

APPENDIX

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Decision of the Eleventh Circuit Court of Appeals,
United States v. Guillen, 781 Fed. App'x 980 (11th Cir. Oct. 23, 2019)
No. 19-10902.....A-1

Judgment in a Criminal Case
United States v. Guillen, (Feb. 27, 2019)
No. 18-60253-CR-BLOOMA-6

A - 1

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 19-10902
Non-Argument Calendar

D.C. Docket No. 0:18-cr-60253-BB-1

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JEREMIAS GUILLEN,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida

(October 23, 2019)

Before TJOFLAT, WILLIAM PRYOR and BLACK, Circuit Judges.

PER CURIAM:

Jeremias Guillen, a citizen of El Salvador, appeals following his conviction

for illegally reentering the United States, in violation of 8 U.S.C. § 1326(a), (b)(2). He argues the district court erred in denying his motion to dismiss the indictment in his case because (1) the notice to appear (NTA) in his underlying immigration case did not specify the date and time of his removal hearing, causing the Immigration Judge (IJ) that ordered his underlying removal to have no jurisdiction over his removal proceedings, and (2) the order of removal which formed the basis for his criminal indictment was entered by an immigration court *in absentia* and in violation of his right to due process. After review, we affirm the district court.

We review the district court's denial of a motion to dismiss the indictment for abuse of discretion. *United States v. Pendergraft*, 297 F.3d 1198, 1204 (11th Cir. 2002). For purposes of 8 U.S.C. § 1326, the existence of an underlying deportation order is an adjudicative fact to be proven by the government. *See United States v. Henry*, 111 F.3d 111, 113 (11th Cir. 1997). However, a defendant charged with violating that Section may collaterally challenge the validity of his underlying deportation order in the criminal proceeding, which is an issue of law to be reviewed *de novo* on appeal. *United States v. Zelaya*, 293 F.3d 1294, 1297 (11th Cir. 2002).

Under the Immigration and Nationality Act, an individual may be ordered removed *in absentia* if he does not attend a removal proceeding after written notice has been provided. 8 U.S.C. § 1229a(b)(5)(A). An alien may seek to rescind an *in*

absentia removal order by filing a motion to reopen at any time if he demonstrates that he did not receive proper notice of the removal proceedings. *Id.*

§ 1229a(b)(5)(C). A rescission order may be sought even after deportation. *See Zelaya*, 293 F.3d at 1297.

First, Guillen's argument regarding the IJ's jurisdiction in his underlying removal hearing is foreclosed by our decision in *Perez-Sanchez v. U.S. Attorney General*, 935 F.3d 1148 (11th Cir. 2019). Construing 8 U.S.C. § 1229(a), this Court held that although an NTA is deficient if it fails to include both the time and place of removal proceedings, the statute's time and place requirements do not operate as a jurisdictional rule. *Id.* at 1153-54. Similarly, this Court held that 8 C.F.R. § 1003.14, which stated jurisdiction vested with the IJ upon the filing of the NTA with the immigration court, set forth only a claim-processing rule. *Id.* at 1155-57. Accordingly, this Court held the IJ and BIA properly exercised jurisdiction over the petitioner's removal hearing pursuant to their statutory authority because any alleged defect in the petitioner's NTA violated only a claim-processing rule. *Id.* at 1157. Thus, Guillen's argument the IJ did not have jurisdiction over his removal proceeding fails.

Second, Guillen failed to establish that he was deprived of an opportunity for judicial review and that his removal proceedings before the immigration court were fundamentally unfair. *See* 8 U.S.C. § 1326(d); *United States v. Watkins*, 880 F.3d

1221, 1224 (11th Cir. 2018) (providing to challenge the validity of an underlying deportation order in a criminal proceeding for illegal reentry, a defendant must show all three of the following: (1) all available administrative remedies have been exhausted; (2) the deportation proceedings deprived him of the opportunity for judicial review; and (3) the deportation proceedings were fundamentally unfair).

Although Guillen asserts he was denied notice and an opportunity to be heard during his original removal proceeding, the record reflects the NTA notified Guillen that he could be ordered removed *in absentia* and that Guillen used an opportunity to seek review of his order of removal by moving the IJ to reopen his case. The IJ denied that motion to reopen in 2017, stating Guillen had “not established improper notice [or] exceptional circumstances. It appears [Guillen] knew [about] the hearing but was afraid to appear.” Thus, Guillen cannot establish he was deprived of an opportunity for judicial review. *See Watkins*, 880 F.3d at 1224.

Further, Guillen failed to argue in his initial appellate brief that he was prejudiced by the NTA’s failure to specify the date and time of his hearing. *See United States v. Levy*, 379 F.3d 1241, 1244 (11th Cir. 2004) (stating arguments raised for the first time in a reply brief are deemed abandoned). Thus, he has abandoned that argument, and has failed to establish his removal proceeding was fundamentally unfair. *See United States v. Holland*, 876 F.2d 1533, 1536 (11th

Cir. 1989) (proving “fundamental unfairness requires a showing that specific errors prejudiced the defendant”). An alien characterizing an underlying deportation as fundamentally unfair must, at a minimum, demonstrate that the outcome of the deportation proceeding would have been different but for a particular error.

Zelaya, 293 F.3d at 1298. Moreover, Guillen does not present any law suggesting a removal order entered *in absentia per se* violates due process.

