No. 15-50384

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA

Plaintiff-Appellee

v.

JOSE VALDIVIA-FLORES

Defendant-Appellant

Appeal from the United States District Court for the Southern District of California Honorable Judge Cynthia Bashant Presiding

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DEFENDANT-APPELLANT'S OPENING BRIEF

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FOR THE NINTH CIRCUIT

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INTRODUCTION

Mr. Valdivia's only removal order was based on the premise that his conviction under Revised Code Washington 69.50.401 was an aggravated felony. Under Washington law, an accomplice can be convicted of a substantive crime even if he is charged as the principal; there doesn't even need to be jury unanimity as to whether the defendant was an accomplice or principal. And the Washington legislature has defined accomplice liability as sweeping far more broadly than the generic definition. Where a statute of conviction is overbroad and no juror unanimity is required to distinguish the overbroad aspect of the conviction from the rest, federal law does not permit a further categorical analysis; it's indivisible. Why wasn't Mr. Valdivia's deportation invalid under these circumstances?

STATEMENT OF JURISDICTION

Jose Valdivia-Flores appeals his conviction and sentence for attempted reentry after deportation and misuse of immigration documents imposed by District Judge Cynthia Bashant in the United States District Court for the Southern District of California. The district court had original subject-matter jurisdiction over this offense against the laws of the United States. 28 U.S.C. § 3231. This Court has jurisdiction over the appeal pursuant to 28 U.S.C. §§ 1291 & 1294(1) (appellate jurisdiction over appeal of final judgment from district court of circuit) and 18 U.S.C. § 3742 (jurisdiction to review criminal sentence).

The district court entered a final judgment on September 2, 2015. [CR 39; ER 3][1] Mr. Valdivia filed a timely notice of appeal the same day. Fed. R. App. P. 4(b)(1) (notice timely if filed within 14 days of judgment). [CR 35; ER 1]

Mr. Valdivia is currently serving his 21-month sentence at Taft Correctional Institution in California. His scheduled release date is May 22, 2016. See BOP Inmate Locator, http://www.bop.gov/inmateloc/ (last checked January 28, 2016).

[1] "ER" refers to the Appellant's Excerpt of Record; "CR" refers to the district court

STATUTORY PROVISIONS

Pursuant to 9th Cir. R. 28-2.7, copies of pertinent statutes, etc., appear in the attached Addendum.

ISSUE PRESENTED FOR REVIEW

> Mr. Valdivia was deported as an aggravated felon even though his prior felony implicitly encompassed accomplice liability broader than the generic definition of conviction. Both this Court and the Supreme Court have held that one cannot look past the fact of conviction to any underlying fact that doesn't require juror unanimity. Washington requires no unanimity as to whether one was a principal or accomplice to a crime. Why didn't the district court err when it looked past the fact of conviction to determine by plea documents that Mr. Valdivia was convicted as a principal of possessing heroin for delivery in 1997?

STATEMENT OF THE CASE

A. Mr. Valdivia's background, immigration history, and arrest.

Mr. Valdivia has lived in the United States for most of his life. He married his wife in 2002, and together they have three children, all born in the United States. While here, Mr. Valdivia paid income taxes and ran a cabinet-making business for which he also paid taxes. He has built up an enormous amount of goodwill through his honesty and willingness to work hard. [CR 33; ER 27-31].

But Mr. Valdivia didn't achieve this level of respect without suffering some serious setbacks. It began almost 20 years ago when, in 1997, Mr. Valdivia pled guilty to a violation of RCW 69.50.401. He was sentenced to 21 months, but ordered to serve that time at a work ethic camp with credit for 3 days for every day in the camp, making his actual sentence 7 months. *Id.*

1. 1998 Immigration Proceedings

While he was in the work camp, immigration officers prepared a Notice of Appearance (NTA) which charged Mr. Valdivia with being removable. [CR 13-2; ER 234] Notes on the NTA indicate that it was mailed to Washington Correction Center, and that a copy in Spanish was not provided. However, in an order dated January 28, 1998, the immigration judge ordered that the proceedings be terminated. This is the only IJ order from 1998 which appears in Mr. Valdivia's A file. [CR 13-2; ER 237]

Undeterred by the lack of an order, immigration officers still apparently physically removed Mr. Valdivia to Mexico, without an order, on April 8, 1998. [CR 13-2; ER 239] In the space provided to check off the type of removal order, the officers left all the boxes unchecked.

Mr. Valdivia returned, but, having learned from his work ethic camp experience, remained clear of any criminal activity, and continued building his life with his wife. Together they had three children between 1999 and 2009. [CR 13-2; ER 209]

2. 2009 Removal Order

In 2009, Mr. Valdivia was arrested for hitting the windshield of his own unoccupied vehicle after an argument with his wife. He pled guilty to criminal mischief (a misdemeanor) and was sentenced to 2 days (364 with 362 suspended). [CR 13-3; ER 243]. He was then placed in administrative removal proceedings under INA 238. The Notice of Intent (NOI) alleged that he had been convicted in 1997 of RCW 69.50.401. [CR 13-3; ER 250]. It then alleged that that he was removable because that conviction was an aggravated felony. Mr. Valdivia was never advised that he had a right to dispute the categorization of his conviction as an aggravated felony. The immigration officer ordered Mr. Valdivia removed due to conviction for an aggravated felony. [CR 13-3; ER 243]

Because his children, his wife, his church and his work were all here, Mr. Valdivia returned. He was convicted in 2013 of illegal reentry after deportation in Washington. After he served his sentence, an immigration attorney on his behalf made a request for asylum and, after that was denied, a request for a stay of

removal for Mr. Valdivia to get his affairs in order. [PSR at 10] This was denied and the 2009 removal order was reinstated.

On November 13, 2014, Mr. Valdivia again attempted to reunite with his family who had been here together in the United States for almost 20 years. He was arrested at the border attempting to use a phony naturalization certificate that he bought from a woman shortly before his attempted crossing. [PSR at 5] He was ultimately charged in a two-count indictment with attempted reentry after deportation in violation of 8 U.S.C. § 1326 and fraudulent use of an immigration document in violation of 18 U.S.C. § 1546. [CR 1; ER 257] He pled not guilty.

