Ms. Cordova was foreclosed from showing that her removal proceeding violated due process conflicts with decisions of the Second and Ninth Circuits. Pet. App. 17a.

In *United States v. Copeland*, 376 F.3d 61 (2d Cir. 2004), the Second Circuit held that an IJ's failure to inform an alien about the availability of discretionary relief—Section 212(c) relief—was a fundamental procedural error violating due process. *Id.* at 71. The court concluded that even where the only relief available to the alien was discretionary and was "not constitutionally mandated," that did not preclude him from showing that the removal proceedings violated due process. *Id.* It stated that the decisions of the "majority of circuits" holding that due process does not attach where discretionary relief is at issue improperly collapse the "distinction between a right to seek relief and the right to that relief itself." *Id.* at 70-72 (citing *Lopez-Ortiz*, 313

F.3d at 231). Further, these courts "incorrectly assume that, because the grant of Section 212(c) relief is itself discretionary, the denial of a Section 212(c) hearing cannot be a fundamental procedural error." *Id*. at 72.

The Ninth Circuit adheres to the same rule as the Second. *See United States v. Lopez-Velasquez*, 629 F.3d 894, 897 n.2 (9th Cir. 2010) (en banc) (stating that the Second and Ninth Circuits both apply due process protections to proceedings involving discretionary relief which is different than the rule applied in "most other circuits"); *United States v. Ubaldo-Figueroa*, 364 F.3d 1042, 1048 (9th Cir. 2004) (holding due process applied to removal proceeding where the only "plausible challenge to [the alien's] removal order" was "the fact that he was eligible for relief under former INA § 212(c)," a form of discretionary relief).

These circuits together—the Second and the Ninth—resolve fully seventy percent of immigration appeals annually. U.S. Courts, *Judicial Business 2014—U.S. Court of Appeals* (2014).

B. The Fifth Circuit, to the contrary, has long held that due process has no application to immigration proceedings where discretionary relief is at issue because discretionary relief "is not a right protected by due process." Pet. App. 16a (citing *Lopez-Ortiz*, 313 F.3d at 231). Indeed, as the decision below noted, "[a] majority of circuits," including the First, Third, Fourth, Sixth, Seventh, Eighth, Tenth, and Eleventh Circuits, have all adopted the Fifth Circuit's sweeping rule. Pet. App. 17a (identifying split and citing representative cases).

Specifically, the First, Third, Seventh, and Tenth Circuits have, in the context of evaluating an indictment for illegal reentry, held that due process does not attach to a removal proceeding where discretionary relief is at issue. *See, e.g.*, *United States v. Soto-Mateo*, 799 F.3d 117, 123 (1st Cir. 2015); *United States v. De Horta Garcia*, 519 F.3d 658, 661 (7th Cir. 2008); *United States v. Chavez-Alonso*, 431 F.3d 726, 729 (10th Cir. 2005); *United States v. Torres*, 383 F.3d 92, 102 (3d Cir. 2004); *United States v. Aguirre-Tello*, 353 F.3d 1199, 1205 (10th Cir. 2004) (en banc). Each of these circuits has acknowledged that the majority rule conflicts with decisions of the Second and Ninth Circuits. *Id.*

And, the Fourth, Sixth, and Eighth Circuits have applied the same rule in a number of published cases to preclude challenges to BIA decisions on direct appeal. *See, e.g.*, *Alhuay v. U.S. Att'y Gen.*, 661 F.3d 534, 548-49 (11th Cir. 2011) (per curiam) (rejecting claim that the IJ's failure to provide interpreter at removal hearing violated due process because the alien "has no cognizable due process interest [in her applications for waiver of removability and cancellation of removal] because those forms of relief are discretionary"); *Ibrahimi v. Holder*, 566 F.3d 758, 766 (8th Cir. 2009) (rejecting claim that finding alien had not entered into good-faith marriage violated due process because good-faith-waiver was a form of discretionary relief and alien did not "have a constitutionally protected interest in eligibility for discretionary relief"); *Dekoladenu v. Gonzales*, 459 F.3d 500, 508 (4th Cir. 2006) (holding "[n]o property or liberty interest can exist when the relief sought is discretionary" and so the alien was foreclosed from

"mak[ing] out a due process violation" and arguing denial of motion to reopen was error) *overruled on other grounds by Dada v. Mukasey*, 554 U.S. 1 (2008); *Smith v. Ashcroft*, 295 F.3d 425, 429 (4th Cir. 2002) (similar); *Ashki v. I.N.S.*, 233 F.3d 913, 921 (6th Cir. 2000) (rejecting claim that considering application for discretionary relief under more exacting standard was fundamentally unfair because "[e]ligibility for suspension is not a right protected by the Constitution").

Each of these cases rests on a simple premise: the "Due Process Clause does not apply" to proceedings where discretionary relief is at issue because the alien cannot meet the "threshold requirement" of showing "a protected property or liberty interest," *Ibrahimi*, 566 F.3d at 766.

This division among the circuits, between the Second and Ninth Circuits on one side, and the First, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Tenth, and Eleventh Circuits, on the other, is clear. But, the Court need not take Ms. Cordova's word. No fewer than *seven* federal courts of appeals have acknowledged that a conflict exists on the question presented. *See supra* at 9, 11. Given that all eleven territorial courts of appeals have weighed in on the question presented, no further percolation would be helpful. Accordingly, the Court should grant this petition and resolve this mature and intractable split.

II. THE QUESTION PRESENTED IS EXCEPTIONALLY IMPORTANT

The question presented on which the circuits are so sharply divided is one of fundamental importance that impacts many thousands of aliens in criminal

prosecutions for illegal reentry across the country, as well as in immigration proceedings.

A. The question presented has profound ramifications for criminal prosecutions based on immigration status because, for an alien to challenge an indictment for illegal reentry under § 1326(d) and this Court's decision in *United States v. Mendoza-Lopez*, 481 U.S. 828 (1987), she must show that her underlying removal order violated due process. This showing is possible only where due process in fact applies to the removal proceeding. *Id.* at 839. In fact, the majority rule has effectively gutted *Mendoza-Lopez*'s dictate that "there must be some meaningful review of the administrative proceeding" where a determination made in that proceeding "play[s] a critical role in the subsequent imposition of a criminal sanction," *id.* at 837-38, as clearly demonstrated by the fact that the Fifth Circuit has *no* published opinions dismissing an indictment under § 1326(d).

The question also has broad impact for immigration proceedings themselves. Particularly for individuals who, like Ms. Cordova, are lawfully residing in this country at the time of their removal proceeding, the protections of due process against arbitrary governmental action in that proceeding "govern a matter of the utmost importance—whether lawful resident aliens with longstanding ties to this country may stay here." *Judulang v. Holder*, 132 S. Ct. 476, 490 (2011). Indeed, this Court has "long recognized that deportation is a particularly severe 'penalty,'" *Padilla v. Kentucky*, 559 U.S. 356, 365 (2010) (citing *Fong Yue Ting v. United States*, 149 U.S. 698, 740 (1893)), "at times the equivalent of banishment or

exile," *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948).

B. The sheer number of immigration proceedings in which the issue is implicated is staggering. Nearly all forms of relief from removal, including asylum, cancellation of removal, waiver of admissibility, and former Section 212(c) relief, among others, by statute allow the Attorney General some measure of discretion in determining whether relief is warranted. In contrast, the only forms of mandatory relief—and, under the majority rule, the only forms of relief subject to due process protections—are withholding of removal, 8 U.S.C. § 1231(b)(3) and relief under the Convention Against Torture, 18 U.S.C. §§ 2340 & 2340A.

Thus, the question presented has relevance to literally tens of thousands of immigration proceedings that take place each year. In 2013, for example, ICE initiated removal proceedings against more than 133,000 aliens residing in the United States, U.S. Immigration & Customs Enf't, *FY 2013 ICE Removal Statistics*, nearly 10,000 of whom were granted asylum after raising it in defense to a removal charge. Dep't of Homeland Sec., *Annual Flow Report 2013* at 1 (Aug. 2014).

The circuits adopting the majority rule have applied it to foreclose due process challenges on direct review from the BIA to a panoply of claims, including claims that the alien was prevented from testifying or did not receive an interpreter at his removal proceedings, and that there was ineffective assistance of counsel, among many others. *See supra* at 12. That alone is deeply troubling.

This rule also has profound and continuing effects on individuals after entry and execution of a removal order whose fairness is in doubt. Many thousands of noncitizens are, like Ms. Cordova, charged criminally with illegal reentry each year. In 2013, the most recent year for which data is available, fully *one quarter* of all federal criminal prosecutions were for illegal reentry, with more than 18,000 individuals prosecuted under § 1326. U.S. Sentencing Comm'n, *Illegal Reentry Offenses* 8 (Apr. 2015). Situated on the border, California, Arizona, and Texas prosecute the largest numbers of individuals for illegal reentry: nearly 4,000 aliens were prosecuted in California and Arizona in 2013, and an additional 7,000 aliens were prosecuted in Texas the same year. *Id*.

Given the sharp split in the circuits, an alien indicted for illegal reentry in the Second or Ninth Circuits can challenge her indictment under § 1326(d) and avoid criminal conviction if, in the underlying removal proceedings, the IJ determined the alien's eligibility for discretionary relief by unfair or arbitrary means, and she met § 1326(d)'s other requirements of prejudice, exhaustion, and deprivation of judicial review. *See Ubaldo-Figueroa*, 364 F.3d at 1049; *Copeland*, 376 F.3d at 71. For example, suppose an IJ determined an alien's eligibility for asylum by flipping a coin—heads, she could apply, tails, she could not. An alien entering in Arizona could attack the indictment on the grounds that the coin flip determination in the underlying removal proceeding violated due process. *See Ubaldo-Figueroa*, 364 F.3d at 1049; *cf. Judulang*, 132 S. Ct. at 485 (holding that if BIA rule allowed eligibility for discretionary relief

to be determined by a coin flip "we would reverse the policy in an instant" as arbitrary and capricious). If that same alien—the victim of the unlucky coin flip—had entered the United States a few miles to the east in New Mexico, instead of Arizona, or in states in the other eight circuits applying this rule, she would be foreclosed from demonstrating that the coin flip violated due process and would face certain conviction. *See* Pet. App. 16a-17a. Such inconsistent results in the criminal context further warrant this Court's granting of the petition.

III. THIS CASE PRESENTS AN EXCELLENT VEHICLE TO ADDRESS THE QUESTION PRESENTED

This is an ideal case to address the question presented: The issue manifestly matters and was fully developed below.

A. The question presented is outcome determinative. As discussed *supra* at 6, Ms. Cordova's removal order was based on a stipulation of removal signed after an ICE agent misinformed her that she could not challenge her removal. Pet. App. 2a. The stipulation included waivers of the right to apply for relief, and to seek administrative and judicial review. Pet. App. 3a. But, this advice was incorrect because Ms. Cordova's conviction for possession of methamphetamine did not qualify as an aggravated felony and, as such, she was not ineligible for cancellation of removal.

The Fifth Circuit held that Ms. Cordova could not show her removal order was fundamentally unfair based on any "misinformation about the possibility of obtaining relief" that induced the stipulation

because an "alien's eligibility for discretionary relief from removal is not a liberty or property interest deserving of due process protection," and it was "undisputed that the cancellation of removal at issue in the instant case constitutes discretionary relief." Pet. App. 15a-16a. Because due process does not attach to consideration of discretionary relief, "an IJ's failure to explain the eligibility for such relief," or an immigration officer's failure to do the same, could not, as a matter of law, be fundamentally unfair. Pet. App. 16a.

The Fifth Circuit's holding that Ms. Cordova could not demonstrate prejudice from the ICE agent's "misinformation regarding her eligibility to avoid removal" turns on the same rule. Pet. App. 16a. The court explained that Ms. Cordova could not show "the agent's advice prejudiced her," because there was "no reason to believe that the IJ would have given her different advice with respect to her eligibility for cancellation of removal" or that "she would have changed her mind about her willingness to remain detained had the same advice been given to her by an IJ instead of the agent." Pet. App. 18a. But surely it is no answer to a due process claim based on an ICE agent's critical misinformation about the law, to speculate that the presiding legal officer might well have given the same incorrect advice. *See INS v. Miranda*, 459 U.S. 14, 18 (1982) (per curiam) (applying presumption of regularity to INS's actions).

The court's conclusions regarding the other requirements of § 1326(d), that Ms. Cordova did not exhaust her administrative remedies and was not deprived of judicial review, are also expressly gov-

erned by its holding that any misinformation regarding the availability of cancellation of removal could not invalidate Ms. Cordova's stipulation and make the removal proceedings fundamentally unfair. Pet. App. 19a.

Indeed, this case presents a particularly good vehicle for resolving the question presented because it is reasonably likely that Ms. Cordova would have been able to stay in this country had she not been misinformed about her eligibility for discretionary relief. Ms. Cordova was brought to the United States when she was nine months old; she became a lawful permanent resident in 1991 at age 13; she had four U.S. citizen children, one of whom was an infant at the time of her removal; and had a positive work history. Pet. App. 81a-83a. Given these favorable factors, and the relatively minor nature of her convictions for simple possession and theft, Ms. Cordova was an excellent candidate for cancellation of removal. *Id.* Reflecting this fact, the government did not contest below that Ms. Cordova would have sought and been granted cancellation had she not signed the stipulation, nor did the Fifth Circuit or district court conclude otherwise. *See* Pet. App. 18a, 31a-33a.

B. The Fifth Circuit's invocation of "plain error review" addressing the question presented is no barrier to this Court's consideration of whether due process applies to discretionary relief. It did not impact its analysis of Ms. Cordova's claim, which it held was foreclosed by circuit precedent. And, in any event, plain error review was improper here because the claim was raised and decided by the district court.

1. Notwithstanding the Fifth Circuit's reference to "plain error review" (Pet. App. 14a), its rejection of

Ms. Cordova's due process argument rested on the conclusion that there was no error at all—and could never be—under the controlling precedent of *Lopez-Ortiz*, (Pet. App. 16a-17a ("Our precedent precludes Cordova from demonstrating plain error")). Because the Fifth Circuit squarely analyzed whether due process applies to discretionary relief, its invocation of "plain error review" does not prevent this Court from reaching and resolving the question presented. The Fifth Circuit did not, for example, find that the district court did err in analyzing fundamental fairness, but the error was not sufficiently "clear or obvious" to require reversal. *Puckett v. United States*, 556 U.S. 129, 135 (2009). Rather, the Fifth Circuit held that Ms. Cordova's contention that the ICE agent's misinformation rendered Ms. Cordova's removal proceedings fundamentally unfair was squarely foreclosed by circuit precedent because consideration for "relief that is 'available within the broad discretion of the Attorney General is not a right protected by due process.'" Pet. App. 16a (citing *Lopez-Ortiz*, 313 F.3d at 231).

Indeed, the Fifth Circuit went to lengths to allow for review of this question: it analyzed the due process question in detail in a published opinion, noted that a circuit split exists on the issue (Pet. App. 17a), and also provided that Ms. Cordova "preserve[d] the argument that the holding in *Lopez-Ortiz* is incorrect and should be overturned by this court en banc or by the Supreme Court" (Pet. App. 17a n.9).

2. In any event, the Fifth Circuit was wrong to hold that Ms. Cordova "failed to argue that her waiver was involuntary based on the alleged misinformation from the ICE agent." Pet. App. 8a. To the

contrary, the district court itself recognized that Ms. Cordova "claim[ed] that had the IJ conducted a hearing or colloquy to determine whether the Stipulation was given intelligently, knowingly, and voluntarily, the Immigration Court would not have accepted the Stipulation." Pet. App. 24a-25a. And, this claim was based solely on her factual allegations about the ICE agent's misinformation. Accordingly, Ms. Cordova's claim that the IJ's misinformation rendered her removal order fundamentally unfair was not forfeited and should have been reviewed de novo. And, besides, even if Ms. Cordova had not expressly argued in the district court that the ICE agent's misinformation rendered her removal proceedings fundamentally unfair, she was entitled on appeal to present this argument in support of her broader claim that the IJ's acceptance of the stipulation and entry of the removal order was fundamentally unfair. *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) ("[o]nce a federal claim is properly presented," "a party can make any argument in support of that claim" and "parties are not limited to the precise arguments they made below."); *see also United States v. Robinson*, 744 F.3d 293, 300 & n. 6 (4th Cir. 2014) (applying *Lebron* in criminal proceedings).

