Appendix A

United States v. Pedroza-Rocha,
933 F.3d 490 (5th Cir. 2019)

tive explanation to Hudson and to a police officer, the affidavit still would state that GWF called the police and told Hudson he was struck by his mother, which would support that it was in GWF's best interest to remove him from the home until the adversarial hearing could adequately test the claims of other witnesses.

The reconstructed affidavit also would support that reasonable efforts were made to provide for the safety of the child while preventing the child's removal, given the discussion in the affidavit of Marks' refusal to attend counseling sessions and Marks' own concession that she did refuse. § 2262.102(a)(3).[1] Other evidence in the affidavit that was not refuted by the plaintiffs is that Hudson attempted on multiple occasions to speak with Marks. Reviewing the reconstructed affidavit, we find that there was an adequate basis for the issuance of the temporary conservatorship order, and therefore there was no Fourth Amendment violation based on Hudson's affidavit.

C. *Dentaen's Testimony*

The plaintiffs also challenge Dentaen's testimony at the February adversarial hearing as violating the Fourteenth Amendment: "a conviction obtained through [the] use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment." *Napue v. Illinois*, 360 U.S. 264, 269, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959). We assume in our analysis that this constitutional right is clearly established in the context of a hearing regarding the state taking custody of a child.

The plaintiffs must allege facts to support that Dentaen falsely testified at the adversarial hearing. The plaintiffs allege only that Dentaen testified to what was in the affidavit. The plaintiffs do not allege any specific facts but only their conclusions that (1) he "had personal knowledge" that GWF's eye injury was not serious and due to an accident when he testified that GWF's eye injury was serious, and (2) that he had knowledge of the allegedly false statements in the affidavit but approved them.

[17] Because there is no vicarious liability for supervisors for the conduct of their subordinates, the claim against Dentaen fails absent well-pled allegations of his personal involvement or some other form of causation to connect the supervisor to the violation. *Rios v. City of Del Rio*, 444 F.3d 417, 425-26 (5th Cir. 2006). At most, the complaint makes unwarranted conclusions about a defendant's actual knowledge. This claim was properly dismissed.

We REVERSE and REMAND with instructions to dismiss the suit.

UNITED STATES of America, Plaintiff - Appellant

v.

Carlos PEDROZA-ROCHA, Defendant - Appellee

No. 18-50828

United States Court of Appeals, Fifth Circuit.

FILED August 8, 2019

REVISED August 29, 2019

Background: Defendant moved to dismiss indictment charging him with illegal reen-

1. Neither party discusses whether there was time for a hearing based upon the allegations in the affidavit.

try following removal. The United States District Court for the Western District of Texas, David Briones, Senior District Judge, 2018 WL 6629649, granted the motion. Government appealed.

Holdings: The Court of Appeals held that:

(1) defendant's removal during pendency of government's appeal did not render the case moot;

(2) government's failure to include date and time on defendant's notice to appear for removal hearing did not deprive immigration judge (IJ) of subject matter jurisdiction over defendant's removal proceeding; and

(3) defendant was barred from collaterally attacking his underlying removal.

Reversed and remanded.

1. Criminal Law ⚷1017

The Court of Appeals has a continuing obligation to assure itself of its own jurisdiction, sua sponte if necessary.

2. Federal Courts ⚷2106

Article III's grant of federal jurisdiction requires a live controversy at all stages of a case. U.S. Const. art. 3, § 2, cl. 1.

3. Criminal Law ⚷1131(4)

If the controversy between the parties is extinguished while a case is pending on appeal, the Court of Appeals must dismiss it as moot.

4. Federal Courts ⚷2111

A case becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party.

5. Criminal Law ⚷1131(4)

Defendant's removal during pendency of government's appeal from dismissal of indictment charging defendant with illegal reentry following removal did not render the case moot, where government would suffer concrete injury if Court of Appeals refused to intervene, in that it had no control over whether defendant would illegally reenter the United States and it would be required to once again present evidence to grand jury and procure another indictment if he did reenter illegally.

6. Criminal Law ⚷1131(4)

Mootness of appeal cannot be avoided by general assertions or inferences that in the course of their activities defendants will be prosecuted for violating valid criminal laws.

7. Aliens, Immigration, and Citizenship ⚷337, 773

Government's failure to include date and time on defendant's notice to appear for removal hearing did not deprive immigration judge (IJ) of subject matter jurisdiction over defendant's removal proceeding, as would render defendant's prior removal invalid and warrant dismissal of indictment charging him with illegal reentry following removal, where regulation requiring that date and time of hearing be set forth in notice to appear was not jurisdictional, and defendant was subsequently served notice of hearing that included date and time and thus cured any defect that might have existed in notice to appear. Immigration and Nationality Act §§ 239, 276, 8 U.S.C.A. §§ 1229(a)(1)(G)(i), 1326; 8 C.F.R. § 1003.14.

8. Criminal Law ⚷1139

The Court of Appeals reviews the district court's ruling on a motion to dismiss an indictment de novo.

9. Aliens, Immigration, and Citizenship ⚷379

Defendant failed to exhaust all available administrative remedies by appealing or reopening prior removal order, and, thus, he was barred from collaterally attacking his underlying removal in later prosecution for illegal reentry following removal, where he did not file appeal with Board of Immigration Appeals (BIA) even though immigration judge (IJ) had advised him of his right to appeal. Immigration and Nationality Act § 276, 8 U.S.C.A. § 1326(d)(1).

Appeal from the United States District Court for the Western District of Texas, David Briones, U.S. District Judge

Joseph H. Gay, Jr., Elizabeth Berenguer, Assistant U.S. Attorneys, John Franklin Bash, U.S. Attorney's Office, Western District of Texas, San Antonio, TX, for Plaintiff - Appellant.

Kristin Michelle Kimmelman, Assistant Federal Public Defender, Maureen Scott Franco, Federal Public Defender, Federal Public Defender's Office, Western District of Texas, San Antonio, TX, David J. Kimmelman, Federal Public Defender's Office, Western District of Texas, El Paso, TX, for Defendant - Appellee.

Alina Das, Immigrant Rights Clinic, Washington Square Legal Services, New York, NY, for Amici Curiae.

Before KING, ELROD, and ENGELHARDT, Circuit Judges.

