

FILED

JUL 21 2015

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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

MILTON LOMELI-CAPETILLO,

Petitioner,

v.

LORETTA E. LYNCH, Attorney General,

Respondent.

No. 10-70944

Agency No. A037-429-761

ORDER

Before: CANBY, GOULD, and N.R. SMITH, Circuit Judges.

Lomeli-Capetillo's petition for panel rehearing is granted.

The memorandum disposition filed on January 29, 2015, is withdrawn. A replacement memorandum disposition is being filed concurrently with this order.

Lomeli-Capetillo's petition for rehearing en banc is denied as moot.

Any petition for rehearing of the replacement memorandum disposition must be filed within 45 days of the filing date of this order.

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Petitioner,

v.

ERIC H. HOLDER, Jr., Attorney General,

Respondent.

No. 10-70944

Agency No. A037-429-761

MEMORANDUM*

On Petition for Review of an Order of the
Board of Immigration Appeals

January 21, 2015**

Before: CANBY, GOULD, and N.R. SMITH, Circuit Judges.

Milton Lomeli-Capetillo, a native and citizen of Mexico, petitions for review of the Board of Immigration Appeals' order dismissing his appeal from an immigration judge's removal order. We have jurisdiction under 8 U.S.C. § 1252.

* 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).

We review de novo questions of law. *Medina-Lara v. Holder*, 771 F.3d 1106, 1111 (9th Cir. 2014).

Under the modified categorical approach, the government has not met its burden of proving by clear and convincing evidence that Lomeli-Capetillo was convicted of transportation of methamphetamine. *See id.* at 1113. The complaint charged Lomeli-Capetillo with six counts of misconduct. Reviewing the abstract of judgment, it seems that Lomeli-Capetillo pleaded guilty to only two of those counts. However, reviewing the record, it is unclear whether the counts of the complaint match the counts in the abstract of judgment. It is further unclear to which counts Lomeli-Capetillo pleaded guilty. *See id.* at 1114-15.

We therefore grant the petition for review and remand for further proceedings.

PETITION FOR REVIEW GRANTED; REMANDED.