IV. THE DECISION BELOW IS WRONG

The Fifth Circuit's rule—that due process does not attach to immigration proceedings where discretionary relief is at issue, which has been adopted by eight other circuits—is obviously incorrect. Pet. App. 17a.

1. In short, this rule is absurd. If due process does not apply to proceedings just because they afford only discretionary relief from removal, the Con-

stitution is not offended where an IJ concludes a lawful permanent resident is ineligible for discretionary relief from removal by any arbitrary means. *See* Pet. App. 17a. It also follows that there is no due process violation where an IJ refuses to consider an alien for discretionary relief based solely on the alien's race or sexual orientation, because the Equal Protection Clause applies to federal immigration proceedings only by way of the Due Process Clause. *See United States v. Windsor*, 133 S. Ct. 2675, 2693 (2013) ("equal protection principles [are] applicable to the Federal Government" under the Fifth Amendment (citing *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954))).

Not surprisingly, such a conclusion cannot be reconciled with this Court's precedent. In *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954), the Court addressed whether an alien was deprived of due process where the BIA violated regulatory requirements when it did not exercise its discretion in evaluating the alien's application for discretionary relief. *Id.* at 266-67. The Court held that the alien's due process rights were violated when he was denied "what the regulations accord[ed] petitioner as a right." *Id.* at 268. The Court conceded that, because suspension of deportation was discretionary in nature, the alien "may still fail to convince the Board or the Attorney General, in the exercise of their discretion, that he is entitled to suspension." *Id.* But he was nevertheless "entitled to the opportunity to try" to show entitlement to relief because then "at least he will have been afforded that due process required by the regulations in such proceedings." *Id.*

The Court recognized the continued vitality of this reasoning in *Accardi* in *INS v. St. Cyr*, 533 U.S. 289 (2001). *Id.* at 307-08 (citing *Accardi*). *St. Cyr* discussed at length the distinction the majority rule ignores here; that is, the distinction "between eligibility for discretionary relief, on the one hand, and the favorable exercise of discretion, on the other hand." *Id.* at 307-08 (*Jay v. Boyd*, 351 U.S. 345, 353-54 (1956)). Where eligibility for discretionary relief is "governed by specific statutory standards," those standards establish a due process "right to a ruling on an applicant's eligibility, even though the actual granting of relief was not a matter of right under any circumstances, but rather is in all cases a matter of grace." *Id.*[3]

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[3] Under the same logic, due process protections have been extended to other discretionary decisions outside of the immigration context. In *Evitts v. Lucey*, for example, the Court rejected Kentucky's argument that because it had discretion in deciding whether to "establish a system of appeals" in criminal proceedings, it was therefore "immune from all constitutional scrutiny when it chooses to have such a system." 469 U.S. 387, 400 (1985). The Court explained: "In short, when a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution—and, in particular, in accord with the Due Process Clause." *Id.* at 401. Similarly, the Court has held that the Due Process Clause applies to discretionary sentencing decisions, *Hicks v. Oklahoma*, 447 U.S. 343, 346 (1980), to determinations to revoke preparole and parole status where those decisions are governed by statutory criteria, *Young v. Harper*, 520 U.S. 143, 147-48, 153 (1997) (preparole); *Morrissey v. Brewer*, 408 U.S. 471, 485 (1972) (parole), and to the discretionary decision to withhold a license to practice law, *Willner v. Comm. on Character & Fitness*, 373 U.S. 96, 99 (1963), among others.

Due process plainly applies to the consideration of cancellation of removal, the discretionary relief at issue in this case. Cancellation of removal is governed by specific statutory standards. *See* 8 U.S.C. § 1229b. Section 1229b provides that an alien is eligible for cancellation where she "has been an alien lawfully admitted for permanent residence for not less than 5 years," has "resided in the United States continuously for 7 years," and "has not been convicted of any aggravated felony." *Id.* § 1229b(a)(1)-(3). The BIA, the agency authorized to interpret the INA, *Negusie v. Holder*, 555 U.S. 511, 517 (2009), has further interpreted § 1229b to require consideration of certain adverse and favorable factors, including, along with others, any criminal convictions weighed against the alien's family ties in the United States and duration of residence here, *see Matter of C-V-T-*, 22 I. & N. Dec. 7, 11 (BIA 1998). That Congress has provided by statute a right for eligible aliens to be considered for cancellation of removal and delineated clear standards by which this relief is evaluated, establishes that an alien has a due process right "to the opportunity to try" to show entitlement to cancellation of removal, *Accardi*, 347 U.S. at 268, "even though the actual granting of relief [is] not a matter of right under any circumstances," *St. Cyr*, 533 U.S. at 308. The Fifth Circuit's decision to the contrary was incorrect.

2. The absurdity of the current majority rule has led a number of judges in these circuits to call for reevaluation of their precedents. In *United States v. De Horta Garcia*, 519 F.3d 658 (7th Cir. 2008), Judge Rovner authored a concurring opinion "to note [her] reservations about those precedents" applying the

rule because they "fail[ ] to properly distinguish the right to seek relief . . . from the right to the relief itself." *Id.* at 662. She opined that the Second Circuit in *Copeland*, 376 F.3d at 70-73, "has the better of the debate among the circuits on this point," and encouraged the Seventh Circuit to reexamine its position. 519 F.3d at 662-63. Similarly, in *United States v. Zambrano-Reyes*, 724 F.3d 761 (7th Cir. 2013), (now Chief) Judge Wood, writing for the court (a panel of herself, Judge Flaum and Judge Hamilton) acknowledged Judge Rovner's concurring opinion and that there was "academic support for the position that the erroneous failure to consider an alien for Section 212(c) relief, or to advise an unrepresented alien of his eligibility for such relief, is sufficiently 'unfair' to satisfy Section 1326(d)(3) in a later reentry prosecution," *id.* at 765-66. The court left "this issue to another day," however, as it was not dispositive in that case. *Id.*

Judge Motz in the Fourth Circuit, too, in a concurring opinion in *United States v. Wilson*, 316 F.3d 506 (4th Cir. 2003), took issue with broad application of the majority rule, *id.* at 515. As she put it, "I take it to be quite clear that, regardless of the discretionary nature of relief available at a deportation proceeding, if a defendant's initial deportation, for example, had been ordered by a biased judge, relying on the knowing use of perjured testimony, or garnered under threat of mob violence, the defendant could collaterally attack this deportation in any subsequent prosecution in which deportation is an element of the crime." *Id.*

This Court should grant this petition to establish as uniform law of the land the correct rule that the

Due Process Clause applies to proceedings (such as the removal proceeding here) where discretionary relief is at issue.

CONCLUSION

The petition for certiorari should be granted.

JANUARY 2016

RESPECTFULLY SUBMITTED,

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APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 14-50053

UNITED STATES OF AMERICA,
v. Plaintiff - Appellee
GABRIELA CORDOVA-SOTO,
Defendant - Appellant

Appeal from the United States District Court
for the Western District of Texas

Before BENAVIDES, CLEMENT, and HIGGINSON, Circuit Judges. FORTUNATO P. BENAVIDES, Circuit Judge:

This is a direct criminal appeal in which the appellant is challenging her conviction for illegal reentry into the United States as a previously removed alien. *See* 8 U.S.C. § 1326. Appellant Gabriela Cordova-Soto ("Cordova") appeals the district court's denial of her motion to dismiss the indictment, arguing that the order of removal, which formed the basis for the instant offense, was invalid. More specifically, Cordova contends that the Immigration Judge ("IJ") failed to expressly find that

her waiver of rights and stipulation of removability was voluntary, knowing, and intelligent as required by 8 C.F.R. § 1003.25(b). She also contends that her waiver was involuntary because it was induced by incorrect advice given to her by an immigration officer. Finding no reversible error, we AFFIRM.

I. PROCEDURAL HISTORY

Cordova is a Mexican national who was brought into the United States as an infant. In 1991, she attained lawful permanent residency at age 13. In May 2002, she was convicted of misdemeanor theft. The next year she was convicted of passing a worthless check. In 2005, she pleaded guilty to felony possession of methamphetamine in Kansas state court. Later that year, agents of the Immigration and Customs Enforcement Agency ("ICE") served Cordova with a Notice to Appear before an IJ. The notice charged her as removable as (1) an aggravated felon based on the methamphetamine conviction, (2) an alien convicted of two crimes involving moral turpitude (theft and worthless check convictions), and (3) an alien convicted of a controlled substance offense (same methamphetamine conviction). *See* 8 U.S.C. § 1227(a)(2)(A)(ii), (a)(2)(A)(iii), and (a)(2)(B)(i).

At the processing center in Chicago, an ICE agent presented Cordova with a boiler plate form that was entitled Stipulated Request for Issuance of Final Order of Removal, Waiver of Appearance and Hearing ("Stipulated Form of Removal"). The agent told Cordova that she had no basis to challenge her removal and that any attempts to challenge it would only prolong her detention. The agent informed her that she could call a legal service organization and

gave her a list of phone numbers. Cordova called one legal service organization and briefly spoke to a person who also told her that she did not have any basis for seeking cancellation of removal. Cordova, who speaks and reads English, signed the Stipulated Form of Removal and dated it November 1, 2005. The form provided that she had been "fully advised of [her] rights" and "hereby voluntarily, knowingly and intelligently enter[s] into the following stipulations." It also provided that she had been advised of her right to be represented by counsel and right to a removal hearing. It further provided that she waived any right to make any application for relief from removal under the Immigration and Nationality Act. On the final page of the form, albeit dated six days later on November 7, 2005, ICE Agent James Gutierrez certified that he had read and explained the document to Cordova.

On November 8, 2005, after finding Cordova removable, the IJ accepted the Stipulated Form of Removal and ordered her removed to Mexico. Approximately three weeks later, on November 27, 2005, Cordova reentered the United States. Several years later, on March 18, 2010, local law enforcement officers discovered Cordova in Kansas. On September 15, 2010, she was taken into the custody of the Department of Homeland Security. The 2005 order of removal was reinstated, and Cordova was removed to Mexico on September 26, 2010. She appealed to the Board of Immigration Appeals ("BIA"), and her appeal was dismissed. Cordova appealed to the Tenth Circuit, requesting review of the initial removal order and the reinstated removal order, and her petition was denied. *Cordova-Soto v.*

Holder, 659 F.3d 1029, 1030 (10th Cir. 2011). The Tenth Circuit held that it did not have jurisdiction to review the 2005 order because she had not filed her petition for review within 30 days of her 2005 removal as directed by 8 U.S.C. § 1252(b)(1). *Id.* at 1032. The court found that it had jurisdiction to review the 2010 removal order but denied it on the merits. *Id.* at 1035. The court held that "[b]ecause she could not have entered the United States legally at [the time of her reentry], her reentry was illegal and she was therefore subject to reinstatement of her previous removal order under 8 U.S.C. § 1231(a)(5)." *Id.*[1]

On January 24, 2012, Cordova filed a motion seeking to reopen her 2005 order of removal in the Kansas City Immigration Court, which the IJ denied on June 6, 2012. The BIA upheld the IJ's decision on September 17, 2012. Cordova petitioned for review of the denial of the motion to reopen the 2005 removal order in the Seventh Circuit. *Cordova-Soto v. Holder*, 732 F.3d 789, 793 (7th Cir. 2013), *cert. denied*, 135 S. Ct. 85 (2014). Like the Tenth Circuit, the Seventh Circuit held that it did not have jurisdiction to review the 2005 removal order because the appeal was not filed within the 30-day time limit contained in 8

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[1] Section 1231(a)(5) provides as follows:

> If the Attorney General finds that an alien has reentered the United States illegally after having been removed or having departed voluntarily, under an order of removal, the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed, the alien is not eligible and may not apply for any relief under this chapter, and the alien shall be removed under the prior order at any time after the reentry.

U.S.C. § 1252(b)(1). *Id.*[2] The court explained that although it did have jurisdiction to consider the merits of the denial of Cordova's motion to reopen, it held that 8 U.S.C. § 1231(a)(5) "prohibits collateral review after the review of the reinstatement is complete." *Id.* at 795. The court thus denied the petition. *Id.* at 796.

Meanwhile, on September 6, 2012, Border Patrol agents arrested Cordova for being an alien illegally present in the United States. On October 3, a grand jury in Del Rio, Texas indicted Cordova for the offense of illegal reentry after removal in violation of 8 U.S.C. § 1326. Cordova filed a motion to dismiss the indictment, challenging the validity of the 2005 removal order. She argued, among other things, that the removal order was fundamentally unfair because the IJ did not conduct a hearing and expressly determine that her waiver of rights in the Stipulated Form of Removal was voluntary, knowing, and intelligent as required by 8 C.F.R. § 1003.25(b). The district court noted that (1) Cordova is fluent in English, (2) the stipulation she signed is written in plain language that clearly stated the legal effect of signing the waiver, (3) she does not in fact claim that she unknowingly signed it—only that the IJ failed to make such a determination, and (4) the record

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[2] The government moved to dismiss the petition for improper venue or transfer to the Eighth Circuit. 732 F.3d at 792. The Seventh Circuit recognized that a petition for review should be filed with the court of appeals for the judicial circuit in which the IJ completed the proceedings. *Id.*; 8 U.S.C. § 1252(b)(2). However, the court stated that the statute was not jurisdictional and concluded that the interest of justice favored retaining the petition in the Seventh Circuit. *Id.*

contains a certification by the ICE agent that he explained to her the rights she was waiving by signing the document. The district court ruled that "[a]ll of these facts taken together support a finding that the Defendant intelligently, knowingly, and voluntarily entered into the Stipulation of removal." The court further found that although the IJ did not conduct a hearing or colloquy to determine whether her waiver was voluntary and knowing, "the acceptance of the Stipulation supports an implicit finding that the IJ determined the Stipulation was given as such." Accordingly, the district court denied the motion to dismiss the indictment.

Cordova pleaded guilty. In the plea agreement, Cordova reserved the right to appeal all issues relating to the district court's ruling on the motion to dismiss the indictment. Cordova now appeals.

II. ANALYSIS

Cordova contends that because her prior order of removal was invalid, the district court erred in denying her motion to dismiss the instant indictment charging her with illegal reentry. We review de novo a district court's denial of a motion to dismiss the indictment, including any underlying constitutional claims. *United States v. Villanueva-Diaz*, 634 F.3d 844, 848 (5th Cir. 2011). This court accepts "all factual findings made by the district court in connection with that ruling unless clearly erroneous." *Id.* A factual finding is clearly erroneous only if, based on the entirety of the evidence, the reviewing court is left with the definite and firm conviction that a mistake has been made. *United States v. Valdez*, 453 F.3d 252, 262 (5th Cir. 2006).

The Supreme Court has held that an alien who is prosecuted for illegal reentry may collaterally attack the underlying removal order. *United States v. Mendoza-Lopez*, 481 U.S. 828, 839 (1987). More specifically, the Supreme Court held that due process requires collateral review of deportation orders that form the basis of a prosecution for illegal reentry, explaining that "where the defects in an administrative proceeding foreclose judicial review of that proceeding, an alternative means of obtaining judicial review must be made available before the administrative order may be used to establish conclusively an element of a criminal offense." *Id.* at 838. After *Mendoza-Lopez*, this court held that to collaterally attack a prior removal order in a criminal proceeding, the alien must demonstrate that:

> (1) the removal hearing was fundamentally unfair; (2) the hearing effectively eliminated the right of the alien to challenge the hearing by means of judicial review of the order; and (3) the procedural deficiencies caused the alien actual prejudice.

United States v. Lopez-Ortiz, 313 F.3d 225, 229 (5th Cir. 2002). To show prejudice, an alien must show that "there was a reasonable likelihood that but for the errors complained of the defendant would not have been deported." *United States v. Benitez-Villafuerte*, 186 F.3d 651, 658–59 (5th Cir. 1999). This test was "effectively codified" in 8 U.S.C. § 1326(d). *United States v. Lopez-Vasquez*, 227 F.3d 476, 483 n.13 (5th Cir. 2000). Section 1326(d) provides that an alien may not challenge the validity of a removal order unless the alien establishes that:

> (1) the alien exhausted any administrative remedies that may have been available to seek relief against the order; (2) the deportation proceeding at which the order was issued improperly deprived the alien of the opportunity for judicial review; and (3) the entry of the order was fundamentally unfair.