PER CURIAM:

The district court dismissed Carlos Pedroza-Rocha's indictment for illegal reentry following removal under 8 U.S.C. § 1326, finding that the immigration judge in the underlying removal proceeding lacked jurisdiction. While this appeal was pending, this court issued an opinion in an analogous immigration appeal that forecloses the arguments advanced by Pedroza-Rocha that were adopted by the district court below. For that reason, we REVERSE and REMAND.

I.

Defendant–appellee Carlos Pedroza-Rocha, a citizen of Mexico without lawful status in the United States, entered the country on or about March 12, 2003. He was not admitted or paroled by an immigration officer. Shortly thereafter, Pedroza-Rocha pleaded guilty in Texas state court to the crime of burglary of a habitation and was sentenced to ten years of community supervision. Around the same time, the Government issued Pedroza-Rocha a notice to appear ("NTA") for removal proceedings before an immigration judge ("IJ"). The NTA informed Pedroza-Rocha that he was present in the United States without lawful status and was therefore removable. It also specified the place where Pedroza-Rocha was to appear, but not the date and time, instead stating only that the date and time were "to be set." Around two months later, the immigration court issued a notice of hearing to Pedroza-Rocha, which specified the date and time for Pedroza-Rocha's hearing. At the hearing, the IJ ordered Pedroza-Rocha removed from the United States, and the resulting removal order (the "2003 Removal Order") was entered on May 27, 2003.

In 2009, Pedroza-Rocha was again discovered in the United States when he was arrested for drunk driving in El Paso, Texas. Shortly thereafter, Pedroza-Rocha pleaded guilty in federal court to illegally reentering the United States after removal in violation of 8 U.S.C. § 1326. He was sentenced to 10 months in prison. Additionally, the state court revoked his term of community supervision for the 2003 burglary conviction, and it sentenced him to two years in prison on that charge. Following his release from state custody, the Government reinstated the 2003 Removal

Order and removed Pedroza-Rocha to Mexico. In 2011 and again in 2015, Pedroza-Rocha unlawfully reentered the United States and was removed, again through reinstatement of the 2003 Removal Order.

In May of 2017, after having been removed four times pursuant to the 2003 Removal Order, Pedroza-Rocha was arrested for assault in El Paso. A federal grand jury thereafter indicted Pedroza-Rocha for illegal reentry under § 1326. This case concerns that indictment.

Pedroza-Rocha moved to dismiss the indictment, arguing that the 2003 Removal Order could not support a conviction. Pointing to the recent Supreme Court decision in *Pereira v. Sessions*, ––– U.S. ––––, 138 S. Ct. 2105, 201 L.Ed.2d 433 (2018), Pedroza-Rocha argued that the NTA he received in 2003 (which resulted in the 2003 Removal Order) was invalid because it did not include a date and time for his hearing. Immigration regulations provide that jurisdiction vests upon the filing of a "charging document," which includes an NTA. 8 C.F.R. §§ 1003.13-14.[1] Thus, Pedroza-Rocha reasoned, the IJ in the 2003 proceeding lacked subject-matter jurisdiction, and the 2003 Removal Order was a nullity.

The district court agreed with Pedroza-Rocha and dismissed the indictment. Citing *Pereira*, the district court held that the defect in the 2003 NTA (the absence of a date and time for the removal hearing) divested the IJ of jurisdiction to enter the 2003 Removal Order. Because the IJ had no jurisdiction, the district court reasoned, each subsequent removal (each predicated on reinstatement of the 2003 Removal Order) was also invalid. The district court then concluded that, because the 2003 Removal Order was invalid, each time that Pedroza-Rocha was removed pursuant to the 2003 Removal Order, he was not "removed" for purposes of § 1326, and therefore could not be convicted under that statute. The district court held, in the alternative, that Pedroza-Rocha was permitted to collaterally attack under § 1326(d) the 2003 Removal Order and each subsequent removal based on that order. The district court therefore dismissed the indictment. The Government now appeals. During the pendency of this appeal, the Department of Homeland Security removed Pedroza-Rocha to Mexico.

II.

A.

[1–4] Pedroza-Rocha first argues that his deportation during the pendency of this appeal moots this case. This court has a continuing obligation to assure itself of its own jurisdiction, sua sponte if necessary. *Bass v. Denney (In re Bass)*, 171 F.3d 1016, 1021 (5th Cir. 1999). Article III's grant of federal jurisdiction requires a live controversy at all stages of a case. *Campbell-Ewald Co. v. Gomez*, ––– U.S. ––––, 136 S. Ct. 663, 669, 193 L.Ed.2d 571 (2016). If the controversy between the parties is extinguished while a case is pending on appeal, this court must dismiss it as moot. *Id.* "A case becomes moot, however, 'only when it is impossible for a court to grant any effectual relief whatever to the prevailing party.' " *Id.* (quoting *Knox v. Serv.*

1. Section 1003.14(a) provides that "[j]urisdiction vests, and proceedings before an Immigration Judge commence, when a charging document is filed with the Immigration Court by the Service." Section 1003.13, in turn, defines a "charging document" as "the written instrument which initiates a proceeding before an Immigration Judge," including "a Notice to Appear, a Notice of Referral to Immigration Judge, and a Notice of Intention to Rescind and Request for Hearing by Alien."

Emps. Int'l Union, Local 1000, 567 U.S. 298, 307, 132 S.Ct. 2277, 183 L.Ed.2d 281 (2012)).

This court has once before considered the question of whether a defendant's removal moots the Government's appeal from a district court's dismissal of an indictment. In *United States v. Sarmiento-Rozo*, 592 F.2d 1318 (5th Cir. 1979), the defendants—Colombian nationals arrested on the high seas—had been indicted for attempting to import marijuana. *Id.* at 1319. The district court dismissed the indictment on the grounds that it lacked subject-matter jurisdiction. *Id.* Shortly after the district court's dismissal of the indictment, the defendants were removed to Colombia. *Id.* One question on appeal was whether the defendants' removal mooted the case. The court held that it did. The court reasoned that if it were to conclude that the indictment was wrongly dismissed, it could not afford the Government any relief because "[t]he defendants cannot be tried in absentia" because they "have a constitutional right to be present at their trial, to testify on their own behalf, and to confront the witnesses against them." *Id.* at 1320. The court was unpersuaded by the Government's contention that it would suffer collateral legal consequences (e.g., the district court decision being used as the law of the case in a parallel civil suit against the defendants) if the court failed to intervene, writing that "courts have been sensitive to the mere possibility of collateral consequences only in criminal cases following imposition of a criminal sanction." *Id.* at 1321. In the case before it, however, the court explained that "there has been no criminal conviction and no equivalent restraint on the government's ability to impose legal disabilities on the defendants." *Id.* The court therefore vacated and remanded to the district court with instructions to dismiss the indictment as moot.