Accordingly, the district court did not abuse its discretion in denying Guillen’s motion to dismiss the indictment, and we affirm.

AFFIRMED.

A-6

UNITED STATES DISTRICT COURT
Southern District of Florida
Fort Lauderdale Division

UNITED STATES OF AMERICA
v.
JEREMIAS GUILLEN

JUDGMENT IN A CRIMINAL CASE

Case Number: **18-60253-CR-BLOOM-001**
USM Number: **89482-279**

Counsel For Defendant: Felipe Jaramillo
Counsel For The United States: Jennifer Keene
Court Reporter: Yvette Hernandez

The defendant pleaded guilty to count(s) 1 of the indictment.

The defendant is adjudicated guilty of these offenses:

<u>TITLE & SECTION</u>	<u>NATURE OF OFFENSE</u>	<u>OFFENSE ENDED</u>	<u>COUNT</u>
8 U.S.C. § 1326(a) and (b)(2)	Illegal Reentry After Removal	09/13/2018	1

The defendant is sentenced as provided in the following pages of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

All remaining counts are dismissed on the motion of the government.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

Date of Imposition of Sentence: **2/26/2019**



Beth Bloom
United States District Judge

Date: 2/26/2019

DEFENDANT: JEREMIAS GUILLEN

CASE NUMBER: 18-60253-CR-BLOOM-001

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of **eight (8) months as to Count 1 with credit for time served since the date of his arrest.**

The court makes the following recommendations to the Bureau of Prisons: that the Defendant be designated to a South Florida facility, preferably FDC due to his young child living nearby.

The defendant is remanded to the custody of the United States Marshal.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____
at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL.

DEPUTY UNITED STATES MARSHAL

DEFENDANT: JEREMIAS GUILLEN
CASE NUMBER: 18-60253-CR-BLOOM-001

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **one (1) year as to Count 1 of the indictment.**

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

The defendant shall cooperate in the collection of DNA as directed by the probation officer.

The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon.

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1. The defendant shall not leave the judicial district without the permission of the court or probation officer;
2. The defendant shall report to the probation officer and shall submit a truthful and complete written report within the first fifteen days of each month;
3. The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4. The defendant shall support his or her dependents and meet other family responsibilities;
5. The defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
6. The defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
7. The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9. The defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
10. The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11. The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
13. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: JEREMIAS GUILLEN

CASE NUMBER: 18-60253-CR-BLOOM-001

SPECIAL CONDITIONS OF SUPERVISION

Cooperating with Immigration during Removal Proceedings - The defendant shall cooperate in any removal proceedings initiated or pending by the U.S. Immigration and Customs Enforcement consistent with the Immigration and Nationality Act. If removed, the defendant shall not reenter the United States without the prior written permission of the Undersecretary for Border and Transportation Security. The term of supervised release shall be non-reporting while the defendant is residing outside the United States. If the defendant reenters the United States within the term of probation, the defendant is to report to the nearest U.S. Probation Office within 72 hours of the defendant's arrival.

Permissible Search - The defendant shall submit to a search of his/her person or property conducted in a reasonable manner and at a reasonable time by the U.S. Probation Officer.

Surrendering to Immigration for Removal After Imprisonment - At the completion of the defendant's term of imprisonment, the defendant shall be surrendered to the custody of the U.S. Immigration and Customs Enforcement for removal proceedings consistent with the Immigration and Nationality Act. If removed, the defendant shall not reenter the United States without the prior written permission of the Undersecretary for Border and Transportation Security. The term of supervised release shall be non-reporting while the defendant is residing outside the United States. If the defendant reenters the United States within the term of supervised release, the defendant is to report to the nearest U.S. Probation Office within 72 hours of the defendant's arrival.

Unpaid Restitution, Fines, or Special Assessments - If the defendant has any unpaid amount of restitution, fines, or special assessments, the defendant shall notify the probation officer of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay.

DEFENDANT: JEREMIAS GUILLEN**CASE NUMBER: 18-60253-CR-BLOOM-001****CRIMINAL MONETARY PENALTIES**

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	<u>Assessment</u>	<u>Fine</u>	<u>Restitution</u>
TOTALS	\$100.00	\$0.00	\$0.00

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

NAME OF PAYEE	TOTAL LOSS*	RESTITUTION ORDERED
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* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

**Assessment due immediately unless otherwise ordered by the Court.

DEFENDANT: **JEREMIAS GUILLEN**CASE NUMBER: **18-60253-CR-BLOOM-001****SCHEDULE OF PAYMENTS**

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A. Lump sum payment of \$100.00 due immediately.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

This assessment/fine/restitution is payable to the CLERK, UNITED STATES COURTS and is to be addressed to:

**U.S. CLERK'S OFFICE
ATTN: FINANCIAL SECTION
400 NORTH MIAMI AVENUE, ROOM 08N09
MIAMI, FLORIDA 33128-7716**

The assessment/fine/restitution is payable immediately. The U.S. Bureau of Prisons, U.S. Probation Office and the U.S. Attorney's Office are responsible for the enforcement of this order.

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

CASE NUMBER	TOTAL AMOUNT	JOINT AND SEVERAL AMOUNT
DEFENDANT AND CO-DEFENDANT NAMES (INCLUDING DEFENDANT NUMBER)		

The Government shall file a preliminary order of forfeiture within 3 days.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.