B. Pretrial litigation and bench trial.

With respect to the attempted reentry charge, 8 U.S.C. § 1326(d) allows for a collateral attack against the validity of the underlying deportation. Mr. Valdivia made a such a challenge to the validity of his 2009 removal and moved to dismiss Count One of the indictment. [CR 13; ER 171] The government responded. [CR 14; ER 118] And the court considered and denied the motion in an oral ruling on February 9, 2015. [CR 15; ER 111-16]

The court proceeded to set the case for trial. [ER 116] Mr. Valdivia waived his right to a jury trial [CR 18; ER 98]; the parties entered into a stipulation in

which Mr. Valdivia agreed to facts satisfying all the elements of both counts in the indictment [CR 19; ER 95]; and the court found Mr. Valdivia guilty of both charges at the conclusion of a brief stipulated-facts bench trial. [ER 92] The court then set the case for sentencing. [ER 92-93]

C. Sentencing.

Mr. Valdivia was sentenced on August 31, 2015, to 21 months' custody, concurrent on Counts One and Two. [CR 34; ER 22-25] The court calculated Mr. Valdivia's guidelines consistent with the presentence report's calculations under U.S.S.G. § 2L1.2 as a Base Offense Level of 8 with a 12-point increase for a prior drug trafficking conviction. [ER 22; PSR at 6-7] The court then adjusted downward three levels for acceptance of responsibility and then an additional two levels for cultural assimilation. [ER 22] The court sentenced Mr. Valdivia to the low end of his sentencing range. [ER 23]

The court acknowledged Mr. Valdivia's objections to the guideline calculations as well as his intention to appeal. [ER 24] Mr. Valdivia filed his notice of appeal on the same day as his sentencing, [CR 35], and this appeal follows.

SUMMARY OF THE ARGUMENT

Mr. Valdivia was convicted of attempted reentry in violation of 8 U.S.C. § 1326 after the district denied his collateral challenge to the 2009 removal underlying his conviction. That removal was premised upon the belief that Mr. Valdivia's 1997 Washington state conviction under RCW 69.50.401 for possession of heroin with the intent to deliver was an aggravated felony.

Whether or not a conviction as a principal under RCW 69.50.401 would constitute a drug trafficking offense, Washington state has codified an unusually broad definition of aiding and abetting liability that is implied in every offense whether or not one is charged as a principal, and such liability requires no jury unanimity to sustain a criminal conviction. In fact, it is one of only six out of 51 jurisdictions that allows a conviction under the aiding and abetting theory for mere knowledge of the principal's criminal activity rather than having some purpose or intent that the aider or abettor's actions further such activity.

Because aiders and abettors are uniformly held as accountable as principals, the Supreme Court has held that aiding and abetting constitutes an aspect of all federal generic offenses. And because the scope of Washington's accomplice liability sweeps more broadly than nearly all other jurisdictions, it is overbroad in the generic sense. No one seems to seriously dispute that in this case.

The question is whether the district court erred in looking beyond the mere fact of conviction in this case when finding that Mr. Valdivia in "fact" pled guilty to violating RCW 69.50.401 as a principal. It did. The modified categorical approach, which permits a court to look at certain conviction documents in a limited set of circumstances, is only available to analyze divisible statutes. And this Court as well as the Supreme Court have recently made clear that the only divisible aspect of a crime that can be determined by the modified categorical approach is one involving "elements," specifically those elements of a crime that would require jury unanimity.

Because Washington case law is clear that the difference between accomplice and principal liability requires no such jury unanimity, the modified categorical approach was erroneously used by the district court in this case. Mr. Valdivia's conviction is overbroad and indivisible. Thus, his conviction for illegal reentry must be reversed.

ARGUMENT

I. BECAUSE MR. VALDIVIA WAS DEPORTED AS AN AGGRAVATED FELON AND HIS PRIOR CONVICTION DOES NOT QUALIFY AS AN AGGRAVATED FELONY, HIS DEPORTATION IS INVALID, AND HIS CONVICTION FOR ATTEMPTED REENTRY MUST BE REVERSED.

A. Standard of review.

This court reviews *de novo* a district court's denial of a motion to dismiss an illegal reentry charge that is based on the invalidity of a prior removal order. *United States v. Gonzalez-Corn*, 807 F.3d 989, 993 (9th Cir. 2015).

B. Because aiding and abetting is a part of the generic definition of drug trafficking offenses and Washington's aiding and abetting is overbroad and indivisible from the principal offense, Mr. Valdivia's prior conviction isn't an aggravated felony.

"A defendant charged with illegal reentry under 8 U.S.C. § 1326 has a Fifth Amendment right to collaterally attack his removal order because the removal order serves as a predicate element of his conviction." *United States v. Ubaldo-Figueroa*, 364 F.3d 1042, 1047 (9th Cir. 2004) (citing *United States v. Mendoza-Lopez*, 481 U.S. 828, 837-838 (1987)).

To sustain a collateral attack under 8 U.S.C. § 1326(d), a defendant must demonstrate: 1) that he exhausted all administrative remedies available to appeal the removal order (or was excused from doing so), 2) that the underlying removal

proceedings at which the order was issued improperly deprived him of the opportunity for judicial review (or that he is excused from so showing), and 3) that the entry of the order was fundamentally unfair. 8 U.S.C. § 1326(d); *Ubaldo-Figueroa*, 364 F.3d at 1050. Because Mr. Valdivia was deported as an aggravated felon for an indivisible offense that is too overbroad to qualify as an aggravated felony, his deportation was invalid. Consequently, his conviction for illegal reentry which was based on this invalid removal must be reversed.

1. Fundamental Unfairness

Beginning with the third prong of a collateral attack, Mr. Valdivia must show that there was a due process violation and resulting prejudice. Ordinarily, due process violations include a violation of the statutes or regulations governing removal proceedings. *See, e.g.*, *United States v. Raya-Vaca*, 771 F.3d 1195 (9th Cir. 2014) (failure to allow alien to review sworn statement); *United States v. Arrieta*, 224 F.3d 1076, 1079 (9th Cir. 2000) (failure to advise about eligibility for relief).

Under these circumstances, however, when the individual simply was not removable as a matter of law on the grounds alleged by the immigration service, such removal constitutes both a due process violation and prejudice together. The reason is that an order of removal entered without jurisdiction is, "in essence, a

legal nullity." *Noriega v. Ashcroft*, 335 F.3d 874, 884 (9th Cir. 2003). When the immigration service alleges, as they did here, an aggravated felony conviction as the sole grounds of removability, and the alien's conviction is not for an aggravated felony, there is no remaining basis for the order of removal. *See Chowdhury v. INS*, 249 F.3d 970, 975 (9th Cir. 2001) (refusing to allow government to argue that alien was independently removable on grounds not alleged in a Notice to Appear).

This Court unequivocally reaffirmed this principle in *United States v. Aguilera-Rios*, 769 F.3d 626 (9th Cir. 2014). Aguilera had been issued a Notice to Appear which charged two grounds of removability: a crime involving moral turpitude (CIMT), and a firearms offense. *Id*. at 629. The government conceded that the CIMT charge was incorrect. *Id*. at 637. For the remaining ground, this Court held that the defendant's conviction was overbroad and indivisible as a firearms offense and therefore did not satisfy the categorical definition. *Id*. Since there was "no legal basis" for his removal order, this satisfied the due process and prejudice prongs of a 1326(d) motion. *Id*. In other words, it is the entry of the order itself that is prejudicial.

a. Not deportable as charged

Thus, the only question is whether Mr. Valdivia's nearly 20-year-old conviction under RCW 69.50.401 is, in fact, an aggravated felony since that was

the only basis alleged for his removal. If it was an aggravated felony, he was precluded from any relief regardless of the procedures employed; if it was not an aggravated felony, then the order was entered without jurisdiction on an invalid basis and cannot be used in a § 1326 prosecution.