In the intervening years, the Supreme Court weighed in on this issue, albeit briefly in a footnote. In *United States v. Villamonte-Marquez*, 462 U.S. 579, 103 S.Ct. 2573, 77 L.Ed.2d 22 (1983), the defendants were convicted of various drug crimes, but the convictions were reversed on appeal on Fourth Amendment grounds. *Id.* at 583-84, 103 S.Ct. 2573. Before the case reached the Supreme Court, the defendants were deported and the charges against them were dismissed with the consent of the Government. *Id.* at 581 n.2, 103 S.Ct. 2573. The defendants "briefly" argued that this mooted the case, citing *Sarmiento-Rozo*. *Id.* The Supreme Court acknowledged that *Sarmiento-Rozo* "provide[d] some authority for [the defendants'] argument" but nevertheless "reject[ed] the contention." *Id.* The Court noted the "possibility that [the defendants] could be extradited and imprisoned for their crimes, or if [the defendants] manage to re-enter this country on their own they would be subject to arrest and imprisonment for these convictions." *Id.* Since reversal of the appeals court's judgment would reinstate that conviction, the Court found it was in a position to afford relief to the Government with a favorable disposition and therefore found that a live controversy persisted. *Id.*

We read *Villamonte-Marquez*, at the very least, to severely undermine *Sarmiento-Rozo*. First, the Court in *Villamonte-Marquez* acknowledged that *Sarmiento-Rozo* provided some support for the defendants' argument, but nonetheless rejected that argument. 462 U.S. at 581 n.2, 103 S.Ct. 2573. Second, the *Villamonte-Marquez* Court relied on the possibility of the defendants being extradited to the United States or returning to the United States to reach its conclusion that a live controversy existed in that case.[2] This reasoning would have applied equally to the facts of *Sarmiento-Rozo*: similarly there, the Colombian defendants could have returned to the United States following deportation.

[5] Pedroza-Rocha seeks to distinguish his case and *Sarmiento-Rozo* from *Villamonte-Marquez* by arguing that the former two cases involve an indictment, while the latter involved a conviction. We do not see this as a distinction with a difference. In either case, the Government suffers a concrete injury when the court refuses to intervene. If in this case, for example, the court dismisses this appeal as moot and Pedroza-Rocha returns, the Government will be required to once again present evidence to a grand jury and procure another indictment. This will require the expenditure of time and resources by the Government. Such an injury, whatever its likelihood, is sufficient under *Villamonte-Marquez* to create a live controversy despite defendant's deportation. *Cf. United States v. Suleiman*, 208 F.3d 32, 38 (2d Cir. 2000) ("Though arguably speculative, the possibilities of extradition or re-entry into the United States are precisely the kind of circumstances recognized in *Villamonte–Marquez* ... as preventing deportation from mooting a Government criminal appeal seeking an enhanced sentence."). Accordingly, *Villamonte-Marquez* dictates that a live controversy persists in this case.

[6] At oral argument, counsel for Pedroza-Rocha contended that *Spencer v. Kemna*, 523 U.S. 1, 118 S.Ct. 978, 140 L.Ed.2d 43 (1998), requires this court to dismiss this case as moot, the above authorities notwithstanding. In that case, a habeas petitioner sought to challenge the revocation of his parole, even though he had been released from prison. *Id.* at 8, 118 S.Ct. 978. Arguing that a live controversy existed, Spencer noted that the revocation of his parole might be used to increase his sentence in a future criminal proceeding. *Id.* at 15, 118 S.Ct. 978. The Court rejected this argument, citing the established principle that mootness cannot be avoided by "general assertions or inferences that in the course of their activities respondents will be prosecuted for violating valid criminal laws." *Id.* (quoting *O'Shea v. Littleton*, 414 U.S. 488, 497, 94 S.Ct. 669, 38 L.Ed.2d 674 (1974)). Pedroza-Rocha seizes on this language, arguing that a controversy in this case cannot be premised on the assumption that he will violate the law by reentering the country. This reads *Spencer* too broadly. In *Spencer*, as well as the cases it relied upon, the party challenging governmental action sought to premise jurisdiction on the possibility that the challenger might violate the law. Here, by contrast, the Government seeks to premise jurisdiction on the possibility that *someone else* may violate the law. As the Ninth Circuit has noted in rejecting this same argument on analogous facts, the Government in this case "is not seeking to benefit from future criminal behavior it can prevent." *United States v. Plancarte-Alvarez*, 366 F.3d 1058, 1063 (9th Cir. 2004). Instead, the Government "has no control over whether [Pedroza-Rocha] will choose to violate the laws of this country by reentry." *Id.* This distinction takes the case before us out of the principle of *Spencer* and leaves it squarely within the ambit of *Villamonte-Marquez*. This case is not moot.

2. Pedroza-Rocha points out that Mexico's extradition treaty with the United States makes it unlikely that he will be extradited from Mexico. Whatever the merits of that argument, it cannot be disputed that, given his history, Pedroza-Rocha may return to the United States for a sixth time.

B.

[7, 8] Turning to the merits, the Government argues that the district court erred in concluding that the lack of a date and time on Pedroza-Rocha's 2003 NTA deprived the IJ of jurisdiction in the 2003 removal proceeding. This court reviews the district court's ruling on a motion to dismiss an indictment de novo. *United States v. Kay*, 513 F.3d 432, 440 (5th Cir. 2007).

