NO._____

IN THE SUPREME COURT OF THE UNITED STATES

JUAN ALBERTO **CANTU-SIGUERO**, JOSE **GOMEZ-LOPEZ**,
HORACIO **GUTIERREZ-MURILLO**, EDUARDO **HERNANDEZ CASTELLANOS**,
PEDRO **PALACIOS GUEVARA**, ODWAR GEOVANY **PALOMEQUE-RAMOS**,
JOSE ANTONIO **VARGAS CASTRO**, MARGARITO **ZARATE-HERNANDEZ**, and
JUAN DE DIOS **TREVINO-VILLARREAL**,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, in light of *Pereira v. Sessions*, 138 S. Ct. 2105 (2018), the immigration court issuing orders of removal against each petitioner lacked jurisdiction to issue such orders, so that use of such orders in a prosecution for illegal reentry violated the separation of powers and due process.

PARTIES TO THE PROCEEDINGS

Petitioners were convicted in separate proceedings before the district court, and the United States Court of Appeals for the Fifth Circuit entered separate judgments in each of their cases. Because petitioners seek review of these judgments on the basis of identical questions, they jointly file this petition with this Court. *See* Sup. Ct. R. 12.4. All parties to petitioners' Fifth Circuit proceedings are named in the caption of the case before this Court.[1]

DIRECTLY RELATED PROCEEDINGS

There are no other state or federal proceedings "directly related" to the cases in this Court. *See* Sup. Ct. R. 14.1(b)(iii).

[1] In the courts below, petitioners Gomez-Lopez and Palomeque-Ramos were also known by the aliases listed in the captions in Appendices B and F.

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MISCELLANEOUS

PRAYER

Petitioners Cantu-Siguero, Gomez-Lopez, Gutierrez-Murillo, Hernandez Castellanos, Palacios Guevara, Palomeque-Ramos, Vargas Castro, Zarate-Hernandez, and Trevino-Villarreal respectfully pray that this Court grant their consolidated petition for certiorari.

OPINIONS BELOW

The opinions of the United States Court of Appeals for the Fifth Circuit in petitioners' cases are attached to this petition as Appendices A through I. The opinions and orders of the United States District Court for the Southern District of Texas are attached as Appendices J through R.

JURISDICTION

The United States Court of Appeals for the Fifth Circuit issued its opinions on the following dates: on January 10, 2020, for Mr. Gomez-Lopez; on January 29, 2020, for Mr. Palomeque-Ramos; on January 30, 2020, for Mr. Palacios Guevara and Mr. Vargas Castro; on February 3, 2020, for Mr. Zarate-Hernandez; on February 5, 2020, for Mr. Hernandez Castellanos; on February 7, 2020, for Mr. Gutierrez-Murillo; on February 14, 2020, for Mr. Trevino-Villarreal; and on February 17, 2020, for Mr. Cantu-Siguero. *See* Appendices A-I. This petition is filed within 90 days after entry of judgment in each case. *See* Sup. Ct. R. 13.1. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

The texts of the relevant constitutional, statutory and regulatory provisions involved are attached as Appendix S.

BASIS OF FEDERAL JURISDICTION IN THE UNITED STATES DISTRICT COURT

These cases were originally brought as federal criminal prosecutions under 8 U.S.C. 1326. The district court therefore had jurisdiction pursuant to 8 U.S.C. § 1329 and 18 U.S.C. § 3231.

STATEMENT OF THE CASE

In separate proceedings in the United States District Court for the Southern District of Texas, petitioners were charged by indictment with the offense of illegal reentry of a previously deported alien, in violation of 8 U.S.C. § 1326. Each petitioner filed a motion to dismiss the indictment in his respective case, arguing that, in light of *Pereira v. Sessions*, 138 S. Ct. 2105 (2018), the prior order of removal and any reinstatement thereof was void because the Immigration Judge issuing the order did not have jurisdiction to issue such an order and that the use of such a void order violated due process. Specifically, each petitioner argued that the "Notice to Appear" provided by immigration authorities alleging the grounds of removal prior to issuance of the first order of removal did not state the time and place at which removal proceedings were to be held and, in light of *Pereira*, such a document lacking that information was not a valid "Notice to Appear" under 8 U.S.C. § 1229(a)(1)(G)(i). Consequently, petitioners argued, the document did not vest jurisdiction with the immigration court in light of regulations which provide that "[j]urisdiction vests, and proceedings before an Immigration Judge commence, when" the Department of Homeland Security files a notice to appear with the immigration court. 8 C.F.R. § 1103.14(a); *see also* 8 C.F.R. 1003.13. The district court denied the motion in each case. *see* Appendices J-R, and petitioners timely appealed.

In all of Petitioners' appeals, the Government filed a motion for summary affirmance relying on the decision in *United States v. Pedroza-Rocha*, 933 F.3d 490 (5th Cir. 2019), *petition for cert. filed*, (No. 19-6588) (U.S. Nov. 12, 2019). In *Pedroza-Rocha*, the Fifth

Circuit held that the omission of the hearing time did not make the notice to appear defective because the regulatory definition of the notice to appear (which does not require a hearing time), not the statutory definition (which does), controls. *Pedroza-Rocha*, 933 F.3d at 497 (citing *Pierre-Paul v. Barr*, 930 F.3d 684, 689-90 (5th Cir. 2019)). Even if the notice to appear was defective, the later notice of hearing cured it. *Pedroza-Rocha*, 933 F.3d at 497. And the regulation requiring a notice to appear to be filed with the immigration court was not jurisdictional. *Id.* at 497-98. Consequently, the Fifth Circuit, relying on *Pedroza-Rocha*, affirmed the judgment in each of petitioners' cases. See Appendices A-I.

REASONS FOR GRANTING THE WRIT

The Court should grant certiorari to address the important issue whether, in light of *Pereira v. Sessions*, 138 S. Ct. 2105 (2018), the immigration court issuing orders of removal against each petitioner lacked jurisdiction to issue such orders, so that use of such orders in a prosecution for illegal reentry violated the separation of powers and due process

A. The decisions below in each case are incorrect and violate the separation of powers.

An agency's power to act comes from Congress. *City of Arlington v. F.C.C.*, 569 U.S. 290, 298 (2013). Courts must "tak[e] seriously, and apply[ ] rigorously, in all cases, statutory limits on agencies' authority." *Id.* at 307.

The notice to appear is such a limit. Congress specified that the notice to appear must be served on every noncitizen in removal proceedings. § 1229(a)(1). It also required that a notice to appear must have a hearing time. § 1229(a)(1)(G)(i). The omission of a hearing time cannot be cured; without it, the document is not a notice to appear. *Pereira*, 138 S. Ct. at 2116.

Without a notice to appear, the immigration court lacks authority to remove a noncitizen. § 1229(a)(1). That is because service of the notice to appear is necessary for subject matter jurisdiction – the immigration judge's authority to preside over cases. *See United States v. Cotton*, 535 U.S. 625, 630 (2002) (describing subject matter jurisdiction as "the court's statutory or constitutional authority to hear the case" (cleaned up)).

Immigration judges only have authority to decide cases in which the Department of Homeland Security chooses to serve a notice to appear. § 1229(a)(1). In contrast, immigration officials – not judges – can rule on a noncitizen's deportability and inadmis-

sibility through certain expedited procedures when no notice to appear is filed. *See, e.g.*, 8 U.S.C. §§ 1225(b)(1), 1228(b). The notice to appear confers subject matter jurisdiction by defining the cases over which immigration judges preside. *See Bowles v. Russell,* 551 U.S. 205, 213 (2007) ("the notion of subject-matter jurisdiction obviously extends to classes of cases ... falling within a court's adjudicatory authority" (cleaned up)).

The government has sought to avoid this straightforward application of § 1229(a)(1) and *Pereira* by arguing that the regulatory definition of a notice to appear, not the statutory one, applies to the notice to appear required to start the removal proceeding. The regulations do not require a hearing time. 8 C.F.R. §§ 1003.15(b), 1003.18(b).

In *Pierre-Paul* and *Pedroza-Rocha*, the Fifth Circuit agreed. By ignoring the jurisdictional import of § 1229(a)(1) and finding "no glue" between the regulations and § 1229(a)(1), the Fifth Circuit distinguished *Pereira* and approved a two-step procedure: first a notice to appear with no hearing time, and then a notice of hearing. *Pierre-Paul*, 930 F.3d at 691.

But there is glue binding the statute to the regulations. Congress's transitional instructions recognize the jurisdictional significance of the notice to appear. Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996, § 309(c)(2), Pub. L. No. 104-208, 110 Stat 3009 (1996) (making certain documents "valid as if provided under [§ 1229] (as amended by this subtitle) to confer jurisdiction on the immigration judge"). And the regulations incorporate the statutory jurisdictional limit by providing that

a charging document such as a notice to appear vests jurisdiction with the immigration court. §§ 1003.13, 1003.14(a); *see* 8 C.F.R. § 1239.1.

The agency even acknowledged the need to "implement[ ] the language of the amended Act indicating that the time and place of the hearing must be on the Notice to Appear" and committed to providing a hearing time in the notices to appear "as fully as possible by April 1, 1997[.]" Immigration and Naturalization Service and EOIR, Proposed Rules, Inspection and Expedited Removal of Aliens, 62 Fed. Reg. 444-01, 1997 WL 1514 (Jan. 3, 1997). But the agency created an exception that hearing times could be omitted if providing them was not practicable, such as when "automated scheduling [is] not possible ... (e.g., power outages, computer crashes/downtime)." *Id.* at 449; *see* 8 C.F.R. §§ 1003.15(b), (c); 1003.18.

Two decades later, "almost 100 percent of notices to appear omit the time and date of proceeding[.]" *Pereira*, 138 S. Ct. at 2111 (cleaned up). The "where practicable" regulatory exception swallowed the statutory rule of including the hearing time in the notice to appear. And the Fifth Circuit sanctioned the agency's attempt to rewrite the statute. This violates the separation of powers. *Utility Air Regulatory Group v. EPA*, 573 U.S. 302, 327 (2014) (agencies cannot "revise clear statutory terms that turn out not to work in practice").