And to the extent that the government might wish to allege an alternative basis for deportation that was not alleged in Mr. Valdivia's notice of intent, it cannot. *See Hernandez-Cruz v. Holder*, 651 F.3d 1094, 1109-1110 (9th Cir. 2011) (vacating order of removal without remand). Thus, the only issue presented here is whether Mr. Valdivia's conviction under RCW 69.50.401 is, as a matter of law, an aggravated felony as alleged in the Notice of Intent.

b. Under the applicable framework, RCW 69.50.401 is not an aggravated felony.

The definition of an aggravated felony for immigration purposes includes drug trafficking offenses. 8 U.S.C. § 1101(a)(43)(B).[2] To decide whether Mr. Valdivia's conviction under RCW 69.50.401 is a drug trafficking offense and therefore an aggravated felony, the Court must use the categorical analysis. That is, one must "compare the elements of the statute forming the basis of the

[2] "Illicit trafficking in a controlled substance, (as defined in section 802 of Title 21), including a drug trafficking crime (as defined in section 924(c) of Title 18)." 8 U.S.C. § 1101(a)(43)(B). "Drug trafficking crime" is defined as any felony punishable under the Controlled Substances Act." 18 U.S.C. § 924(c)(2).

defendant's conviction with the elements of the 'generic' crime – *i.e.*, the offense as commonly understood." *Descamps v. United States*, 133 S.Ct. 2276, 2281 (2013).

The first step is to identify the generic offense identified in the federal statute. *See, e.g.*, *Taylor v. United States*, 495 U.S. 575, 598 (1990). The "generic" definition of a crime is determined by consulting federal statutes and case law, treatises such as LaFave's Substantive Criminal Law and the Model Penal Code, and a survey of State statutes and practices. *See United States v. Garcia-Santana*, 743 F.3d 666, 672-73 (9th Cir. 2014); see also *United States v. Esparza–Herrera*, 557 F.3d 1019, 1023 (9th Cir. 2009) (per curiam) (reaffirming that when performing the categorical analysis, this Court "derive[s] [the crime's] uniform meaning from the generic, contemporary meaning employed by most states, guided by scholarly commentary"); *see also Taylor*, 495 U.S. at 598 (comparing convictions to the predicate crime in "the generic sense in which the term is now used in the criminal codes of *most* states") (emphasis added).

The next step is to compare the nature of the generic offense and the particular individual's offense of conviction to determine whether the reach of the individual's conviction is broader than the scope of the generic crime. An element is a fact that a jury must find beyond a reasonable doubt. *See id*. at 2288 (citing *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000)).

If the state statute covers conduct beyond the generic definition, then the court must determine whether the state crime is divisible. The touchstone of divisibility is jury unanimity. As this Court explained in *Rendon v. Holder*:

> The critical distinction is that while indivisible statutes may contain multiple, alternative *means* of committing the crime, only divisible statutes contain multiple, alternative *elements* of functionally separate crimes. [. . .] While the jury faced with a divisible statute must unanimously agree on the particular offense of which the petitioner has been convicted (and thus, the alternative element), the opposite is true of indivisible statutes; the jury need not so agree. For example, if the statute at issue [, Cal. Penal Code § 459: burglary] is indivisible, the jury would not need to agree on the particular substantive crime that the defendant intended as long as all jurors find that the defendant intended to commit at least one of "grand or petit larceny or any felony."

764 F.3d 1077, 1085-86 (9th Cir. 2014) (citations omitted). The Court also recognized the legal principle that "the distinction between elements and means is reflected in the requisite jury findings is well-established in Supreme Court precedent." *Id*.

"If the state statute at issue is overbroad and indivisible, [the court] may not apply the modified categorical approach, and [the court] must hold that petitioner has met his burden for establishing that he was not convicted of an aggravated felony." *Id.* at 1083. If, on the other hand, the state statute is divisible, the courts may consider a narrow range of judicially noticeable documents to determine what

particular elements provided the basis for the conviction. *Rendon*, 764 F.3d at 1083 (discussing *Descamps*, 133 S.Ct. at 2285).

Importantly, as part of the first step, i.e., identifying the generic offense of conviction, the Supreme Court held in *Gonzales v. Duenas-Alvarez* that one aspect common to the generic definition of any predicate offense is aiding and abetting liability. 549 U.S. 183, 189 (2007) ("The question before us is whether one who aids or abets a [crime] falls, like a principal, within the scope of this generic definition. We conclude that he does."). Because "generically speaking the law treats aiders and abettors during and before the crime the same way it treats principals[,] the immigration statute must then treat them similarly as well." *Id.* at 190.

Therefore, in this case, the Court must compare the elements of generic aiding and abetting liability with the elements of Washington's aid/abet liability, focusing in particular on the mental state requirement. In this case, the overbreadth of Mr. Valdivia's conviction arises from the overly expansive reach of Washington's aiding and abetting liability. In particular, Washington's accomplice liability, which is implicit in every charge, requires only a *mens rea* of "knowledge," whereas nearly every other jurisdiction, federal law, and the Model

Penal Code require a higher—and therefore, more narrow— *mens rea* of purpose or intent.

i. Elements of Generic Aid/Abet Liability

As noted above, the "generic" definition of a crime is determined by consulting federal statutes and case law, treatises such as LaFave's Substantive Criminal Law and the Model Penal Code, and a survey of State statutes and practices. *See, e.g., Garcia-Santana*, 743 F.3d at 672-73. And in this case, all of these relevant sources are nearly unanimous that the intent element of aiding and abetting requires proof that the defendant intended to promote the crime, rather than mere knowledge.

