

1 CUAUHTEMOC ORTEGA (Bar No. 257443)
Federal Public Defender
2 KYRA NICKELL (Bar No. 328816)
(E-Mail: Kyra.Nickell@fd.org)
3 JAKE CRAMMER (Bar No. 329928)
(E-Mail: Jake.Crammer@fd.org)
4 Deputy Federal Public Defenders
321 East 2nd Street
5 Los Angeles, California 90012-4202
Telephone: (213) 894-2854
6 Facsimile: (213) 894-0081

7 Attorneys for Defendant
JOSE ANTONIO BONILLA

8
9 **UNITED STATES DISTRICT COURT**
10 **CENTRAL DISTRICT OF CALIFORNIA**
11 **WESTERN DIVISION**

12 UNITED STATES OF AMERICA,

13 Plaintiff,

14 v.

15 JOSE ANTONIO BONILLA,

16 Defendant.

Case No. 2:25-CR-259-WLH

**REPLY IN SUPPORT OF MOTION
TO DISMISS INDICTMENT UNDER
8 U.S.C. § 1326(d)**

**Date: May 28, 2025
Time: 10:30 a.m.**

17
18 Defendant Jose Antonio Bonilla, by and through his attorneys of record, Deputy
19 Federal Public Defenders Kyra Nickell and Jake Crammer, hereby submits this Reply
20 in support of his Motion to Dismiss the Indictment.

21 Respectfully submitted,

22 CUAUHTEMOC ORTEGA
23 Federal Public Defender

24 DATED: May 26, 2025

By */s/ Kyra Nickell*

25 KYRA NICKELL

26 JAKE CRAMMER
27 Deputy Federal Public Defender
Attorneys for JOSE ANTONIO BONILLA

1 **I. INTRODUCTION**

2 The government takes several strikes at Mr. Bonilla’s motion to dismiss under 8
3 U.S.C. § 1326(d), but none of them land. The government would improperly constrain
4 the reach of section 1326(d) to deportation proceedings only. But the government’s
5 position does not comply with the origin of 1326(d), the due process rights of
6 defendants, or Ninth Circuit authority. It next argues that Mr. Bonilla suffered no due
7 process violations, despite the fact that USCIS wrongfully terminated his TPS with
8 deliberate indifference and that the IJ deprived him of the right to cross-examine
9 witnesses whose statements were used against him. Finally, the government would
10 blame Mr. Bonilla for the dismissal of his petition of review, even though the dismissal
11 relied on an erroneous interpretation of the statutory deadline.

12 Because Mr. Bonilla’s 1326(d) challenge still stands, the Court should dismiss
13 the Indictment.

14 **II. ARGUMENT**

15 **A. Mr. Bonilla may collaterally attack USCIS’s decision to withdraw his**
16 **TPS Status.**

17 The government would limit collateral attacks under section 1326(d) to removal
18 orders only, placing administrative decisions such as the withdrawal of TPS beyond
19 their reach. The Court should reject the government’s overly restrictive reading of
20 1326(d), instead holding that the Court has the power to consider collateral attacks to
21 TPS determinations.

22 In *United States v. Mendoza-Lopez*, the Supreme Court reviewed an earlier
23 version of 8 U.S.C. § 1326 that did not contain a provision allowing for a collateral
24 attack on the accused’s underlying immigration proceedings. 481 U.S. 828 (1987). The
25 Supreme Court held that the earlier version of section 1326 did “not comport with the
26 constitutional requirement of due process,” since it “imposes a criminal penalty for
27 reentry after any deportation, regardless of how violative of the rights of the
28

1 [noncitizen] the deportation proceeding may have been.” *Id.* at 837. With the passage of
2 AEDPA in 1996, Congress amended section 1326 by adding subsection (d), permitting
3 the accused to collaterally attack the underlying immigration proceedings. *See United*
4 *States v. Palomar-Santiago*, 593 U.S. 321, 324-325 (2021); *see also* 8 U.S.C. §
5 1326(d).