To successfully challenge a removal order, the alien must prove all three prongs. "If the alien fails to establish one prong of the three part test, the Court need not consider the others." *United States v. Mendoza-Mata*, 322 F.3d 829, 832 (5th Cir. 2003).

A. Fundamentally Unfair Under § 1326(d)

Cordova contends that her removal proceedings, which formed the basis for the instant criminal conviction, were fundamentally unfair. § 1326(d)(3). "Fundamental fairness is a question of procedure." *Lopez-Ortiz*, 313 F.3d at 230. Cordova contends that her waiver of the right to a hearing before the IJ was invalid because it was based on critical misinformation with respect to the possibility of cancelling her removal. Additionally, she contends that the IJ's failure to expressly make a determination that her waiver was knowing and voluntary in violation of the pertinent regulation rendered her removal proceedings involuntary.

In Cordova's motion to dismiss the indictment filed in the district court, she failed to argue that her waiver was involuntary based on the alleged misinformation from the ICE agent. The factual section of her motion explained that the agent advised her that "if she wanted to be removed quickly she should sign" the waiver form and that "either

way, she was going to be deported." The factual section of her motion also stated that "[n]otwithstanding that the law concerning simple drug possession was in flux, on November 7, 2005, ICE agents persuaded Cordova to sign" the waiver of removal hearing. Nonetheless, Cordova never argued that the agent's advice rendered her waiver involuntary. Instead, she *only* challenged the validity of her waiver based on the IJ's failure to expressly find that her stipulated removal request and waiver of rights was voluntary and knowing. Tellingly, the district court did not address a claim that the waiver was rendered involuntary by the ICE agent's advice.[3] Thus, we will first review de novo her argument that the IJ's failure to make a finding with respect to the voluntariness of her waiver rendered the proceedings fundamentally unfair. We will then review for plain error her argument that the agent's advice rendered her waiver involuntary. *See Puckett v. United States*, 556 U.S. 129, 135 (2009).

1. IJ's Failure to Make a Finding of Voluntariness

Cordova correctly contends that the IJ failed to expressly find that her waiver was voluntary, knowing, and intelligent as required by 8 C.F.R. § 1003.25(b). Section 1003.25(b) provides that an IJ "may enter [a removal] order without a hearing and in the absence of the parties based on a review of the charging document, the written stipulation, and

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[3] Indeed, the district court stated that although Cordova repeatedly contended that the IJ failed to make a voluntariness determination, she never claimed that her waiver was actually unknowing and involuntary.

supporting documents, if any." However, "[i]f the alien is unrepresented, the Immigration Judge must determine that the alien's waiver is voluntary, knowing, and intelligent." *Id.*

Cordova, who was unrepresented, argues that this error rendered her removal proceedings fundamentally unfair and that she was deprived of an immigration hearing in violation of due process. This court has not addressed the precise question of whether an IJ's failure to expressly make a determination of the voluntariness of the waiver in violation of 8 C.F.R. § 1003.25(b) constitutes a due process violation that renders the removal proceedings fundamentally unfair.[4]

Nonetheless, this court's precedent with respect to determining whether an alien has received due process during deportation proceedings provides guidance for the instant analysis. In *Benitez-Villafuerte*, an alien was convicted of an aggravated felony and deported following expedited removal proceedings conducted within the Immigration and Naturalization Service ("INS"). 186 F.3d at 654. Benitez subsequently reentered the United States without permission and was charged with illegal reentry after deportation under § 1326. *Id.* Like Cordova, Benitez challenged the validity of the deportation order that formed the basis of the illegal reentry prosecution. *Id.* at 656. The district court

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[4] *See Altamirano-Lopez v. Keisler*, 250 F. App'x 658, 659 (5th Cir. 2007) (although petitioners raised a due process violation based on the IJ's failure to determine whether their waivers were voluntary under § 1003.25(b), this court did not reach the argument because it dismissed the claims for lack of jurisdiction).

held that "Benitez's waiver of rights executed before INS officers did not constitute an effective waiver of his basic rights to judicially contest his deportation because his waiver had not been made in open court before a neutral magistrate who could affirm that the waiver was knowing and voluntary." *Id.*

On appeal, this court explained that the due process clause prohibits the government "from 'arbitrarily . . . causing an alien who has entered the country . . . illegally to be taken into custody and deported without giving him all opportunity to be heard upon the questions involving his right to be and remain in the United States.'" *Id.* (quoting *Yamataya v. Fisher*, 189 U.S. 86, 101 (1903)). "[D]ue process requires only that an alien be provided notice of the charges against him, a hearing before an executive or administrative tribunal, and a fair opportunity to be heard." *Id.* at 657. However, due process rights, including the right to a hearing, can be waived. *Id.*

In *Benitez-Villafuerte*, the record demonstrated that an INS agent gave Benitez notice of the charges against him and that the agent explained to him that he had a right to a hearing to contest the charges. *Id.* at 658. Benitez waived that right. *Id.* Additionally, Benitez waived his right to a 14-day stay of execution of the deportation order. *Id.* This court stated that the record showed Benitez was provided with "ample constitutional protection." *Id.* We noted that there was no record evidence that Benitez's waiver was not knowing and voluntarily. *Id.*[5]

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[5] In *Benitez*, the alien argued that his waiver of rights was not voluntary. 186 F.3d at 660 n.9. However, because the alien

Here, Cordova received notice of the charges and was informed that she had the right to be represented by an attorney. The agent gave Cordova the telephone numbers to legal services organizations. She called one of the numbers and was given the same advice that the agent had provided. She was also told that she could contest the charges in a hearing. After being informed of those rights, Cordova signed the stipulation waiving them. This sequence of events is indistinguishable from the procedural due process afforded in *Benitez*, and there we held that that the alien received ample constitutional protection.[6]

Moreover, the district court found that the record evidence supports an *implicit* finding that Cordova's waiver was knowing and voluntary. We have construed an administrative record as showing that an IJ made an implicit finding of good moral character, which was a prerequisite for the grant of voluntary departure. *Rodriguez-Gutierrez v. INS*, 59 F.3d 504, 508 (5th Cir. 1995). Thus, we now look to see whether the district court clearly erred in finding

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failed to show prejudice, the court did not consider the argument on appeal. *Id.*

[6] Citing Rule 11 of the Federal Rules of Criminal Procedure, Cordova contends that the IJ's failure to make a determination of the voluntariness of her waiver of rights is akin to a district court's failure to conduct a plea colloquy prior to accepting a guilty plea. This contention is without merit. "Removal hearings are civil proceedings, not criminal; therefore, procedural protections accorded an alien in a removal proceeding are less stringent than those available to a criminal defendant." *Lopez-Ortiz*, 313 F.3d at 230.

that the record supports an implicit finding that the IJ determined the waiver was knowing and voluntary.

The district court began by observing that Cordova did *not* claim that the waiver was actually unknowing and involuntary. The court stated that Cordova had lived in this country since she was an infant and spoke English fluently. The court found that the waiver form she signed was "written in plain, non-legalese language that clearly stated the legal effect of the instrument." Additionally, the court noted that the record demonstrated that an immigration officer explained to her the provisions in the form and what legal rights she was waiving. The district court stated that all of these facts support a finding that Cordova intelligently, knowingly, and voluntarily signed the waiver form. The court further found that the IJ's acceptance of the waiver "supports an implicit finding that the IJ determined" the waiver was knowing and voluntary. Under these circumstances, Cordova has not shown that the district court's findings are clearly erroneous or that the court abused its discretion in not conducting an evidentiary hearing. *See United States v. Gutierrez*, 343 F.3d 415, 421 (5th Cir. 2003). Our decision rests upon the particular facts as presented in this appeal. Of course, the better procedure is for an ICE agent to contemporaneously certify his explanation of rights and the alien's waiver, as well as for an IJ to follow the regulation, which directs him to make the finding regarding voluntariness. § 1003.25(b). Nevertheless, the "failure of an agency to follow its own regulations is not, however, a per se denial of due process unless the regulation is required by the constitution or a statute." *Arzanipour v. INS*, 866 F.2d 743, 746 (5th

Cir. 1989). As discussed above, this court's opinion in *Benitez* supports our conclusion that due process does not require a separate finding by an IJ that the *pro se* alien's waiver is knowing and voluntary.[7] We reject Cordova's claim that the IJ's failure to make an express determination of voluntariness constituted a due process violation and conclude that such failure did not render her proceedings fundamentally unfair.

2. Advice from the ICE Agent

Cordova also contends that the ICE agent misinformed her with respect to her eligibility for relief from removal and that the misinformation induced her to sign the waiver. As previously mentioned, because Cordova did not raise this argument before the district court, we review it for plain error. *See United States v. Chavez–Hernandez*, 671 F.3d 494, 497 (5th Cir. 2012). To succeed on plain error review, an appellant must show (1) a forfeited error, (2) that is clear or obvious, and (3) that affects her substantial rights. *See Puckett v. United States*, 556 U.S. 129, 135 (2009). If an appellant makes such a showing, we may exercise our discretion "to remedy the error . . . only if the error seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *Id.*

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[7] In contrast, the Ninth Circuit has held that an IJ could not have found that the alien's waiver was voluntary and knowing based only on the signed stipulated form of removal. *United States v. Gomez*, 757 F.3d 885, 898 (9th Cir. 2014). The court found that it constituted an invalid waiver of the right to appeal and that it was a violation of 8 C.F.R. § 1003.25(b).

(alteration in original) (internal quotation marks and citation omitted).[8]

Cordova contends that the ICE agent incorrectly advised her that her prior drug conviction was an aggravated felony, which rendered her ineligible for relief from removal, and that the misinformation induced her to sign the waiver. Having an aggravated felony makes an alien ineligible for cancellation of removal, 8 U.S.C. § 1229b(a)(3), and Cordova was charged with having an aggravated felony, the methamphetamine conviction. The agent's advice regarding the availability of relief was correct with respect to the applicable BIA precedent at the time. *In re Ismael Yanez-Garcia*, 23 I & N Dec. 390, 398 (BIA 2002). However, a few months after Cordova's removal proceedings, the Seventh Circuit and the Supreme Court determined that an offense such as Cordova's drug conviction does not qualify as an aggravated felony. *Gonzales-Gomez v. Achim*, 441 F.3d 532, 533 (7th Cir. 2006); *Lopez v. Gonzales*, 549 U.S. 47, 60 (2006).

Cordova contends that the misinformation about the possibility of obtaining relief rendered her waiver unknowing and involuntary. Relying on *Mendoza-Lopez*, Cordova asserts that the invalid waiver rendered her removal proceedings fundamentally unfair. However, in *Mendoza-Lopez*, the Supreme

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[8] The government argues that Cordova's plea agreement waived this claim. The plea agreement waived any appeal except for "issues relating to the district court's ruling on Defendant's Motion to Dismiss Indictment." Because this issue is related to the court's ruling on the motion to dismiss the indictment, we reject the government's argument that this claim is waived by the plea agreement.

Court accepted the government's invitation to *assume* (and not decide) that the "respondents' rights to due process were violated by the failure of the Immigration Judge to explain adequately their right to suspension of deportation or their right to appeal." 481 U.S. at 839–40. Thus, Cordova's reliance on *Mendoza-Lopez* is misplaced.

Our precedent precludes Cordova from demonstrating plain error. We have held that relief that is "available within the broad discretion of the Attorney General is not a right protected by due process." *Lopez-Ortiz*, 313 F.3d at 231. More specifically, we held that because an alien's eligibility for discretionary relief from removal is not a liberty or property interest deserving of due process protection, an IJ's failure to explain the eligibility for such relief "does not rise to the level of fundamental unfairness." *Id.* It is undisputed that the cancellation of removal at issue in the instant case constitutes discretionary relief. Accordingly, it follows that the ICE agent's failure to explain to Cordova that there was a possibility that she could become eligible for discretionary relief does not demonstrate fundamental unfairness.

Cordova recognizes our precedent and attempts to distinguish her case. She asserts that *Lopez-Ortiz* does not control her case because she did not receive a hearing, and it was undisputed that *Lopez-Ortiz* was afforded a hearing and a fair opportunity to be heard. 313 F.3d at 230–31. Cordova argues that the misinformation regarding her eligibility to avoid removal resulted in the deprivation of her right to a removal hearing, a right that *Lopez-Ortiz* emphasized is guaranteed by principles of due process. Thus, she

contends that her case is not governed by *Lopez-Ortiz's* holding on fundamental fairness.[9]

We are not persuaded that *Lopez-Ortiz* does not control. Although the right to a hearing is guaranteed by due process, as previously explained, such a right can be waived. A majority of circuits agree with our holding in *Lopez-Ortiz* that there is no constitutional right to be informed of eligibility for—or to be considered for—discretionary relief. *United States v. Soto-Mateo*, 799 F.3d 117, 123 (1st Cir. 2015); *United States v. Santiago-Ochoa*, 447 F.3d 1015, 1020 (7th Cir. 2006); *United States v. Torres*, 383 F.3d 92, 104–06 (3rd Cir. 2004); *United States v. Aguirre-Tello*, 353 F.3d 1199, 1204–05 (10th Cir. 2004) (en banc); *Smith v. Ashcroft*, 295 F.3d 425, 430 (4th Cir. 2002); *Oguejiofor v. Attorney General of U.S.*, 277 F.3d 1305, 1309 (11th Cir. 2002); *Escudero-Corona v. INS*, 244 F.3d 608, 615 (8th Cir. 2001); *Ashki v. INS*, 233 F.3d 913, 921 (6th Cir. 2000). *But see United States v. Copeland*, 376 F.3d 61, 70–73 (2d Cir. 2004) (opining that a "failure to advise a potential deportee of a right to seek Section 212(c) relief can, if prejudicial, be fundamentally unfair"); *United States v. Arrieta*, 224 F.3d 1076, 1079 (9th Cir. 2000) (explaining that the IJ's failure to inform the alien of eligibility for relief from removal violated due process).

Moreover, in the above-cited First and Seventh Circuit cases, the aliens waived their right to a hearing and did not appear before an IJ. *Soto-Mateo*,

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[9] Alternatively, Cordova seeks to preserve the argument that the holding in *Lopez-Ortiz* is incorrect and should be overturned by this court en banc or by the Supreme Court.

799 F.3d at 119; *Santiago-Ochoa*, 447 F.3d at 1019. Although the aliens had waived their right to a hearing, those two circuits held that the aliens had no constitutional right to be informed of their eligibility for discretionary relief. Those two cases are indistinguishable from Cordova's case. Agreeing with our sister circuits' reasoning, Cordova is precluded from showing that any error was clear or obvious.

Additionally, Cordova has not shown that the ICE agent's advice affected her substantial rights. In other words, she has failed to show that the agent's advice prejudiced her. If Cordova had gone before the IJ, there is no reason to believe that the IJ would have given her different advice with respect to her eligibility for cancellation of removal. As she points out, the alien in *Lopez-Ortiz* was afforded a hearing before an IJ. 313 F.3d at 227. However, in *Lopez-Ortiz*, once the IJ found the alien removable, the alien declined to remain in detention and did not appeal the ruling. *Id.* Cordova has failed to show that she would have changed her mind about her willingness to remain detained had the same advice been given to her by an IJ instead of the agent. *Cf. Soto-Mateo*, 799 F.3d at 123–24 (explaining that the "appellant's unsolicited request to speed up the removal process is some indication that he had no stomach for deportation proceedings (during which he was likely to have been detained)"). Cordova has failed to show prejudice and thus cannot show her substantial rights were affected. At least in the context of plain error, Cordova has not carried her burden of showing that the agent's advice rendered her proceedings fundamentally unfair.

B. Judicial Review and Exhaustion Under § 1326

Because Cordova failed to prove that her immigration proceedings were fundamentally unfair, we are not required to consider the other prongs of the test. *Mendoza-Mata*, 322 F.3d at 832. We briefly address the two remaining prongs of the test.

Cordova argues that she was improperly deprived of the opportunity for judicial review because her stipulation waiving review was invalid. As discussed above, we rejected her argument that the waiver was invalid, and thus, this argument falls under its own weight.

Similarly, Cordova contends that she is excused from exhausting her administrative remedies because the waiver was invalid. This argument likewise falls under its own weight. Cordova also argues that by filing the motion to reopen the proceedings in immigration court, she exhausted her administrative remedies. It is undisputed that she filed the motion to reopen years beyond the 90-day deadline. This court has held that filing an untimely motion to reopen removal proceedings more than one year after the expiration of the limitation period does not exhaust an alien's administrative remedies. *Panova-Bohannan v. Gonzales*, 157 F. App'x 706, 707 (5th Cir. 2005). Thus, we conclude that she did not properly exhaust her administrative remedies.