Survey of States' Aid/Abet Intent Element

Of all 51 jurisdictions (the states and the District of Columbia), only six allow conviction on a *mens rea* of knowledge. The vast majority–35 jurisdictions—require, either explicit in the statute or in case law, a *mens rea* of intent or purpose to promote or facilitate the crime.[3] And ten of the remaining

[3] Alabama Code §13A-2-23 ("intent to promote"); Alaska Statutes § 11.16.110 ("intent to promote or facilitate"); Ariz. Rev. Stat. § 13-301 ("intent to promote"); Ark. Code. Ann. §5-2-403 ("with the purpose of promoting or facilitating"); *People v. Prettyman*, 14 Cal. 4th 248, 271 (1996)(requiring "intent of committing, encouraging, or facilitating" a target crime); Colorado Rev. Stat. §18-1-603

("intent to promote or facilitate"); Conn. Gen. Laws §53a-8 (intentional mens rea except as to provision of firearm, which requires only knowledge), *State v. Artis*, 47 A.3d 419 (Conn. App. 2012)(state must prove dual intent: "first that the accessory have the intent to aid the principal and second that in so aiding he intend to commit the offense with which his is charged."); 11 Delaware Code §271 ("intending to promote or facilitate the commission of the offense"); D.C. Code §22-1805, *Wilson-Bey v. United States*, 903 A.2d 818 (D.C. 2006)(adopting the *Peoni* rule, requiring intent to promote offense); Fla. Stat. Ann. § 777.011, *G.C. v. State*, 407 So.2d 639 (Fla. App. 1981)("it is necessary that he . . . have conscious intent that the criminal act be done"); Ga. Code Ann. §16-2-20 ("intentionally"); Hawai'I Rev. Stat. §702-222 ("intention of promoting or facilitating"); 720 Ill. Compiled Stat. §5/5-2 ("with the intent to promote or facilitate"); Kansas Stat. Ann. §21-5210("acting with the mental culpability required for the commission" of the offense"), *State v. Nash*, 261 Kan. 340, 344, 932 P.2d 442, 445 (Kan. 1997) ("A defendant must have the intent to promote or assist in the commission of the crime when the defendant provides assistance."); Kentucky Rev. Stat. §502.020 ("with the intention of promoting or facilitating the commission of the offense"); 17-A Maine Rev. Stat. Ann. §57 ("with the intent of promoting or facilitating the commission of the crime"); Md. Crim. Proc. Code Ann. §4-204, *Davis v. State*, 52 A.3d 148, 160 (Md. App. 2012)(requiring "intent to help commit the crime"); Minnesota Stat. Ann. §609.05("intentionally aids"), *State v. Bahtuoh*, 840 N.W.2d 804, 810 (Minn. 2013)(" The phrase 'intentionally aids' in the accomplice-liability statute includes . . . that the defendant 'intended his presence or actions to further the commission of that crime.'"); Vernon's Ann. Missouri Stat. §562.041 ("with the purpose of promoting the commission of an offense"); Montana Code Ann. §45-2-302 ("with the purpose to promote or facilitate the commission"); New Hampshire Rev. Stat. §626:8 ("with the purpose of promoting or facilitating the commission of the offense"); New Jersey Stat. Ann. §2C:2-6 ("with the purpose of promoting or facilitating the commission of the offense"); New Mexico Stat. Ann. §30-1-13, *State v. Carrasco*, 946 P.2d 1075, 1079 (N.M. 1997)("a jury cannot convict a defendant on accessory liability for a crime unless the defendant intended the principal's acts."); McKinney's NY Penal Law §20.00, *People v. Kaplan*, 76 N.Y.2d 140, 146, 556 N.E.2d 415, 418 (N.Y. 1990)("the accomplice must have *intentionally* aided the principle in bringing forth a result")(emphasis in original); North Carolina Gen. Stat. Ann. §14-5.2, *State v. Barnes*, 481 S.E.2d 44 (N.C. 1997)(requiring joint purpose before natural and probable consequences); North Dakota Century Code Ann. § 12.1-03-01 ("with intent that an offense be

states essentially require the same by requiring that the aider or abettor share the intent of the principal, or that there be a community of intent between the principal and accomplice.[4] Only five, besides Washington, have lowered the *mens rea* to

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committed"); Oregon Rev. Stat. §161.155 ("with the intent to promote or facilitate the commission of the crime"); 18 Pennsylvania Code §306 ("with the intent of promoting or facilitating the commission of the offense"); South Dakota Codified Laws §22-3-3 ("with the intent to promote or facilitate the commission of a crime"); Tennessee Code Ann. § 39-11-402 ("acting with the intent to promote or assist the commission of the offense, or to benefit in the proceeds or results of the offense"); Texas Penal Code §7.02("acting with the intent to promote or assist the commission of the offense"); Utah Code § 76-2-202, *State v. Briggs*, 197 P.3d 628, 631 -632 (Utah 2008)("To show that a defendant is guilty under accomplice liability, the State must show that an individual acted with both the intent that the underlying offense be committed and the intent to aid the principal actor in the offense."); Wisconsin Stat. §939.05, *State v. Ivy*, 119 Wis.2d 591, 598, 350 N.W.2d 622, 626 (Wis. 1984)("The elements of aiding and abetting are that a person: (1) undertakes conduct, either verbal or overt action, that as a matter of objective fact aids another person in the execution of a crime; and (2) he or she desires or intends that his or her conduct will yield such assistance."); Wyoming Stat. §6-1-201 ("knowingly aids"), *Vlahos v. State*, 75 P.3d 628, 636 (Wyo. 2003)("To fall within this definition of accomplice, a person must actively participate in or encourage the crime and have the intent to accomplish the same criminal end as the principal.").

[4] Idaho Code §18-204 (shared intent with principal); Louisiana Rev. Stat. §14:24, *State v. Holmes*, 388 So.2d 722 (La. 1980)("Thus, an individual may only be convicted as a principal for those crimes for which he personally has the requisite mental state."); Mich. Code of Laws Ann. §767.39, *People v. Kelly*, 378 N.W.2d 365 (Mich. 1985)("The 'requisite intent' for conviction of a crime as an aider and abettor 'is that necessary to be convicted of the crime as a principal.'"); Miss. Code Ann. 97-1-3, *Welch v. State*, 566 So.2d 680, 684 (Miss. 1990)(" An accomplice may be convicted of accomplice liability only for those crimes as to which he personally has the requisite mental state. He must have a "community of intent" for the commission of the crime."); Nevada law is unclear. The statute lacks a *mens*

"knowingly."[5] Washington's rule therefore falls within the smallest of minorities of jurisdictions: six out of fifty-one.

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rea and the State Supreme Court has held only that intent is required for aid/abet liability for specific intent crimes. Nev. Rev. Stat §195.020, *Sharma v. State*, 56 P.3d 868 (Nev. 2002); Ohio Revised Code §2923.03, *State v. Johnson*, 754 N.E.2d 796 (2001) ("To support a conviction for complicity by aiding and abetting pursuant to R.C. 2923.03(A)(2), the evidence must show . . . that the defendant shared the criminal intent of the principal."); Rhode Island Gen. Laws § 11-1-3, *State v. Long*, 61 A.3d 439, 447 (R.I. 2013)("To prove criminal liability for aiding and abetting a criminal act, it must be shown that "(1) 'the alleged aider and abettor share[d] in the criminal intent of the principal,' and (2) 'a community of unlawful purpose' exist[ed] between them."); South Carolina Code of Laws §16-1-40, *State v. Curry*, 636 S.E.2d 649 (S.C. App. 2006)(requiring "common plan" before natural and probable consequences); 13 Vermont Stat. Ann. § 4, *State v. Bacon*, 163 Vt. 279, 289, 658 A.2d 54, 61 (Vt. 1995)(a defendant can be convicted as an accomplice "only if he acted with the same intent as that required for" the principal perpetrator of the crime.); *Rollston v. Commonwealth*, 11 Va. App. 535, 542, 399 S.E.2d 823, 827 (Va. App. 1991)(requiring concert of action before natural and probable consequences); *State v. Harper*, 365 S.E.2d 69, 74 (W.Va. 1987)(adopting *Peoni* rule, holding that abettor must "share[] the criminal intent of the principal").