B. This Court should resolve a circuit split over whether, in light of *Pereira*, the statutory definition of "notice to appear" defines the jurisdiction of the immigration courts.

Eleven circuits, as well as the Board of Immigration Appeals (BIA), have weighed in on the proper definition of a "notice to appear" and the effect of a putative notice missing a hearing time. The circuits are split on whether the statutory or regulatory definition of a notice to appear governs, and whether a notice to appear is a jurisdictional requirement or a claims-processing rule.

Two circuits hold that the statutory definition of a notice to appear applies to starting a removal proceeding, but eight circuits and the BIA hold that the regulatory definition does.

The Seventh and Eleventh Circuits, applying this Court's reasoning in *Pereira*, interpret § 1229(a)(1) as requiring the notice to appear used to begin removal proceedings to have a hearing time. The Seventh Circuit rejects as "absurd" the government's argument that the notice to appear referenced in the regulations is not the same notice to appear defined in the statute. *Ortiz-Santiago v. Barr*, 924 F.3d 956, 961–62 (7th Cir. 2019). The Eleventh Circuit explains that, per § 1229(a)(1), Congress intended for service of the notice to appear to "operate as the point of commencement for removal proceedings[,]" and "the agency was not free to redefine the point of commencement[.]" *Perez-Sanchez v. U.S. Att'y Gen.*, 935 F.3d 1148, 1154 (11th Cir. 2019).

The First, Second, Third, Fourth, Fifth, Sixth, Eighth, and Ninth Circuits find that the regulatory definition of a notice to appear, which does not require a hearing time,

applies for beginning removal proceedings.[2] Several circuits also hold that a later notice of hearing cures any statutory defect. *See Pierre-Paul*, 930 F.3d at 690; *but see Lopez v. Barr*, 925 F.3d 396, 405 (9th Cir. 2019) (a defective § 1229(a)(1) notice to appear cannot be cured by a notice of hearing for the stop-time rule).

In finding that the regulatory definition controls, the First, Sixth, and Ninth Circuits specifically defer to the BIA's reasoning. *Goncalves Pontes*, 938 F.3d at 7; *Karingithi*, 913 F.3d at 1161; *Hernandez-Perez v. Whitaker*, 911 F.3d 305, 312 (6th Cir. 2018). The BIA interpreted *Pereira* narrowly, limiting it to the stop-time rule, and approved the two-step process of notice to appear without a hearing time followed by a notice of hearing. *Matter of Bermudez-Cota*, 27 I. & N. Dec. 441, 443–47 (BIA 2018). The Seventh Circuit, however, sharply criticized reliance on the BIA's decision, which it found "brushed too quickly over the Supreme Court's rationale in *Pereira*" and failed to consider significant legislative history. *Ortiz-Santiago*, 924 F.3d at 962.

Four circuits and the BIA believe that a notice to appear is a jurisdictional requirement, but five circuits disagree.

The Second and Eighth Circuits hold that a notice to appear, as defined by the regulations, confers "jurisdiction" on the immigration court. *Ali*, 924 F.3d at 986; *Banegas Gomez*, 922 F.3d at 112. The Sixth and Ninth Circuits adopt similar reasoning after

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[2] *See Goncalves Pontes v. Barr*, 938 F.3d 1, 6–7 (1st Cir. 2019); *Banegas Gomez v. Barr*, 922 F.3d 101, 110–12 (2d Cir. 2019); *Nkomo v. U.S. Att'y Gen.*, 930 F.3d 129, 133–34 (3d Cir. 2019); *United States v. Cortez*, 930 F.3d 350, 363 (4th Cir. 2019); *Pierre-Paul*, 930 F.3d at 690; *Santos-Santos v. Barr*, 917 F.3d 486, 490–91 (6th Cir. 2019); *Ali v. Barr*, 924 F.3d 983, 986 (8th Cir. 2019); *Karingithi v. Whitaker*, 913 F.3d 1158, 1161–62 (9th Cir. 2019).

deferring to the BIA. *Hernandez-Perez*, 911 F.3d at 314–15; *Karingithi*, 913 F.3d at 1161; *see Bermudez-Cota*, 27 I. & N. Dec. at 447.

The Fourth and Fifth Circuits disagree and find the regulations provide a claims-processing, not jurisdictional, rule. *Cortez*, 930 F.3d at 362; *Pierre-Paul*, 930 F.3d at 692. The Seventh and Eleventh Circuits also hold that the statutory time requirement is a claims-processing, not a jurisdictional rule. *Perez-Sanchez*, 935 F.3d at 1154; *Ortiz-Santiago*, 924 F.3d at 963. Similarly, the Tenth Circuit holds that neither the statute nor the regulations provide a jurisdictional rule. *Lopez-Munoz v. Barr*, 941 F.3d 1013, 1015-18 (10th Cir. 2019).

The First and Third Circuits reject that § 1229(a)(1) has jurisdictional significance but do not decide whether the regulations do. *Goncalves Pontes*, 938 F.3d at 7 n.3; *Nkomo*, 930 F.3d at 134. In light of the fractured reasoning of the circuits' decisions on the jurisdictional significance of the statutory and regulatory definitions of "Notice to Appear," certiorari should be granted.

C. The Fifth Circuit's restrictions on collaterally attacking removal orders in illegal reentry prosecutions conflict with this Court's precedent and violate due process

The offense of illegal reentry depends on a determination made in an administrative proceeding. § 1326(a); *United States v. Mendoza-Lopez*, 481 U.S. 828, 837–38 (1987). The government must prove the defendant is a noncitizen who "has been ... removed" from the United States and later reenters the United States without permission. § 1326(a). Section 1326(d) provides that a defendant "may not challenge the validity of the deportation order ... unless" the defendant shows exhaustion of administrative remedies, deprivation of

judicial review, and fundamental unfairness. Due process, however, requires a defendant be allowed to challenge the jurisdictional basis of the administrative order being used to prosecute him.

This Court considered the use of an administrative order to impose criminal sanctions when selective service registrants, whose military inductions were ordered by local boards, were prosecuted for refusing to be inducted into the military. *Estep v. United States*, 327 U.S. 114 (1946). Even though the statute did not specify that defendants could collaterally attack those induction orders, the Court could not "believe that Congress intended that criminal sanctions were to be applied to orders issued by local boards no matter how flagrantly they violated the rules and regulations which define their jurisdiction." *Id.* at 121. The Court refused to resolve any statutory ambiguity against the accused, noting that "[w]e are dealing here with a question of personal liberty." *Id.* at 122.

Here, too, we are dealing with a question of personal liberty and an administrative agency that acted outside the authority defining its jurisdiction. Congress limits any challenge to the "validity of the deportation order" in § 1326(d), but that cannot be read to remove the government's burden to prove that a defendant has been removed. § 1326(a). Just as a notice to appear without a hearing time is not a notice to appear, *Pereira*, 138 S. Ct. at 2116, a removal order entered without jurisdiction is not removal order.

Alternatively, § 1326(d) is unconstitutional if it prevents a defendant from challenging the jurisdictional validity of the removal order. To comport with due process, petitioners must be able to challenge whether the immigration court lacked jurisdiction

even if he cannot satisfy the § 1326(d) criteria. The Fifth Circuit's decision in *Pedroza-Rocha* to the contrary, as applied to petitioners' cases, conflicts with this Court's precedent in *Estep*.

D. The Court should grant certiorari.

For decades, immigration authorities ignored the statutory requirement to include a hearing time in the notice to appear. In the past two decades, well over 200,000 notices to appear were filed on average per year.[3] Most of those notices lacked hearing times. *Pereira*, 138 S. Ct. at 2111. As a result, millions of people have been deported by an agency without authority to do so.

Many of those removed came back unlawfully. Illegal reentry continues to be the most prosecuted federal felony.[4] In fiscal year 2018, over 18,000 people were sentenced for illegal reentry.[5] These prosecutions not only cost defendants their liberty, taxpayers

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[3] *See* U.S. Dep't of Justice, Executive Office for Immigration Review (EOIR), Statistics Yearbook FY 2018, at 7, https://www.justice.gov/eoir/file/1198896/download; U.S. Dep't of Justice, EOIR, FY 2013 Statistics Yearbook, at A7 (Apr. 2014), https://www.justice.gov/sites/default/files/eoir/legacy/2014/04/16/fy13syb.pdf; U.S. Dep't of Justice, EOIR, FY 2008 Statistical Year Book, at B1 (Mar. 2009), https://www.justice.gov/sites/default/files/eoir/legacy/2009/03/27/fy08syb.pdf; U.S. Dep't of Justice, EOIR, FY 2003 Statistical Year Book, at B2 (Apr. 2004), https://www.justice.gov/sites/default/files/eoir/legacy/2008/04/18/fy03syb.pdf.

[4] TRAC-Immigration, Immigration Prosecutions for 2019 (Oct. 31, 2019), https://tracfed.syr.edu/results/9x705dbb47e5a0.html.

[5] U.S. Sentencing Comm'n, Quick Facts: Illegal Reentry Offenses (Fiscal Year 2018), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Illegal_Reentry_FY18.pdf.

pay approximately $27,000 to detain a defendant for the average 10-month sentence.[6] The number affected militates against leaving the agency's deliberate decades-long violation of a congressional directive unchecked.

For these reasons, the consolidated petition for certiorari should be granted. Alternatively, if the Court grants certiorari in *Pedroza-Rocha*, No. 19-6588, the petition should be held pending this Court's final decision in *Pedroza-Rocha* and then disposed of as appropriate in light of that decision.