The initiation of removal proceedings under the Immigration and Nationality Act is governed by 8 U.S.C. § 1229. In relevant part, the statute provides that in such proceedings "written notice (in this section referred to as a 'notice to appear') shall be given in person to the alien." *Id.* § 1229(a)(1). An NTA must include, inter alia, "[t]he time and place at which the proceedings will be held." § 1229(a)(1)(G)(i). Title 8 of the Code of Federal Regulations, § 1003.14, entitled "Jurisdiction and commencement of proceedings,"[3] provides that "[j]urisdiction vests, and proceedings before an Immigration Judge commence, when a charging document is filed with the Immigration Court by the [Immigration and Naturalization] Service." *Id.* § 1003.14(a). "Charging document," in turn, "means the written instrument which initiates a proceeding before an Immigration Judge" and includes "a Notice to Appear, a Notice of Referral to Immigration Judge, and a Notice of Intention to Rescind and Request for Hearing by Alien." *Id.* § 1003.13.

The statutory and regulatory requirements for a valid NTA in immigration proceedings differ from one another. As discussed, 8 U.S.C. § 1229 requires that NTAs include, inter alia, the time and place of a hearing. By contrast, the regulations, while mimicking several of the statutory requirements, do not mandate that the time of a hearing be included in an NTA. *See* 8 C.F.R. § 1003.15(b). But the regulations do require that the NTA include such information "where practicable." *Id.* § 1003.18(b). In that same provision, the following sentence states, "If that information is not contained in the Notice to Appear, the Immigration Court shall be responsible for scheduling the initial removal hearing and providing notice to the government and the alien of the time, place, and date of hearing." *Id.*

The Supreme Court addressed the statutory requirement that an NTA include date-and-time information in *Pereira v. Sessions*, ––– U.S. ––––, 138 S. Ct. 2105, 201 L.Ed.2d 433 (2018). *Pereira* concerned the so-called stop-time rule under the Illegal Immigration Reform and Immigration Responsibility Act of 1996 ("IIRIRA"). *Id.* at 2109-10. Under IIRIRA, the Attorney General has discretion to cancel the removal of certain nonpermanent residents, so long as they meet certain criteria. 8 U.S.C. § 1229b(b)(1). The criterion at issue in *Pereira* was the requirement that "the noncitizen must have 'been physically present in the United States for a continuous period of not less than 10 years immediately preceding the date of [an] application' for cancellation of removal." *Pereira*, 138 S. Ct. at 2110 (alteration in original) (quoting § 1229b(b)(1)(A)). Under the stop-time rule, that period ends "when the alien is served a notice to appear under section 1229(a) of this title." *Id.* (quoting § 1229b(d)(1)(A)). At issue before the Supreme Court was whether the Government's service of an NTA to Pereira stopped his period of continuous presence. *Id.* at 2113-14. As in this case, the Government failed to include the time and date of

3. As explained below, our recent decision in *Pierre-Paul* held that, despite its title, § 1003.14 does not set forth the prerequisites for an IJ's jurisdiction. 930 F.3d 684, 691-92, 2019 WL 3229150 at *6 (5th Cir. July 18, 2019).

the removal proceedings in the NTA provided to Pereira, instead stating that both were "to be set." *Id.* at 2112.

The Supreme Court agreed with Pereira that the service of an NTA that lacked the information required under § 1229(a) did not stop the clock on his period of continued presence. The Court determined that the "statutory text alone [was] enough to resolve" that question. *Id.* at 2114. Looking to the stop-time rule's cross-reference to § 1229(a), the Court found that "the statute specifies where to look to find out what 'notice to appear' means." *Id.* Because § 1229(a) requires that time-and-place information be included on an NTA, the Court concluded that to trigger the stop-time rule, the Government must serve an NTA that, "at the very least, 'specif[ies]' the 'time and place' of the removal proceedings." *Id.* (alteration in original). Thus, the Court concluded that the invalid NTA could not halt Pereira's period of continuous presence for purposes of the stop-time rule. *Id.* at 2113-14.

The district court's dismissal of the indictment below was based on its understanding that (1) for an IJ to have jurisdiction, the Government must have served the noncitizen with a valid NTA, as outlined in 8 C.F.R. §§ 1003.13 and 1003.14, and (2) under *Pereira*, for an NTA to be "valid," it must list a date and time. While this appeal was pending, this court issued an opinion addressing this precise argument in *Pierre-Paul v. Barr*, 930 F.3d 684, 2019 WL 3229150 (5th Cir. July 18, 2019). The posture of *Pierre-Paul* is different from the case at bar, but the central legal issue is the same. *Pierre-Paul* was an appeal from a Board of Immigration Appeals decision affirming an IJ's order of deportation. *Id.*, at 688–89, 2019 WL 3229150 at *3. Pierre-Paul challenged his deportation order arguing, inter alia, that the IJ lacked jurisdiction because the NTA in his case failed to include a date and time. *Id.*, at 687–88, 2019 WL 3229150 at *1-2. We rejected Pierre-Paul's argument for "three independent reasons."[4]

> First, Pierre-Paul's notice to appear was not defective. Second, assuming *arguendo* that the notice to appear were defective, the immigration court cured the defect by subsequently sending a notice of hearing that included the time and date of the hearing. Third, assuming *arguendo* that the notice to appear were defective and the defect could not be cured, 8 C.F.R. § 1003.14 is not jurisdictional.

Id., at 689, 2019 WL 3229150 at *3.

Each of *Pierre-Paul*'s three alternative holdings renders the district court's ruling in this case untenable. First, the *Pierre-Paul* court found that the NTA in that case was not defective under *Pereira*, despite its failure to include date-and-time information. *Id.*, at 688–89, 2019 WL 3229150 at *3-4. Since the district court here found the NTA wanting because of its failure to include a date and time, its decision was in error under *Pierre-Paul*. Second, the *Pierre-Paul* court held that the subsequent serving of a notice of hearing that includes a date and time cured any defect that might have existed in the NTA. *Id.*, at 689–90, 2019 WL 3229150 at *4-5. Here, Pedroza-Rocha was similarly served with a subsequent notice of hearing that did include a date and time. Thus, under *Pierre-Paul*, any alleged defect was cured by the later service of a notice of hearing. Finally, the *Pierre-Paul* court held that § 1003.14 was not jurisdictional. *Id.*, at 690–91, 2019 WL 3229150 at *5-6. Pedroza-

4. As this court noted in *Pierre-Paul*, "alternative holdings are binding and not *obiter dictum*." at 689, 2019 WL 3229150 at *3 n.2.