[5] Indiana (included here due to caution) has no explicit mens rea requirement, and courts have approved, even within the same case, contradictory jury instructions that both require that the defendant "intended . . . to cause or facilitate commission" of the offense and also that he "need only have knowledge that he is helping in the commission of a crime." *Green v. State*, 937 N.E.2d 923 (Ind. App. 2010), Indiana Stat. §35-41-2-4; Iowa Code ann. §703.1, *State v. Hustead*, 538 N.W.2d 867, 870 (Iowa App. 1995)("We also observe that an aider and abettor is not required to possess the intent to commit the crime, but is only required to have knowledge that the perpetrator possess the intent.")(overruled on other grounds by *State v. Allen*, 633 N.W.2d 752 (Iowa 2001); 274 Massachussetts Code of Laws Ann. §2, *Commonwealth v. Ortiz*, 679 N.E.2d 1007, 1009 (Mass. 1997)(*mens rea* either intent to commit the crime *or* "knowledge that another intends to commit the crime"); Neb. Rev. Stat. 28-206, *State v. Becerra*, 261 Neb. 596, 607, 624 N.W.2d

Federal Law

Judge Learned Hand articulated the intent requirement for federal aiding and abetting liability in a seminal case that's been quoted and adopted throughout the federal circuits and beyond. In order to find a defendant guilty under an aiding and abetting theory, the law requires proof

> that he in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed. All the words used- even the most colorless, 'abet'- carry an implication of purposive attitude towards it.

United States v. Peoni, 100 F.2d 401 (2d Cir. 1938). This language has been quoted approvingly by the Supreme Court in *Nye & Nissen v. United States*, 336 U.S. 613, 619 (1949) and thereafter in the Ninth Circuit. *See Ramirez v. United States*, 363 F.2d 33 (9th Cir. 1966). Indeed, this Court has explicitly held, "to prove liability as an aider and abettor the government must establish beyond a reasonable doubt that the accused had the specific intent to facilitate the

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21, 29 (Neb. 2001)(" When a crime requires the existence of a particular intent, an alleged aider or abettor can be held criminally liable as a principal if it is shown that the aider or abettor knew that the perpetrator of the act possessed the required intent or that the aider or abettor himself or herself possessed the required intent."); 21 Oklahoma Stat. Ann. §172 (no specified mental state), *Conover v. State*, 933 P.2d 904 (Okl. Cr. 1997)(allowing *mens rea* of intent or knowledge of principal's intent)(citing Ok Unif. Jury Instr. – Cr. 2-6); Rev. Code Wash. §9A.08.020 ("With **knowledge** that it will promote or facilitate the commission of the crime").

commission of a crime by someone else." *United States v. Garcia*, 400 F.3d 816, 819 (9th Cir. 2005).

Model Penal Code

Even the Model Penal Code drafters, after a debate about whether the level of intent should be "purpose" or "knowledge," adopted the purpose standard. Model Penal Code §2.06(3) requires that the accomplice act "with the purpose of promoting or facilitating the commission of the offense." Model Penal Code § 2.06(3)(a). The Commentary elaborates that the "knowledge" position was considered and rejected: "Though the Chief Reporter favored a formulation that would broaden liability beyond merely purposive conduct, the Institute rejected that position, principally on the argument that the need for stating a general principle in this section pointed toward a narrow formulation in order not to include situations where liability was inappropriate." Model Penal Code §2.06 Commentary at 318.

To summarize: there is a broad consensus among the vast majority of relevant authorities—the federal courts, 45 state jurisdictions, and the Model Penal Code—that a defendant cannot be convicted on an aiding and abetting theory on only a "knowledge" *mens rea*.

ii. Washington Law

In contrast to the *mens rea* of generic aiding and abetting, which requires purposefulness, Washington law only requires mere *knowledge* that one's actions will facilitate a crime. In other words, Washington adopted a theory of liability rejected by nearly every relevant jurisdiction and the drafters of the Model Penal Code who found Washington's version of *mens rea* "to include situations where liability was inappropriate." Model Penal Code §2.06 Commentary at 318. Consequently, Washington's version of aiding and abetting liability it is overbroad. Also, as discussed below, because Washington does not require jury unanimity to distinguish between principals and aiders or abettors, the overbroad element is indivisible.

Overbreadth

Washington adopted the Model Penal Code, but with one crucial change. Where the Model Penal Code required that the defendant act "with the **purpose** of promoting or facilitating" the offense, Washington's enactment required only that the defendant act "with **knowledge** that it will promote or facilitate" the commission of the offense. *Compare* Model Penal Code §2.06(3)(a) *with* Rev. Code Wash. §9A.08.020(3)(a) (emphasis added). As the Model Penal Code makes clear, knowledge is a materially lower standard to meet. Model Penal Code

§2.02(2) (defining purposely and knowingly). In addition, the Washington Pattern Jury Instructions reflect the same language as the statute, verbatim. See Washington Pattern Jury Instructions—Criminal §10.51 ("A person is an accomplice in the commission of a crime if, with **knowledge** that it will promote or facilitate the commission of the crime. . .") (emphasis added).

Washington courts have followed the language of the statute. "The language of the accomplice liability statute establishes a *mens rea* requirement of 'knowledge' of 'the crime.'" *State v. Roberts*, 14 P.3d 713, 735 (Wash. 2000). In *Roberts*, in fact, the Washington Supreme Court acknowledged that its accomplice statute, by reducing the *mens rea* from purpose to knowledge, and expanding the definition of what acts constitute aid, now fell outside the limits of conduct which could justify the death penalty (which requires a *mens rea* of intent or major participation). *Roberts*, 14 P.3d at 500-506.

iii. Divisibility

Despite the Supreme Court's holding in *Duenas-Alvarez* that aiding and abetting is an aspect of every generic offense, the government argued below that aiding and abetting liability "has no application in this case." [CR 14; ER 127]. It argued that if one only looks past the statute of conviction then "all the relevant documents in this case demonstrate that Defendant was convicted as a principal."

[ER 127] But what the government failed to appreciate is that it can only look past the fact of conviction, i.e., engage in a modified categorical analysis, if the statute is divisible because the modified categorical approach, which allows consultation of judicially noticeable documents, applies only to divisible statutes. *See generally*, *Descamps*, 133 S.Ct. 2276 (2013); *Rendon*, 764 F.3d 1077 (9th Cir. 2014).