[6] U.S. Dep't of Justice, U.S. Marshals Service, FY 2020 Performance Budget: Federal Prisoner Detention Appropriation 19 (Mar. 2019), https://www.justice.gov/jmd/page/file/1144161/download (daily non-federal facility cost in fiscal year 2018 was $90.17).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Date: February 26, 2020

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
FILED
February 17, 2020
Lyle W. Cayce
Clerk

No. 19-20524
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff–Appellee,

versus

JUAN ALBERTO CANTU-SIGUERO,

Defendant–Appellant.

Appeal from the United States District Court
for the Southern District of Texas
No. 4:19-CR-78-1

Before DAVIS, SMITH, and HIGGINSON, Circuit Judges.

PER CURIAM:*

Juan Cantu-Siguero appeals his conviction of illegal reentry after

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

deportation in violation of 8 U.S.C. § 1326(a) and (b)(1). Cantu-Siguero entered a conditional guilty plea, reserving his right to appeal the denial of his motion to dismiss.

Cantu-Siguero contends that the district court erred in denying his motion to dismiss the indictment. He contends that his original removal order was void because the immigration judge lacked jurisdiction to issue it, given that it followed a defective notice to appear that failed to specify a date and time for the removal hearing. In the alternative, Cantu-Siguero contends that he either satisfies or is excused from the 8 U.S.C. § 1326(d) requirements to attack his removal proceeding collaterally.

Cantu-Siguero acknowledges that his contentions are foreclosed by *United States v. Pedroza-Rocha*, 933 F.3d 490 (5th Cir.), *petition for cert. filed* (U.S. Nov. 6, 2019) (No. 19-6588), and *Pierre-Paul v. Barr*, 930 F.3d 684 (5th Cir.), *petition for cert. filed* (U.S. Dec. 16, 2019) (No. 19-779). He explains that he has raised them on appeal to preserve further review. The government has filed an unopposed motion for summary affirmance, agreeing that the points are foreclosed under *Pedroza-Rocha* and *Pierre-Paul*. In the alternative, the government requests an extension of time to file its brief.

Summary disposition is proper where, *inter alia*, the position of one party is "clearly right as a matter of law so that there can be no substantial question as to the outcome of the case." *Groendyke Transp., Inc. v. Davis*, 406 F.2d 1158, 1162 (5th Cir. 1969). Because Cantu-Siguero's arguments are foreclosed by this court's precedent, there is no substantial question as to the outcome. *See id.* Accordingly, the motion for summary affirmance is GRANTED, the alternative motion for an extension is DENIED as unnecessary, and the judgment is AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
FILED
January 10, 2020
Lyle W. Cayce
Clerk

No. 19-20190
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

JOSE GOMEZ-LOPEZ, also known as Pedro Antonio Trujillo, also known as Mercedes Escalante, also known as Roberto M Escalante,

Defendant-Appellant

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:18-CR-485-1

Before JOLLY, JONES, and SOUTHWICK, Circuit Judges.

PER CURIAM:*

Jose Gomez-Lopez appeals his conviction of illegal reentry into the United States and was sentenced to 24 months of imprisonment and one year of supervised release. He entered a conditional guilty plea to the indictment, reserving the right to challenge the district court's denial of his motion to dismiss the indictment.

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Now, Gomez-Lopez asserts, as he did in the district court, that his prior removal was invalid because the notice to appear which commenced the proceeding was defective for failing to specify a place, date, and time for his removal hearing. He contends therefore that the removal order is void and that the Government cannot establish an essential element of the illegal reentry offense under 8 U.S.C. § 1326. He concedes that this challenge is foreclosed by *United States v. Pedroza-Rocha*, 933 F.3d 490 (5th Cir. 2019), *petition for cert. filed* (U.S. Nov. 6, 2019) (No. 19-6588), but he wishes to preserve the issue for further review.

The Government has filed an unopposed motion for summary affirmance, agreeing that the issue is foreclosed under *Pedroza-Rocha*. Alternately, the Government requests an extension of time to file its brief.

Summary affirmance is appropriate if "the position of one of the parties is clearly right as a matter of law so that there can be no substantial question as to the outcome of the case." *Groendyke Transp., Inc. v. Davis*, 406 F.2d 1158, 1162 (5th Cir. 1969).

Pedroza-Rocha concluded that the notice to appear was not deficient, that any such alleged deficiency had not deprived the immigration court of jurisdiction, and that Pedroza-Rocha could not collaterally attack his notice to appear without first exhausting his administrative remedies. 933 F.3d at 496-98. Gomez-Lopez's arguments are, as he concedes, foreclosed. *See id.* Accordingly, the Government's motion for summary affirmance is GRANTED, the Government's alternative motion for an extension of time to file a brief is DENIED, and the judgment of the district court is AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
FILED
February 7, 2020
Lyle W. Cayce
Clerk

No. 19-20393
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

HORACIO GUTIERREZ-MURILLO,

Defendant-Appellant

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:18-CR-563-1

Before HIGGINBOTHAM, HO, and ENGELHARDT, Circuit Judges.

PER CURIAM:*

Horacio Gutierrez-Murillo appeals his conviction for illegally reentering the United States after being removed. He challenges the district court's denial of his motion to dismiss the indictment. He argues that the indictment was invalid because the prior removal order was void due to a defective notice to appear that failed to specify a time and date for his removal hearing. He concedes that the issue is foreclosed by *Pierre-Paul v. Barr*, 930 F.3d 684, 689-

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

93 (5th Cir. 2019), *petition for cert. filed* (U.S. Dec. 16, 2019) (No. 19-779), and *United States v. Pedroza-Rocha*, 933 F.3d 490 (5th Cir. 2019), *petition for cert. filed* (U.S. Nov. 12, 2019) (No. 19-6588), but he wishes to preserve it for further review. The Government has filed an unopposed motion for summary affirmance, agreeing that the issue is foreclosed under *Pierre-Paul* and *Pedroza-Rocha*. Alternately, the Government requests an extension of time to file a brief.

In *Pedroza-Rocha*, this court applied *Pierre-Paul* to conclude that the notice to appear was not rendered deficient because it did not specify a date for the hearing, that any such alleged deficiency had not deprived the immigration court of jurisdiction, and that Pedroza-Rocha could not collaterally attack his notice to appear without first exhausting his administrative remedies. *Pedroza-Rocha*, 933 F.3d at 496-98. Gutierrez-Murillo's arguments are, as he concedes, foreclosed. *See id.* Because the Government's position "is clearly right as a matter of law so that there can be no substantial question as to the outcome of the case," *Groendyke Transp., Inc. v. Davis*, 406 F.2d 1158, 1162 (5th Cir. 1969), the Government's motion for summary affirmance is GRANTED, the Government's alternative motion for an extension of time to file a brief is DENIED AS MOOT, and the judgment of the district court is AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
FILED
February 5, 2020
Lyle W. Cayce
Clerk

No. 19-20525
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

EDUARDO HERNANDEZ CASTELLANOS,

Defendant-Appellant

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:18-CR-592-1

Before WIENER, HAYNES, and COSTA, Circuit Judges.

PER CURIAM:*

Eduardo Hernandez Castellanos appeals his conviction for illegal reentry into the United States. He entered a conditional guilty plea, reserving the right to challenge the district court's denial of his motion to dismiss the indictment. The district court sentenced him to 12 months and one day of imprisonment and two years of supervised release. Although Hernandez Castellanos is not presently incarcerated for the instant conviction, his appeal

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

of his conviction is not moot. *See Spencer v. Kemna*, 523 U.S. 1, 7-8 (1998); *United States v. Lares-Meraz*, 452 F.3d 352, 355 (5th Cir. 2006).

Hernandez Castellanos argues, as he did in the district court, that his prior removal was invalid because it followed a defective notice to appear that failed to specify a date and hearing time. He further contends that he may collaterally attack the removal proceeding without exhausting his administrative remedies. He concedes that his arguments are foreclosed by *United States v. Pedroza-Rocha*, 933 F.3d 490 (5th Cir. 2019), *petition for cert. filed* (U.S. Nov. 6, 2019) (No. 19-6588), and he explains that he has raised the arguments to preserve them for further review. The Government has filed an unopposed motion for summary affirmance, agreeing that the issues are foreclosed under *Pedroza-Rocha*. The Government, alternatively, requests an extension of time to file its brief.

Summary affirmance is appropriate if "the position of one of the parties is clearly right as a matter of law so that there can be no substantial question as to the outcome of the case." *Groendyke Transp., Inc. v. Davis*, 406 F.2d 1158, 1162 (5th Cir. 1969). Hernandez Castellanos's arguments are indeed foreclosed. *See Pedroza-Rocha*, 933 F.3d at 496-98; *see also Pierre-Paul v. Barr*, 930 F.3d 684, 688-93 (5th Cir. 2019), *petition for cert. filed* (U.S. Dec. 16, 2019) (No. 19-779).

Accordingly, the Government's motion for summary affirmance is GRANTED, the Government's alternative motion for an extension of time to file a brief is DENIED, and the judgment of the district court is AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
FILED
January 30, 2020
Lyle W. Cayce
Clerk

No. 19-20507
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

PEDRO PALACIOS GUEVARA,

Defendant-Appellant

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:19-CR-47-1

Before WIENER, HAYNES, and COSTA, Circuit Judges.

PER CURIAM:*

Pedro Palacios Guevara appeals his conviction of illegal reentry into the United States after deportation subsequent to a felony conviction. He entered a conditional guilty plea to the indictment, reserving the right to challenge the district court's denial of his motion to dismiss the indictment. The district court sentenced him to 48 months of imprisonment.

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Now, Guevara asserts, as he did in the district court, that his prior removal was invalid because the notice to appear which commenced the proceeding was defective for failing to specify a date and time for his removal hearing. He contends therefore that the removal order is void and that the Government cannot establish an essential element of the illegal reentry offense under 8 U.S.C. § 1326. He concedes that this challenge is foreclosed by *United States v. Pedroza-Rocha*, 933 F.3d 490 (5th Cir. 2019), *petition for cert. filed* (U.S. Nov. 6, 2019) (No. 19-6588), but he wishes to preserve the issue for further review.

