No. ____

October Term, 2019

IN THE
Supreme Court of the United States

JEREMIAS GUILLEN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

A charging document is required to initiate removal proceedings against a noncitizen. 8 C.F.R. § 1003.14; 8 U.S.C. § 1229. A Notice to Appear (NTA) qualifies as a charging document in this context. 8 C.F.R. § 1003.13. Section 1229 compels the Government to serve NTA's containing the time and place of the hearing for jurisdiction to vest in an immigration Court under 8 C.F.R. § 1003.14. An illegal reentry conviction cannot be sustained when the underlying removal order is void, and the indictment charging illegal reentry under 8 U.S.C. § 1326 based on such a void removal order must be dismissed. This Court has held that in order for a Notice to Appear to be legally valid, it must, at a minimum state the place **and time** at which a noncitizen is to appear before an immigration judge. *See Pereira v. Sessions*, 138 S. Ct. 2105 (2018). This Petition raises the following issue:

Where a Notice to Appear served on a noncitizen to initiate removal proceedings fails to state the date and time to appear, the noncitizen is never provided with the date and time for the removal hearing, and the noncitizen is ordered removed *in absentia*, may that removal serve as a basis for a subsequent criminal prosecution for illegal reentry under 8 U.S.C. § 1326, or is such a prosecution barred either because the immigration court lacked jurisdiction to order the noncitizen removed or because the noncitizen was deprived of due process?

INTERESTED PARTIES

There are no parties to the proceeding other than those named in the caption of the case.

RELATED CASES

There are no related cases.

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PETITION FOR WRIT OF CERTIORARI

Mr. Jeremias Guillen, respectfully petitions the Supreme Court of the United States for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit, rendered and entered in case number 19-10902 in that court on October 23, 2019, *United States v. Jeremias Guillen,* which affirmed the judgment and commitment of the United States District Court for the Southern District of Florida

OPINION BELOW

A copy of the decision of the United States Court of Appeals for the Eleventh Circuit, which affirmed the judgment and commitment of the United States District Court for the Southern District District of Florida, is contained in the Appendix (A-1).

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Part III of the RULES OF THE SUPREME COURT OF THE UNITED STATES. The decision of the court of appeals was entered on October 23, 2019. This petition is timely filed pursuant to Sup. Ct. R. 13.1. The district court had jurisdiction because petitioner was charged with violating federal criminal laws. The court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742, which provide that courts of appeals shall have jurisdiction for all final decisions of United States district courts.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner intends to rely upon the following constitutional provision:

U.S. Const., amend. V:

> No person 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.

STATEMENT OF THE CASE

COURSE OF PROCEEDINGS AND DISPOSITION IN THE DISTRICT COURT

A federal grand jury charged Mr. Jeremias Guillen with unlawfully being found in the United States after having been removed on March 19, 2010 and June

2, 2011. (DE 1). Mr. Guillen moved to have the indictment dismissed based on an unlawful removal proceeding that resulted in his removal in 2010 and 2011. (DE 16). The district court denied the motion. (DE 19). Mr. Guillen subsequently entered a plea of guilty to the one-count indictment. (DE 21,24). The district court sentenced Mr. Guillen to an eight-month term of imprisonment. (DE 31). On appeal, a panel of the Eleventh Circuit affirmed the conviction holding that the underlying removal order properly supported a subsequent conviction for illegal reentry.

STATEMENT OF FACTS

Mr. Jeremias Guillen is a forty year-old native of El Salvador. Presentence Report (PSR) ¶ 42. He is a husband and father of two young kids. PSR ¶ 44.

In March of 1999, Mr. Guillen entered the United States, and was subsequently granted Temporary Protected Status (TPS). PSR ¶ 4. Temporary Protected Status (TPS) prevents an alien from being removed from the United States "during the period in which such status is in effect," and allows the alien to legally work in the United States. *See* 8 U.S.C. § 1254a(a)(1). On November 17, 2005, Mr. Guillen was approved for Advanced Parole, which allowed Mr. Guillen to travel abroad until February 18, 2006. PSR ¶5. On January 19, 2006, Mr. Guillen arrived at Miami International Airport and presented his Advanced Parole form. PSR ¶ 6.