In *Rendon*, the Ninth Circuit held that divisibility of a statute depends on whether a jury was required to find the particular fact unanimously. 764 F.3d at 1086. "That is because '[a] prosecutor charging a violation of a divisible statute must generally select the relevant element from its list of alternatives. And the jury, as instructions in the case will make clear, must then find that element, *unanimously* and beyond a reasonable doubt.'" *Rendon,* 764 F.3d at 1085 (quoting *Descamps*, 133 S. Ct. at 2290). If a jury did not have to agree on a particular fact unanimously, then it is not an element, and the statute is indivisible. "Otherwise, [*Descamps*'] express purpose for separating indivisible statutes from divisible ones—preventing sentencing courts from finding *facts* on which a jury *did not* have to agree—would be undermined." *Rendon*, 764 F.3d at 1085-86 (emphasis in original). In other words, even if a jury might have agreed that Mr. Valdivia was a principal—and even if he admitted at his plea colloquy that he was a principal, it

would be improper for a later court to *find* that he was a principal if neither a jury had to make that finding nor Mr. Valdivia had to make that admission if he could still be found guilty as an aider or abettor.

And, in fact, Washington law does not require juror unanimity as to whether a defendant was a principal or accomplice. First, accomplice liability is implicit in every charge: "The law is settled in [Washington] that a verdict may be sustained upon evidence that the defendant participated in the commission of the crime charged, as an aider or abettor, even though he was not expressly accused of aiding and abetting and even though he was the only person charged in the information." *State v. Carothers*, 84 Wn.2d 256, 260 (1974), *disapproved on other grounds by State v. Harris*, 102 Wn.2d 148, 153-54 (1984); *see also State v. Frazier*, 76 Wn.2d 373, 376-77 (1969). Washington courts have held that it is not error to instruct a jury on both theories – principal and accomplice, frankly admitting: "Although we agree ... that these two instructions, read together, would allow the jury to convict based on splitting the elements of the crime between [the defendant] and his brother, such is not an incorrect statement of the law of accomplice liability." *State v. Haack*, 958 P.2d 1001, 1003 (Wash. App. 1997). Most importantly, "*jurors are not required to determine which participant acted as a principal and which acted as an accomplice [and they] need not be unanimous as to the manner of . . .*

participation." *Id*. at 1004 (emphasis added). Indeed: "It matters not that some jurors may have believed that the petitioner fired the gun, while others may have believed that his only role was in aiding and abetting [the other participant], so long as all twelve agreed that he did participate." *State v. Hoffman*, 116 Wn.2d 51, 105 (1991) (quoting *Carothers*, 84 Wn.2d at 265).

Accomplice liability, even though it is defined in a completely different statute than Mr. Valdivia's offense of conviction, need not be pled against him or even found unanimously by a jury because it is not elemental. And if it's not elemental, it's not a divisible part of Mr. Valdivia's conviction. And if it's indivisible, there is no modified categorical analysis. Specifically: There is no way to look further to the documents of conviction to see what "really" happened.

This case is squarely controlled by *Rendon*. There, this Court held that Cal. Penal Code § 459 was overbroad as a theft offense because it included an intent to commit "any felony" as well as theft. California state law is clear: the jury need not be unanimous regarding the particular offense the defendant intended to commit in order to convict under section 459. All the prosecution must prove is that the defendant intended to commit *an* offense listed in the statute – namely, 'grand or petit larceny or any felony.' The jury need not agree on which of the substantive offenses the defendant intended to commit – only that he intended to

commit an offense listed in the statute. *See Rendon*, 764 F.3d at 1088-1089. And it wouldn't matter if the charging documents said that the defendant entered the dwelling with the intent to steal or that he even admitted such an intention during his plea, since the offense of conviction requires no such specificity. In this case, as discussed above, Washington state law is clear: the jury need not be unanimous regarding the role of the defendant as a principal or an aider and abettor. Therefore, the role as principal or aider and abettor are elements of liability for the substantive offense, and the crime is indivisible. Neither the government nor the district court addressed the significance of Washington's own caselaw regarding juror unanimity and its significance to this anaylsis.

iv. The district court's ruling, *Duenas-Alvarez*, and *Grisel*

Instead of grappling with Washington's own interpretation of its statutes or *Duenas-Alvarez*'s command that aiding and abetting liability is a necessary component of any categorical analysis because it is a form of liability inherent in the generic defense, *see* 549 U.S. at 190, the district court instead focused on an aspect of *Duenas-Alvarez* that appears irrelevant to this analysis when it addressed these arguments:

> I find that in this case Mr. Cruz is presenting a theoretical possibility, and because I find a modified categorical approach is appropriate and because I find that Mr. Cruz did in fact admit in his plea agreement to committing a

> drug trafficking offense, which is an aggravated felony, I am going to deny the motion to dismiss pursuant to 1326(d).

[CR 42; ER 115]. In discussing "a theoretical possibility" and citing to another district judge's unpublished order denying a similar motion,[6] the court appears to have been referencing that part of *Duenas-Alvarez* requiring a defendant to point out a case illustrating, there, the overbroad application of a judicially-created natural and probable consequences doctrine to the concept of aiding and abetting liability. *See* 549 U.S. at 193-194.

This principle does not apply to this argument. To begin, the argument made in *Duenas* was quite different than the one offered here. There, the defendant argued that California had adopted a version of aiding and abetting liability that "relatively few jurisdictions (only 10 in Duenas-Alvarez's own view) have rejected . . . ." *Id.* at 191. Considering the paucity of support this survey produced, the Court held that "[t]o succeed, Duenas-Alvarez must show something *special* about California's version of the doctrine—for example, that California in applying it criminalizes conduct that most other States would not consider 'theft.'" *Id.* Of course, here, Washington has adopted a theory of aiding and abetting liability that almost every single other relevant jurisdiction (save five) have

[6] *See United States v. Gonzalez-Altamirano*, 2014 WL 7047636 (S.D.Ca 2015) (unpublished).

rejected. Thus, it is not even clear from *Duenas* itself that its "special" showing would be required for a theory of liability that has been uniformly rejected.

Moreover, when the Court in *Duenas* canvassed the cases that the defendant proffered as showing an unusual application of the aiding and abetting theory of liability, it found that those decisions essentially rejected the very sort of lesser *mens rea* complained of here. *See, e.g., id.* at 191-92 (noting that one state court decision expressly rejected "knowledge of another's criminal purpose [as] not sufficient for aiding and abetting" and another "found that the defendant had the requisite 'motive' or intent to commit" the crime). Yet such a lesser *mens rea* of knowledge rejected by California courts is expressly and legislatively the very *mens rea* that Washington has adopted. *See supra*. And it's the fact that Washington has expressly codified this overly broad outlier of culpability in its aiding and abetting statute and jury instructions that takes it out of the ambit of *Duenas-Alvarez*'s special showing.