The Government has filed an unopposed motion for summary affirmance, agreeing that the issue is foreclosed under *Pedroza-Rocha*. Alternately, the Government requests an extension of time to file its brief.

Summary affirmance is appropriate if "the position of one of the parties is clearly right as a matter of law so that there can be no substantial question as to the outcome of the case." *Groendyke Transp., Inc. v. Davis*, 406 F.2d 1158, 1162 (5th Cir. 1969). *Pedroza-Rocha* concluded that the notice to appear was not deficient for failing to specify a date and time for the hearing, that any such alleged deficiency had not deprived the immigration court of jurisdiction, and that Pedroza-Rocha could not collaterally attack his notice to appear without first exhausting his administrative remedies. 933 F.3d at 496–98. Guevara's arguments are, as he concedes, foreclosed by this case. *See id*; *see also Pierre-Paul v. Barr*, 930 F.3d 684, 688-90 (5th Cir. 2019). Accordingly, the Government's motion for summary affirmance is GRANTED, the Government's alternative motion for an extension of time to file a brief is DENIED, and the judgment of the district court is AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
FILED
January 29, 2020
Lyle W. Cayce
Clerk

No. 19-20382
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

ODWAR GEOVANY PALOMEQUE-RAMOS, also known as Jose Lopez,

Defendant-Appellant

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:19-CR-24-1

Before CLEMENT, ELROD, and OLDHAM, Circuit Judges.

PER CURIAM:*

Odwar Geovany Palomeque-Ramos appeals his conviction for illegal reentry into the United States in violation of 8 U.S.C. § 1326. He entered a conditional guilty plea, reserving the right to challenge the district court's denial of his motion to dismiss the indictment. Relying on *Pereira v. Sessions*, 138 S. Ct. 2105 (2018), Palomeque-Ramos argues that his prior removal order was invalid because the notice to appear was defective for failing to include the

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

date and time of his removal hearing. Therefore, Palomeque-Ramos asserts that his prior removal could not support a conviction for illegal reentry under § 1326. He concedes that this challenge is foreclosed by *United States v. Pedroza-Rocha*, 933 F.3d 490 (5th Cir. 2019), *petition for cert. filed* (U.S. Nov. 6, 2019) (No. 19-6588), and *Pierre-Paul v. Barr*, 930 F.3d 684 (5th Cir. 2019), *petition for cert. filed* (U.S. Dec. 16, 2019) (No. 19-779), but he wishes to preserve the issue for further review. The Government has filed an unopposed motion for summary affirmance, agreeing that the issue is foreclosed under *Pedroza-Rocha* and *Pierre-Paul*. Alternately, the Government requests an extension of time to file its brief.

Summary affirmance is appropriate if "the position of one of the parties is clearly right as a matter of law so that there can be no substantial question as to the outcome of the case." *Groendyke Transp., Inc. v. Davis*, 406 F.2d 1158, 1162 (5th Cir. 1969). In *Pedroza-Rocha*, 933 F.3d at 492-93, the district court dismissed an indictment charging the defendant with a violation of § 1326 based on the reasoning that the notice to appear was defective because it did not specify a date and time for the removal hearing and that, therefore, the removal order was void. Our court reversed, concluding that the notice to appear was not defective, that the alleged defect would not deprive an immigration court of jurisdiction, and that § 1326(d) barred the defendant from collaterally attacking his removal order because he had failed to exhaust his administrative remedies. *Id.* at 496-98.

Pedroza-Rocha forecloses Palomeque-Ramos's arguments. *See id.* Accordingly, the Government's motion for summary affirmance is GRANTED, the Government's alternative motion for an extension of time to file a brief is DENIED, and the judgment of the district court is AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
FILED
January 30, 2020
Lyle W. Cayce
Clerk

No. 19-20394
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

JOSE ANTONIO VARGAS CASTRO,

Defendant-Appellant

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:18-CR-570-1

Before HIGGINBOTHAM, HO, and ENGELHARDT, Circuit Judges.

PER CURIAM:*

Jose Antonio Vargas Castro appeals his conviction for illegally reentering the United States after being removed. He challenges the district court's denial of his motion to dismiss the indictment. He argues that the indictment was invalid because the prior removal order was void due to a defective notice to appear that failed to specify a time and date for his removal hearing. He concedes that the issue is foreclosed by *Pierre-Paul v. Barr*, 930

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F.3d 684, 689-93 (5th Cir. 2019), and *United States v. Pedroza-Rocha*, 933 F.3d 490 (5th Cir. 2019), *petition for cert. filed*, (U.S. Nov. 6, 2019) (No. 19-6588), but he wishes to preserve it for further review. The Government has filed an unopposed motion for summary affirmance, agreeing that the issue is foreclosed under *Pierre-Paul* and *Pedroza-Rocha*. Alternatively, the Government requests an extension of time to file a brief.

In *Pedroza-Rocha*, this court applied *Pierre-Paul* to conclude that the notice to appear was not rendered deficient because it did not specify a date for the hearing, that any such alleged deficiency had not deprived the immigration court of jurisdiction, and that the defendant could not collaterally attack his notice to appear without first exhausting his administrative remedies. *Pedroza-Rocha*, 933 F.3d at 496-98. Vargas Castro's arguments are, as he concedes, foreclosed. *See id.* Because the Government's position "is clearly right as a matter of law so that there can be no substantial question as to the outcome of the case," *Groendyke Transp., Inc. v. Davis*, 406 F.2d 1158, 1162 (5th Cir. 1969), the Government's motion for summary affirmance is GRANTED, the Government's alternative motion for an extension of time to file a brief is DENIED, and the judgment of the district court is AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
FILED
February 3, 2020
Lyle W. Cayce
Clerk

No. 19-20305
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff–Appellee,

versus

MARGARITO ZARATE-HERNANDEZ,

Defendant–Appellant.

Appeal from the United States District Court
for the Southern District of Texas
No. 4:18-CR-562-1

Before DAVIS, SMITH, and HIGGINSON, Circuit Judges.

PER CURIAM:*

Margarito Zarate-Hernandez pleaded guilty of illegal reentry. The plea

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

was conditional, reserving the right to challenge the denial of a motion to dismiss the indictment. On appeal, Zarate-Hernandez reiterates his argument that the immigration court in his initial removal proceeding never acquired jurisdiction because his notice to appear failed to specify a date and time of hearing. As a result, he contends, the removal order is void, which left the government unable to prove an essential element of the offense. As to 8 U.S.C. § 1326(d), which limits an alien's ability to attack a removal order collaterally, Zarate-Hernandez asserts that it poses no obstacle because his challenge is jurisdictional in nature and because, given the state of the law at the time of his initial removal proceeding, he is excused from meeting the requirements of § 1326(d)(1) and (2).

Zarate-Hernandez concedes that these arguments are foreclosed by *United States v. Pedroza-Rocha*, 933 F.3d 490 (5th Cir. 2019), *petition for cert. filed* (U.S. Nov. 6, 2019) (No. 19-6588), and for the most part we agree. There too the defendant argued that failure to include date-and-time information in a notice to appear is a jurisdictional defect, and we found that argument to be both without merit and barred by § 1326(d) for failure to exhaust. *Pedroza-Rocha*, 933 F.3d at 496–98. Zarate-Hernandez's identical and similarly unexhausted jurisdictional argument must accordingly fail for the same reasons.

Pedroza-Rocha does not speak to Zarate-Hernandez's contention that he can escape the strictures of § 1326(d)(1) and (2) under a "futility" exception, but other authority shows that theory to be unavailing. An alien "must prove all three prongs" of § 1326(d) to challenge a prior removal order. *United States v. Cordova-Soto*, 804 F.3d 714, 719 (5th Cir. 2015). In claiming fundamental unfairness under the third prong of § 1326(d), Zarate-Hernandez relies solely on the jurisdictional argument that *Pedroza-Rocha* foreclosed. Any argument as to prongs one and two is therefore moot. *See United States v. Mendoza-*

Mata, 322 F.3d 829, 832 (5th Cir. 2003) ("If the alien fails to establish one prong of the three part test, the Court need not consider the others.").

For the foregoing reasons, we DENY the government's motion for summary affirmance, DENY as unnecessary its alternative motion for an extension of time to file a brief, and AFFIRM the judgment.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
FILED
February 14, 2020
Lyle W. Cayce
Clerk

No. 19-20378
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

JUAN DE DIOS TREVINO-VILLARREAL,

Defendant-Appellant

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:18-CR-565-1

Before WIENER, HAYNES, and COSTA, Circuit Judges.

PER CURIAM:*

Juan De Dios Trevino-Villarreal appeals his conviction for illegal reentry into the United States. He challenges the district court's denial of his motion to dismiss the indictment, arguing that his indictment was invalid because the prior order of removal was void, as the notice to appear did not specify a time and date for his removal hearing. He concedes that his argument is foreclosed by *United States v. Pedroza-Rocha*, 933 F.3d 490 (5th Cir. 2019), *petition for*

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

cert. filed (U.S. Nov. 6, 2019) (No. 19-6588), but he wishes to preserve it for further review.

The Government has filed an unopposed motion for summary affirmance, agreeing that the issue is foreclosed under *Pedroza-Rocha*. Summary affirmance is appropriate if "the position of one of the parties is clearly right as a matter of law so that there can be no substantial question as to the outcome of the case." *Groendyke Transp., Inc. v. Davis*, 406 F.2d 1158, 1162 (5th Cir. 1969). Alternatively, the Government requests an extension of time to file its brief.

In *Pedroza-Rocha*, 933 F.3d at 496-98, we held that the notice to appear was not deficient merely because it did not specify a date for the hearing, any such purported deficiency had not deprived the immigration court of jurisdiction, and the appellant could not collaterally attack his notice to appear without first exhausting his administrative remedies. Trevino-Villarreal's arguments are, as he concedes, foreclosed by this case. *See id.*

Accordingly, the Government's motion for summary affirmance is GRANTED, the Government's alternative motion for an extension of time to file a brief is DENIED, and the judgment of the district court is AFFIRMED.

