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U.S. COURT OF APPEALS

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. SERGIO MIRAMONTES-MALDONADO, Defendant-Appellant.	No. 20-30178 D.C. Nos. 1:19-cr-00060-BLW-1 1:19-cr-00060-BLW MEMORANDUM[*]

Appeal from the United States District Court
for the District of Idaho
B. Lynn Winmill, Chief District Judge, Presiding

Submitted December 6, 2021[**]
Seattle, Washington

Before: McKEOWN, CHRISTEN, and MILLER, Circuit Judges.

Sergio Miramontes-Maldonado appeals his criminal conviction for one count of illegal reentry pursuant to 8 U.S.C. § 1326. Miramontes-Maldonado filed a motion to dismiss the indictment in the district court, arguing that the exclusion

[*] This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

[**] The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

order underlying the illegal reentry charge violated his right to due process because the order was "fundamentally unfair." The district court denied the motion, and Miramontes-Maldonado entered a conditional plea. We review de novo. *See United States v. Camacho-Lopez*, 450 F.3d 928, 929 (9th Cir. 2006). We have jurisdiction pursuant to 18 U.S.C. § 1291, and we affirm. Because the parties are familiar with the facts, we do not recite them here.

Miramontes-Maldonado argues that his original exclusion hearing in 1997 violated his right to due process for three reasons: (1) he was not advised of his eligibility to request that his application be withdrawn; (2) he was not advised in Spanish of the underlying immigration charges; and (3) the immigration court failed to preserve a verbatim recording of his exclusion hearing. Miramontes-Maldonado has the burden of showing both that the exclusion hearing violated his due process rights and that he suffered prejudice from these defects. *See United States v. Ubaldo-Figueroa*, 364 F.3d 1042, 1048 (9th Cir. 2004).

We conclude Miramontes-Maldonado has not met his burden of establishing a due process violation. In pre-Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) exclusion proceedings, a non-citizen was entitled only to those rights provided by statute and regulation. *See Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) ("It is well established that certain constitutional

protections available to persons inside the United States are unavailable to aliens outside of our geographic borders.") (internal citations omitted)*; see also United States v. Barajas-Alvarado*, 655 F.3d 1077, 1088 (9th Cir. 2011). Miramontes-Maldonado has not identified a statute that entitled him to a recording of his hearing, and we have held that the absence of an audio recording of a prior deportation hearing does not necessarily violate due process, so long as "other means were available for [Miramontes-Maldonado] to challenge the validity of his prior deportation hearings, such as his own memory, witnesses, and other information within his [immigration] file." *United States v. Medina*, 236 F.3d 1028, 1032 (9th Cir. 2001).

Miramontes-Maldonado's contrary authority involved a permanent resident, not an unadmitted alien. *See Singh v. Holder*, 638 F.3d 1196, 1200 (9th Cir. 2011). Nor has Miramontes-Maldonado identified a statutory right to be informed of his eligibility to request withdrawal of his application. In the context of an expedited removal preceding, we have held that a non-citizen does not have the right to be informed of this eligibility. *See, e.g.*, *United States v. Sanchez-Aguilar*, 719 F.3d 1108, 1112 (9th Cir. 2013). Finally, Miramontes-Maldonado has not established that he did not receive a translation of his charges, nor has he shown that he

required a translator. We thus affirm the district court's conclusion that Miramontes-Maldonado has not established a due process violation.

Even if we were to decide that Miramontes-Maldonado established a due process violation, however, he has not shown that he was prejudiced. To show prejudice, "[w]here the relevant form of relief is discretionary, the alien must 'make a "plausible" showing that the facts presented would cause the Attorney General to exercise discretion in his favor.'" *Barajas-Alvarado*, 655 F.3d at 1089 (quoting *United States v. Acre–Hernandez*, 163 F.3d 559, 563 (9th Cir. 1998)). Although Miramontes-Maldonado cites various equitable factors to argue he would have been allowed to withdraw his application in the absence of the cited defects, he also applied for admission with a fraudulent document, and we have held that an alien who intentionally presents fraudulent immigration documents likely would not be allowed to withdraw his application, *see, e.g., id.* (citing *In Re Gutierrez*, 19 I. & N. Dec. 562 (BIA 1988)). We thus agree that Miramontes-Maldonado has not shown prejudice, and we affirm the district court's denial of his motion to dismiss the indictment.

AFFIRMED.