III. CONCLUSION

For the above reasons, the judgment of the district court is AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
DEL RIO DIVISION

UNITED STATES OF AMERICA, **Plaintiff,** **v.** **GABRIELA CORDOVA-SOTO,** **Defendant.**	**DR-12-CR-1557(1)-AM**

ORDER

Pending before the Court is the Defendant's Motion to Dismiss Indictment (ECF No. 20) and the Government's Response in opposition (ECF No. 25). For the following reasons, the Defendant's Motion is **DENIED**.

I. BACKGROUND

The Defendant is a Mexican national who attained lawful permanent residency in 1991. (ECF No. 20 at 1.) On May 3, 2002, the Defendant was convicted of theft; the following year she was convicted of giving a worthless check; and in October of 2005, she was convicted of possession of methamphetamine—a felony under Kansas state law, the state where the Defendant was residing at the time. Because the Defendant's two theft offenses constituted crimes of

moral turpitude, and because her drug offense qualified as both an aggravated felony and possession of a controlled substance, agents of the Immigration and Customs Enforcement served the Defendant with a Notice to Appear on October 28, 2005. The Notice to Appear ordered the Defendant to appear before an Immigration Judge ("IJ") at a particular place and time, advised her of the nature of the proceedings, and informed her of the alleged immigration law violations she had committed.

On November 1, 2005, the Defendant, proceeding pro se, signed and dated a document entitled "Stipulation Request For Issuance of Final Order of Removal, Waiver of Appearance and Hearing" ("Stipulation") (ECF No. 25, Ex. 2), wherein the Defendant agreed to waive the removal hearing before an Immigration Judge ("IJ") to which she was entitled to, admitted to the substantive elements of the crimes levied against her, stipulated that she did not qualify for relief from removal, and requested a removal order. Immediately below the title designating the document as a stipulation and waiver was the language, "I Gabriela Cordova-Soto respondent in the above proceedings, being fully advised of my rights, hereby *voluntarily*, *knowingly*, *and intelligently* enter into the following stipulations." (ECF No. 25, Ex. 2 at 1) (emphasis added). An immigration enforcement agent then attested "that [the Stipulation] has been explained by me to the respondent in the English language which the respondent understands." (ECF No. 25, Ex. 2 at 6.)

On November 8, 2005, the IJ accepted the Defendant's Stipulation, finding that the Defendant

was removable pursuant to §§ 237(a)(2)(A)(iii), [1] (a)(2)(A)(ii),[2] and (a)(2)(B)(i)[3] of the Immigration and Nationality Act. (ECF No. 20, Ex. 1.) Accordingly, the IJ ordered the Defendant removed to Mexico. (*Id.*)

On November 27, 2005, hardly three weeks after her removal order, the Defendant admitted that she reentered the United States without permission from the Attorney General. She resided in the United States from that time until March 18, 2010, when she was detected by local law enforcement and was consequently taken into Department of Homeland Security ("DHS") custody on September 15, 2010. The original order of removal was reinstated and the Defendant was removed to Mexico on September 26, 2010. The Defendant then filed an appeal with the Tenth Circuit, asking for review of her underlying initial removal order, as well as the DHS's order reinstating her prior removal. *See Cordova-Soto v.*

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[1] Codified in 8 U.S.C. § 1227(a)(2)(A)(iii). This section makes an alien removable if she commits an aggravated felony any time after admission. At the time of the Defendant's Stipulation, the possession of methamphetamine, a crime designated as a felony by the state of Kansas, qualified as an aggravated felony under this provision.

[2] Codified in 8 U.S.C. § 1227(a)(2)(A)(ii). This section makes an alien removable if she commits two crimes of moral turpitude at any time, not arising out of a single scheme of criminal misconduct. The Defendant's two acts of thievery presumably qualified her as removable under this provision.

[3] Codified in 8 U.S.C. § 1227(a)(2)(B)(1). This section makes an alien removable if she has been convicted of any law relating to a controlled substance that is not under thirty grams of marijuana or less at any time after admission. The Defendant's possession of methamphetamine presumably made her removable under this provision.

Holder, 659 F.3d 1029 (10th Cir, 2011). The Circuit Court found that it did not have proper jurisdiction to consider the initial 2005 removal order because the Defendant failed to file an appeal within thirty days of the order.[4] *Id*. at 1032.

On January 24, 2012, the Defendant then filed a motion seeking to reopen her 2005 order of removal in the Kansas City Immigration Court, which was denied on June 6, 2012. (*See* ECF No. 20, Ex. 3.) The Defendant sought an appeal of the denial with the Board of Immigration Appeals, which upheld the Immigration Judge's decision on September 17, 2012 ("BIA Opinion"). (ECF No. 20, Ex. 3.) Shortly before the issuance of the BIA Opinion, on September 6, 2012, the Defendant was arrested in the Western District of Texas for illegal reentry, after having previously been removed, pursuant to 8 U.S.C. § 1326.[5] (ECF No. 8.)

The Defendant now files her Motion to Dismiss the Indictment by collaterally attacking her original 2005 removal order. The Defendant relies on 8 U.S.C. § 1326(d), which states:

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[4] The Tenth Circuit also rejected the Defendant's argument concerning the reinstatement of her removal by DHS. *Id*. at 1032.

[5] The Government cites the 2010 reinstatement order of removal as the Defendant's previous order of removal for purposes of her § 1326 charge. The Defendant is collaterally attacking the underlying order of removal that was the basis for the reinstatement order of removal. As the Defendant correctly points out, a reinstatement of an invalid removal order is invalid itself, and thus the Court will review the underlying order of removal, despite the Government relying on the reinstatement.

> (d) Limitation on collateral attack on underlying deportation order
>
> In a criminal proceeding under this section, an alien may not challenge the validity of the deportation order described in subsection (a)(1) of this section or subsection (b) of this section unless the alien demonstrates that—
>
> (1) the alien exhausted any administrative remedies that may have been available to seek relief against the order;
>
> (2) the deportation proceedings at which the order was issued improperly deprived the alien of the opportunity for judicial review; and
>
> (3) the entry of the order was fundamentally unfair.

Essentially, the Defendant argues that her initial 2005 removal order was fundamentally unfair because the IJ did not "conduct a hearing or any other colloquy to ascertain that the . . . [Defendant's] waiver of rights was voluntary, knowingly, and intelligent." (ECF No. 25 at 8.) The Defendant asserts that because the original removal order was tainted by procedural deficiencies as a result of noncompliance of the applicable immigration regulations that bind IJs, the original removal order is not valid, thus making the reinstatement of that order invalid, which in turn negates an element under the instant charged offense—that is, that the alien must have been previously removed. Moreover, the Defendant asserts that the immigration provision that made her removable with regards to her drug charge changed shortly after her removal. The Defendant claims that had the IJ conducted a

hearing or colloquy to determine whether the Stipulation was given intelligently, knowingly, and voluntarily, the Immigration Court would not have accepted the Stipulation, the underlying charge would have been rendered inapplicable to her, and as a consequence she would never have been removed.

The Defendant asserts that because the Government cannot make a showing of an essential element in the charged offense, the indictment against her should be dismissed.

II. DISCUSSION

a. Relevant Law

Pursuant to the Rules of Federal Criminal Procedure, an "indictment . . . must be a plain, concise, and definite written statement of the essential facts consisting the offense charged." Fed. R. Crim. P. 7(c)(1). In most cases, a pre-trial motion to dismiss the indictment will not usually succeed, as such a motion is not proper to challenge the adequacy of the Government's evidence. *United States v. Mann*, 517 F.2d 259, 267 (5th Cir. 1975). However, indictments alleging illegal reentry pursuant to § 1326 are subject to dismissal if the underlying removal proceeding violated due process.

In 1987 the Supreme Court held that a defendant can collaterally attack an indictment for illegal reentry by showing that the underlying removal order did not comport with certain due process requirements. *See United States v. Mendoza-Lopez*, 481 U.S. 828 (1987) ("*Mendoza-Lopez* test"). In 1996, 8 U.S.C. § 1326 was amended with the addition of subsection (d), which codified the Supreme Court's holding of *Mendoza-Lopez* 8 U.S.C. § 1326(d).

Subsection (d) provides that for an alien to prevail on a collateral attack, it must be shown that "(1) the alien exhausted any administrative remedies that may have been available to seek relief against the order; (2) the deportation proceedings at which the order was issued improperly deprived the alien of the opportunity for judicial review; and (3) the entry of the order was fundamentally unfair."

In this Circuit, as in most others, the holding of *Mendoza-Lopez* has been interpreted to require that to "successfully . . . collaterally attack a deportation order in a § 1326 prosecution, the alien must show (1) that the deportation hearing was fundamentally unfair, (2) that the hearing effectively eliminated the right of the alien to challenge the hearing by means of judicial review of the deportation, and (3) the procedural deficiencies caused him actual prejudice." *United States v. Benitez-Villafuerte*, 186 F.3d 651, 658 (5th Cir. 1999). A defendant must establish prejudice by showing "there was a reasonable likelihood that but for the errors complained of the defendant would not have been deported."[6] *United*

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[6] It is important to note that the Fifth Circuit's standard for prejudice is a more demanding one than the Ninth Circuit's, as the Ninth Circuit only requires that the defendant show that there were "plausible grounds for relief." *United States v. Jimenez-Marmolejo*, 104 F.3d 1083, 1086 (9th Cir. 1996). In her Motion, the Defendant makes this Court aware that she is cognizant of the respective standards of prejudice between the two circuits, and argues that the Ninth's Circuits is the correct one. (ECF No. 20 at 11, n.3.) This Court will decline the Defendant's invitation to adopt the Ninth Circuit's interpretation of what constitutes prejudice. Moreover, the various case law submitted by the Defendant emanating from the Ninth Circuit will not be accepted by this Court as

States v. Encarnacion-Galvez, 964 F.2d 402, 407 (5th Cir. 1992).

b. Analysis

i. Fundamental Unfairness

The Defendant maintains that because the IJ did not make a determination that the Defendant's Stipulation was given intelligently, knowingly, and voluntarily, the Stipulation to her removal and the removal itself is not valid. The IJ's noncompliance with the applicable regulations, the Defendant claims, is sufficient enough to render the removal proceeding as fundamentally unfair.[7] The pertinent regulation reads as follows:

> (b) Stipulated request for order; waiver of hearing. An Immigration Judge may enter an order of deportation, exclusion or removal stipulated to by the alien (or the alien's representative) and the Service. The Immigration Judge may enter such an order without a hearing and in the absence of the parties based on a review of the charging document, the written stipulation, and supporting documents, if any. *If the alien is*

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particularly persuasive, in as much as it is in conflict with already-settled Fifth Circuit case law.

[7] The language of 8 C.F.R. § 1003.25(b) is open to interpretation. It is unclear whether this provision mandates IJs to conduct a hearing to determine if stipulations for removal given by pro se aliens were given intelligently, knowingly, and voluntarily. In the Ninth Circuit, it is clear that an IJ's failure to determine if the stipulation was given intelligently, knowingly, and voluntarily results in an invalid removal order. *See United States v. Ramos*, 623 F.3d 672 (9th Cir. 2010). However, this standard is not controlling outside the Ninth Circuit.

> *unrepresented, the Immigration Judge must determine that the alien's waiver is voluntary, knowing, and intelligent*. The stipulated request and required waivers shall be signed on behalf of the government and by the alien and his or her attorney or representative, if any. The attorney or representative shall file a Notice of Appearance in accordance with § 1003.16(b). A stipulated order shall constitute a conclusive determination of the alien's deportability or removability from the United States.

8 C.F.R. § 1003.25(b) (emphasis added). Though the Defendant repeatedly insists that the IJ did not make a determination that the Stipulation was given intelligently, knowingly, or voluntarily, nowhere in the Defendant's Motion does she claim that the Stipulation was not given as such.

As she points out in her Motion, the Defendant has been in this country since she was an infant and is fluent in the English language. (ECF No. 20 at 12.) The Stipulation she signed was written in plain, non-legalese language that clearly stated the legal effect of the instrument. She does not claim that she did not sign the Stipulation without knowledge; she is simply arguing that the IJ failed to make that determination. Further, the record reflects that an immigration officer explained to the Defendant the provisions contained in the Stipulation and what legal rights she was waiving by signing the document. (ECF No. 25, Ex. 2 at 5) All of these facts taken together support a finding that the Defendant intelligently, knowingly, and voluntarily entered into the Stipulation of removal.

Moreover, this Court finds that the IJ issuing the initial 2005 removal order complied with the regulations governing the procedure for accepting stipulations and waivers. Though the record does not indicate that a hearing or colloquy was conducted to determine if the Defendant's Stipulation was given intelligently, knowingly, and voluntarily, the acceptance of the Stipulation supports an implicit finding that the IJ determined the Stipulation was given as such.

Particularly persuasive is the September 17, 2012 BIA Opinion directly on point. As related earlier, the Defendant had filed a motion to rescind her initial removal order, or in the alternative, moved to reopen the case. The IJ declined to exercise jurisdiction and the Defendant appealed to the BIA. In its opinion, the BIA affirmed the IJ's decision, finding that the Defendant's argument failed for three reasons. The first two reasons related to jurisdictional and timeliness bars; however, in its last reason, the BIA addressed the issue that the Defendant raises in her instant motion: that the IJ erred in not making a determination that the then pro se Defendant gave her Stipulation intelligently, knowingly, and voluntarily.

The pertinent part of the opinion reads as follows:

> Third, even assuming, *arguendo*, that the 90-day deadline and jurisdictional limitation . . . do not apply to the respondent's case, her Motion to Reopen must still be denied because *she has failed to show that the stipulated order of removal is defective*. Notably, the stipulated request that she signed on November 1, 2005, includes the following statement: 'I . . . being

> fully advised of my rights, hereby voluntarily, knowingly and intelligently enter into the following stipulations. . . .' Furthermore, the affidavit the respondent has submitted in support of her motion does not show that her stipulated request was not knowing, voluntary, or intelligent. In relevant part, she indicated that she signed the request because she was told that she was ineligible for relief. . . . At the time, this advice was correct, as her conviction for possession of methamphetamine was then classified as a an aggravated felony. . . . That the law in this area proceeded to change several months later, when the Seventh Circuit decided *Gonzalez-Gomez* on March 22, 2006, does not render the respondent's stipulated agreement invalid. In other words, an alien does not need to be clairvoyant in order to give knowing, voluntary, and intelligent consent.

(ECF No. 25, Ex. 3 at 3.) (emphasis added).

Thus, the BIA, the appellate body specifically tasked with determining whether or not immigration courts comply with their own regulations, found the Defendant's argument that the IJ's order of removal was procedurally defective to be without merit. This Court finds the BIA's determination on this matter to be persuasive for the stated reasons in the opinion. Accordingly, because the Stipulation and initial order of removal comported with all due process considerations given to aliens in immigration court proceedings, no fundamental unfairness can be said to have sufficiently tainted them, giving rise to a collateral attack pursuant to § 1326 (d) or under *Mendoza-Lopez*.

Because it is necessary for a movant to prevail under all three prongs under *Mendoza-Lopez* test, the failure to satisfy one requirement is a fatal defect in a collateral attack of a prior removal order. *United States v. Encarnacion-Galvez*, 964 F.2d 402, 407 (5th Cir. 1992). Therefore, it is not necessary for this Court to analyze whether the proceeding effectively eliminated the right of the alien to challenge the removal order by means of judicial review of the deportation.

ii. Prejudice

However assuming, *arguendo*, that the Defendant could have sufficiently shown that the underlying removal order was fundamentally unfair and that she exhausted all opportunities for judicial review, the Defendant cannot meet the last prong of the *Mendoza-Lopez* test–a showing of actual prejudice. For a movant to show prejudice, she must submit evidence that would support a finding that but for the procedural deficiencies in the underlying removal order, she would have not been removed. To this end, the Defendant claims that had the IJ conducted a hearing to determine that the Stipulation was given intelligently, knowingly, and voluntarily, her removal order would have been stayed for an undetermined length of time.