United States District Court
Southern District of Texas
ENTERED
April 03, 2019
David J. Bradley, Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA	§	
	§	
VS.	§	CRIMINAL NO. 4:19-CR-00078
	§	
JUAN ALBERTO CANTU-SIGUERO	§	

ORDER

On this day, the Court considered the defendant's motion to dismiss the indictment (Dkt. No. 12). The Court, having considered the motion, is of the opinion that the motion should be **DENIED**.

It is, therefore, **ORDERED** that the defendant's Motion to Dismiss the Indictment is hereby **DENIED**.

It is so ORDERED.

SIGNED on this 3rd day of April, 2019.

Kenneth M. Hoyt
United States District Judge

United States District Court
Southern District of Texas
ENTERED
January 09, 2019
David J. Bradley, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA,	§	
	§	
Plaintiff,	§	
	§	
v.	§	CRIMINAL NUMBER H-18-485-01
	§	
JOSE GOMEZ-LOPEZ,	§	
	§	
Defendant.	§	

MEMORANDUM OPINION AND ORDER

Defendant Jose Gomez-Lopez has filed a Motion to Dismiss the Indictment ("Defendant's Motion") (Docket Entry No. 14), to which the United States has filed its Opposition to Defendant Jose Gomez-Lopez's Motion to Dismiss the Indictment (Docket Entry No. 17); and defendant has filed a Reply to the United States' Opposition to Motion to Dismiss the Indictment (Docket Entry No. 20) and a Reply to the United States' Supplemental Exhibits (Docket Entry No. 25).

On August 22, 2008, defendant was served with a Notice to Appear ("NTA") before an immigration judge for a removal hearing. The NTA stated that the hearing would be held on "a date to be set at a time to be set."[1] On August 26, 2008, defendant signed a Request for Prompt Hearing, stating:

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[1]NTA, Exhibit 2 to Defendant's Motion, Docket Entry No. 14-3, p. 2.

> To expedite a determination in my case, I request an immediate hearing. I waive my right to a 10-day period prior to appearing before an immigration judge.[2]

Also on August 26, 2008, the defendant executed in English and Spanish a Stipulated Request for Order of Removal and Waiver of Hearing in which he stated, inter alia:

> I, Jose GOMEZ-LOPEZ ("Respondent"), voluntarily and knowingly make the following requests, statements, admissions and stipulations. I understand that by signing this document, I am requesting a prompt order or removal from the United States.
>
> 1. I have received a copy of the Notice to Appear ("NTA") dated 08/22/08 and my full, true and correct name is as indicated therein. *See* attached NTA.
>
> 2. I have been advised of my right to be represented by a lawyer or other qualified person to represent aliens in immigration proceedings at no expense to the government of the United States. I have also been provided a copy of the legal aid list.
>
> 3. I am at least 18 years of age.
>
> 4. I hereby voluntarily concede and acknowledge that I am not a citizen of the United States. I further voluntarily concede and acknowledge that my parents are not citizens of the United States and, therefore, I do not derive any citizenship benefits from my parents.
>
> 5. I understand that I have the right to a hearing before an Immigration Judge in which hearing I have the right to be represented, the opportunity to examine and object to the evidence presented against me, to present witnesses on my own behalf, to cross-examine witnesses presented by the government, to present my own evidence and that the government may be required to prove that I am removable from the United States. Knowing the above, I hereby waive those rights and request my removal proceedings be conducted solely by way of written record without a hearing.

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[2] Id. at 2.

6. I request that my removal from the United States be based solely on this stipulated request. By signing this document, I understand that I am giving up the right to appear before an Immigration Judge and that I will be removed from the United States without a hearing.

7. I admit that all of the factual allegations contained in the NTA are true and correct as written, and I concede that I should be removed from the United States based on the charges contained therein.

8. I voluntarily and knowingly agree, stipulate and represent that I am not applying for any form of relief from removal, including but not limited to: voluntary departure, asylum, withholding of removal, protection under the Convention Against Torture, adjustment of status, registry, de novo review of a denial or revocation of temporary protected status, cancellation of removal under Section 240(A) of the Immigration and Nationality Act ("Act"), or any other possible relief under the Act.

9. I consent to the introduction of this document as an exhibit to the record of proceedings.

10. I request that an order be issued for my removal to: MEXICO.

11. I accept a written order for my removal to the above county [sic] as a final disposition of these removal proceedings.

12. I waive my right to appeal the written decision for my removal from the United States.

13. I, or my attorney, have read (or I have had read to me in a language I understand) this entire document. I fully understand its consequences. I can unequivocally state that I have submitted this document voluntarily, knowingly, and intelligently.

14. I understand that based on the removal charge(s), I will be barred for Lifetime from returning to the United States.

> I certify that all of the information I have given in this document is true and correct.[3]

On August 27, 2008, the immigration judge ordered that the defendant be removed from the United States, and he was removed on August 28, 2008.[4] On at least five subsequent occasions defendant reentered the United States. On each occasion he was arrested and removed after the 2008 removal order was reinstated.

Defendant was indicted in this action for illegal reentry after being convicted of a felony in violation of 8 U.S.C. §§ 1326(a) and (b)(1) (Docket Entry No. 1). In his Motion the defendant argues that as a result of the United States Supreme Court's recent decision in Pereira v. Sessions, 138 S. Ct. 2105, 2110-14 (2018), the immigration judge lacked subject matter jurisdiction, rendering the 2008 removal order and all subsequent removals based on that order void. Defendant also argues that the underlying removal order "did not comport with due process and 8 U.S.C. § 1326(d)" (Defendant's Motion, Docket Entry No. 14, page 2).

There is no authority by the United States Court of Appeals that directly addresses the effect of Pereira on indictments under 8 U.S.C. § 1326. District courts have reached differing conclusions. Having carefully considered these opinions the court concludes that the December 14, 2018, Memorandum and Order entered

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[3]Exhibit 2 to Decision of the Immigration Judge, Docket Entry No. 24-2.

[4]Decision of the Immigration Judge, Exhibit 1 to Defendant's Motion, Docket Entry No. 14-2, p. 2.

by Judge Diana Saldaña in United States of America v. Guillermo Malagamba-De Leon, Criminal Action No. 5:18-00691, correctly analyzes and resolves these issues raised by Defendant's Motion. As Judge Saldaña explained,

> . . . even assuming without deciding that Defendant's jurisdictional arguments are correct, he is still not entitled to the relief he seeks. A jurisdictionally defective removal order may still serve as the basis for a Section 1326 prosecution, and a Section 1326 defendant who seeks to challenge his underlying removal order on jurisdictional grounds must still satisfy all three requirements of Section 1326(d).

Memorandum and Order in 5:18-00691, Docket Entry No. 27, p. 17.

8 U.S.C. § 2326(d) provides:

> (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.

If a defendant fails to satisfy any of these elements, the court need not consider the other elements. See United States v. Mendoza-Mata, 322 F.3d 829, 832 (5th Cir. 2003).

A removal order of an immigration judge may be appealed to the Board of Immigration Appeals ("BIA"). See 8 C.F.R. § 1003.3. Defendant has not exhausted his administrative remedies by seeking

relief from the BIA; in fact, he expressly "waive[d] [his] right to appeal the written decision for [his] removal from the United States."[5] Defendant argues that he is not required to exhaust his administrative remedies because the immigration proceeding was void under Pereira. But a court's exercise of apparent jurisdiction, even if erroneous, is not subject to collateral attack if the party seeking to challenge the order had the prior opportunity to challenge jurisdiction and failed to do so.[6] See, e.g., Royal Insurance Company of America v. Quinn-L Capital Corporation, 960 F. 2d 1286, 1293 (5th Cir. 1992); United States v. Hansard, 2007 WL 2141950, *1 (5th Cir. 2007). Therefore, even assuming arguendo that the immigration judge lacked jurisdiction, defendant was required to exhaust his administrative remedies in order to challenge the underlying removal order. It is undisputed that he failed to do so.

Defendant has also failed to show that the 2008 removal proceeding improperly deprived him of the opportunity for judicial review. Defendant conceded that he had no right to be present in the United States and requested that he be removed to Mexico. Defendant's decision to waive his right to appeal the removal order

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[5]Stipulated Request for Order of Removal and Waiver of Hearing, Exhibit 2A to Decision of the Immigration Judge, Docket Entry No. 24-2, ¶ 12.

[6]Even assuming that the failure to include the date and time of the removal proceeding in the NTA deprived the immigration judge of subject matter jurisdiction, the immigration judge in this case would have reasonably believed that jurisdiction existed.

precludes him from satisfying the second requirement for a collateral challenge under § 1326(d).

Nor has defendant demonstrated that entry of the removal order was prejudicial or otherwise unfair. Entry of a removal order may be fundamentally unfair or prejudicial to the defendant if there is a "reasonable likelihood that but for the errors complained of the defendant would not have been" removed. See Mendoza-Mata, 322 F.3d at 832 (citation omitted). Defendant admitted that he was not lawfully present in the United States, asked to be removed to Mexico, and requested an expedited hearing. There is nothing in the record to indicate that if the NTA had included the date and time for the removal proceeding, the proceeding would not have resulted in defendant's removal.

Because defendant has failed to establish any of the three § 1326(d) requirements to challenge collaterally his prior removal order, the Motion to Dismiss the Indictment (Docket Entry No. 14) is **DENIED**.

This case is set for a jury trial on February 4, 2019, at 1:00 p.m. By January 29, 2019, counsel will file exhibit lists, witness lists, and a proposed jury charge.

SIGNED at Houston, Texas, on this 9th day of January, 2019.