In *United States v. Grisel*, 488 F.3d 844 (9th Cir. 2007)(en banc), the government made the same "special showing" argument in the wake of *Duenas-Alvarez*. The law at issue was Oregon's burglary statute, which was overbroad because it included non-buildings, such as vehicle and boats, in its definition of

"building." *Id*. at 850. This Court, *en banc*, recounted the rule from *Duenas-Alvarez*, but explained that

> The Oregon legislature expressly recognized the ordinary, generic meaning of burglary and consciously defined second-degree burglary more broadly by extending the statute to non-buildings. Where, as here, a state statute explicitly defines a crime more broadly than the generic definition, no 'legal imagination,' *Duenas-Alvarez*, 127 S.Ct. at 822, is required to hold that a realistic probability exists that the state will apply its statute to conduct that falls outside the generic definition of the crime. The state statute's greater breadth is evident from its text.

Grisel, 488 F.3d at 850.

Likewise in this case, the Washington legislature, in a sharp break from the majority of jurisdictions and even the Model Penal Code on which its statute is based, consciously rejected the generic definition and substituted a "knowledge" *mens rea* for "purpose" in the text of its statute. *Compare* Model Penal Code §2.06(3)(a) *with* RCW §9A.08.020(3)(a). Therefore, "[t]he state statute's greater breadth is evident from its text." *Id*. Consequently there is nothing left for the legal imagination. And the district court's concerns about there only being a "theoretical possibility" concerning the overbreadth of Washington's aiding and abetting liability are unfounded.

But even if *Duenas*'s "special" showing somehow applied here, and Mr. Valdivia was required somehow to "point to his case own case or other cases in

which the state courts in fact did apply the statute in the special (non-generic) manner for which he argues," 549 U.S. at 193, he can.

In *State v. Leyva*, 00-1-00324-5, (Sup. Ct. Wash. 2000), the defendant was charged in a two-count information that alleged a violation of RCW 60.50.401(a) the same statute of conviction at issue here:

> "the above-named defendant, BENJAMIN B. LEYVA, then and there being in said county and state, with the intent to unlawfully deliver a controlled substance, to-wit, Heroin, did deliver such substance"

See Information in Wash. Sup. Ct. Case 00-1-00324-5.[7] Despite the language charging Mr. Leyva with personally delivering the heroin, the jury was instructed that he could be convicted on an aiding and abetting theory. In particular, Jury Instruction No. 4 states: "A person is an accomplice in the commission of a crime if, with *knowledge* that it will promote or facilitate the commission of a crime . . ." Filed Jury instructions in Case No. 00-1-00324-5. This accurately reflects

[7] This document, as well as all others referenced from *State v. Leyva* are publically available online from the Whatcom County Superior Court Case Search website at the following web link: http://documents.whatcomcounty.us/weblink8/0/doc/348296/Page1.aspx?searchid=211a06ad-074b-47bb-96c7-59de10aa03be (last visited January 29, 2016). The documents are provided as a single 260 page .pdf document. Upon request, counsel will provide the referenced documents separately in a supplemental excerpt of records.

Washington law. *See* RCW 9A.08.020; *Frazier*, 76 Wn.2d at 376-77 (accomplice instruction may be given even when the defendant is on trial alone and is charged as a principal). Furthermore, Jury Instruction No. 8 explains the accomplice theory for the count, naming the principals, Lucia Prieto and Jose Flores-Castaneda (who were not mentioned in the information), and specifying that the state had only to prove "the defendant *knew* he was assisting Lucia Prieto in committing a crime" – not that he *intended* to assist in the crime. Filed Jury Instructions in Case No. 00-1-00324-5 (emphasis added). This is clearly broader than the generic or federal definition. *Compare id.* ("with knowledge that it will promote or facilitate the commission of a crime") *with* Ninth Circuit Model Jury Instruction 5.1 (requiring that "the defendant acted with the intent to facilitate [specify crime charged]"). The jury found the defendant guilty on both counts under those instructions. Jury Verdict Form in Wash. Sup. Ct 00-1-00324-5.

When it comes to aiding and abetting or conspiracy, the difference between knowledge and intent is well established. The Model Penal Code drafters acknowledged it explicitly: "Though the Chief Reporter favored a formulation that would broaden liability beyond merely purposive conduct, the Institute rejected that position, principally on the argument that the need for stating a general principle in this section pointed toward a narrow formulation in order not to

include situations where liability was inappropriate." Model Penal Code §2.06 Commentary at 318. The Supreme Court has acknowledged the difference between knowledge and intent as well: "While it is not identical with mere knowledge that another purposes unlawful action, it is not unrelated to such knowledge. Without the knowledge, the intent cannot exist." *Direct Sales Co. v. United States*, 319 U.S. 703, 711 (1943). Intent requires "more than suspicion, more than *knowledge*, acquiescence, carelessness, indifference, lack of concern. There is informed and interested cooperation, stimulation, instigation." *Id*. at 713.

Given the record from *Leyva*, the Court cannot stand on the assertion that RCW 69.50.401's overbreadth is only a "theoretical possibility," because it is now possible to "point to a case in which the state courts in fact did apply the statute in the special (nongeneric) manner for which he argue[d]." *Duenas-Alvarez*, 549 U.S. at 193. *Leyva* is that case.

More to the point, Washington juries are instructed only that they must find that the defendant acted "with *knowledge* that [his action] would promote or facilitate the commission of the crime." WPIC 10.51. Like the breaking-and-entering element of burglary at issue in *Descamps*, no Washington jury is ever asked to determine whether a defendant *intended* to promote or facilitate the crime (the generic standard), only whether he *knew* that his actions would have that

effect. In *Descamps*, the Court acknowledged that the defendant "may (or may not) have broken and entered, and so committed generic burglary. But § 459 – the crime of which he was convicted – does not require the factfinder (whether jury or judge) to make that determination." *Descamps*, 133 S.Ct. at 2293. Thus, because the "actual statute" for Washington aiding and abetting does not require a finding of intent, only knowledge, a later court conducting the categorical analysis "cannot supply that missing judgment." *Id*. at 2290.