Rocha's argument on appeal—like the district court's holding below—relies on the premise that § 1003.14 sets forth jurisdictional requirements. Otherwise, the failure to serve a valid NTA would amount to a ministerial, rather than jurisdictional, defect, and the error could be waived where, as here, the alien fails to raise it in the underlying proceeding. As a result, *Pierre-Paul*'s third alternative holding that § 1003.14 is not jurisdictional forecloses Pedroza-Rocha's jurisdictional argument as well. Accordingly, following *Pierre-Paul*, we conclude that the IJ in Pedroza-Rocha's 2003 removal proceeding did not lack jurisdiction as a result of the Government's failure to include a date and time on Pedroza-Rocha's NTA. The district court therefore erred in dismissing the indictment and its judgment must be reversed.

C.

We also hold that the district court should have denied the motion to dismiss the indictment because 8 U.S.C. § 1326(d) bars Pedroza-Rocha's collateral attack on the validity of his removal order. *See Pierre-Paul*, 930 F.3d at 689, 2019 WL 3229150, at *3 n.2 ("In this circuit, alternative holdings are binding and not *obiter dictum*."). As we explained in *United States v. Parrales-Guzman*, 922 F.3d 706 (5th Cir. 2019), an alien seeking to collaterally attack the underlying removal order in a later reentry prosecution must show, inter alia, that he "exhausted any administrative remedies that may have been available to seek relief against the order." *Id.* at 707 (quoting 8 U.S.C. § 1326(d)(1)). We then held that Parrales-Guzman's collateral attack failed because he did not exhaust all available administrative remedies by appealing or reopening the removal order. *Id.*

[9] Pedroza-Rocha argues that § 1326(d) poses no bar in this case because the 2003 Removal Order was void ab initio, asserting once again that the IJ who issued the order lacked jurisdiction. We rejected substantially the same argument in *Parrales-Guzman.* In that case, Parrales-Guzman argued that "§ 1326(d)'s bar on collateral attacks does not attach because [the] removal order was *void ab initio* as it rested on an unconstitutionally vague statute." *Id.* We disagreed, writing that such an argument "upends Congress's mandate that collateral review in the course of reentry prosecutions be available only in a narrow set of circumstances." *Id.*; *see also Ross v. Blake*, ––– U.S. ––––, 136 S. Ct. 1850, 1857, 195 L.Ed.2d 117 (2016) ("[J]udge-made exhaustion doctrines, even if flatly stated at first, remain amenable to judge-made exceptions. ... But a statutory exhaustion provision stands on a different footing. There, Congress sets the rules—and courts have a role in creating exceptions only if Congress wants them to.").

Despite having been advised of his right to appeal by the IJ, Pedroza-Rocha did not file an appeal with the Board of Immigration Appeals. Having failed to exhaust all administrative remedies, Pedroza-Rocha is thus barred under 8 U.S.C. § 1326(d)(1) from collaterally attacking his removal order. *Parrales-Guzman*, 922 F.3d at 707. For this additional reason, the district court erred in granting Pedroza-Rocha's motion to dismiss the indictment.

III.

For the reasons set forth above, the judgment of the district court is REVERSED and the case is REMANDED for further proceedings consistent with this opinion.

APPENDIX B

U.S. Const. amend. V (Due Process Clause)
8 U.S.C. § 1229
8 U.S.C. § 1326
8 C.F.R. § 1003.13
8 C.F.R. § 1003.14
8 C.F.R. § 1003.15
8 C.F.R. § 1003.18

United States Code Annotated
Constitution of the United States
Annotated
Amendment V. Grand Jury; Double Jeopardy; Self-Incrimination; Due Process; Takings

U.S.C.A. Const. Amend. V full text

Amendment V. Grand Jury Indictment for Capital Crimes; Double Jeopardy; Self-Incrimination; Due Process of Law; Takings without Just Compensation

Currentness

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

<Historical notes and references are included in the full text document for this amendment.>

<For Notes of Decisions, see separate documents for clauses of this amendment:>

<USCA Const. Amend. V--Grand Jury clause>

<USCA Const. Amend. V--Double Jeopardy clause>

<USCA Const. Amend. V--Self-Incrimination clause>

<USCA Const. Amend. V-- Due Process clause>

<USCA Const. Amend. V--Takings clause>

U.S.C.A. Const. Amend. V full text, USCA CONST Amend. V full text
Current through P.L. 116-66.

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KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

8 U.S.C.A. § 1229

§ 1229. Initiation of removal proceedings

Effective: August 12, 2006

Currentness

(a) Notice to appear

(1) In general

In removal proceedings under section 1229a of this title, written notice (in this section referred to as a "notice to appear") shall be given in person to the alien (or, if personal service is not practicable, through service by mail to the alien or to the alien's counsel of record, if any) specifying the following:

(A) The nature of the proceedings against the alien.

(B) The legal authority under which the proceedings are conducted.

(C) The acts or conduct alleged to be in violation of law.

(D) The charges against the alien and the statutory provisions alleged to have been violated.

(E) The alien may be represented by counsel and the alien will be provided (i) a period of time to secure counsel under subsection (b)(1) and (ii) a current list of counsel prepared under subsection (b)(2).

(F)(i) The requirement that the alien must immediately provide (or have provided) the Attorney General with a written record of an address and telephone number (if any) at which the alien may be contacted respecting proceedings under section 1229a of this title.

(ii) The requirement that the alien must provide the Attorney General immediately with a written record of any change of the alien's address or telephone number.

(iii) The consequences under section 1229a(b)(5) of this title of failure to provide address and telephone information pursuant to this subparagraph.

(G)(i) The time and place at which the proceedings will be held.

(ii) The consequences under section 1229a(b)(5) of this title of the failure, except under exceptional circumstances, to appear at such proceedings.

(2) Notice of change in time or place of proceedings

(A) In general

In removal proceedings under section 1229a of this title, in the case of any change or postponement in the time and place of such proceedings, subject to subparagraph (B) a written notice shall be given in person to the alien (or, if personal service is not practicable, through service by mail to the alien or to the alien's counsel of record, if any) specifying--

(i) the new time or place of the proceedings, and

(ii) the consequences under section 1229a(b)(5) of this title of failing, except under exceptional circumstances, to attend such proceedings.