On May 23, 2006, Mr. Guillen submitted a re-registration application for TPS. However, on August 1, 2008, the United States Citizenship and Immigration Services (USCIS) withdrew Mr. Guillen's approval for TPS. PSR ¶7.

In November 2008, Mr. Guillen was served with a Notice to Appear (Form I-862) by regular mail. PSR ¶8; (DE 16-1). The Notice to Appear noted that Mr. Guillen

was not a United States Citizen but rather that he was a Citizen of El Salvador. It also noted that Mr. Guillen was paroled into the United States on January 19, 2006, for the purpose of resuming his Temporary Protected Status and that the TPS was withdrawn on August 18, 2008, leaving Mr. Guillen without lawful status. The Notice also included an allegation that Mr. Guillen had been convicted of felony battery, domestic battery by strangulation in violation of Fla. Stat. § 784.041 on September 7, 2006. *Id.*

The Notice to Appear ordered Mr. Guillen to appear before an immigration judge at One Riverview Square, 333 S. Miami Avenue, Suite 700, Miami, Florida 33130-1904. *Id.* However, in the space provided for the date on which Mr. Guillen was ordered to appear, someone had typed, "a date to be set," and in the space provided for a time at which Mr. Guillen was ordered to appear, someone had typed, "a time to be set." *Id.*

On February 3, 2009, the immigration judge held a removal hearing *in absentia.* (DE 16-2). The immigration judge, without opposition, found that Mr. Guillen was removable. The immigration judge further found as follows:

> I further find that the respondent's failure to appear and proceed with any applications for relief from removal constitutes an abandonment of any pending applications and any applications the respondent may have been eligible to file. Those applications are deemed abandoned and denied for lack of prosecution.

Id. As a result, the immigration judge ordered Mr. Guillen removed to El Salvador. *Id.* On February 12, 2010, Mr. Guillen was arrested by immigration officials. PSR

¶ 10. On March 19, 2010, Mr. Guillen was removed to El Salvador pursuant to the *in absentia* order of removal. PSR ¶ 11.

On April 19, 2011, Mr. Guillen entered the United States. He was arrested by U.S. Border Patrol and the prior order of removal was reinstated. PSR ¶ 12. On June 2, 2011, Mr. Guillen was removed based on the February 9, 2009 order of removal. PSR ¶13.

Mr. Guillen was charged with illegal reentry under 8 U.S.C. § 1326 based on his prior removal on March 19, 2010 and June 2, 2011. (DE 1). Both removals, and thus the underlying charge, are based on the February 9, 2009 order of removal. Mr. Guillen moved to have the indictment dismissed based on an unlawful removal proceeding that resulted in his removal in 2010 and 2011. (DE 16). The district court denied the motion. (DE 19). Mr. Guillen subsequently entered a plea of guilty to the one-count indictment. (DE 21,24). The district court sentenced Mr. Guillen to an eight-month term of imprisonment. (DE 31). On appeal, a panel of the Eleventh Circuit affirmed the conviction holding that the underlying removal order properly supported a subsequent conviction for illegal reentry.

REASONS FOR GRANTING THE WRIT

In *Pereira v. Sessions*, 138 S. Ct. 2105 (2018), this Court held that in order for a Notice to Appear to be legally valid, it must, at a minimum state the place and time at which a noncitizen is to appear before an immigration judge. Here, the Notice to Appear failed to state a date and time for Mr. Guillen's removal hearing, Mr. Guillen was never notified of the date and time for his removal hearing and he was removed *in absentia*. The Eleventh Circuit's holding that the *in absentia* removal was legally sufficient to support a subsequent prosecution for illegal reentry is contrary to the holding in *Pereira* and contrary to established law in this Court that the Due Process Clause requires notice and an opportunity to be heard.