6 Looking closer to the underlying rationale of *Mendoza-Lopez*, it makes sense to
7 permit noncitizens to attack administrative decisions regarding TPS under section
8 1326(d). In reaching its conclusion, the *Mendoza-Lopez* Court relied on three cases,
9 none of which concerned deportation proceedings specifically: *Estep v. United States*,
10 327 U.S. 114 (1946) (collateral attack to draft regulations); *Yakus v. United States*, 321
11 U.S. 414 (1944) (challenge to wartime price control regulations); *McKart v. United*
12 *States*, 395 U.S. 185, (collateral attack on draft regulations). In all three of these cases,
13 the defendants sought to challenge administrative regulations that were insulated from
14 judicial review. *Estep*, 321 U.S. at 427-431; *Yakus*, 321 U.S. at 427-431; *McKart*, 199
15 U.S. at 196-197. Thus, under *Mendoza-Lopez*’s rationale, collateral attacks should not
16 be cabined to deportation proceedings only, but should extend to administrative
17 decisions like TPS, regardless of whether they are deemed discretionary.

18 Furthermore, the Ninth Circuit has recognized due process challenges to aspects
19 of the immigration process beyond deportation orders. In *Dent v. Sessions*, 900 F.3d
20 1075, the Ninth Circuit allowed for due process challenges to USCIS’s handling of a
21 person’s citizenship application. *Id.* at 1083. *See also Brown v. Holder*, 763 F.3d 1141
22 (9th Cir. 2014) (“*Brown I*”), *Brown v. Lynch*, 831 F.3d 1146, 1150 (9th Cir. 2016)
23 (“*Brown II*”). Thus, a noncitizen’s due process rights can be violated not only by
24 unlawful removal orders, but also by the deliberate indifference of administration
25 officials handling a person’s application for immigration status, like TPS.

1 **B. Mr. Bonilla’s Deportation Order was Fundamentally Unfair.**

2 **a. USCIS violated Mr. Bonilla’s due process rights by behaving**
3 **with deliberate indifference toward his TPS application**

4 The government contends that the Court cannot review TPS, because “TPS is
5 discretionary relief that is ultimately vested with the Attorney General.” (Dkt. 50 at 6).

6 But the government confuses the Court’s constitutional powers to hear 1326(d)
7 challenges with its authority to review a petition for review from a BIA decision.

8 Indeed, none of the cases it cites for this proposition pertain to 1326(d) challenges.¹

9 However, in *Mendoza-Lopez*, the Supreme Court relied on cases in which the Court had
10 found a right to challenge administrative proceedings that act as predicates for criminal
11 prosecutions, even where those proceedings were executive, discretionary, and
12 insulated from judicial review. *See, e.g., Estep*, 327 U.S. at 116-119.

13 Furthermore, Mr. Bonilla had a right under federal law not to have his TPS
14 terminated unlawfully. Immigration regulations permit USCIS to withdraw TPS in only
15 three situations: ineligibility, lack of physical presence, or failure to register with DHS.
16 8 CFR § 244.14(a); *see also Russell v. Landrieu*, 621 F.2d 1037, 1040 (9th Cir. 1980)
17 (an “interest in a benefit protected by the due process clause results from a legitimate
18 claim of entitlement created and defined by an independent source, such as state or
19 federal law”). USCIS withdrew Mr. Bonilla’s TPS status even though he met none of
20 these three categories. Thus, his claim is properly analyzed under the deliberate
21 indifferent standard articulated in *Brown I*, *Brown II*, and *Dent*.

22
23
24
25
26 ¹ *See* Dkt. 50 at 6-7, *citing Mejia-Rodriguez v. U.S. Dept. of Homeland Sec.*, 562
27 F.3d 1137, 1139 (11th Cir. 2009) (hearing a petition for review); *Munoz v. Ashcroft*,
339 F.3d 950, 952 (9th Cir. 2003) (same); *Tovar-Landin v. Ashcroft*, 361 F.3d 1164,
1165 (9th Cir. 2004) (same).

1 **a. Even under the modified categorical approach, Mr.**
2 **Bonilla’s conviction is not an aggravated felony**

3 The government is correct that courts have applied the modified categorical
4 approach to determine whether Mr. Bonilla’s crime of conviction, Cal. Penal Code §
5 647.6(a)(1), is an aggravated felony, but the government misapplies that approach here.
6 The government’s errors stem, primarily, from a misunderstanding of how police
7 reports are considered under the modified categorical approach.

8 In *United States v. Almazan-Becerra*, the Ninth Circuit held that it was proper to
9 consider police reports where the accused “stipulate[s] during the plea colloquy that the
10 police reports contained a factual basis for [the accused’s] guilty plea[.]” 537 F.3d
11 1094, 1097 (9th Cir. 2008). But courts are not to take every statement contained within
12 police reports as gospel truth. Recognizing that court documents sometimes contain
13 contradictory facts, the *Almazan-Becerra* panel held that “when a defendant stipulates
14 that ‘a factual basis’ for his plea is present in ‘court documents,’ courts may use any
15 *uncontradicted facts* in those documents to establish an element of a prior conviction.”
16 *Id.* at 1099 (emphasis added) (quoting *United States v. Castillo-Morales*, 507 F.3d 873,
17 876 (5th Cir. 2007)).