(B) Exception

In the case of an alien not in detention, a written notice shall not be required under this paragraph if the alien has failed to provide the address required under paragraph (1)(F).

(3) Central address files

The Attorney General shall create a system to record and preserve on a timely basis notices of addresses and telephone numbers (and changes) provided under paragraph (1)(F).

(b) Securing of counsel

(1) In general

In order that an alien be permitted the opportunity to secure counsel before the first hearing date in proceedings under section 1229a of this title, the hearing date shall not be scheduled earlier than 10 days after the service of the notice to appear, unless the alien requests in writing an earlier hearing date.

(2) Current lists of counsel

The Attorney General shall provide for lists (updated not less often than quarterly) of persons who have indicated their availability to represent pro bono aliens in proceedings under section 1229a of this title. Such lists shall be provided under subsection (a)(1)(E) and otherwise made generally available.

(3) Rule of construction

Nothing in this subsection may be construed to prevent the Attorney General from proceeding against an alien pursuant to section 1229a of this title if the time period described in paragraph (1) has elapsed and the alien has failed to secure counsel.

(c) Service by mail

Service by mail under this section shall be sufficient if there is proof of attempted delivery to the last address provided by the alien in accordance with subsection (a)(1)(F).

(d) Prompt initiation of removal

(1) In the case of an alien who is convicted of an offense which makes the alien deportable, the Attorney General shall begin any removal proceeding as expeditiously as possible after the date of the conviction.

(2) Nothing in this subsection shall be construed to create any substantive or procedural right or benefit that is legally enforceable by any party against the United States or its agencies or officers or any other person.

(e) Certification of compliance with restrictions on disclosure

(1) In general

In cases where an enforcement action leading to a removal proceeding was taken against an alien at any of the locations specified in paragraph (2), the Notice to Appear shall include a statement that the provisions of section 1367 of this title have been complied with.

(2) Locations

The locations specified in this paragraph are as follows:

(A) At a domestic violence shelter, a rape crisis center, supervised visitation center, family justice center, a victim services, or victim services provider, or a community-based organization.

(B) At a courthouse (or in connection with that appearance of the alien at a courthouse) if the alien is appearing in connection with a protection order case, child custody case, or other civil or criminal case relating to domestic violence, sexual assault, trafficking, or stalking in which the alien has been battered or subject to extreme cruelty or if the alien is described in subparagraph (T) or (U) of section 1101(a)(15) of this title.

CREDIT(S)

(June 27, 1952, c. 477, Title II, § 239, as added Pub.L. 104-208, Div. C, Title III, § 304(a)(3), Sept. 30, 1996, 110 Stat. 3009-587; amended Pub.L. 109-162, Title VIII, § 825(c)(1), Jan. 5, 2006, 119 Stat. 3065; Pub.L. 109-271, § 6(d), Aug. 12, 2006, 120 Stat. 763.)

Notes of Decisions (73)

8 U.S.C.A. § 1229, 8 USCA § 1229
Current through P.L. 116-5. Title 26 current through 116-7.

End of Document

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

United States Code Annotated
Title 8. Aliens and Nationality (Refs & Annos)
Chapter 12. Immigration and Nationality (Refs & Annos)
Subchapter II. Immigration
Part VIII. General Penalty Provisions

8 U.S.C.A. § 1326

§ 1326. Reentry of removed aliens

Effective: September 30, 1996
Currentness

(a) In general

Subject to subsection (b), any alien who--

(1) has been denied admission, excluded, deported, or removed or has departed the United States while an order of exclusion, deportation, or removal is outstanding, and thereafter

(2) enters, attempts to enter, or is at any time found in, the United States, unless (A) prior to his reembarkation at a place outside the United States or his application for admission from foreign contiguous territory, the Attorney General has expressly consented to such alien's reapplying for admission; or (B) with respect to an alien previously denied admission and removed, unless such alien shall establish that he was not required to obtain such advance consent under this chapter or any prior Act,

shall be fined under Title 18, or imprisoned not more than 2 years, or both.

(b) Criminal penalties for reentry of certain removed aliens

Notwithstanding subsection (a), in the case of any alien described in such subsection--

(1) whose removal was subsequent to a conviction for commission of three or more misdemeanors involving drugs, crimes against the person, or both, or a felony (other than an aggravated felony), such alien shall be fined under Title 18, imprisoned not more than 10 years, or both;

(2) whose removal was subsequent to a conviction for commission of an aggravated felony, such alien shall be fined under such title, imprisoned not more than 20 years, or both;

(3) who has been excluded from the United States pursuant to section 1225(c) of this title because the alien was excludable under section 1182(a)(3)(B) of this title or who has been removed from the United States pursuant to the provisions of subchapter V, and who thereafter, without the permission of the Attorney General, enters the United States, or attempts to do so, shall be fined under Title 18 and imprisoned for a period of 10 years, which sentence shall not run concurrently with any other sentence.[1] or

(4) who was removed from the United States pursuant to section 1231(a)(4)(B) of this title who thereafter, without the permission of the Attorney General, enters, attempts to enter, or is at any time found in, the United States (unless the Attorney General has expressly consented to such alien's reentry) shall be fined under Title 18, imprisoned for not more than 10 years, or both.

For the purposes of this subsection, the term "removal" includes any agreement in which an alien stipulates to removal during (or not during) a criminal trial under either Federal or State law.

(c) Reentry of alien deported prior to completion of term of imprisonment

Any alien deported pursuant to section 1252(h)(2)[2] of this title who enters, attempts to enter, or is at any time found in, the United States (unless the Attorney General has expressly consented to such alien's reentry) shall be incarcerated for the remainder of the sentence of imprisonment which was pending at the time of deportation without any reduction for parole or supervised release. Such alien shall be subject to such other penalties relating to the reentry of deported aliens as may be available under this section or any other provision of law.

(d) Limitation on collateral attack on underlying deportation order

In a criminal proceeding under this section, an alien may not challenge the validity of the deportation order described in subsection (a)(1) or subsection (b) unless the alien demonstrates that--

(1) the alien exhausted any administrative remedies that may have been available to seek relief against the order;

(2) the deportation proceedings at which the order was issued improperly deprived the alien of the opportunity for judicial review; and

(3) the entry of the order was fundamentally unfair.