SIM LAKE
UNITED STATES DISTRICT JUDGE

United States District Court
Southern District of Texas
ENTERED
January 18, 2019
David J. Bradley, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA	§	
	§	
	§	
v.	§	CR. NO. H-18-563
	§	
	§	
HORACIO GUTIERREZ-MURILLO	§	

MEMORANDUM AND ORDER DENYING MOTION TO DISMISS INDICTMENT

Pending is Defendant Horacio Gutierrez-Murillo's Motion to Dismiss Indictment (Document No. 15). After carefully considering the motion, response, reply, supplemental reply, the arguments of counsel at the December 21, 2018 pretrial conference, and applicable law, the Court concludes for the reasons that follow that the motion should be denied.

I. Background

Defendant Horacio Gutierrez-Murillo, a citizen of Mexico, is charged with illegally reentering the United States after having been removed following conviction of a felony, in violation of 8 U.S.C. § 1326(a) and (b)(1).[1] Defendant entered the United States illegally sometime before March 2002, the month by which he was convicted of felony theft in Harris County, Texas, and sentenced to a term of imprisonment.[2] In early 2006, Defendant was convicted of

[1] Document No. 1 (Indictment).

[2] Document No. 22-4.

APPENDIX L
19-20393.112

another felony theft and was sentenced to another term of imprisonment. In March 2006, Defendant received a "Notice to Appear" ordering him to appear before an immigration judge "on a date to be set at a time to be set" to show why he should not be removed.[3] Defendant by his signature on the Certificate of Service acknowledged that the Notice was served on him in person.[4] He additionally signed a Request for Prompt Hearing to expedite the hearing on his case.[5] On April 3, 2006, Defendant attended his hearing, which concluded with the immigration judge ordering him removed from the United States.[6] Defendant waived his right to appeal the removal order,[7] and was removed from the United States. Thereafter, Defendant repeatedly reentered the United States illegally and continued to commit crimes in this country, resulting in additional convictions and successive removals of Defendant twice in 2009 and once in 2011.[8] In July 2011, Defendant was convicted in this Court of illegal reentry in violation of 8 U.S.C. § 1326(a) and (b)(1) and sentenced to 26 months in prison.[9] After

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[3] Document No. 22-1 at 1.

[4] Id. at 2.

[5] Id.

[6] Document No. 22-2.

[7] Id.

[8] Document Nos. 22-7, 23-1, 23-2.

[9] Document No. 23-4.

serving this sentence, Defendant was again removed in 2013.[10] Undeterred, Defendant illegally reentered the United States yet again, and was arrested in Harris County, Texas, in August 2018 for driving under the influence of alcohol with a minor child in his vehicle.[11] While that charge remained pending, Defendant was released by Harris County into ICE custody and was subsequently indicted on the instant illegal reentry offense.[12]

Defendant now argues that the Indictment must be dismissed because his March 2006 Notice to Appear failed to state the time and date of Defendant's removal hearing, such that the immigration judge lacked jurisdiction to issue the removal order on which Defendant's subsequent removals (which establish a necessary element of the crime of illegal reentry) were based.

II. Discussion

A. *Pereira v. Sessions* and Developing Caselaw on Similar Motions to Dismiss Indictments

Defendant's argument relies on the Supreme Court's recent decision in Pereira v. Sessions, 138 S. Ct. 2105 (2018), a case which did not involve criminal charges under § 1326. Instead, Pereira involved application of a special statutory rule relating

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[10] *See* Document No. 23-5 at 3.

[11] Document No. 23-5.

[12] Id.

to continuous residence or physical presence in the United States, known as the "stop-time rule." 8 U.S.C. § 1229b(d)(1). The stop-time rule provides that an alien's period of continuous residence or continuous physical presence is deemed to end when the alien "is served a notice to appear [at a removal proceeding] under section 1229(a)."[13] Id. The Supreme Court held that "[a] notice that does not inform a noncitizen when and where to appear for removal proceedings is not a 'notice to appear under section 1229(a)' and therefore does not trigger the stop-time rule." Pereira, 138 S. Ct. at 2110. As observed in Pereira, the Attorney General in 1997 promulgated a regulation taking a different approach, namely, that a notice to appear need only provide the time, place, and date of the removal hearing "where practical." Id. at 2111. As a result, nearly all of the notices served on aliens by the Department of Homeland Security in recent years fail to specify the time, date, or place of initial removal hearings whenever the agency deems it impracticable to include such information. Id.

After the Supreme Court decided Pereira in June 2018, numerous criminal defendants charged with illegal reentry moved to dismiss their indictments, arguing--like Defendant--that the predicate

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[13] An alien subject to removal proceedings who has been physically present in the United States for a continuous period of ten years or more may be eligible for cancellation of removal. 8 U.S.C. § 1229b(b)(1)(A). Under the stop-time rule, an alien who is served with a notice to appear before having been present for ten years in the United States is ineligible for cancellation of removal.

removal orders were void because the notices to appear had not included the details of date and time required under Pereira such that the immigration judges lacked jurisdiction to order their removal. No circuit court of appeals has yet squarely ruled on the issue, but the Fourth Circuit last month affirmed a § 1326 conviction and sentence of a defendant who argued for the first time on appeal that the district court committed plain error by not dismissing the indictment *sua sponte*, where the defendant's initial notice to appear in 2004 had lacked the date and time information required by Pereira. United States v. Perez-Arellano, No. 18-4301, 2018 WL 6617703 (4th Cir. Dec. 17, 2018) (unpublished). In Perez-Arellano, the defendant upon receiving the notice to appear had waived his hearing and requested a removal order without a hearing. The Fourth Circuit held that the defendant had waived his challenge to the validity of his 2004 removal proceeding, but regardless, the district court had not erred because "Pereira did not address the question of an immigration judge's jurisdiction to rule on an alien's removability, and it certainly does not plainly undermine the jurisdiction of the 2004 removal proceeding." Perez-Arellano, 2018 WL 6617703, at *3.

Faced with motions to dismiss indictments similar to Defendant's motion, a substantial majority of district courts, both nationwide and in the Southern District of Texas, have denied the motions, most of them holding that the defendants have not

satisfied the requirements of 8 U.S.C. § 1326(d) to make a collateral attack upon the removal order.[14]

Defendant principally argues that the Indictment must be dismissed because his Notice to Appear was defective under Pereira and therefore the immigration court lacked subject matter jurisdiction to order his removal. Pereira did not involve jurisdictional challenges, and the Supreme Court's opinion did not address jurisdiction. However, 8 C.F.R. § 1003.14(a) provides that

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[14] The Court is aware of fifteen decisions on similar motions issued within the Southern District of Texas. Thirteen of those decisions denied the defendants' motions: United States v. Camacho-Diaz, No. 4:18-cr-557 (S.D. Tex. Nov. 16, 2018) (Gilmore, J.), ECF No. 19; United States v. Ibarra-Ramos, No. 4:18-cr-618 (S.D. Tex. Nov. 16, 2018) (Gilmore, J.), ECF No. 11; United States v. Molinero-Jimenez, No. 1:18-cr-908 (S.D. Tex. Dec. 4, 2018) (Rodriguez, J.), ECF No. 18; United States v. Casas-Ramirez, No. 4:18-cr-445 (S.D. Tex. Dec. 5, 2018) (Hughes, J.), ECF No. 21; United States v. Gutierrez-Rodriguez, No. 4:18-cr-596 (S.D. Tex. Dec. 10, 2018) (Gilmore, J.), ECF No. 17; United States v. Tellez Valencia, No. 4:18-cr-520 (S.D. Tex. Dec. 12, 2018) (Hughes, J.), ECF No. 23; United States v. Malagamba-De Leon, No. 5:18-cr-691 (S.D. Tex. Dec. 14, 2018) (Saldaña, J.), ECF No. 27; United States v. Lara-Martinez, No. 4:18-cr-647 (S.D. Tex. Dec. 14, 2018) (Atlas, J.), ECF No. 19; United States v. Medina-Sanchez, No. 5:18-cr-502 (S.D. Tex. Dec. 17, 2018) (Saldaña, J.), ECF No. 32; and United States v. Pena-Cruz, No. 5:18-cr-535 (S.D. Tex. Dec. 17, 2018) (Saldaña, J.), ECF No. 35; United States v. Gomez-Lopez, No. CR H-18-485-01, 2019 WL 147539 (S.D. Tex. Jan. 9, 2019) (Lake, J.); United States v. Reyna Rodriguez, No. CR H-18-519, 2019 WL 147477 (S.D. Tex. Jan. 9, 2019) (Lake, J.); United States v. Hernandez Lozano, No. CR H-18-598, 2019 WL 224178 (S.D. Tex. Jan. 15, 2019) (Hanen, J.). Three of these denials--those issued by Judge Gilmore--were without prejudice and abated the cases to allow the defendants the opportunity to exhaust their administrative remedies. The only two decisions dismissing indictments based on Pereira were United States v. Tzul, No. 4:18-CR-521, 2018 WL 6613348 (S.D. Tex. Dec. 4, 2018) (Ellison, J.), and United States v. Ramirez Flores, No. 18-cr-569 (S.D. Tex. Dec. 6, 2018) (Ellison, J.), ECF No. 21.

"[j]urisdiction vests, and proceedings before an Immigration Judge commence, when a charging document is filed with the Immigration Court by the Service." Defendant relies on this regulation, together with the regulatory definition of "charging document" as "the written instrument which initiates a proceeding before an Immigration Judge," including a "Notice to Appear," 8 C.F.R. § 1003.13, to argue that the defect in his Notice to Appear deprived the immigration judge of jurisdiction to order his removal. The Government disputes that the immigration judge lacked subject matter jurisdiction.

B. Statutory Requirements for Challenging Underlying Removal Order in an Illegal Reentry Prosecution under § 1326

Even if Defendant's 2006 order of removal was invalid for lack of jurisdiction, Defendant still would not be entitled to dismissal of the Indictment because he fails to satisfy the statutory requirements to make a collateral challenge to the 2006 order. Congress unambiguously provided in § 1326, the statute under which Plaintiff is charged, that:

> 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.