Shortly after her removal from the United States, the law regarding what offenses constituted "aggravated felonies" in a removal context changed.[8]

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[8] *See Gonzalez-Gomez v. Achim*, 441 F.3d 532 (7th Cir. 2006). Approximately five months after the Defendant's removal, the Seventh Circuit found that possession of small quantities of drugs, though categorized as felonies under state law, would not

The Defendant submits that had she elected to contest the charges against her, she would have been eligible for cancellation of her removal given the new precedent, thus meeting the prejudice requirement under *Mendoza-Lopez*. This argument is equally without merit.

First, the Defendant submits no evidence that supports her assertion that her possession of methamphetamine would have constituted a misdemeanor under the federal definition, other than deeming it as a "single drug possession." (ECF No 20 at 11.) Moreover, even if her proceeding was held after the change in decisional law, and even if her drug charge was designated as a misdemeanor, the Defendant still must have applied for cancellation of removal, a decision that ultimately rested within the discretion of the IJ. The Defendant cannot assert without any reasonable degree of certainty or probability that the IJ would have granted the Defendant's cancellation of removal.

Second, the Defendant does not address the fact that she was charged with three separate offenses constituting grounds for removal. In her Notice to Appear and the IJ's order of removal, the Defendant

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be designated as such if the quantity qualified as a misdemeanor under federal law. In other words, the immigration courts would no longer give deference to state categorization of which drug offenses constituted felonies and which constituted misdemeanors. The Defendant avers that the quantity of methamphetamine that she possessed, though deemed a felony by state law, would have constituted a misdemeanor under federal law. The Defendant claims that the effect of this designation would have made the Defendant statutorily eligible for cancellation of removal, as she was a legal permanent resident.

was charged with being a convicted aggravated felon (INA 237(a)(2)(A)(iii)), being convicted of possessing a controlled substance (INA 237(a)(2)(B)(i)), and being convicted of two or more crimes involving moral turpitude (INA 237(a)(2)(A)(ii)). The first two charges stem from the Defendant's conviction of possession of methamphetamine; the last charge is a result of her 2002 and 2003 theft convictions. All three of these charges rendered the Defendant removable at the time of her removal proceeding.

The Defendant focuses solely on the charge labeling her as an aggravated felon due to the possession of drugs case and ignores the other two charges. Any one of the government's charges could have been used to remove the Defendant to Mexico. Assuming *arguendo* that the Defendant would have contested her status as an aggravated felon, she offers no argument concerning how she would have overcome her two other grounds of removal–that is, her two prior convictions of theft and her possession of a controlled substance. It is very probable, in fact certain, that if the Defendant had successfully mounted a defense against her status as an aggravated felon, the government would have relied on the other two grounds for removal. Thus, the Defendant cannot show that but for the alleged procedural deficiencies in the removal proceeding, she would have probably prevailed and remained in the United States.

III. Conclusion

For the above reasons, the Defendant's Motion to dismiss her indictment is **DENIED**, as the Defendant cannot show that her underlying order of removal was performed in contravention of due

process rendering the proceeding as fundamentally unfair, nor can she show actual prejudice.

SIGNED this 8th day of April, 2013.

s/ Alia Moses
ALIA MOSES
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
Western District of Texas
DEL RIO DIVISION

UNITED STATES OF AMERICA	
v.	Case Number: DR-12-CR-01557(01)-RTH
GABRIELA CORDOVA-SOTO	USM Number: 03821-380
Defendant.	

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

The defendant, GABRIELA CORDOVA-SOTO, was represented by Juan Neri, III.

The defendant pled guilty to Count(s) One of the Indictment on July 24, 2013. Accordingly, the defendant is adjudged guilty of such Count(s), involving the following offense(s):

Title & Section	*Nature of Offense*	*Offense Ended*	*Count(s)*
8 U.S.C. § 1326	Illegal Re Entry Into the United States After Deportation	September 6, 2012	One

As pronounced on January 13, 2014, the defendant is sentenced as provided in pages 2 through 3 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid. If ordered to pay restitution, the defendant shall notify the Court and United States Attorney of any material change in the defendant's economic circumstances.

Signed this 31st day of January, 2014.

s/Richard T. Haik
Richard T. Haik
United States
District Judge

Arresting Agency: BP-Eagle Pass

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of **TIME SERVED** with credit for time served while in custody for this federal offense.

RETURN

I have executed this Judgment as follows:

_____
_____
_____
_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this Judgment.

_____
United States Marshal
By _____
Deputy Marshal

CRIMINAL MONETARY PENALTIES/SCHEDULE

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth. Unless the Court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. Criminal Monetary Penalties, except those payments made through Federal Bureau of Prisons' Inmate Financial Responsibility Program shall be paid through the Clerk, United States District Court, 111 E. Broadway, Suite 100 Del Rio, Texas 78840.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

	Assessment	***Fine***	***Restitution***
TOTAL:	$0	$0	$0

Special Assessment

Pursuant to 18 U.S.C. § 3573, the Government moves to remit the special assessment. Therefore, the Court does not impose a special assessment.

Fine

The fine is waived because of the defendant's inability to pay.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column above. However, pursuant to 18 U.S.C. § 3664(i), all non-federal victims must be paid before the United States is paid.

If the fine is not paid, the court may sentence the defendant to any sentence which might have been originally imposed. See 18 U.S.C. § 3614.

The defendant shall pay interest on any fine or restitution of more than $2,500.00, unless the fine or restitution is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All payment options may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. §3612(g).

Payments shall be applied in the following order: (1) assessment, (2) principal restitution, (3) restitution interest, (4) fine principal, (5) community restitution, (6) fine interest (7) penalties, and (8) costs, including costs of prosecution and court costs.

Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

APPENDIX D

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE IMMIGRATION JUDGE
CHICAGO, ILLINOIS

IN THE MATTER OF:) Gabriela CORDOVA-Soto) AKA: Gabriela Cordova Respondent))	IN REMOVAL PROCEEDINGS) FILE NO. A91 045 891

CHARGES: Section(s) **237(a)(2)(A)(iii) and 237(a)(2)(ii)** of the Immigration and Nationality Act and Section 237(a)(2)(B)(i)

RELIEF APPLICATION: None

ON BEHALF OF RESPONDENT:	*ON BEHALF OF SERVICE/DHS:*
Pro Se	Assistant District Counsel

DECISION AND ORDER OF THE IMMIGRATION JUDGE

Pursuant to the Notice to Appear issued on **10/28/2005**, the respondent is charged with being removable as indicated above. The respondent has submitted a statement wherein he/she waives a personal hearing before the Immigration Judge, and admits the truthfulness of the allegations and

charges contained in the Notice to Appear. The respondent concedes that he/she is ineligible for or has made no application for relief from removal proceedings which would allow him/her to remain in the United States, but instead requests issuance of an order by this Court for his/her removal to the country of **MEXICO**. The Immigration and Naturalization Service concurs with this request.

A stipulated order shall constitute a conclusive determination of the alien's removability from the United States. Based upon the respondent's admissions, the charges of removal are sustained by evidence that is clear and convincing. Appeal has been waived by the parties.

Accordingly, the following Order shall be entered

ORDER: IT IS HEREBY ORDERED that the respondent be REMOVED from the United States to MEXICO on the charges contained in the Notice to Appear.

November 8, 2005	s/ Jennie Grambast
Date	Immigration Judge

APPENDIX E

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE IMMIGRATION JUDGE
CHICAGO, ILLINOIS

IN THE MATTER OF:)	
)	
Gabriela CORDOVA-Soto)	IN REMOVAL PROCEEDINGS
AKA: Gabriela Cordova)	
FILE NO. A91 045 891	
Respondent)	
)	

STIPULATED REQUEST FOR ISSUANCE OF FINAL ORDER OF REMOVAL, WAIVER OF APPEARANCE AND HEARING

I, **Gabriela CORDOVA-Soto** respondent in the above entitled proceedings, being fully advised of my rights, hereby voluntarily, knowingly and intelligently enter into the following stipulations pursuant to 8 C.F.R. § 3.25(b):

1. I am at least 18 years of age.

2. I acknowledge service of the Notice to Appear dated **10/28/2005**, that my full, true, and correct name is stated thereon, and that this document relates to me.

3. I have been advised of my right to be represented by a lawyer or other person qualified to represent aliens in immigration proceedings at no expense to the government of the United States. I have also been provided a copy of the *List of Free Legal Services Provided*

(Circle a or b)

a. I hereby waive my right to be represented in this matter.

b. I am represented in this matter by an attorney or accredited representative who's EOIR-28 is attached.

4. My rights in these proceedings have been fully explained to me by the undersigned immigration officer. I am aware that in a removal hearing I would have the right to question government witnesses, object to evidence offered by the government, offer evidence of my own, call witnesses on my behalf, and demand that the government prove by clear and convincing evidence that I am removable from the United States or that I must prove that I am clearly and beyond a doubt entitled to be admitted to the United States. I understand these rights and waive further explanation by the Court.

5. I request that my removal proceedings be conducted completely on the written record without a hearing and specifically waive the requirement of a hearing recorded verbatim under 8 C.F.R. § 240.9. I further waive my right to have ten (10) days to prepare for said hearing. In the event that a hearing is scheduled in this matter, I request that my presence be waived.

6. I admit that I am a national of **MEXICO** and a citizen of **MEXICO** and that I am not a citizen or national of the United States.

7. I admit that each of the factual allegations contained in the Notice to Appear are true and correct.

8. I concede that I am subject to removal from the United States as charged in the Notice to Appear.

9. I request that **MEXICO** be designated as my country of removal. I have no fear of returning to that country.

10. I waive any right to make application for any relief from removal, including, but not limited to, voluntary departure, asylum, adjustment of status, registry, *de novo* review of a termination of conditional resident status, *de novo* review of a denial or revocation of temporary protected status, cancellation of removal, or any other possible relief under the Immigration and Nationality Act.

11. I am currently a Lawful Permanent President of the United States. I understand that by waiving my right to a hearing and by waiving my right to apply for any relief from removal which could be available to me under the Immigration and Nationality Act, or any other provision of the law, I will no longer be a Lawful Permanent Resident. I will no longer have the privilege of living in the United States nor would I be able to apply for naturalization based upon lawful permanent resident status. I realize that I will need to reapply for entrance to the United States in the future and that I may not be eligible for admission into the United States in the future.

12. I agree that this Stipulated Request for Issuance of Final Order of Removal, Waiver of Appearance and Hearing will become part of the record of proceedings in my removal case. I further agree that the exhibits attached to this stipulated request, if any, relate to me and I do not object to them becoming part of the record of proceedings in this matter.

13. I will accept a written order for my removal from the United States to **MEXICO** as a final disposition of these proceedings, and waive my rights to appeal this removal order or to challenge it in any other proceedings.

14. I understand that by accepting an order of removal, I cannot return to the United States legally for at least ten (10) years without special permission from the Attorney General. If I have been convicted of an aggravated felony, I understand that I may not legally return to the United States at any time without special permission from the Attorney General. I also understand that returning without special permission from the Attorney General could result in further removal proceedings and/or criminal prosecution, and that a conviction for illegal reentry may result in the imposition of a prison sentence of up to twenty (20) years.

15. This Stipulated Request for Issuance of Final Order of Removal, Waiver of Appearance and Hearing has been read and explained to me in its entirety by the undersigned immigration officer in the **English** language which I understand.

16. I acknowledge that this stipulation contains the entire agreement of the parties and that no other

promises or inducements have been given to me in return for the execution of this stipulation.

17. I will accept a written order for my removal from the United States to **MEXICO** as a final disposition of these proceedings, and waive my rights to appeal this removal order or to challenge it in any other proceedings.

18. I freely state that I have executed this stipulated request for removal voluntarily, knowingly, and intelligently, and fully understand its consequences.

I hereby certify that all the information contained in this Stipulated Request for Issuance of Final Order of Removal, Waiver of Appearance and Hearing is true and correct, and that I signed this document under the pains and penalties of perjury.

Gabriela CORDOVA-Soto _____ [Name of RESPONDENT]	s/ Gabriela Cordova-Soto (SIGNATURE)	11/1/05 (DATE)

CERTIFICATION OF IMMIGRATION OFFICER

I certify that this document has been read and explained by me to the respondent in the **English** language which the respondent understands and have provided the respondent with a complete copy of this document and attachments, if any.

James Gutierrez/Immigration Enforcement Agent

	s/ James Gutierrez	11-07-05
[NAME & TITLE OF IMMIGRATION OFFICER	(SIGNATURE OF OFFICER)	(DATE)

CERTIFICATION OF INTERPRETER (IF ANY)

I _____ hereby certify that I interpreted the above document to the respondent from English into _____ and certify that I am competent in both English and _____ to render such interpretation.

[NAME INTERPRETER]	(SIGNATURE OF INTERPRETER)	(DATE)

CONCURRENCE OF RESPONDENT'S ATTORNEY (IF ANY)

[NAME ATTORNEY]	(SIGNATURE)	(DATE)

DHS/CONCURRENCE OF THE IMMIGRATION AND NATURALIZATION SERVICE/DHS

The Service will accept a written order of Respondent's removal as a final disposition of these removal proceedings and waives its right to appeal.

BY: s/ Paula V. Davis Paula V. Davis NOV 7 2005
ASSISTANT CHIEF COUNSEL Date

APPENDIX F

Amendment V to the U.S. Constitution

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

8 U.S.C.A. § 1228(c)

§ 1228. Expedited removal of aliens convicted of committing aggravated felonies

* * *

(c) Presumption of deportability

An alien convicted of an aggravated felony shall be conclusively presumed to be deportable from the United States.

(c) Judicial removal

(1) Authority

Notwithstanding any other provision of this chapter, a United States district court shall have

jurisdiction to enter a judicial order of removal at the time of sentencing against an alien who is deportable, if such an order has been requested by the United States Attorney with the concurrence of the Commissioner and if the court chooses to exercise such jurisdiction.

(2) Procedure

(A) The United States Attorney shall file with the United States district court, and serve upon the defendant and the Service, prior to commencement of the trial or entry of a guilty plea a notice of intent to request judicial removal.

(B) Notwithstanding section 1252b of this title, the United States Attorney, with the concurrence of the Commissioner, shall file at least 30 days prior to the date set for sentencing a charge containing factual allegations regarding the alienage of the defendant and identifying the crime or crimes which make the defendant deportable under section 1227(a)(2)(A) of this title.

(C) If the court determines that the defendant has presented substantial evidence to establish prima facie eligibility for relief from removal under this chapter, the Commissioner shall provide the court with a recommendation and report regarding the alien's eligibility for relief. The court shall either grant or deny the relief sought.

(D)(i) The alien shall have a reasonable opportunity to examine the evidence against him or her, to present evidence on his or her own

behalf, and to cross-examine witnesses presented by the Government.

(ii) The court, for the purposes of determining whether to enter an order described in paragraph (1), shall only consider evidence that would be admissible in proceedings conducted pursuant to section 1229a of this title.

(iii) Nothing in this subsection shall limit the information a court of the United States may receive or consider for the purposes of imposing an appropriate sentence.

(iv) The court may order the alien removed if the Attorney General demonstrates that the alien is deportable under this chapter.

(3) Notice, appeal, and execution of judicial order of removal

(A)(i) A judicial order of removal or denial of such order may be appealed by either party to the court of appeals for the circuit in which the district court is located.

(ii) Except as provided in clause (iii), such appeal shall be considered consistent with the requirements described in section 1252 of this title.

(iii) Upon execution by the defendant of a valid waiver of the right to appeal the conviction on which the order of removal is based, the expiration of the period described in section 1252(b)(1) of this title, or the final dismissal of an appeal from such conviction, the order of removal shall become final and shall be executed at the end of the prison term

in accordance with the terms of the order. If the conviction is reversed on direct appeal, the order entered pursuant to this section shall be void.

(B) As soon as is practicable after entry of a judicial order of removal, the Commissioner shall provide the defendant with written notice of the order of removal, which shall designate the defendant's country of choice for removal and any alternate country pursuant to section 1253(a) of this title.

(4) Denial of judicial order

Denial of a request for a judicial order of removal shall not preclude the Attorney General from initiating removal proceedings pursuant to section 1229a of this title upon the same ground of deportability or upon any other ground of deportability provided under section 1227(a) of this title.

(5) Stipulated judicial order of removal

The United States Attorney, with the concurrence of the Commissioner, may, pursuant to Federal Rule of Criminal Procedure 11, enter into a plea agreement which calls for the alien, who is deportable under this chapter, to waive the right to notice and a hearing under this section, and stipulate to the entry of a judicial order of removal from the United States as a condition of the plea agreement or as a condition of probation or supervised release, or both. The United States district court, in both felony and misdemeanor cases, and a United States magistrate judge in misdemeanor cases, may accept such a stipulation

and shall have jurisdiction to enter a judicial order of removal pursuant to the terms of such stipulation.