The United States Constitution ensures that "no person shall be . . . deprived of life, liberty, or property, without due process of law." U.S. Const., amend. V. Due process requires notice and an opportunity to be heard. *See Matthews v. Eldridge*, 424 U.S. 319, 332-35 (1976)). Those basic due process requirements of notice and an opportunity to be heard apply to aliens in removal proceedings. *See Kwong Hai Chew v. Colding*, 344 U.S. 590, 596-98 (1953). "The Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent." *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001).

Where a deportation, or removal proceeding deprived the removed alien of due process, the government may not rely on that removal order or proceeding "as reliable proof of an element of a criminal offense." *United States v. Mendoza-Lopez*, 481 U.S. 828, 840 (1987). Where such an infirmed proceeding is the basis for a criminal charge in a federal indictment, the dismissal of that indictment is the proper remedy. *Id.* at 842.

In addition, a charging document is required to initiate removal proceedings against a noncitizen. *United States v. Chavez-Flores*, 365 F. Supp. 3d 782, 785-87 (W.D. Texas Feb. 5, 2019) (citing 8 C.F.R. § 1003.14; 8 U.S.C. § 1229). A Notice to Appear (NTA) qualifies as a charging document in this context. 8 C.F.R. § 1003.13. "[T]he plain language of Section 1229 compels the Government to serve NTA's containing the time and place of the hearing for jurisdiction to vest in an immigration Court under 8 C.F.R. § 1003.14. An NTA without such details does not comply with Section 1229 and is facially deficient." *Chavez-Flores*, 365 F. Supp. 3d at 787. "An illegal reentry conviction cannot be sustained when the underlying removal order is void," and the indictment charging illegal reentry under 8 U.S.C. § 1326 based on such a void removal order must be dismissed. *Id.* at 790.

Here, the immigration judge lacked jurisdiction to order Mr. Guillen *in absentia*. In addition, Mr. Guillen's due process rights were violated in the administrative proceeding that resulted in his order of removal. As such, the order of removal, and his subsequent removal based on that order cannot form the essential element of Mr. Guillen's criminal prosecution under 8 U.S.C. § 1326. The district

court should have dismissed his indictment with prejudice as requested by Mr. Guillen. *See Mendoza-Lopez*, 481 U.S. at 842; *Chavez-Flores*, 365 F. Supp. 3d at 790. On appeal, the Eleventh Circuit, relying on its prior published opinion in *Perez-Sanchez v. U. S. Att'y General*, 935 F.3d 1148 (11th Cir. 2019), affirmed the conviction. *United States v. Guillen*, 781 Fed. App'x 980 (11th Cir. Oct. 23, 2019) (unpublished).

In March of 1999, Mr. Guillen entered the United States, and was subsequently granted Temporary Protected Status (TPS). PSR ¶ 4. Temporary Protected Status (TPS) prevents an alien from being removed from the United States "during the period in which such status is in effect," and allows the alien to legally work in the United States. *See* 8 U.S.C. § 1254a(a)(1). On November 17, 2005, Mr. Guillen was approved for Advanced Parole, which allowed Mr. Guillen to travel abroad until February 18, 2006. PSR ¶5. On January 19, 2006, Mr. Guillen arrived at Miami International Airport and presented his Advanced Parole form. PSR ¶ 6.

On May 23, 2006, Mr. Guillen submitted a re-registration application for TPS. However, on August 1, 2008, the United States Citizenship and Immigration Services (USCIS) withdrew Mr. Guillen's approval for TPS. PSR ¶7.