CREDIT(S)

(June 27, 1952, c. 477, Title II, ch. 8, § 276, 66 Stat. 229; Pub.L. 100-690, Title VII, § 7345(a), Nov. 18, 1988, 102 Stat. 4471; Pub.L. 101-649, Title V, § 543(b)(3), Nov. 29, 1990, 104 Stat. 5059; Pub.L. 103-322, Title XIII, § 130001(b), Sept. 13, 1994, 108 Stat. 2023; Pub.L. 104-132, Title IV, §§ 401(c), 438(b), 441(a), Apr. 24, 1996, 110 Stat. 1267, 1276, 1279; Pub.L. 104-208, Div. C, Title III, §§ 305(b), 308(d)(4)(J), (e)(1)(K), (14)(A), 324(a), (b), Sept. 30, 1996, 110 Stat. 3009-606, 3009-618 to 3009-620, 3009-629.)

Notes of Decisions (1300)

Footnotes

1 So in original. The period probably should be a semicolon.

2 So in original. Section 1252 of this title, was amended by Pub.L. 104-208, Div. C, Title III, § 306(a)(2), Sept. 30, 1996, 110 Stat. 3009-607, and as so amended, does not contain a subsec. (h); for provisions similar to those formerly contained in section 1252(h)(2) of this title, see 8 U.S.C.A. § 1231(a)(4).

8 U.S.C.A. § 1326, 8 USCA § 1326

Current through P.L. 115-132.

End of Document

8 C.F.R. § 1003.13

§ 1003.13 Definitions.

Currentness

As used in this subpart:

Administrative control means custodial responsibility for the Record of Proceeding as specified in § 1003.11.

Charging document means the written instrument which initiates a proceeding before an Immigration Judge. For proceedings initiated prior to April 1, 1997, these documents include an Order to Show Cause, a Notice to Applicant for Admission Detained for Hearing before Immigration Judge, and a Notice of Intention to Rescind and Request for Hearing by Alien. For proceedings initiated after April 1, 1997, these documents include a Notice to Appear, a Notice of Referral to Immigration Judge, and a Notice of Intention to Rescind and Request for Hearing by Alien.

Filing means the actual receipt of a document by the appropriate Immigration Court.

Service means physically presenting or mailing a document to the appropriate party or parties; except that an Order to Show Cause or Notice of Deportation Hearing shall be served in person to the alien, or by certified mail to the alien or the alien's attorney and a Notice to Appear or Notice of Removal Hearing shall be served to the alien in person, or if personal service is not practicable, shall be served by regular mail to the alien or the alien's attorney of record.

Credits

[57 FR 11571, April 6, 1992; 59 FR 1899, Jan. 13, 1994; 60 FR 34089, June 30, 1995; 62 FR 10332, March 6, 1997]

AUTHORITY: 5 U.S.C. 301; 6 U.S.C. 521; 8 U.S.C. 1101, 1103, 1154, 1155, 1158, 1182, 1226, 1229, 1229a, 1229b, 1229c, 1231, 1254a, 1255, 1324d, 1330, 1361, 1362; 28 U.S.C. 509, 510, 1746; sec. 2 Reorg. Plan No. 2 of 1950; 3 CFR, 1949–1953 Comp., p. 1002; section 203 of Pub.L. 105–100, 111 Stat. 2196–200; sections 1506 and 1510 of Pub.L. 106–386, 114 Stat. 1527–29, 1531–32; section 1505 of Pub.L. 106–554, 114 Stat. 2763A–326 to –328.

Notes of Decisions (7)

Current through March 14, 2019; 84 FR 9449.

End of Document

8 C.F.R. § 1003.14

§ 1003.14 Jurisdiction and commencement of proceedings.

Currentness

(a) Jurisdiction vests, and proceedings before an Immigration Judge commence, when a charging document is filed with the Immigration Court by the Service. The charging document must include a certificate showing service on the opposing party pursuant to § 1003.32 which indicates the Immigration Court in which the charging document is filed. However, no charging document is required to be filed with the Immigration Court to commence bond proceedings pursuant to §§ 1003.19, 1236.1(d) and 1240.2(b) of this chapter.

(b) When an Immigration Judge has jurisdiction over an underlying proceeding, sole jurisdiction over applications for asylum shall lie with the Immigration Judge.

(c) Immigration Judges have jurisdiction to administer the oath of allegiance in administrative naturalization ceremonies conducted by the Service in accordance with § 1337.2(b) of this chapter.

(d) The jurisdiction of, and procedures before, immigration judges in exclusion, deportation and removal, rescission, asylum-only, and any other proceedings shall remain in effect as it was in effect on February 28, 2003, until the regulations in this chapter are further modified by the Attorney General. Where a decision of an officer of the Immigration and Naturalization Service was, before March 1, 2003, appealable to the Board or an immigration judge, or an application denied could be renewed in proceedings before an immigration judge, the same authority and procedures shall be followed until further modified by the Attorney General.

Credits

[57 FR 11571, April 6, 1992; 59 FR 1899, Jan. 13, 1994; 60 FR 34089, June 30, 1995; 62 FR 10332, March 6, 1997; 68 FR 9832, Feb. 28, 2003; 68 FR 10350, March 5, 2003]

AUTHORITY: 5 U.S.C. 301; 6 U.S.C. 521; 8 U.S.C. 1101, 1103, 1154, 1155, 1158, 1182, 1226, 1229, 1229a, 1229b, 1231, 1254a, 1255, 1324d, 1330, 1361, 1362; 28 U.S.C. 509, 510, 1746; sec. 2 Reorg. Plan No. 2 of 1950; 3 CFR, 1949–1953 Comp., p. 1002; section 203 of Pub.L. 105–100, 111 Stat. 2196–200; sections 1506 and 1510 of Pub.L. 106–386, 114 Stat. 1527–29, 1531–32; section 1505 of Pub.L. 106–554, 114 Stat. 2763A–326 to –328.

Notes of Decisions (23)

Current through March 14, 2019; 84 FR 9449.