8 U.S.C.A. § 1229b(a)-(b)

§ 1229b. Cancellation of removal; adjustment of status

* * *

(a) Cancellation of removal for certain permanent residents

The Attorney General may cancel removal in the case of an alien who is inadmissible or deportable from the United States if the alien—

(1) has been an alien lawfully admitted for permanent residence for not less than 5 years,

(2) has resided in the United States continuously for 7 years after having been admitted in any status, and

(3) has not been convicted of any aggravated felony.

(b) Cancellation of removal and adjustment of status for certain nonpermanent residents

(1) In general

The Attorney General may cancel removal of, and adjust to the status of an alien lawfully admitted for permanent residence, an alien who is inadmissible or deportable from the United States if the alien—

(A) has been physically present in the United States for a continuous period of not less than 10 years immediately preceding the date of such application;

(B) has been a person of good moral character during such period;

(C) has not been convicted of an offense under section 1182(a)(2), 1227(a)(2), or 1227(a)(3) of this title, subject to paragraph (5); and

(D) establishes that removal would result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.

(2) Special rule for battered spouse or child

(A) Authority

The Attorney General may cancel removal of, and adjust to the status of an alien lawfully admitted for permanent residence, an alien who is inadmissible or deportable from the United States if the alien demonstrates that—

(i)(I) the alien has been battered or subjected to extreme cruelty by a spouse or parent who is or was a United States citizen (or is the parent of a child of a United States citizen and the child has been battered or subjected to extreme cruelty by such citizen parent);

(II) the alien has been battered or subjected to extreme cruelty by a spouse or parent who is or was a lawful permanent resident (or is the parent of a child of an alien who is or was a lawful permanent resident and the child has been battered or subjected to extreme cruelty by such permanent resident parent); or

(III) the alien has been battered or subjected to extreme cruelty by a United States citizen or lawful permanent resident whom the alien intended to marry, but whose marriage is not legitimate because of

that United States citizen's or lawful permanent resident's bigamy;

(ii) the alien has been physically present in the United States for a continuous period of not less than 3 years immediately preceding the date of such application, and the issuance of a charging document for removal proceedings shall not toll the 3-year period of continuous physical presence in the United States;

(iii) the alien has been a person of good moral character during such period, subject to the provisions of subparagraph (C);

(iv) the alien is not inadmissible under paragraph (2) or (3) of section 1182(a) of this title, is not deportable under paragraphs (1)(G) or (2) through (4) of section 1227(a) of this title, subject to paragraph (5), and has not been convicted of an aggravated felony; and

(v) the removal would result in extreme hardship to the alien, the alien's child, or the alien's parent.

(B) Physical presence

Notwithstanding subsection (d)(2) of this section, for purposes of subparagraph (A)(ii) or for purposes of section 1254(a)(3) of this title (as in effect before the title III-A effective date in section 309 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996), an alien shall not be considered to have failed to maintain continuous physical presence by reason of an absence if the alien demonstrates a connection between the absence and the battering or extreme cruelty perpetrated against

the alien. No absence or portion of an absence connected to the battering or extreme cruelty shall count toward the 90-day or 180-day limits established in subsection (d)(2) of this section. If any absence or aggregate absences exceed 180 days, the absences or portions of the absences will not be considered to break the period of continuous presence. Any such period of time excluded from the 180-day limit shall be excluded in computing the time during which the alien has been physically present for purposes of the 3-year requirement set forth in this subparagraph, subparagraph (A)(ii), and section 1254(a)(3) of this title (as in effect before the title III-A effective date in section 309 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996).

(C) Good moral character

Notwithstanding section 1101(f) of this title, an act or conviction that does not bar the Attorney General from granting relief under this paragraph by reason of subparagraph (A)(iv) shall not bar the Attorney General from finding the alien to be of good moral character under subparagraph (A)(iii) or section 1254(a)(3) of this title (as in effect before the Title III-A effective date in section 309 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996), if the Attorney General finds that the act or conviction was connected to the alien's having been battered or subjected to extreme cruelty and determines that a waiver is otherwise warranted.

(D) Credible evidence considered

In acting on applications under this paragraph, the Attorney General shall consider any credible evidence relevant to the application. The determination of what evidence is credible and the weight to be given that evidence shall be within the sole discretion of the Attorney General.

(3) Recordation of date

With respect to aliens who the Attorney General adjusts to the status of an alien lawfully admitted for permanent residence under paragraph (1) or (2), the Attorney General shall record the alien's lawful admission for permanent residence as of the date of the Attorney General's cancellation of removal under paragraph (1) or (2).

(4) Children of battered aliens and parents of battered alien children

(A) In general

The Attorney General shall grant parole under section 1182(d)(5) of this title to any alien who is a—

(i) child of an alien granted relief under section 1229b(b)(2) or 1254(a)(3) of this title (as in effect before the title III-A effective date in section 309 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996); or

(ii) parent of a child alien granted relief under section 1229b(b)(2) or 1254(a)(3) of this title (as in effect before the title III-A effective date in section 309 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996).

(B) Duration of parole

The grant of parole shall extend from the time of the grant of relief under subsection (b)(2) of this section or section 1254(a)(3) of this title (as in effect before the title III-A effective date in section 309 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996) to the time the application for adjustment of status filed by aliens covered under this paragraph has been finally adjudicated. Applications for adjustment of status filed by aliens covered under this paragraph shall be treated as if the applicants were VAWA self-petitioners. Failure by the alien granted relief under subsection (b)(2) of this section or section 1254(a)(3) of this title (as in effect before the title III-A effective date in section 309 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996) to exercise due diligence in filing a visa petition on behalf of an alien described in clause (i) or (ii) may result in revocation of parole.

(5) Application of domestic violence waiver authority

The authority provided under section 1227(a)(7) of this title may apply under paragraphs (1)(B), (1)(C), and (2)(A)(iv) in a cancellation of removal and adjustment of status proceeding.

(6) Relatives of trafficking victims

(A) In general

Upon written request by a law enforcement official, the Secretary of Homeland Security may parole under section 1182(d)(5) of this title any alien who is a relative of an alien granted continued presence under section 7105(c)(3)(A) of Title 22, if the relative—

(i) was, on the date on which law enforcement applied for such continued presence—

(I) in the case of an alien granted continued presence who is under 21 years of age, the spouse, child, parent, or unmarried sibling under 18 years of age, of the alien; or

(II) in the case of an alien granted continued presence who is 21 years of age or older, the spouse or child of the alien; or

(ii) is a parent or sibling of the alien who the requesting law enforcement official, in consultation with the Secretary of Homeland Security, as appropriate, determines to be in present danger of retaliation as a result of the alien's escape from the severe form of trafficking or cooperation with law enforcement, irrespective of age.

(B) Duration of parole

(i) In general

The Secretary may extend the parole granted under subparagraph (A) until the final adjudication of the application filed by the principal alien under section 1101(a)(15)(T)(ii) of this title.

(ii) Other limits on duration

If an application described in clause (i) is not filed, the parole granted under subparagraph (A) may extend until the later of—

(I) the date on which the principal alien's authority to remain in the United States under section 7105(c)(3)(A) of this title is terminated; or

(II) the date on which a civil action filed by the principal alien under section 1595 of Title 18, is concluded.

(iii) Due diligence

Failure by the principal alien to exercise due diligence in filing a visa petition on behalf of an alien described in clause (i) or (ii) of subparagraph (A), or in pursuing the civil action described in clause (ii)(II) (as determined by the Secretary of Homeland Security in consultation with the Attorney General), may result in revocation of parole.

(C) Other limitations

A relative may not be granted parole under this paragraph if—

(i) the Secretary of Homeland Security or the Attorney General has reason to believe that the relative was knowingly complicit in the trafficking of an alien permitted to remain in the United States under section 7105(c)(3)(A) of Title 22; or

(ii) the relative is an alien described in paragraph (2) or (3) of section 1182(a) of this title or paragraph (2) or (4) of section 1227(a) of this title.

* * *

8 U.S.C.A. § 1326

§ 1326. Reentry of removed aliens

* * *

(d) Limitation on collateral attack on underlying deportation order

In a criminal proceeding under this section, an alien may not challenge the validity of the deportation

order described in subsection (a)(1) of this section or subsection (b) of this section unless the alien demonstrates that—

(1) the alien exhausted any administrative remedies that may have been available to seek relief against the order;

(2) the deportation proceedings at which the order was issued improperly deprived the alien of the opportunity for judicial review; and

(3) the entry of the order was fundamentally unfair.

8 C.F.R. § 1003.25

§ 1003.25 Form of the proceeding.

(a) Waiver of presence of the parties. The Immigration Judge may, for good cause, and consistent with section 240(b) of the Act, waive the presence of the alien at a hearing when the alien is represented or when the alien is a minor child at least one of whose parents or whose legal guardian is present. When it is impracticable by reason of an alien's mental incompetency for the alien to be present, the presence of the alien may be waived provided that the alien is represented at the hearing by an attorney or legal representative, a near relative, legal guardian, or friend.

(b) Stipulated request for order; waiver of hearing. An Immigration Judge may enter an order of deportation, exclusion or removal stipulated to by the alien (or the alien's representative) and the Service. The Immigration Judge may enter such an order without a hearing and in the absence of the parties

based on a review of the charging document, the written stipulation, and supporting documents, if any. If the alien is unrepresented, the Immigration Judge must determine that the alien's waiver is voluntary, knowing, and intelligent. The stipulated request and required waivers shall be signed on behalf of the government and by the alien and his or her attorney or representative, if any. The attorney or representative shall file a Notice of Appearance in accordance with § 1003.16(b). A stipulated order shall constitute a conclusive determination of the alien's deportability or removability from the United States. The stipulation shall include:

(1) An admission that all factual allegations contained in the charging document are true and correct as written;

(2) A concession of deportability or inadmissibility as charged;

(3) A statement that the alien makes no application for relief under the Act;

(4) A designation of a country for deportation or removal under section 241(b)(2)(A)(i) of the Act;

(5) A concession to the introduction of the written stipulation of the alien as an exhibit to the Record of Proceeding;

(6) A statement that the alien understands the consequences of the stipulated request and that the alien enters the request voluntarily, knowingly, and intelligently;

(7) A statement that the alien will accept a written order for his or her deportation, exclusion or removal as a final disposition of the proceedings; and

(8) A waiver of appeal of the written order of deportation or removal.

(c) Telephonic or video hearings. An Immigration Judge may conduct hearings through video conference to the same extent as he or she may conduct hearings in person. An Immigration Judge may also conduct a hearing through a telephone conference, but an evidentiary hearing on the merits may only be conducted through a telephone conference with the consent of the alien involved after the alien has been advised of the right to proceed in person or, where available, through a video conference, except that credible fear determinations may be reviewed by the Immigration Judge through a telephone conference without the consent of the alien.

APPENDIX G

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
DEL RIO DIVISION

UNITED STATES OF AMERICA	§	
	§	
VS.	§	CAUSE NO.
	§	DR-12-CR-1557
GABRIELA CORDOVA-SOTO	§	

MOTION TO DISMISS INDICTMENT

TO THE HONORABLE ALIA MOSES, UNITED STATES DISTRICT JUDGE FOR THE WESTERN DISTRICT OF TEXAS:

Gabriela Cordova-Soto is charged with illegally reentering the United States after having been removed. The indictment alleges that she was removed from the United States on or about October 1, 2010. That removal was pursuant to a reinstatement of an earlier removal order from 2005. Neither removal may be used to establish the prior-removal element of the illegal reentry charge against her because the 2005 removal order, as well as the 2010 reinstatement of that order, are invalid.

Cordova asks for a hearing on this motion,[1] and for the Court to dismiss the indictment with prejudice.

I.

Factual and Procedural Background

1. Cordova's Entry Into the United States and Granting of Lawful Permanent Resident Status.

Gabriela Cordova-Soto entered the United States in 1978, when she was just nine months old. She became a lawful permanent resident (LPR) in 1991, at the age of 13.

2. The 2005 Removal.

More than a decade later, Cordova ran afoul of the law in Kansas. In 2002, she was convicted of theft. In 2003, she was convicted of giving a worthless check. In 2005, Cordova was convicted of possession of methamphetamine, which was a felony offense in Kansas.

Shortly thereafter, Immigration and Customs Enforcement agents arrested Cordova, took her to Wichita, Kansas, and initiated removal proceedings against her. On October 28, 2005, Cordova was served with a Notice to Appear before an immigration judge. The Notice alleged that she was subject to removal from the United States on three grounds: 1) as an aggravated felon, based on her drug-possession conviction, 2) as an alien convicted of two crimes involving moral turpitude, based on her theft and worthless check convictions, and 3) as an alien

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[1] *See* FED. R. CRIM. P. 12(b)(2) ("A party may raise by pretrial motion any defense, objection, or request that the court can determine without a trial of the general issue.").

convicted of violating a law relating to a controlled substance, based on her drug-possession conviction. On the same date, the immigration judge ordered that Cordova be detained pending her removal hearing.

While Cordova was at the ICE processing center, agents presented her some forms and advised her that if she wanted to be removed quickly she should sign them. The agents advised her that either way, she was going to be deported. Cordova was given permission to make a brief call to one of the legal services providers listed at the ICE processing center. She had a short conversation with the person who answered the phone at the number listed for one of the providers, who advised her that she had no grounds for relief. Cordova does not know if the person with whom she spoke was even an attorney.

As an LPR, Cordova was statutorily eligible for cancellation of removal, if her single drug possession conviction was not an "aggravated felony."[2] At that time, the courts of appeals were divided over whether a state drug conviction that is a felony under state law, but that would only be a misdemeanor under federal law, is an "aggravated felony" for immigration purposes.[3] The Board of Immigration Appeals had held that, for immigration proceedings occurring in circuits that had resolved the question, the law of the circuit would control the determination of whether a state felony drug conviction was an aggravated

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[2] *See* 8 U.S.C. § 1229b(a).

[3] *See Lopez v. Gonzales*, 549 U.S. 47, 52 & n.3 (2006).

felony.[4] For immigration proceedings occurring in circuits that had not resolved the question, the BIA applied the view of the majority of circuits, which was that a state felony drug conviction is an aggravated felony.[5] Cordova's case was before an immigration judge in Chicago, Illinois, which is in the Seventh Circuit.[6] At the time Cordova was in removal proceedings, the Seventh Circuit had not yet resolved the question. In a separate case involving proceedings in the Chicago immigration court, the BIA had held that a state felony drug conviction was an aggravated felony.[7] But the question was before the Seventh Circuit court in *Gonzalez-Gomez v. Achim*,[8] and briefing in that case was completed on October 24, 2005, before Cordova was served with the Notice to Appear.

Notwithstanding that the law concerning simple drug possession was in flux, on November 7, 2005, ICE agents persuaded Cordova to sign a document captioned "Stipulated Request for Issuance of Final Order of Removal, Waiver of Appearance and Hearing." Among other things, the Stipulated Request conceded Cordova's removability "as charged in the Notice to Appear[,]"[9] and contained several important waivers:

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[4] *In re Yanez-Garcia*, 23 I & N Dec. 390, 396–97 (BIA 2002).

[5] *Id.* at 394–95, 397.

[6] At the time, the immigration court in Chicago heard and decided all cases for aliens in the Kansas City, Missouri area.

[7] *Yanez-Garcia*, 23 I & N Dec. at 398–400.

[8] No. 05-2728.

[9] Stipulated Request ¶ 8.

> I hereby waive my right to be represented in this matter.[10]
>
> I . . . specifically waive the requirement of a hearing recorded verbatim . . . . In the event that a hearing is scheduled in this matter, I request that my presence be waived.[11]
>
> I waive any right to make application for any relief from removal including, but not limited to, . . . cancellation of removal, or any other possible relief under the Immigration and Nationality Act.[12]
>
> I . . . waive my rights to appeal this removal order or to challenge it in any other proceedings.[13]

The government submitted Cordova's pro se Stipulated Removal Request and Notice to Appear to the Chicago immigration court. On November 8, 2005, the immigration judge entered a removal order without a hearing or any communication with Cordova.