In November 2008, Mr. Guillen was served with a Notice to Appear (Form I-862) by regular mail. PSR ¶8; (DE 16-1). The Notice to Appear noted that Mr. Guillen was not a United States Citizen but rather that he was a Citizen of El Salvador. It also noted that Mr. Guillen was paroled into the United States on January 19, 2006, for the purpose of resuming his Temporary Protected Status and that the TPS was withdrawn on August 18, 2008, leaving Mr. Guillen without lawful status. The Notice

also included an allegation that Mr. Guillen had been convicted of felony battery, domestic battery by strangulation in violation of Fla. Stat. § 784.041 on September 7, 2006. *Id.*

The Notice to Appear ordered Mr. Guillen to appear before an immigration judge at One Riverview Square 333 S. Miami Avenue, Suite 700, Miami, Florida 33130-1904. *Id.* However, in the space provided for the date on which Mr. Guillen was ordered to appear, someone had typed, "a date to be set," and in the space provided for a time at which Mr. Guillen was ordered to appear, someone had typed, "a time to be set." *Id.*

This Court has held that in order for a Notice to Appear to be legally valid, it must, at a minimum state the place **and time** at which a noncitizen is to appear before an immigration judge. *See Pereira v. Sessions*, 138 S. Ct. 2105 (2018). As the Court reasoned:

> If the three words "notice to appear" mean anything in this context, they must mean that, at a minimum, the Government has to provide noncitizens "notice" of the information, i.e., the "time" and "place," that would enable them "to appear" at a removal hearing in the first place. Conveying such time-and-place information to a noncitizen is an essential function of a notice to appear, for without it, the Government cannot reasonably expect the noncitizen to appear for his removal proceedings.

Id. at 2115.

However, the immigration judge here had that exact expectation -- that Mr. Guillen would appear for a removal hearing even though he had NOT been provided with the date and time of the hearing. On February 3, 2009, apparently the date set for the removal hearing, the immigration judge held a removal hearing *in absentia.*

(DE 16-2). The immigration judge, without opposition, found that Mr. Guillen was removable. The immigration judge further found as follows:

> I further find that the respondent's failure to appear and proceed with any applications for relief from removal constitutes an abandonment of any pending applications and any applications the respondent may have been eligible to file. Those applications are deemed abandoned and denied for lack of prosecution.

Id. As a result, the immigration judge ordered Mr. Guillen removed to El Salvador. *Id.* On February 12, 2010, Mr. Guillen was arrested by immigration officials. PSR ¶ 10. On March 19, 2010, Mr. Guillen was removed to El Salvador pursuant to the *in absentia* order of removal. PSR ¶ 11.

On April 19, 2011, Mr. Guillen entered the United States. He was arrested by U.S. Border Patrol and the prior order of removal was reinstated. PSR ¶ 12. On June 2, 2011, Mr. Guillen was removed based on the February 9, 2009, order of removal. PSR ¶13.

Mr. Guillen was charged with illegal reentry under 8 U.S.C. § 1326 based on his prior removal on March 19, 2010, and June 2, 2011. (DE 1). Both removals, and thus the underlying charge, are based on the February 9, 2009, *in absentia* order of removal.

However, the February 9, 2009, order of removal is legally void and cannot serve as a basis for a section 1326 prosecution. The failure to notify Mr. Guillen of the date and time to appear for his removal hearing means that the NTA was legally insufficient and could not serve as the charging document required under 8 C.F.R. § 1003.14. *See Chavez-Flores*, 365 F. Supp. 3d at 787. Absent a valid charging

document, the immigration judge lacked jurisdiction to preside over Mr. Guillen's removal proceedings. The district court should have dismissed the indictment against Mr. Guillen. *See id.* at 790. Mr. Guillen filed a motion to dismiss his indictment making this exact argument. (DE 16). The district court erroneously denied the motion. (DE 19).

In addition, Mr. Guillen's motion brought to the Court's attention the fact that Mr. Guillen was ordered removed *in absentia* in a proceeding where he was not given notice and an opportunity to be heard. Thus, the facts clearly demonstrate that Mr. Guillen's Due Process rights were violated.

A defendant may collaterally attack the underlying removal order in a prosecution for illegal reentry where he was denied the opportunity for judicial review of the removal order and the order was "fundamentally unfair." 8 U.S.C. § 1326(d). An order is fundamentally unfair where due process rights were violated in the removal proceeding and the noncitizen was prejudiced as a result. *See United States v. Becerril-Lopez*, 541 F.3d 881, 885 (9th Cir. 2008).