End of Document

KeyCite Red Flag - Severe Negative Treatment
Unconstitutional or PreemptedHeld Invalid United States v. Chavez-Flores, W.D.Tex., Feb. 05, 2019

Code of Federal Regulations
Title 8. Aliens and Nationality
Chapter V. Executive Office for Immigration Review, Department of Justice (Refs & Annos)
Subchapter A. General Provisions (Refs & Annos)
Part 1003. Executive Office for Immigration Review (Refs & Annos)
Subpart C. Immigration Court—Rules of Procedure (Refs & Annos)

8 C.F.R. § 1003.15

§ 1003.15 Contents of the order to show cause and notice to appear and notification of change of address.

Currentness

(a) In the Order to Show Cause, the Service shall provide the following administrative information to the Executive Office for Immigration Review. Omission of any of these items shall not provide the alien with any substantive or procedural rights:

(1) The alien's names and any known aliases;

(2) The alien's address;

(3) The alien's registration number, with any lead alien registration number with which the alien is associated;

(4) The alien's alleged nationality and citizenship;

(5) The language that the alien understands;

(b) The Order to Show Cause and Notice to Appear must also include the following information:

(1) The nature of the proceedings against the alien;

(2) The legal authority under which the proceedings are conducted;

(3) The acts or conduct alleged to be in violation of law;

(4) The charges against the alien and the statutory provisions alleged to have been violated;

(5) Notice that the alien may be represented, at no cost to the government, by counsel or other representative authorized to appear pursuant to 8 CFR 1292.1;

(6) The address of the Immigration Court where the Service will file the Order to Show Cause and Notice to Appear; and

(7) A statement that the alien must advise the Immigration Court having administrative control over the Record of Proceeding of his or her current address and telephone number and a statement that failure to provide such information may result in an in absentia hearing in accordance with § 1003.26.

(c) Contents of the Notice to Appear for removal proceedings. In the Notice to Appear for removal proceedings, the Service shall provide the following administrative information to the Immigration Court. Failure to provide any of these items shall not be construed as affording the alien any substantive or procedural rights.

(1) The alien's names and any known aliases;

(2) The alien's address;

(3) The alien's registration number, with any lead alien registration number with which the alien is associated;

(4) The alien's alleged nationality and citizenship; and

(5) The language that the alien understands.

(d) Address and telephone number.

(1) If the alien's address is not provided on the Order to Show Cause or Notice to Appear, or if the address on the Order to Show Cause or Notice to Appear is incorrect, the alien must provide to the Immigration Court where the charging document has been filed, within five days of service of that document, a written notice of an address and telephone number at which the alien can be contacted. The alien may satisfy this requirement by completing and filing Form EOIR–33.

(2) Within five days of any change of address, the alien must provide written notice of the change of address on Form EOIR–33 to the Immigration Court where the charging document has been filed, or if venue has been changed, to the Immigration Court to which venue has been changed.

Credits

[57 FR 11571, April 6, 1992; 59 FR 1899, Jan. 13, 1994; 60 FR 34089, June 30, 1995; 62 FR 10332, March 6, 1997; 68 FR 10350, March 5, 2003]

AUTHORITY: 5 U.S.C. 301; 6 U.S.C. 521; 8 U.S.C. 1101, 1103, 1154, 1155, 1158, 1182, 1226, 1229, 1229a, 1229b, 1229c, 1231, 1254a, 1255, 1324d, 1330, 1361, 1362; 28 U.S.C. 509, 510, 1746; sec. 2 Reorg. Plan No. 2 of 1950; 3 CFR, 1949–1953 Comp., p. 1002; section 203 of Pub.L. 105–100, 111 Stat. 2196–200; sections 1506 and 1510 of Pub.L. 106–386, 114 Stat. 1527–29, 1531–32; section 1505 of Pub.L. 106–554, 114 Stat. 2763A–326 to –328.

Notes of Decisions (13)

Current through March 14, 2019; 84 FR 9449.

End of Document

KeyCite Red Flag - Severe Negative Treatment
Unconstitutional or PreemptedHeld Invalid United States v. Chavez-Flores, W.D.Tex., Feb. 05, 2019

Code of Federal Regulations
Title 8. Aliens and Nationality
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Subchapter A. General Provisions (Refs & Annos)
Part 1003. Executive Office for Immigration Review (Refs & Annos)
Subpart C. Immigration Court—Rules of Procedure (Refs & Annos)

8 C.F.R. § 1003.18

§ 1003.18 Scheduling of cases.

Currentness

<For statute(s) affecting validity, see: 8 USCA § 1229a, 1229b.>

(a) The Immigration Court shall be responsible for scheduling cases and providing notice to the government and the alien of the time, place, and date of hearings.

(b) In removal proceedings pursuant to section 240 of the Act, the Service shall provide in the Notice to Appear, the time, place and date of the initial removal hearing, where practicable. If that information is not contained in the Notice to Appear, the Immigration Court shall be responsible for scheduling the initial removal hearing and providing notice to the government and the alien of the time, place, and date of hearing. In the case of any change or postponement in the time and place of such proceeding, the Immigration Court shall provide written notice to the alien specifying the new time and place of the proceeding and the consequences under section 240(b)(5) of the Act of failing, except under exceptional circumstances as defined in section 240(e)(1) of the Act, to attend such proceeding. No such notice shall be required for an alien not in detention if the alien has failed to provide the address required in section 239(a)(1)(F) of the Act.

Credits

[57 FR 11571, April 6, 1992; 59 FR 1899, Jan. 13, 1994; 60 FR 34089, June 30, 1995; 62 FR 10332, March 6, 1997]

AUTHORITY: 5 U.S.C. 301; 6 U.S.C. 521; 8 U.S.C. 1101, 1103, 1154, 1155, 1158, 1182, 1226, 1229, 1229a, 1229b, 1229c, 1231, 1254a, 1255, 1324d, 1330, 1361, 1362; 28 U.S.C. 509, 510, 1746; sec. 2 Reorg. Plan No. 2 of 1950; 3 CFR, 1949–1953 Comp., p. 1002; section 203 of Pub.L. 105–100, 111 Stat. 2196–200; sections 1506 and 1510 of Pub.L. 106–386, 114 Stat. 1527–29, 1531–32; section 1505 of Pub.L. 106–554, 114 Stat. 2763A–326 to –328.

Notes of Decisions (2)

Current through March 14, 2019; 84 FR 9449.

End of Document