A regulation provides that an immigration judge may enter a stipulated order of removal "without a hearing and in the absence of the parties based on a review of the charging document, the written stipulation, and supporting documents, if any."[14] But "[i]f the alien is unrepresented, the Immigration

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[10] Stipulated Request ¶ 3a.

[11] Stipulated Request ¶ 5.

[12] Stipulated Request ¶ 10.

[13] Stipulated Request ¶¶ 13, 17.

[14] 8 C.F.R. § 1003.25(b).

Judge must determine that the alien's waiver is voluntary, knowing, and intelligent."[15] Cordova's Stipulated Request showed that she was proceeding pro se, so the regulation clearly required the immigration judge to find that her waiver was voluntary, knowing, and intelligent. But the record of the proceedings contains no evidence that the immigration judge held a hearing or conducted any inquiry to make this determination. Likewise, immigration judge's decision and order of removal contains no finding that Cordova's waiver of rights was in fact voluntary, knowing, and intelligent, as required by the regulation for unrepresented aliens.

Just a few months after the immigration judge entered the removal order against Cordova, the Seventh Circuit held that a state felony conviction for simple possession of a controlled substance is not an "aggravated felony" for immigration purposes.[16] Later that year, the Supreme Court agreed in *Lopez v. Gonzales*.[17]

3. The 2010 Reinstatement of the 2005 Removal Order.

Once deported, Cordova was heartbroken at being separated from her family. She soon returned to be with her family in Kansas.

In March 2010, Cordova was identified by local police and then arrested by the ICE Fugitive Operations Team in Wichita, Kansas. After the U.S. Attorney's office declined to pursue an illegal reentry

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[15] *Id.*

[16] *Gonzales-Gomez v. Achim*, 441 F.3d 532 (7th Cir. 2006).

[17] 549 U.S. 47 (2006).

charge, ICE moved forward with a reinstatement of Cordova's prior 2005 stipulated removal order.

Cordova petitioned the Tenth Circuit for review of ICE's reinstatement of the 2005 stipulated removal order, in part seeking to challenge the lawfulness of the underlying 2005 order.[18] The Tenth Circuit held that it did not have jurisdiction to review the lawfulness of the underlying stipulated removal order because Cordova did not file a petition for review within 30 days of the date of that order.[19] Cordova was subsequently removed to Mexico again in October 2010.

4. The 2011 Motion to Rescind the 2005 Removal Order and Reopen Cordova's Case.

It was only after the Tenth Circuit's decision that Cordova learned that the only avenue by which she could challenge the lawfulness of her 2005 stipulated removal order was through a motion to rescind the order and reopen her case. Cordova contacted counsel, and filed that motion in December 2011 with the immigration court in Chicago. The Chicago immigration judge rejected the motion. Citing 8 C.F.R. § 1003.23(b)(1)(ii), the judge reasoned that "[s]ince the Kansas City, MO court now has administrative control over the matter, the motion must be filed with the court of processing." Cordova then refiled her motion with the immigration court in Kansas City. That court rejected her motion on four grounds: 1) the motion was filed more than 90 days

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[18] *Cordova-Soto v. Holder*, 659 F.3d 1029 (10th Cir. 2011), *cert. denied*, 81 U.S.L.W. 3286 (U.S. Nov. 26, 2012) (No. 12-95).

[19] *Id.* at 1031-32.

after entry of the 2005 removal order; 2) under regulation and BIA precedent the court lacked jurisdiction to review the decision to reinstate the 2005 removal order; 3) the advice Cordova received—that her conviction for possession of methamphetamine was an aggravated felony—was correct at the time she signed the stipulated request for removal, and the fact that the Seventh Circuit later held otherwise did not make her request involuntary, unknowing, or unintelligent; and 4) notwithstanding the "sympathetic circumstances" of Cordova's case, her removal from the United States precluded the court from exercising its discretion to reopen the removal proceedings sua sponte.

Cordova appealed the denial or her motion to the BIA, which dismissed her appeal in September 2012.

II.

Argument

An alien who illegally reenters the United States after having been removed commits a felony offense in violation of 8 U.S.C. § 1326. But if that removal violated the alien's right to due process in the proceedings, the removal may not be used to prove the prior-removal element of a § 1326 violation. *See United States v. Mendoza-Lopez*, 481 U.S. 828, 837–39 (1987); *United States v. Benitez-Villafuerte*, 186 F.3d 651, 658 (5th Cir. 1999). To prevail in a collateral attack on a deportation order, the alien must show that her prior deportation proceedings were fundamentally unfair, that she exhausted her administrative remedies, that she was deprived of her right to judicial review, and that she suffered prejudice. *Benitez-Villafuerte*, 186 F.3d at 658 & n.8

(citing 8 U.S.C. § 1326(d)). Cordova can meet these requirements.[20]

1. Cordova's 2005 Removal Was Fundamentally Unfair Because the Immigration Judge Did Not Expressly Determine That Her Stipulated Removal Request and Waiver of Rights Was Voluntary, Knowing, and Intelligent.

A regulation provides that an immigration judge may enter an order of removal "without a hearing and in the absence of the parties based on a review of the charging document, the written stipulation, and supporting documents, if any."[21] But "[i]f the alien is unrepresented, the Immigration Judge must determine that the alien's waiver is voluntary, knowing, and intelligent."[22]

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[20] The indictment alleges that Cordova was removed on or about October 1, 2010, a date that coincides with the September 2010 reinstatement of the 2005 removal order, rather than Cordova's removal following the 2005 order itself. Nevertheless, "a valid reinstatement of an invalid removal order cannot transform the prior order into a valid predicate for an illegal reentry conviction." *United States v. Arias-Ordonez*, 597 F.3d 972, 981 (9th Cir. 2010). Consequently, Cordova may collaterally challenge the 2005 removal order in this case. *See id.* at 978–81; *United States v. Charleswell*, 456 F.3d 347, 351–52 & n.4 (3d Cir. 2006); *see also Mendoza-Lopez*, 481 U.S. at 837–39; *cf. Ramirez-Molina v. Ziglar*, 436 F.3d 508, 514 n.9 (5th Cir. 2006) (distinguishing between collateral attack on removal order underlying indictment in criminal case and collateral attack on removal order underlying reinstatement in immigration proceedings). If that order is invalid, then so is the reinstatement of that order.

[21] 8 C.F.R. § 1003.25(b).

[22] *Id.*

There is no indication that the immigration judge conducted a hearing or any other colloquy to ascertain that the Cordova's waiver of rights was voluntary, knowing, and intelligent. "An [immigration judge]'s failure to explore waiver adequately with [the alien] preclude[s] a purported waiver from being considered and intelligent."[23]

Nor did the removal order contain a finding that Cordova's waiver was voluntary, knowing, and intelligent. The BIA has repeatedly vacated stipulated orders of removal that fail to address this essential regulatory requirement and remanded cases to the immigration judge for further fact-finding.[24] While the Stipulated Request recited that Cordova executed it "voluntarily, knowingly, and intelligently[,]" and that she "fully understands its consequences[,]" that boilerplate recital is not sufficient to satisfy the requirements of the regulation or due process. The regulation itself requires that the stipulation include "[a] statement that the alien understands the consequences of the stipulated request and that the alien enters the request voluntarily, knowingly, and intelligently[.]"[25] Nevertheless, the BIA has required immigration judges to expressly make that finding even when the

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[23] *United States v. Ramos*, 623 F.3d 672, 681 (9th Cir. 2010) (internal quotation marks and citation omitted).

[24] *See, e.g., In re Medrano-Umanzor*, File No. A99 520 050, 2006 WL 3088805 (BIA Aug. 9, 2006) (unpublished); *In re Doucoure*, File No. A97 687 412, 2006 WL 2008172 (BIA May 25, 2006) (unpublished); *In re Lagunes-Huerta*, File No. A98 371 053, 2005 WL 3709295 (BIA Dec. 28, 2005) (unpublished).

[25] 8 C.F.R. § 1003.25(b)(6).

alien has signed such a stipulation..[26] Moreover, if a written stipulation by a *pro se* respondent were sufficient under the regulation, that would render extraneous the separate regulatory requirement that the immigration judge make a determination as to stipulations by an alien proceeding *pro se*. The regulations require that all stipulation requests, both *pro se* and represented, include a statement that the waiver was made voluntarily, knowingly, and intelligently.[27] But only as to *pro se* individuals must the immigration judge make an actual determination as to that point.[28] If the boilerplate statement in a stipulation request that the waiver was voluntary, knowing, and intelligent were sufficient to show that it was in fact voluntary, knowing, and intelligent, then the separate regulatory language applicable only to *pro se* individuals would mere surplusage; such an interpretation is to be avoided.[29]

Because the immigration judge failed to determine that Cordova's waiver of rights was voluntary, knowing, and intelligent, the deportation proceeding was fundamentally unfair.[30]

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[26] *See supra* n.23.

[27] 8 C.F.R. § 1003.25(b)(6).

[28] 8 C.F.R. § 1003.25(b).

[29] *See United States v. Nordic Village, Inc.*, 503 U.S. 30, 36 (1992) ("[A] statute must, if possible, be construed in such fashion that every word has some operative effect.").

[30] A study has found widespread flaws in the stipulated removal process, particularly with the requirement that an alien's waiver of rights be voluntary, knowing, and intelligent. *See* JENNIFER LEE KOH ET AL., DEPORTATION WITHOUT DUE PROCESS (Sept. 2011), *available at* http://www.stanford.edu/group/irc/

2. Cordova meets the requirement of exhaustion of administrative remedies.

Cordova did not appeal the removal order or seek cancellation of removal. But there is an exception to the general rule of exhaustion of administrative remedies "'where resort to the agency would be futile because the challenge is one that the agency has no power to resolve in the applicant's favor.'"[31] At the time the immigration judge entered the order of removal, neither he nor the BIA could have found that Cordova was not an aggravated felon because at that time Cordova's drug conviction was considered an aggravated felony by the BIA.[32] Nor could the immigration judge or the BIA have granted Cordova cancellation of removal, because cancellation is not available to a lawful permanent resident who has been convicted of an aggravated felony.[33] Therefore, it would have been futile for Cordova to seek cancellation of removal, and so she met the requirement to exhaust administrative remedies.[34]

Deportation_Without_Due_Process_2011.pdf (last visited Dec. 30, 2012).

[31] *Goonsuwan v. Ashcroft*, 252 F.3d 383, 389 (5th Cir. 2001) (quoting *Sousa v. INS*, 226 F.3d 28, 32 (1st Cir. 2000); *see also United States v. Ojeda-Escobar*, 218 F. Supp. 2d 839, 844 (W.D. Tex. 2002) (recognizing applicability of exception in § 1326 cases involving collateral challenges to deportation).

[32] *Yanez-Garcia*, 23 I & N Dec. at 398–400.

[33] 8 U.S.C. § 1229b(a)(3).

[34] *See United States v. Segundo*, No. 4:10-cr-0397, 2010 WL 4791280, at *4 (S.D. Tex. Nov. 16, 2010) (finding that alien met requirement of administrative exhaustion where appeal of removal order to BIA would have been futile because controlling

Cordova satisfies the requirement of administrative exhaustion for a second reason, as well. "In addition to the futility exception, the administrative exhaustion requirement of 8 U.S.C. § 1326(d) cannot bar collateral review when the waiver of the right to an administrative appeal did not comport with due process."[35] As discussed above, Cordova's waiver of her right to administratively appeal her removal order did not comport with due process because the immigration judge did not find that her waiver was voluntary, knowing, and intelligent.

3. Cordova was deprived of her right to judicial review.

Similarly, Cordova was deprived of her right to judicial review of the deportation order. The immigration judge's failure to determine whether Cordova's waiver of rights—including her waiver of "rights to appeal this removal order or to challenge it in any other proceedings"[36]—prevented Cordova from seeking judicial review of her classification as an aggravated felon.[37]

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case law precluded BIA from finding that alien was not an aggravated felon).

[35] *Id.* at *5.

[36] Stipulated Request ¶¶ 13, 17.

[37] *See Mendoza-Lopez*, 481 U.S. at 840 ("Because the waivers of their rights to appeal were not considered or intelligent, respondents were deprived of judicial review of their deportation proceeding.").

4. Cordova was prejudiced.

To show prejudice, a defendant must demonstrate that "there was a reasonable likelihood that but for the errors complained of the defendant would not have been deported."[38] In this case, there was prejudice because Cordova's removal proceedings would likely have yielded a different result.

If Cordova had contested ICE's allegation that her single drug possession offense constituted an aggravated felony and appealed her case through the legal system, she would have become eligible for cancellation of removal less than six months later when the Seventh Circuit held that an offense like hers is not an aggravated felony.[39] And if she had been able to apply for cancellation, there is a reasonable likelihood that it would have been granted. The Supreme Court has noted that, historically, "a substantial percentage" of the applications for similar

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[38] *Benitez-Villafuerte*, 186 F.3d at 659. The Ninth Circuit employs an arguably more lenient standard for prejudice: "A defendant need not conclusively demonstrate that he or she would have received relief to show prejudice, but must show only that there were 'plausible grounds for relief.'" *Ramos*, 623 F.3d at 684 (quoting *United States v. Gonzalez-Valerio*, 342 F.3d 1051, 1054 (9th Cir. 2003)). To the extent that the Ninth Circuit's standard differs from the Fifth Circuit's, Cordova argues that the Ninth Circuit standard is the correct one. Because this Court is bound by the Fifth Circuit's standard, Cordova raises this argument to preserve it for possible appellate review.

[39] *See Gonzales-Gomez*, 441 F.3d 532; 8 U.S.C. § 1229b(a); *see also Lopez*, 549 U.S. 47.

relief under former § 212(c) of the Immigration and Nationality Act.[40]

Cordova met the domicile requirements for relief. At the time of her removal proceedings, she had been a lawful permanent resident for more than five years and had resided in the United States continuously for more than seven years after obtaining LPR status.[41] Also, as the immigration judge in Kansas City noted when denying Cordova's motion to reopen her removal proceedings, her case involves "sympathetic circumstances[.]" Cordova came to the United States when she was just nine months old, and became a lawful permanent resident in 1991 at the age of 13. She retained that status until 2005, when she was erroneously found to be an aggravated felon on the basis of her conviction for simple possession of methamphetamine. Cordova is married to a United States citizen, and they have four children, all of whom are United States citizens. She speaks fluent English; she understands little Spanish. Mexico is effectively a foreign country to her. Cordova is, for all practical purposes, an American. Given these circumstances, it is reasonably likely that she would have been granted cancellation of removal.

5. Conclusion.

Because Cordova's 2005 removal proceedings were fundamentally unfair, because she exhausted her administrative remedies, because she was deprived of judicial review, and because she was prejudiced, neither her 2005 removal, nor the 2010

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[40] *INS v. St. Cyr*, 533 U.S. 289, 295–96 (2001).

[41] *See* 8 U.S.C. § 1229b(a)(1), (2).

reinstatement of that removal, may be used to establish an element in her criminal prosecution for illegal reentry under 8 U.S.C. § 1326.

PRAYER

Cordova asks that the Court hold a hearing on this motion, and thereafter order that the indictment be dismissed with prejudice.

Respectfully submitted,

G. PATRICK BLACK
Acting Federal Public Defender

/s/ JUAN NERI, III
JUAN NERI, III
Assistant Federal Public Defender
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State Bar Number: TX 14915600
Attorney for Defendant

APPENDIX H

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

DETAINED

No. 12-3392

GABRIELA CORDOVA-SOTO,	)	
Petitioner	)	Petition for Review of an Immigration Matter
vs.	)	
HOLDER,	)	
Respondent.	)	

CERTIFIED ADMINISTRATIVE RECORD

A91-045-891

DETAINED

AFFIDAVIT OF GABRIELA CORDOVA-SOTO

A091-045-891

I, Gabriela Cordova Soto, under penalty of perjury, hereby declare the following:

1. My name is Gabriela Cordova Soto. I am providing this affidavit in support of my Motion to Reopen, and to describe how my family will be affected if I can't return to the United States.
2. I was born on October 10, 1977 in Durango, Mexico. I was brought to the United States by my parents when I was approximately 9 months old. From the time I came to the U.S. until the time I was deported in November of 2005, I had never left the U.S. or ever returned to Mexico, not even for a visit. The only family I currently have in Mexico is one uncle.
3. My parents are Maria del Carmen Hernandez and Hilario Cordova. I have two sisters, Janette Florentino and Elisa Cordova and two brothers Hilario Cordova and Alejandro Cordova. Both of my parents are Lawful Permanent Residents. All of my siblings were born in the U.S. after we came, so they are all United States citizens.
4. I became a lawful permanent resident of the United States in 1986. I believe that I obtained my Lawful Permanent Resident status through my parents, and that they became Lawful Permanent Residents through the amnesty program.
5. I am married to Bernard Benny Lopez, IV, or Benny, who was born in the United States and is a U.S. citizen. We have four children, all of who were born in the United States and are U.S.

citizens. Our children are: Benny, who is 15 years old; our twins Genesis Maria and Gemenis Maria, who are 14 years old; and, Santos Diego Lopez, who is 7 years old.