As this Court has recently held, the immigration law making an otherwise removal alien ineligible for relief from removal based on a conviction for an aggravated felony has changed. *See Sessions v. Dimaya*, 138 S. Ct. 1204 (2018). In *Dimaya*, this Court held that the residual clause of 18 U.S.C. § 16(b), defining a crime of violence, was unconstitutionally vague. 138 S. Ct. at 1210. That holding had a direct effect on immigration proceedings because the Immigration and Nationality Act (INA) defines "aggravated felony" to include a crime of violence under § 16(b) for

which imprisonment is at least one year. 8 U.S.C. § 1101(a)(43)(F). The INA "renders deportable any alien convicted of an 'aggravated felony' after entering the United States." *Dimaya*, 138 S. Ct. 1210 (citing 8 U.S.C. § 1227(a)(2)(A)(iii)). Typically, an alien in a removal proceeding may request withholding of removal, cancellation of removal, and other discretionary relief that would allow an otherwise removable alien to remain in the United States and not be removed, but those aliens with a prior conviction for an aggravated felony are ineligible for such relief. *See* 8 U.S.C. § 1229b(a)(3), (b)(1)(C). "Accordingly, removal is a virtual certainty for an alien found to have an aggravated felony conviction, no matter how long he had previously resided here." *Dimaya*, 138 S. Ct. at 1210, 1211. Following *Dimaya*, denial of discretionary relief based on a prior conviction for an aggravated felony, which in turn is based on the residual clause of § 16(b), cannot stand.

Here, Mr. Guillen was ordered removed *in absentia* based on a determination by the IJ that Mr. Guillen had a prior conviction for an aggravated felony. (DE 16). The failure to provide Mr. Guillen with notice and an opportunity to be heard as required by the Due Process clause prevented him from challenging whether his prior conviction qualified as an aggravated felony. He was thus prejudiced by the violation.

Complete Lack of Notice and Opportunity to be Heard

Mr. Guillen's case differs from cases decided by the Board of Immigration Appeals and other Circuit Courts in that Mr. Guillen was never provided with notice of the date and time of his removal hearing. What other Courts of Appeals have held, adopting the reasoning of the Board of Immigration Appeal, is that, following this

Court's decision in *Pereira*, "a notice to appeal that does not specify the time and place of an alien's removal hearing vests an Immigration Judge with jurisdiction over the removal proceedings and meets the requirements of section 239(a) of the Act, ***so long as a notice of hearing specifying this information is later sent to the alien.***" *In Re Bermudez-Cota*, 271 I. & N. Dec. 441, 447 (B.I.A. Aug. 31, 2018) (emphasis added). In *Bermuda-Cota*, the Board of Immigration Appeals adopted the pre-*Pereira* holdings of the Fifth, Seventh, Eighth and Ninth Circuits that a two-step notification process, where the initial Notice to Appear fails to properly state a place and/or time of the removal hearing, **but where a subsequent notice provides the alien with the requisite information**, was sufficient to establish jurisdiction. *Id.* As the B.I.A. concluded, because the alien actually "received proper notice of the time and place of his proceedings when he received notice of the hearing, his notice to appear was not defective." *Id.*

In *Banegas Gomez v. Barr*, 922 F.3d 101 (2d Cir. April 23, 2019), the Second Circuit adopted the holding and reasoning of the B.I.A. in *Bermudez-Cota*. *Banegas Gomez*, 922 F.3d at 111, 112. The Second Circuit noted that although the NTA filed in May 2013 failed to specify the date and time of the removal hearing, the alien nevertheless "received a hearing notice in June 2013 providing that his initial hearing would take place on August 1, 2013, at 8:30 a.m. [and] he appeared at that hearing, as well as three subsequent hearings in 2014 and 2015." *Id.* at 112. Based on those facts, the Second Circuit held as follows:

> We conclude that an NTA that omits information regarding the time and date of the initial removal hearing is nevertheless adequate to vest

> jurisdiction in the Immigration Court, **at least so long as a notice of hearing specifying this information is later sent to the alien.** The Immigration Court thus had jurisdiction when it ordered Banegas Gomez removed in April 2015.

