

JUN 06 2013

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JOSE ARMANDO ZAVALA-ZAVALA,

Defendant - Appellant.

No. 12-50298

D.C. No. 3:11-cr-05782-JM-1

MEMORANDUM*

Appeal from the United States District Court
for the Southern District of California
Jeffrey T. Miller, Senior District Judge, Presiding

Submitted June 4, 2013**
Pasadena, California

Before: THOMAS, SILVERMAN, and FISHER, Circuit Judges.

José Zavala-Zavala appeals the district court's denial of his 8 U.S.C. § 1326(d) motion to dismiss the indictment, which charged him with being found in

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

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

the United States after removal in violation of 8 U.S.C. § 1326(a) and illegal entry with a prior illegal reentry in violation of 8 U.S.C. § 1325. We affirm.

The immigration judge violated due process by not allowing Zavala-Zavala to apply for voluntary departure before denying relief. *See United States v. Melendez-Castro*, 671 F.3d 950, 954 (9th Cir. 2012) (per curiam). However, Zavala-Zavala's argument that he need not establish prejudice is without merit. *See id.* at 954-55.

Contrary to Zavala-Zavala's assertion, the district court applied the correct prejudice test when it considered the favorable and unfavorable factors to determine whether it was plausible that an immigration judge would have granted Zavala-Zavala voluntary departure pursuant to 8 U.S.C. § 1229c(a). *See id.*; *United States v. Pallares-Galan*, 359 F.3d 1088, 1104 (9th Cir. 2004). In light of Zavala-Zavala's more than 25 previous voluntary returns to Mexico and the minimal positive equities, it was not plausible that an immigration judge would have granted Zavala-Zavala voluntary departure in 2006.

AFFIRMED.