6. As a child, I mostly lived in San Antonio, Texas, though my family moved around quite a bit. For me, it was a little hard to move around so much because as a child, you always want to fit in and that was hard to do because we were moving so often.

7. We moved mostly because my parents were looking for work, but also because my parents had problems in their marriage. This situation was very hard on me.

8. Finally, at the age of 15 or 16, my parents separated. My mom moved Janette, Elisa, Alejandro, and me to Dodge City, Kansas. My brother, Hilario, who is about 10 months younger than me, could not come with us because he was in jail. Hilario and I were very close, and Hilario was the one who usually watched out for me and made sure I was safe. My dad was an alcoholic and often quarreled with Hilario and hit him on a couple of occasions. Hilario started getting into trouble and was in jail when my parents separated. Leaving San Antonio without my dear brother was very hard for me.

9. Moving to Kansas was a turning point in my life. I was a teenager and I was full of anger and confusion. I was leaving my friends and everyone I knew. I was angry at my parents for not staying together and for moving us around. It

has taken me many years to deal with how angry, hurt and helpless I felt during my childhood.

10. When we moved to Dodge City, I think that my mom thought my father would follow us. But actually, my father had another partner and family, so I think it was always pretty clear that he wasn't going to move with us, but my mom thought he would for a long time.

11. Once in Dodge City, as I was the oldest child, I had to work to help my mom support me and my siblings. I worked at different fast food restaurants, including Subway and Wendy's, and also Blockbuster. When I was working at Wendy's, I was also working at Blockbuster. They were across the street from each other so I would finish at Wendy's and then go to work at Blockbuster. My mom was receiving food stamps, and I don't remember my dad providing anything for my mom. He is currently paying back child support for my three youngest siblings.

12. I met my husband, Benny Lopez, in about July 1995. Shortly thereafter, we had our son, Benny, who was born on July 18, 1996. I was not able to finish high school, but I did eventually obtain my GED. I then received a scholarship to attend college, and went to the local community college to study to become an administrative assistant. However, I started working full time to help support my son and husband so I did not finish college.

13. Dodge City, Kansas is a very small town and you get to know everyone pretty quickly. My husband had a group of friends from childhood

and they were all pretty close. They all took me in as part of their circle and for the first time in my life, I felt I belonged somewhere.

14. However, this group was not very wholesome and they got into a lot of trouble. Even though I think I began getting into a bad lifestyle when I became friends with this group, I would not say that what happened to me was their fault. Although I was influenced by the lifestyle of this group of friends, I know that I am the one who put myself in bad situations and made terrible decisions. I blame myself fully for my troubles.
15. During this time, I started using drugs. I am so ashamed about this and looking back at this time period now, I cannot believe that I made such poor decisions. I cannot imagine ever going down that road again.
16. I was convicted in 2003 for check forgery and in 2005 for possession of methamphetamines. In 2005, when I was arrested for the possession offense, my life was basically destroyed. I was incarcerated and eventually pled guilty. I did not understand at the time the big consequence of deportation that I faced as a result. However, because I was guilty for the decisions that I had made, I felt I had to plead guilty.
17. To the best of my recollection, I was sentenced to 1 year of probation for the drug possession offense. Three days later, when I reported to my probation office, I was turned over to the immigration authorities.
18. While in immigration custody, I spoke with an immigration officer who told me that if I wanted

to be deported quickly, I could sign a form for a quicker deportation. The officer told me that I did not have any way to stay in the United States. At the time, I was also told I could call a legal services organization. There was a list by the phones at the jail with lots of phone numbers. I don't remember the name of the organization or the person I spoke with, and I don't even know for certain that she was an attorney, but the woman told me that I did not have any way to fight my case. I signed the papers, and was deported in about November 2005.

19. I was also told that I could not return for 20 years, and that I could apply for a waiver, but that the reality was I'd never get permission and that I would never be able to return to the United States. I was devastated because this is the only country I had ever lived in. I was terrified and heartbroken over my husband and my children and being separated from them and all of my family.

20. My kids had been taken and put into foster care the same day I was arrested. This time of my life was rock bottom for me as my whole world was falling apart and I was away from my kids. I attempted suicide twice in jail.

21. I know now that the law wasn't as black and white as I was told. When I was re-detained in 2010, I learned that, after my deportation, the Supreme Court determined that my offense was not an aggravated felony and that I could have applied for a waiver of my deportation eventually, even though I would have to remain detained for a long time. If I would have known there was

even a glimmer of a possibility that I could keep my green card, remain with my husband and children, I would have waited all of the years that it took. But no one ever explained this to me; everyone told me I could not ever win my case if I fought it.

22. Believing I had no other choice for how to get back to my children, I returned to the United States about a month after I was deported. I came in by taxi with a group. We went through a U.S. immigration point-of entry. When we got to the front of the line, I was putting on make-up, and the officer asked me for my papers. In English, I apologized that I wasn't ready and started going through my bag pretending to look for them. The officer went to another woman and asked to see her papers. Then the officer went to the man in front who said he had alcohol. The official then went and checked the trunk. This was around Thanksgiving time and the border was full, so I think the officials were in a rush to pass us through because then the official passed our car through without saying anything else.

23. I know that I was wrong to return, but I did not do so with any intent to be disrespectful of the laws at all. I only wanted to be with my family more than anything in the world. Mexico is not my home as my children are in the United States. Any mother will tell you that you will do desperate things for your children, and especially so that they have a good life, and that's what I did.

24. After returning to the United States in 2005, I lived with my mom for about 1 year. My mom is

a Christian woman and this is the period where I accepted the Pentecostal faith and vowed to make a better life for myself and children.

25. At the same time, Benny, who had been incarcerated as well but had been released, obtained custody of our children again, while I waited with my mother. This was a very happy moment for us. Despite our problems with the law, I believe Benny and I have always been good parents to our children. This is demonstrated I believe in how exceptional they are; I think anyone who meets them can see that.

26. Once I was back in Kansas, I lived a quiet life with Benny and our kids. I didn't drive or work, except for helping Benny with his company. We found a church we both enjoyed, First Pentecostal, and our children were all doing well in school and in their extra-curricular activities.

27. The one day a man named Carl Timmons came to my house. I didn't know it at the time, but he was an immigration official. He came to my door and told me that he had accidentally hit my husband's car in our driveway. He asked me to go outside to look at the car to see if the damage was worth filing a police report. I was cautious, because I didn't know this man, and then I went outside and he asked me if my name was Gabriel Cordova. I answered yes. He then said that he was from immigration and he took me into custody.

28. Carl actually ended up helping me a lot. He told me that they were worried that I was going to run once they tried to detain me. I believe he

tried to help me as much as he could. Carl told me how impressed he was with what I've become and how my family was responding to what was going on. Unfortunately, in the end, he wasn't able to do anything about my 2005 stipulated order, and I was deported to Mexico again in October 2010.

29. The consequences of my actions are horrible for me but even more so for my family. My kids have had to take on adult chores like laundry and supper. They're so young, and I worry about basic things while apart from them like if someone put Chapstick on Santos because of how cold it's been.

30. Life in Mexico is extremely difficult. It's actually culture shock every day. I work a very physical job, making the wire harnesses for Subaru car parts. My life is lonely and hard; I work the graveyard shift. I go to work at 6 in the evening and end at 4 in the morning. Also, it's not enough to keep in touch with my children via internet and the phone. They visited me for the whole summer last year and it was so much fun, and I was so much sadder when they left.

31. We have decided as a family that if I cannot return to the U.S., they will move to be near me along the border. I am heartbroken over this. Because of my past, they will be forced to leave everything that they know. Even if they come near the border, my kids will live their days in the United States, and I'll be in Mexico. I won't be able to go to my kids' parent-teacher conferences, or any of their performances. We won't have a full family life.

32. I know that I'm in this situation because of what I did. There is nothing I can say to justify any of it. I regret it; I wish I could take it all back. My kids are honor roll students. They are exceptional over-achievers and I couldn't be more proud. I know I don't deserve another chance, but my kids are so amazing and they deserve a chance at school, and college, and a successful life. I don't want them to suffer because I'm not there. I don't want them to pay for my mistake. I ask for an opportunity to have a day in court and tell my story, to be able to give my kids the very best in life, which I believe with all my heart is in the United States.

I have provided the foregoing affidavit in the English language. I agree that it is true and correct to the best of my ability.

s/ Gabriela Cordova-Soto	12/12/11
Gabriela Cordova-Soto	Date

U.S. Department of Justice **Notice to Appear**
Immigration and Naturalization Service

In removal proceedings under section 240 of the Immigration and Nationality Act

File No: A091 045 891
Case No: XWK0610000048

In the Matter of:

Respondent: Gabriela CORDOVA-Soto
AKA: Cordova, GABRIELA currently residing at:
ICE CUSTODY 271 W. 3rd SUITE 1075,
WICHITA, KANSAS 67202

(Number, street, city state and ZIP code) | (Area code and phone number)

☐ 1. You are an arriving alien.

☐ 2. You are an alien present in the United States who has not been admitted or paroled.

☒ 3. You have been admitted to the United States, but are deportable for the reasons stated below.

The Service alleges that you:

See Continuation Page Made a Part Hereof

On the basis of the foregoing, it is charged that you are subject to removal from the United States pursuant to the following provision(s) of law:

See Continuation Page Made a Part Hereof

☐ This notice is being issued after an asylum officer has found that the respondent has demonstrated a credible fear of persecution or torture.

☐ Section 235(b)(1) order was vacated pursuant to: ☐ 8 CFR 208.30(f)(2) ☐ 8 CFR 235.3(b)(5)(iv)

YOU ARE ORDERED to appear before an immigration judge of the United States Department of Justice at:

(Complete Address of Immigration Court, Including Room Number, if any)

on a date to be set (Date) at a time to be set (Time)

to show why you should not be removed from the United States based on the charge(s) set forth above.

s/ Victor Montemayor III
VICTOR MONTEMAYOR III
ACTING RESIDENT AGENT IN CHARGE

(Signature and Title of Issuing Officer)

Date: October 28, 2005 Wichita, Kansas

(City and State)

See reverse for important information

Notice to Respondent

Warning: Any statement you make may be used against you in removal proceedings.

Allen Registration: This copy of the Notice to Appear served upon you is evidence of your alien registration while you are under removal proceedings. You are required to carry it with you at all times.

Representation: If you so choose, you may be represented in this proceeding, at no expense to the Government, by an attorney or other individual authorized and qualified to represent persons before the Executive Office for Immigration Review, pursuant to 8 CFR 3:16. Unless you so request, no hearing will be scheduled earlier than ten days from the date of this notice to allow you sufficient time to secure counsel. A list of qualified attorneys and organizations who may be available to represent you at no cost will be provided with this Notice.

Conduct of the hearing: At the time of your hearing, you should bring with you any affidavits or other documents which you desire to have considered in connection with your case. If any document is in a foreign language, you must bring the original and a certified English translation of the document. If you wish to have the testimony of any witnesses considered, you should arrange to have such witnesses present at the hearing.

At your hearing you will be given the opportunity to admit or deny any or all of the allegations in the Notice to Appear and that you are inadmissible or deportable on the charges contained in the Notice to Appear. You will have an opportunity to present evidence on your own behalf, to examine any

evidence presented by the Government, to object, on proper legal grounds, to the receipt of evidence and to cross examine any witnesses presented by the Government. At the conclusion of your hearing, you have a right to appeal an adverse decision by the immigration judge.

You will be advised by the immigration judge before whom you appear, of any relief from removal for which you may appear eligible including the privilege of departing voluntarily. You will be given a reasonable opportunity to make any such application to the immigration judge.

Failure to appear: You are required to provide the INS, in writing, with your full mailing address and telephone number. You must notify the Immigration Court immediately by using Form EOIR-33 whenever you change your address or telephone number during the course of this proceeding. You will be provided with a copy of this form. Notices of hearing will be mailed to this address. If you do not submit Form EOIR-33 and do not otherwise provide an address at which you may be reached during proceedings, then the Government shall not be required to provide you with written notice of your hearing. If you fail to attend the hearing at the time and place designated on this notice, or any date and time later directed by the Immigration Court, a removal order may be made by the immigration judge in your absence, and you may be arrested and detained by the INS.

Request for Prompt Hearing

To expedite a determination in my case, I request an immediate hearing. I waive my right to have a 10-day period prior to appearing before an immigration judge.

s/ Gabriela Cordova
(Signature of Respondent)

Before:
s/ Rod S. Smith, IA
(Signature and Title of INS Officer)

Date: October 28, 2005

Certificate of Service

This Notice to Appear was served on the respondent by me on October 28, 2005, in the following manner and in compliance with Section 239(a)(1)(F) of the Act:

☒ in person
☐ by certified mail, return receipt requested
☐ by regular mail
☐ Attached is a credible fear worksheet
☒ Attached is a list of organizations and attorneys which provide free legal services.

The alien was provided oral notice in the English language of the time and place of his or her hearing and of the consequences of failure to appear as provided in section 240(b)(7) of the Act.

s/ Gabriela Cordova
(Signature of

s/ Rod S. Smith
ROD S. SMITH
IMMIGRATION AGENT
(Signature and Title of

Respondent if Personally Served)	Officer
U.S. Department of Justice Immigration and Naturalization Service	Continuation for Form I-862

Alien's Name Gabriela CORDOVA-Soto	File Number Case No: XWK0610000048 A091 045 891	Date October 28, 2005

The Service alleges that you:

1) You are not a citizen or national of the United States;

2) You are a native of MEXICO and a citizen of MEXICO;

3) You entered the United States at unknown place on or about unknown date WITHOUT INSPECTION;

4) Your status was adjusted to that of lawful permanent resident on July 3, 1991 under section 245 of the Act;

5) You were, on May 3, 2002, convicted in the District Court at Ford County, Kansas for the offense of THEFT (3 COUNTS), in violation of K.S.A. 21-3701;

6) You were, on March 20, 2003, convicted in the District Court at Ford County, Kansas for the offense of GIVING A WORTHLESS CHECK, in violation of K.S.A. 21-3707;

7) These crimes did not arise out of a single scheme of criminal misconduct.

8) You were, on October 21, 2005, convicted in the District Court at Ford County, Kansas for the felony offense of POSSESSION OF METHAMPHETAMINE, in violation of K.S.A. 65-4160

On the basis of the foregoing, it is charged that you are subject to removal from the United States pursuant to the following provision(s) of law:

Section 237 (a) (2) (A) (iii) of the Immigration and Nationality Act (Act), as amended, in that, at any time after admission, you have been convicted of an aggravated felony as defined in Section 101(a) (43) (B) of the Act, an offense relating to the illicit trafficking in a controlled substance, as described in section 102 of the-Controlled Substances Act, including a drug trafficking crime, as defined in section 924(c) of Title 18, United States Code.

Section 237 (a) (2) (A) (ii) of the Immigration and Nationality Act, as amended, in that, at any time after admission, you have been convicted of two crimes involving moral turpitude not arising out of a single scheme of criminal misconduct.

Signature	Title
s/ Victor Montemayor III VICTOR MONTEMAYOR III	ACTING RESIDENT AGENT IN CHARGE

U.S. Department of Justice Immigration and Naturalization Service	Continuation for Form I-862

Alien's Name Gabriela CORDOVA-Soto	File Number Case No: XWK0610000048 A091 045 891	Date October 28, 2005
Section 237 (a) (2) (B) (i) of the Immigration and Nationality Act, as amended, in that, at any time after admission, you have been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in Section 102 of the Controlled Substances Act, 21 U.S.C. 802), other than a single offense involving possession for one's own use of 30 grams or less of marijuana.		
Signature s/ Victor Montemayor III VICTOR MONTEMAYOR III	Title ACTING RESIDENT AGENT IN CHARGE	