8 U.S.C. § 1326(d). This section "effectively codified" the three-prong common law test previously stated by the Fifth Circuit. United States v. Cordova-Soto, 804 F.3d 714, 719 (5th Cir. 2015) (citing United States v. Lopez-Vasquez, 227 F.3d 476, 483 n.13 (5th Cir. 2000)). "To successfully challenge a removal order, the alien must prove all three prongs." Id. "If the alien fails to establish one prong of the three part test, the Court need not consider the others." United States v. Mendoza-Mata, 322 F.3d 829, 832 (5th Cir. 2003). Additionally, the Fifth Circuit requires a showing that the procedural deficiencies caused the alien actual prejudice. Id. "A showing of prejudice means that 'there was a reasonable likelihood that but for the errors complained of the defendant would not have been deported.'" Id. (quoting United States v. Benitez-Villafuerte, 186 F.3d 651, 658 (5th Cir. 1999)).

Defendant cannot satisfy the first two requirements of § 1326(d) because he did not exhaust his administrative remedies, nor did the immigration court's proceedings deprive him of the opportunity for judicial review. It is uncontroverted that Defendant received the Notice to Appear, signed the document twice--once to acknowledge the notice was served on him in person

and again to request an expedited hearing that was granted. He then attended his removal hearing in person. At the conclusion of the hearing the immigration judge ordered Defendant removed from the United States, Defendant waived his appeal rights, and Defendant never sought further administrative relief or took an appeal from the removal order.[15] "[A] valid waiver of the right to appeal a deportation order precludes a later collateral attack." United States v. Zapata-Cortinas, No. SA-18-CR-00343-OLG, 2018 WL 6061076, at *10 (W.D. Tex. Nov. 20, 2018) (quoting United States v. Garza-Sanchez, 217 F.3d 806, 808 (9th Cir. 2000)); *accord* United States v. Cerna, 603 F.3d 32, 38 (2d Cir. 2010) ("[I]f an alien knowingly and voluntarily waives his right to appeal an order of deportation, then his failure to exhaust administrative remedies

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[15] An immigration judge's removal order can be appealed to the Board of Immigration Appeals. 8 C.F.R. § 1003.3. Congress also provided for judicial review of removal orders by the appropriate court of appeals. 8 U.S.C. § 1252(a)(1); 28 U.S.C. § 2349(a). Defendant argues in his reply brief that "[s]ince the immigration proceedings were void, Mr. Gutierrez-Murillo was also effectively deprived of the right to seek judicial review." Document No. 25 at 9. But "it is well within an appellate body's power to declare orders void if the underlying tribunal lacked jurisdiction." Zapata-Cortinas, 2018 WL 6061076, at *12 (citing Diaz v. Sessions, 894 F.3d 222, 226 (5th Cir. 2018) ("We generally have jurisdiction to review orders of removal ...."); Brumfield v. La. State Bd. of Educ., 806 F.3d 289 (5th Cir. 2015) (reversing and dissolving district court injunction that was void for lack of subject matter jurisdiction)); *see also* United States v. Molinero-Jimenez, No. 1:18-cr-908 (S.D. Tex. Dec. 4, 2018), ECF No. 18 at 6 ("That the removal order might have been void for lack of jurisdiction in no way prevented Mr. Molinero from seeking administrative remedies or judicial review on that very basis, irrespective of the probability of success for such efforts.").

will bar collateral attack on the order in a subsequent illegal reentry prosecution under § 1326(d).").

Defendant argues that he is excused from exhausting his administrative remedies or seeking judicial review because the immigration court proceedings were void.[16] But § 1326(d) itself contemplates invalid removal orders and provides the requirements for collaterallly challenging such orders, and it contains no exception where the challenge is based on a lack of subject matter jurisdiction. The Supreme Court has suggested that illegal reentry convictions under § 1326 need not be based only on deportations that were "lawful." United States v. Mendoza-Lopez, 107 S. Ct. 2148, 2153 (1987) ("Some of the Courts of Appeals considering the question have held that a deportation is an element of the offense defined by § 1326 only if it is 'lawful,' and that § 1326 therefore permits collateral challenge to the legality of an underlying deportation order. The language of the statute, however, suggests

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[16] Defendant relies heavily on United States v. Zapata-Cortinas, No. SA-18-CR-00343-OLG, 2018 WL 4770868, at *1 (W.D. Tex. Oct. 2, 2018), in which Chief Judge Orlando L. Garcia at first accepted the same arguments advanced by Defendant and dismissed an indictment for illegal reentry. But Chief Judge Garcia later granted the Government's motion to reconsider, vacated his original Order, and denied the motion to dismiss, explaining in a thorough and well-reasoned opinion that the defendant's challenge was not exempt from the requirements of § 1326(d) and that the defendant had not met his burden to establish that he had exhausted all administrative remedies or that the removal proceedings had deprived him of the opportunity for judicial review. United States v. Zapata-Cortinas, No. SA-18-CR-00343-OLG, 2018 WL 6061076, at *9 (W.D. Tex. Nov. 20, 2018).

no such limitation[.]") (footnote omitted).[17] *See also* United States v. Earle, 488 F.3d 537, 547 (1st Cir. 2007) ("In an illegal reentry prosecution, the lawfulness of deportation simply is not an element of the offense."); United States v. Alvarado-Delgado, 98 F.3d 492, 493 (9th Cir. 1996) (en banc) (overruling precedent holding that the lawfulness of a prior deportation is an element of the offense under § 1326, because "[t]he Supreme Court held to the contrary in [Mendoza-Lopez]"); United States v. Paredes-Batista, 140 F.3d 367, 380 (2d Cir. 1998) ("8 U.S.C. § 1326 does not require that the alien have been 'properly' or 'lawfully' deported.") (citing Mendoza-Lopez, 107 S. Ct. at 2153 & n.9).

Moreover, the Fifth Circuit has upheld a § 1326 conviction where the removal order had been issued by a body that lacked jurisdiction, holding that the defendant still needed to satisfy all three of § 1326(d)'s requirements. United States v. Castelan-Jaimes, 575 F. App'x 253, 254-55 (5th Cir. 2014) (holding that "[b]ecause Castelan-Jaimes failed to satisfy the requirements for challenging the BIA's removal order collaterally," the removal order "may permissibly serve as a basis for his conviction under § 1326" even though "Castelan-Jaimes is correct that the BIA does not have the authority to order the removal of an alien in the

[17] Mendoza-Lopez predated the enactment of § 1326(d), but the current version of § 1326 still contains no language requiring the underlying removal or deportation to be "lawful" to sustain a conviction for illegal reentry.

first instance"). Defendant offers no binding authority to the contrary, and has not shown that a jurisdictional defect in his removal order excuses his compliance with the requirements for collateral challenge established by Congress in § 1326(d). *See* Zapata-Cortinas, 2018 WL 6061076, at *8 ("[T]here is no indication that Congress or the Mendoza-Lopez Court intended to treat jurisdictional defects differently than any other type of 'unlawful' or invalid removal order."); United States v. Gonzalez-Roque, 301 F.3d 39, 47 (2d Cir. 2002) ("Statutory exhaustion requirements such as that set forth in § 1326(d) are 'mandatory, and courts are not free to dispense with them.'") (citation omitted); *accord, e.g.*, United States v. Malagamba-De Leon, No. 5:18-cr-691 (S.D. Tex. Dec. 14, 2018), ECF No. 27 at 21 (quoting Gonzalez-Roque and denying motion to dismiss indictment).[18]

Defendant's collateral challenge additionally fails because he has not shown actual prejudice. Defendant argues that he was prejudiced because but for the immigration judge's error in ordering his removal without jurisdiction, Defendant would not have

[18] Given Defendant's failure to satisfy the requirements of § 1326(d)(1) and (2), it is unnecessary to prolong this Memorandum with consideration of whether the entry of the removal order was fundamentally unfair so as to satisfy § 1326(d)(3). Mendoza-Mata, 322 F.3d at 832 ("If the alien fails to establish one prong of the three part test, the Court need not consider the others."). Under the facts of this case, however, one would be hard pressed even to conceive of an argument as to why Defendant's removal order in 2006 was "fundamentally unfair."

been removed.[19] Defendant misunderstands the nature of the prejudice required by the Fifth Circuit's caselaw. As observed above, "[a] showing of prejudice means that 'there was a reasonable likelihood that but for the errors complained of the defendant would not have been deported.'" Mendoza-Mata, 322 F.3d at 832 (quoting Benitez-Villafuerte, 186 F.3d at 658). If the errors of which Defendant complains had not occurred--that is, if the date and time had been included in his Notice to Appear--there is no reason to believe that the proceeding would not have resulted in an order for Defendant's removal. Accordingly, Defendant was not prejudiced by the defective Notice to Appear. *See* United States v. Lara-Martinez, No. 4:18-cr-647 (S.D. Tex. Dec. 14, 2018), ECF No. 19 at 7 (finding no prejudice because "[t]here is nothing in the record to indicate that if the Notice to Appear had included the date and time for the removal proceeding--a proceeding at which Defendant was present--the proceeding would not have resulted in Defendant's removal."); *accord* Reyna Rodriguez, 2019 WL 147477, at *3.

In sum, Defendant has failed to make the showing necessary under § 1326(d) to attack collaterally his prior removal order because he cannot demonstrate that he exhausted his administrative remedies, that his removal proceedings deprived him of the opportunity for judicial review, or that the hearing's omission

[19] Document No. 15 at 12.

of the date and time in his 2006 Notice to Appear caused him actual prejudice. Defendant is not entitled to dismissal of the Indictment.

III. Order

It is therefore

ORDERED that Defendant's Motion to Dismiss Indictment (Document No. 15) is DENIED.

The Clerk will enter this Order, providing a correct copy to all parties of record.

