NOT FOR PUBLICATION

FILED

OCT 28 2026

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff - Appellee, v. LUIS ANTONIO TZUN-MAGANA, Defendant - Appellant.	No. 25-6859 D.C. No. 3:21-cr-00306-EMC-1 MEMORANDUM[*]

Appeal from the United States District Court
for the Northern District of California
Edward M. Chen, District Judge, Presiding

Submitted October 20, 2026[**]
San Francisco, California

Before: S.R. THOMAS, KOH, and TUNG, Circuit Judges.

Luis Antonio Tzun-Magaña was convicted of illegal reentry into the United States. *See* 8 U.S.C. § 1326(a). On appeal, he contends that the denial of his motion to dismiss his indictment was erroneous because of defects in his

[*] 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).

underlying removal order. *See id*. § 1326(d). Because the underlying removal proceedings were not "fundamentally unfair," *id*., we affirm.

1. An alien charged with unlawful reentry ordinarily cannot collaterally attack his underlying removal order. *See id*. § 1326(a). Congress provided one exception. He may move to dismiss the indictment if he "demonstrates that" (1) he "exhausted any administrative remedies that may have been available to seek relief against the order"; (2) the deportation proceedings "improperly deprived" him "of the opportunity for judicial review"; and (3) "the entry of the order was fundamentally unfair." *Id*. § 1326(d). Each of these requirements is mandatory. *See United States v. Portillo-Gonzalez*, 80 F.4th 910, 916 (9th Cir. 2023). To prove fundamental unfairness, an alien "must show that [he has] been denied due process under the Fifth Amendment." *United States v. Nunez*, 140 F.4th 1157, 1167 (9th Cir. 2025) (citation and internal quotation marks omitted). And he must pair that denial with proof of prejudice—that the violation prevented him from presenting "plausible grounds for relief." *United States v. Valdivias-Soto*, 112 F.4th 713, 722 n.6 (9th Cir. 2024) (citation and internal quotation marks omitted).

2. Even assuming that Tzun-Magaña was denied due process by either the performance of his counsel or the immigration judge's omissions, he cannot prove that he suffered any prejudice. Tzun-Magaña lacked plausible grounds for relief because he was categorically ineligible for voluntary departure. *See United States*

v. Bustos-Ochoa, 704 F.3d 1053, 1056 (9th Cir. 2012) ("An alien who is barred from receiving relief cannot meet th[e] plausibility standard."). His California robbery conviction is an aggravated felony because it is a match for the generic theft offense listed in the statute. *United States v. Martinez-Hernandez*, 932 F.3d 1198, 1205–07 (9th Cir. 2019); *see also Williams v. Taylor*, 529 U.S. 362, 392 (2000) (The prejudice inquiry does not ask whether "an incorrect interpretation of the law" could prove a "windfall" to a defendant.). Although Tzun-Magaña argues that the government forfeited this point by failing to raise it to the district court, "it is claims that are deemed waived or forfeited, not arguments." *United States v. Guzman-Padilla*, 573 F.3d 865, 877 n.1 (9th Cir. 2009) (citation omitted).

Tzun-Magaña's other theories of prejudice fare no better. He has identified no other ground for relief he would have pursued before the immigration judge or on appeal. And his theory of prejudice regarding his U Visa application depends on his winning voluntary departure. Even if Tzun-Magaña were eligible for voluntary departure, he fails to establish that it was more than merely possible or conceivable that he would have obtained this relief. *See Nunez*, 140 F.4th at 1169 ("Plausibility requires more than a 'showing of mere possibility or conceivability, which we have plainly held is insufficient to satisfy the prejudice prong of § 1326(d)(3).'" (quoting *United States v. Valdez-Novoa*, 780 F.3d 906, 915 (9th Cir. 2015))).

AFFIRMED.