18 In its argument, the government relies on a single statement from the underlying
19 police report—a statement that is contradicted within that same police report. The
20 government keys into a statement from the victim, alleging that Mr. Bonilla “reached
21 over [and] forcibl[y] grabbed his penis over his pants and squeezed.” (Def. Exh. J at
22 USAO_1309; *see also* Dkt. 50 at 9-10). The same victim also alleges that Mr. Bonilla
23 made inappropriate comments to him about his sexuality and asked if he could see his
24 penis. (Def. Exh. J at USAO_1309). Turning to the following page, however, the same
25 police report contains statements made by Mr. Bonilla. At places, the stories overlap:
26 Mr. Bonilla admits to talking about his sexuality and asking if he could see the boy’s
27
28

1 penis. (Def. Exh. J at USAO_1310-1311). But when asked whether he touched the
2 boy’s penis, Mr. Bonilla adamantly denies this fact at least three times. (*Id.*).

3 Applied correctly, then, the modified categorical approach leads to the same
4 conclusion as the categorical approach: Mr. Bonilla did not commit an aggravated
5 felony. To the extent the Court considers the police report as part of its inquiry, it must
6 only adopt “any uncontradicted facts in those documents to establish an element of a
7 prior conviction.” *Almazan-Becerra*, 537 F.3d at 1099. Because the statement regarding
8 Mr. Bonilla touching the victim’s penis is contradicted within the same report, the
9 Court may not rely on that fact. However, the Court may rely on the uncontradicted
10 facts: Mr. Bonilla’s inappropriate sexual comments.

11 Thus, under the modified categorical approach, Mr. Bonilla’s conviction does not
12 constitute an aggravated felony.² As the Ninth Circuit has held, the precise reason that
13 section 647.6(a)(1) is not a categorical match to the aggravated felony statute is because
14 it may be premised on inappropriate speech, such as propositioning a minor for sex,
15 that does not constitute sexual abuse of a minor for aggravated felony purposes. *See*
16 *Pallares-Galan*, 359 F.3d at 1101. Relying on the “uncontradicted facts” in Mr.
17 Bonilla’s police report, then, it is clear that the stipulated factual basis for Mr. Bonilla’s
18 offense was premised on just that: inappropriate sexual comments to a minor, rather
19 than forcible touching.

20 For the same reasons stated in the instant Motion to Dismiss, Mr. Bonilla
21 maintains that USCIS’s deliberate indifference with regard to his TPS application
22 caused him prejudice. (Dkt. 40 at 8-9).

23
24
25
26 ² As stated in Mr. Bonilla’s motion to dismiss, this argument is strengthened by
27 the fact that USCIS later approved his TPS application after wrongfully withdrawing it,
28 suggesting they recognized that he was not, in fact, an aggravated felon. (*See* Def. Exh.
E).

1 **b. The IJ violated Mr. Bonilla’s due process rights by improperly**
2 **considering hearsay statements beyond impeachment evidence**

3 The IJ admitted hearsay statements without the testimony, and cross-
4 examination, of declarants who made them. While at one point, the IJ stated on the
5 record that the statements would be considered for impeachment purposes, the IJ’s
6 order makes it clear that the declarants’ statements were specifically considered. The
7 defense does not contest whether impeachment evidence is admissible in Immigration
8 Court proceedings. However, the IJ erred here in considering the statements in the
9 incident report and probation report as evidence of impeachment, absent the
10 presentation of witnesses for cross-examination.

11 In its opposition, the government asserts that Mr. Bonilla’s statements in the
12 incident report were used as impeachment evidence only. (Dkt. 50 at 12). However, it is
13 abundantly clear that the IJ considered more than just Mr. Bonilla’s statements to police
14 in his final order. The IJ cites to statements from: (1) the complaining witness, (2)
15 Maria Torres, (3) Probation Officer Daniels, and (4) Detective Miguel Torres, who
16 translated Mr. Bonilla’s statements. (Def. Exh. J). The IJ even goes so far as to
17 specifically quote statements from Maria Torres and statements from Probation Officer
18 Daniels that were in the probation report. Mr. Bonilla never provided a statement to
19 probation. This goes far beyond simply using a person’s prior statements against him.