It is of no consequence that the overbreadth here comes from the aiding and abetting statute as opposed to RCW 69.50.401 itself. Aiding and abetting is a valid theory of substantive liability for any prosecution under RCW 69.50.401, *see State v. Rodriguez*, 898 P.2d 871, 873 (Wash. App. 1995) ("The same criminal liability attaches to a principal and his accomplice because they share equal responsibility for the substantive offense."), and a conviction can be obtained on an aiding and abetting theory even when the defendant is charged alone as a principal. *Frazier*, 76 Wn.2d at 376-77. Thus the Washington legislature's adoption of a lower *mens rea* for an indivisible theory of substantive guilt ends the analysis for Mr. Valdivia's conviction. It is overbroad, indivisible, and thus not subject to a modified categorical approach.

v. Precedent from other circuits support this argument

Although the Ninth Circuit has not addressed an argument in the aggravated felony context that aiding and abetting overbreadth renders criminal liability overbroad, other circuits have compared such statutes to the generic definition. In *United States v. Liranzo*, 944 F.2d 73 (2d Cir. 1991), the Second Circuit considered a New York statute that covered conduct 'in which the actor aids the commission of a crime with *knowledge* that he is doing so but without any specific intent to participate therein or benefit therefrom." *Id*. at 79 (emphasis added). The Second Circuit held that it was overbroad as a controlled substance offense because a conviction 'does not involve the *intent* to commit the underlying substantive offense." *Id*. The Sixth and Eighth Circuit have reached the same conclusion regarding similar statutes with only a knowledge *mens rea*. See *United States v. Woodruff*, 735 F.3d 445 (6th Cir. 2013) (Tennessee facilitation overbroad as controlled substance offense); *United States v. Pazzanese*, 982 F.2d 251, 254 (8th Cir. 1992) (New York facilitation overbroad). What New York refers to as "facilitation" shares the same overbroad intent element as what Washington refers to as "complicity" in RCW §9A.08.020. The result under the categorical analysis therefore should be the same.

C. Exhaustion of Administrative Remedies and Deprivation of the Opportunity for Judicial Review.

Although an alien ordinarily must exhaust administrative remedies and show that he was deprived of the opportunity for judicial review, he is excused from those requirements when the due process violations affected the exercise of those rights. *See United States v. Vidal-Mendoza*, 705 F.3d 1012, 1015-16 (9th Cir. 2013) (summarizing caselaw, concluding that violation of regulations regarding advisals excuses exhaustion of administrative remedies and satisfies judicial review deprivation requirement).

"The government," of course, "bears the burden of proving the waiver" of the right to appeal. *See United States v. Lopez-Vazquez*, 1 F.3d 751, 754 (9th Cir. 1993)(as amended). Any purported waiver must be "considered" and "intelligent." *Mendoza-Lopez*, 481 U.S. at 840. When a purported waiver occurs, but the alien was not advised of the right to seek relief or challenge a finding, that waiver cannot as a matter of law, be considered and intelligent. *See, e.g.*, *United States v. Pallares-Galan*, 359 F.3d 1088, 1096 (9th Cir. 2004) (explicit waiver invalid due to lack of proper notice and advice); *United States v. Muro-Inclan*, 249 F.3d 1180, 1182-1183 (9th Cir. 2001) (same).

So when Mr. Valdivia was told that he was removable because his conviction was an aggravated felony, this advice prevented any purported waiver from being considered and intelligent.

Furthermore, there is no administrative remedy for an improperly issued removal order under INA 238. See 8 U.S.C. § 1228(b), 8 C.F.R. § 238.1. As the Fifth Circuit has noted, the regulations and process for an administrative order allow the alien to contest only facts, not law.

> The relevant statutes and corresponding regulations therefore did not provide Validiviez with an avenue to challenge the legal conclusion that he does not meet the definition of an alien subject to expedited removal. As such, Valdiviez did not fail to exhaust his administrative remedies. The relevant statutes and corresponding regulations therefore did not provide Valdiviez with an avenue to challenge the legal conclusion that he does not meet the definition of an alien subject to expedited removal. As such, Valdiviez did not fail to exhaust his administrative remedies.[1]
>
> FN1. This is not to say that there are no administrative remedies available to a petitioner challenging a Notice of Intent; rather, under the circumstances of this case, the legal question presented was not subject to the available methods of administrative review set forth in 8 C.F.R. § 238.1(c)(1), (d)(2)(i), (ii).

Valdiviez-Hernandez v. Holder, 739 F.3d 184, 187 (5th Cir. 2013). Although direct review is available in the circuit court of appeals, Mr. Valdivia was never advised that he had the right to contest the legal conclusion that his conviction was an aggravated felony. The list of options he was presented was limited, exclusive

and did not allow such an argument. As this Court has repeatedly held, an appellate waiver without advice of the right to contest an issue is invalid because it is not considered or intelligent. *See Arrieta*, 224 F.3d at 1079 (invalid waiver because alien was not informed of right to seek relief). Since Mr. Valdivia, like Mr. Valdiviez, was never advised of his right to contest only the legal conclusion, his failure to exhaust administrative remedies or appeal must be excused.

Last, regarding a waiver, Mr. Vadivia could only have been extremely confused. He was explicitly advised that he had the right to a hearing before an immigration judge where he could argue to be able to stay in the United States. He explicitly chose this option in writing when confronted with the choice. But the immigration officers reneged on that advice and removed him without a hearing and without appearing before an immigration judge. That initial advice rendered any contradictory subsequent waivers invalid. In *United States v. San Juan-Cruz*, 314 F.3d 384 (9th Cir. 2002), the defendant, facing interrogation, was initially told that he had the right to an attorney but not at government expense, in accord with the regulations governing immigration proceedings. *Id*. at 388. He was then told the opposite in the course of the *Miranda* warnings. *Id*. The Ninth Circuit held that these contradictory warnings were confusing and prevented the subsequent

waiver of the right to an attorney invalid. *Id*. at 388-389. The same happened here and the same result should apply. The waiver was invalid.

II. CONCLUSION

Because the district court erred in concluding that Mr. Valdivia's 2009 removal was valid on the basis of an overbroad, indivisible statute of conviction, his conviction for attempted reentry after deportation must be reversed.

DATED: January 29, 2016

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. 32(A)(7)(C) AND CIRCUIT RULE 32-1 FOR CASE NUMBER 14-50502

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

X 1. Pursuant to FED. R. APP. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached opening/~~answering~~/~~reply~~/~~cross~~ appeal brief is

Proportionately spaced, has a typeface of 14 points or more and contains 8445 words (opening, answering, and the second and third briefs filed in cross-appeals must **NOT** exceed 14,000 words; reply briefs must **NOT** exceed 7,000 words),

or is

Monospaced, have 10.5 or fewer characters per inch and contain _____ words or _____ lines of text (opening, answering, and second and third briefs filed in cross-appeals must **NOT** exceed 14,000 words, or 1,300 lines of text; reply briefs must **NOT** exceed 7,000 words or 650 lines of text

CERTIFICATE OF RELATED CASES

Counsel for the Appellant is aware of at least one other case currently pending appeal that presents the identical briefed here: *United States v. Paniagua-Paniagua*, 15-50454. Opening briefs for that case are due on March 11, 2016.

Respectfully submitted,
s/Ellis M. Johnston III
ELLIS M. JOHNSTON III
Attorney for Defendant-Appellant

DATED: January 30, 2016

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

I hereby certify that on January 30, 2016, I electronically filed the foregoing along with the Excerpts of Record with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

I certify the foregoing is true and correct.

s/ *Ellis M. Johnston III*
ELLIS M. JOHNSTON III