Id. (emphasis added).

In *Karingithi v. Whitaker*, 913 F.3d 1158 (9th Cir. 2019), the Ninth Circuit similarly adopted the holding and reasoning of the B.I.A. in *Bermudez-Cota*. *Id.* at 1161, 1162. The Ninth Circuit noted that on "April 3, 2009, the Department of Homeland Security commenced removal proceedings by filing a notice to appear with the Immigration Court . . . the notice to appear specified the location of the removal hearing [and] the date and time were 'To Be Set." *Id.* at 1159. "**The same day**, Karingithi was issued a notice of hearing, which provided the date and time of the hearing." *Id.* (emphasis added). Based on that fact, the Ninth Circuit held as follows:

> The bottom line is that the Immigration Court had jurisdiction over Karingithi's removal proceedings. And, as in *Bermudez-Cota*, the hearing notices Karingithi received specified the time and date of her removal proceedings. **Thus, we do not decide whether jurisdiction would have vested if she had not received this information in a timely fashion.**

Id. at 1162 (emphasis added).

In *Hernandez-Perez v. Whitaker*, 911 F.3d 305 (6th Cir. 2018), the Sixth Circuit similarly adopted the holding and reasoning of the B.I.A. in *Bermudez-Cota*. *Id.* at 312-315. The Court noted that although the NTA stated the location of the removal hearing, it only stated that he was required to appear at a date and time "to be set." *Id.* at 311. However, "Hernandez-Perez was subsequently issued several documents titled 'Notice of Hearing' (all of which state the date, time and place of proceedings)."

Id. at n.2. The Sixth Circuit thus held that "jurisdiction vests with the immigration court where, as here, the mandatory information about the time of the hearing . . . is provided in a Notice of Hearing issued after the NTA." *Id.* at 315.

In *Ortiz-Santiago v. Barr*, 924 F.3d 956 (7th Cir. May 20, 2019), the Seventh Circuit reached a similar result under similar facts. The Seventh Circuit had slightly different reasoning however, holding that the alien had forfeited the claim by failing to timely object to the deficiency in the NTA. *Id.* at 964, 965. In so holding, the Seventh Circuit took pains to point out that the alien was provided with notice of the date and time of the hearing and that "this is not a case in which the Notice of Hearing never reached" the alien. *Id.*

In *Ali v. Barr,* 924 F.3d 983 (8th Cir. May 17, 2019), the Eighth Circuit expressly joined the Second, Tenth, Sixth, and Ninth Circuits in adopting the holding and reasoning of the B.I.A. in *Bermudez-Cota. Id.* at 986. The Court noted that although the NTA failed to note a date and time, Ali "received such a notice before then." *Id.*

None of those courts of appeals have actually addressed Mr. Guillen's argument that the Immigration Judge lacked jurisdiction over his removal proceedings because the NTA failed to state the date and time of his removal hearing, he was never subsequently provided with the date and time of the hearing, the Immigration Judge (IJ) proceeded with a removal hearing *in absentia*, the Immigration Judge ordered his removal *in absentia* and the *in absentia* proceeding further deprived him of an opportunity for judicial review of the removal order. In

fact, the decision of the B.I.A. in *Bermudez-Cota* and all of the Courts of Appeals who have adopted the holding and reasoning of the B.I.A. actually suggest that a case such as Mr. Guillen's, where the alien **never** receives proper notice of the date and time, may actually result in a holding that the IJ lacked jurisdiction. The record is also clear that Mr. Guillen was deprived of the basic requirements of Due Process, notice and an opportunity to be heard. As such, his *in absentia* removal cannot support a subsequent prosecution for illegal reentry under 8 U.S.C. § 1326.

CONCLUSION

Based upon the foregoing petition, the Court should grant a writ of certiorari to the Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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Fort Lauderdale, Florida
January 21, 2020