20 The government argues that since the incident report was stipulated to in the
21 criminal proceedings, then it is admissible here as part of the record of conviction.
22 However, the government fails to cite any case law to support the notion that a
23 stipulated factual basis would allow the IJ to disregard due process considerations when
24 considering statements made by out of court declarants. Moreover, the cases cited by
25 the government do not involve the admission of incident reports or probation reports.

26 The *Espinoza* and *Sanchez* cases speak to the admissibility of a Form I-213, a
27 record of deportable or inadmissible noncitizen. See *Espinoza v. INS*, 45 F.3d 308 (9th
28

1 Cir. 1995); see also *Sanchez v. Holder*, 704 F.3d 1107 (9th Cir. 2012)). In *Espinoza*, the
2 Form I-213 was not admitted for impeachment purposes and was considered to be a
3 form “prepared in accordance with normal recordkeeping requirements.” *Id.* at 310.
4 The *Espinoza* court considered that a right to cross-examine the author of a Form I-213
5 for the discrete issue of alienage would create an unwarranted burden on INS. *Id.* at
6 311. A form made during normal recordkeeping is vastly different than an incident
7 report or probation report. Incident reports and probation reports are usually authored
8 by each respective department as a way to document their investigations and the
9 statements of witnesses. This goes far beyond rote recordkeeping, particularly because
10 these reports include statements made by multiple declarants. The respondent in
11 *Espinoza* “bore the burden of demonstrating legal entry.” *Id.* Notably, Mr. Bonilla’s
12 removal proceedings were of a different nature than the proceedings in *Espinoza* as the
13 IJ was not considering whether Mr. Bonilla demonstrated legal entry or contested
14 issues of alienage, but rather whether Mr. Bonilla’s underlying criminal conviction
15 precluded him from relief. *Espinoza* actually affirms a respondent’s right to due process
16 in immigration proceedings and includes a supporting citation to a case provided by the
17 defense in its original brief. *Id.* (citing *Cunanan v. INS*, 856 F.2d 1373, 1375 (9th Cir.
18 1988)); see also Dkt. 40 at 10).

19 Even if the IJ’s considerations were limited to Mr. Bonilla’s statements in the
20 incident report for impeachment purposes, the government fails to address the fact that
21 his statement to police was not made to the officer writing the report. Mr. Bonilla
22 provided a statement in Spanish to Detective Miguel Torres who then interpreted the
23 statement into English to Detective Susan Velazquez. (See Def. Exh. J at
24 USAO_001310). Detective Velazquez then transcribed a summary of the statement into
25 the incident report. (See Def. Exh. J). This is problematic given the fact that there is no
26 information in the report as to the proficiency of the detective in translating the
27
28

1 statement, nor was the report read to Mr. Bonilla in his native language to confirm his
2 statement was accurately translated.

3 Even if the incident report were properly admitted impeachment evidence as part
4 of the record of conviction, the statements of Probation Officer Daniels and Maria
5 Torres are not incorporated into the record of conviction and were improperly
6 considered by the IJ. (*See* Def. Exh. J). The government notes the limited nature of the
7 stipulated facts in the underlying conviction proceedings—highlighting that the parties
8 stipulated to “information in the police reports,” while the record remains silent as to
9 any stipulations to the probation report. (*See* Def. Exh. J). Neither PO Daniels nor Ms.
10 Torres were presented for cross-examination at the removal proceedings, yet specific
11 quotes from each declarant were cited by the IJ. (*See* Def. Exh. I at USAO_000045-46).
12 Furthermore, the IJ does not state that either of these declarants’ statements are
13 afforded less weight because they were not presented for cross-examination. In fact, it
14 seems as though the IJ gives these statements great weight, given that the IJ specifically
15 quotes both declarants from the probation report. (*See* Def. Exh. I at USAO_000045-
16 46). The IJ cannot skirt Mr. Bonilla’s due process rights by verbally acknowledging on
17 the record that the incident report and probation report were admissible for
18 impeachment purposes, only to subvert his own ruling and use the statements contained
19 therein as substantive evidence absent a testifying declarant.

20 The government attempts to shift the burden back on Mr. Bonilla for not
21 presenting affirmative evidence to attack the documents or attack the credibility of the
22 absent declarants. However, this runs afoul of clearly established case law that keeps
23 the burden on DHS to afford respondents with a reasonable opportunity to confront the
24 witnesses against him or her. *Saidane v. INS*, 129 F.3d 1063, 1065 (9th Cir. 1997)
25 (citing *Cunanan v. INS*, 856 F.2d 1373, 1375 (9th Cir. 1988.)) The burden is on DHS to
26 make a good faith effort to present declarants for cross-examination during removal
27 proceedings—efforts which were seemingly not made for Mr. Bonilla’s removal
28

1 proceedings based on the records. This is a blatant violation of Mr. Bonilla’s due
2 process rights, denying him the right to cross-examine declarants whose out-of-court
3 statements were used against him.

4 The government does not cite to relevant case law supporting the notion that Mr.
5 Bonilla did not suffer prejudice when his due process rights were violated. In fact, the
6 government cites an unpublished opinion relating to a material misrepresentation and
7 an extrajudicial killing—none of which are at issue here. See *Radojkovic v. Holder*, 599
8 F.App’x 646 (9th Cir. 2015). And once again, the government cites to cases that
9 involve a Form I-213 created by DHS and not incident reports or probation reports
10 created by external government agencies. See *Hernandez v. Garland*, 52 F.4th 757 (9th
11 Cir. 2022); *Espinoza*, 45 F.3d at 311; *Sanchez*, 704 F.3d. at 1109. In denying Mr.
12 Bonilla the opportunity cross-examine the declarants who made statements against him,
13 Mr. Bonilla could not adequately discredit, challenge, or contest the witness’ credibility
14 before the IJ. But for the IJ’s reliance on aggravating facts that came from the incident
15 report and probation report, the IJ might have considered the reports unreliable and
16 ultimately found Mr. Bonilla eligible for relief. See *Alcaraz-Enriquez*, 19 F.4th at 1232.

17 **C. Mr. Bonilla Was Deprived of Judicial Review.**

18 Mr. Bonilla was improperly deprived of the opportunity for judicial review. As
19 detailed in his underlying motion, Mr. Bonilla, proceeding *pro se* at this point, mailed a
20 petition of review to the Ninth Circuit by certified mail to ensure his filing was timely.
21 (Def. Exh. L). Mr. Bonilla’s filing was due on Friday, August 9, and according to his
22 certified mail receipt, his filing in fact arrived on August 9. (*Id.* at 3). However, because
23 the office did not process the filing until the following Monday, his petition was
24 deemed untimely, and the Ninth Circuit held it had no jurisdiction to hear an untimely
25 petition under *Magtanong v. Gonzales*, 494 F.3d 1190 (9th Cir. 2007).

26 First, Mr. Bonilla’s petition should have been deemed timely. In *Sheviakov v.*
27 *I.N.S.*, the Ninth Circuit held that so long as a petition for review “arrived on the day it
28

1 was due at the address specified,” the panel would “not penalize a petitioner whose
2 mail arrives at that address within the time period.” 237 F.3d 1144, 1148 (9th Cir.
3 2001). The panel wrote, “So long as a litigant complies with our rules, we cannot fault
4 him if the clerk's office proves unable to stamp the petition on the day it arrives.” *Id.*
5 Thus, because Mr. Bonilla’s petition *arrived* at the Ninth Circuit in time, the Ninth
6 Circuit incorrectly deemed his filing untimely.

7 Furthermore, as stated in the underlying motion, the Ninth Circuit relied on
8 *Magtanong* to hold that the petition for review filing deadline was jurisdictional, a case
9 that is no longer good law. *See Alonso-Juarez v. Garland*, 80 F.4th 1039, 1043 (9th Cir.
10 2023). Correctly interpreted, the deadline for petitions of review is not jurisdictional,
11 and thus is subject to waiver and forfeiture.³ *Id.* Thus, even if Mr. Bonilla’s claim were
12 in fact late by one day, his petition should not have been summarily dismissed.

13 III. CONCLUSION

14 Because Mr. Bonilla was prejudiced by the due process violations in his removal
15 proceedings, Ninth Circuit precedent requires dismissal of the indictment.

16
17 DATED: May 26, 2025

By */s/ Kyra Nickell*

18

KYRA NICKELL

JAKE CRAMMER

19 Deputy Federal Public Defender

20 Attorneys for JOSE ANTONIO BONILLA

21
22
23
24
25

³ The government cites to *Nutraceutical Corp. v. Lambert*, 586 U.S. 188, 192
26 (2017) for the argument that even mandatory claim processing rules are “unalterable” if
27 raised by the opposing party, the Supreme Court there stated that only “*some*
28 mandatory claim processing rules” are unalterable. (Dkt. 50 at 5). The government has
not identified a case that places the petition for review deadline in this category.