SIGNED at Houston, Texas, on this 18th day of January, 2019.

EWING WERLEIN, JR.
UNITED STATES DISTRICT JUDGE

United States District Court
Southern District of Texas
ENTERED
April 26, 2019
David J. Bradley, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA,	§	
	§	
v.	§	CRIMINAL NO. 4:18-00592
	§	
EDUARDO HERNANDEZ CASTELLANOS,	§	
Defendant.	§	

MEMORANDUM AND ORDER

Before the Court is Defendant Eduardo Hernandez Castellanos's Motion to Dismiss Indictment ("Motion to Dismiss" or "Motion") [Doc. # 19]. The Government filed a response,[1] and Hernandez replied.[2] The Motion is now ripe for decision. Based on the parties' briefing, relevant matters of record, and pertinent legal authority, the Court **denies** the Motion.

I. BACKGROUND

Defendant Eduardo Hernandez Castellanos, a citizen of Mexico, is charged by indictment with illegal re-entry into the United States in violation of 8 U.S.C. § 1326. Indictment [Doc. # 1]. Castellanos was admitted into the country in 1972

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1 The United States' Opposition to Defendant Eduardo Hernandez Castellanos' Motion to Dismiss the Indictment ("Response") [Doc. # 21].

2 Defendant's Reply to Government's Response to Defendant's Motion to Dismiss Indictment ("Reply") [Doc. # 22].

as a Legal Permanent Resident. On September 4, 2007, Castellanos pleaded guilty and was sentenced to 9 months in Texas state prison for possession one gram of heroin. *See* Doc. # 21-2.

On February 26, 2008, Castellanos was released from Texas-state prison into custody of Immigration and Custom Enforcement ("ICE") officials. On February 29, 2008, Castellanos received form I-862, tiled Notice of Appear ("NTA"), notifying him of his immigration hearing before an Immigration Judge ("IJ"). Notice to Appear dated February 29, 2008 [Doc. # 21-4]. The NTA stated that Castellanos's immigration hearing would be held at a time and date "to be set." Castellanos signed the NTA and requested an expedited hearing, waiving his right to the 10-day waiting period. Without leaving ICE custody, Castellanos attended his deportation hearing, which was held on March 14, 2018. After the hearing, the IJ ordered Castellanos deported to Mexico, and Castellanos left the United States on March 18, 2008.

The 2008 removal order has been reinstated three times—once in 2012, 2013, and 2018. Most recently, on November 19, 2017, Castellanos was discovered in Hidalgo County Texas, and indictment was filed against him charging him with illegal reentry. Castellanos moves to dismiss this indictment.

II. DISCUSSION

Castellanos argues that the 2008 order of removal is void and thus cannot support a § 1326 conviction. Castellanos's fundamental argument is that the IJ lacked subject matter jurisdiction to issue the 2008 removal order because the NTA failed to specify a date and time for the removal proceedings. Castellanos submits that under federal statute, regulation, and the Supreme Court's recent decision in *Pereira v. Sessions*, NTAs *must* provide notice of the date and time of the removal proceedings to be valid and to vest jurisdiction in the immigration court. *See Pereira v. Sessions*, 138 S. Ct. 2105, 2110-14 (2018). District courts across the country have grappled with similar challenges and reached different conclusions.

The Court concludes that Castellanos's challenge does not warrant dismissal of the indictment because Castellanos's collateral attack on the 2008 removal order is barred by 8 U.S.C. § 1326(d). Consequently, the Court **denies** Castellanos's Motion.

A. Section 1326(d) Bars Castellanos's Collateral Attack

Section 1326(d) limits the ability of defendants charged with illegal reentry to collaterally attack an underlying deportation order. A defendant may not challenge the validity of the underlying removal order unless he demonstrates three separate things: (1) he has exhausted any administrative remedies that may have been available to seek relief against the order; (2) the removal proceedings

resulting in the order deprived the defendant of the opportunity for judicial review; and (3) the entry of the underlying order was fundamentally unfair. 8 U.S.C. § 1326(d); *United States v. Garrido*, 519 F. App'x 241, 242 (5th Cir. 2013) (per curiam); *United States v. Lopez-Ortiz*, 313 F.3d 225, 229 (5th Cir. 2002). The defendant must establish all three prongs to prevail; the failure to prove one is fatal to his challenge. *See United States v. Mendoza-Mata*, 322 F.3d 829, 832 (5th Cir. 2003) (setting forth the same three factors as § 1326(d); *United States v. Cordova-Soto*, 804 F.3d 714, 718 (5th Cir. 2015). Castellanos fails to satisfy § 1326(d)'s third prong—that the underlying proceedings were "fundamentally unfair."

To demonstrate the underlying proceedings were "fundamentally unfair," a defendant must show "actual prejudice," meaning "there was a reasonable likelihood that but for the errors complained of the defendant would not have been deported." *See Mendoza-Mata*, 322 F.3d at 832 (quoting *United States v. Benitez-Villafuerte*, 186 F.3d 651, 659 (5th Cir. 1999)); *Garrido*, 519 F. App'x at 242 ("To show actual prejudice, the alien must establish that, but for the errors of which he complains, there is a reasonable likelihood that he would not have been deported."). The "errors complained of" here were the NTA's failure to specify the date and time of an immigration hearing. However, Castellanos in fact appeared at the hearing. *See Mendoza-Mata*, 322 F.3d at 832.

Castellanos fails to demonstrate, or even argue, that had he received an NTA with a hearing date and time, he would not have been deported. Castellanos requested an expedited removal hearing and was present at that hearing. There is no indication in the record that had the NTA included the date and time for the removal hearing, the outcome would have been different. Castellanos does not demonstrate the entry of the removal order was fundamentally unfair. He is therefore barred from collaterally attacking his 2008 removal order. *See United States v. Lara-Martinez*, CR H-18-647, 2018 WL 6590798, at *3 (S.D. Tex. Dec. 14, 2018) (denying motion to dismiss indictment based on § 1326(d)'s bar when the defendant requested an expedited hearing, which was held with defendant present, and nothing in the record indicated that, if the NTA had included the date and time, the proceeding would not have resulted in the defendant's removal).

B. Jurisdictional Attacks Are Not Exempt from § 1326(d)'s Strictures

Castellanos argues that because his collateral attack is based on lack of subject matter jurisdiction, it is exempt from § 1326(d)'s strictures. Castellanos cites no Circuit or Supreme Court authority to support his contention, but at least two district courts in this Circuit have been persuaded not to apply § 1326(d) to jurisdictional attacks akin to Castellanos's. *See United States v. Tzul*, 345 F. Supp. 3d 785, 788 (S.D. Tex. 2018) (Ellison, J.); *United States v. Cruz-Jimenez*, No. A-

17-CR-00063-SS, 2018 WL 5779491, at *2 (W.D. Tex. Nov. 2, 2018) (Sparks, J.), *appeal filed*, No. 18-50943 (5th Cir. Nov. 8, 2018). To reach their conclusion, the *Tzul* and *Cruz-Jimenez* courts relied on Fifth Circuit authority that "*any* judgment may be collaterally attacked if it is void for lack of jurisdiction." *Jacuzzi v. Pimienta*, 762 F.3d 419, 420 (5th Cir. 2014) (per curiam) (alteration in original); *In re Reitnauer*, 152 F.3d 341, 344 (5th Cir. 1998) ("It is true that (1) jurisdictional defects render a judgment void, and (2) void judgments are subject to collateral attack."). The Court is not persuaded these Fifth Circuit precedents avail Castellanos.

Jacuzzi and *Reitnauer* stand only for the proposition that lack of jurisdiction is always a *basis* for a collateral attack. This insight does not resolve the question of what *standard* to apply to a collateral attack based on a jurisdictional defect. For example, a civil litigant collaterally attacking a final civil judgment will not prevail by merely demonstrating a jurisdictional defect. Rather, she must show the defect was "exceptional"—*i.e.*, "the court that rendered judgment lacked even an 'arguable basis' for jurisdiction." *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 271 (2010) (quoting *Nemaizer v. Baker*, 793 F.2d 58, 65 (2d Cir. 1986)).

In this case, the Court must decide what standard applies to collateral attacks on removal orders based on lack of subject matter jurisdiction. Congress has seen fit to impose requirements on collateral attacks against prior removal orders,

without excepting jurisdictional attacks. Castellanos, *Tzul*, and *Cruz-Jimenez* offer no basis—statutory or otherwise—to conclude that jurisdictional attacks are exempt from § 1326(d)'s strictures, and thus the Court concludes that Castellanos's collateral attack must satisfy § 1326(d)'s three prongs.

III. CONCLUSION AND ORDER

Because Castellanos has failed to satisfy § 1326(d)'s three requirements, his attack on the prior removal order is barred. Castellano's Motion to Dismiss the indictment fails. It is therefore

ORDERED that Defendant's Motion to Dismiss Indictment [Doc. # 19] is **DENIED**.

SIGNED at Houston, Texas, this 26th day of **April, 2019.**

United States District Court
Southern District of Texas
ENTERED
March 18, 2019
David J. Bradley, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA	§	
	§	
	§	
v.	§	CRIMINAL NO. H-19-047
	§	
	§	
PEDRO PALACIOS GUEVARA	§	

MEMORANDUM AND OPINION

Pedro Palacios Guevara has moved to dismiss the indictment charging him with violating 8 U.S.C. § 1326 by illegal reentry after a prior deportation. He argues that the indictment is based on a 2008 removal order from an Immigration Court that lacked subject-matter jurisdiction. (Docket Entry No. 17). Guevara was removed based on that order, but was later found and charged under 8 U.S.C. § 1326 with illegal reentry. Guevara argues that because the Immigration Court ordered him removed without jurisdiction in 2008, the removal was invalid. (*Id.* at 1). Alternatively, he argues that the original removal order violated his due process rights and 8 U.S.C. § 1326(d), and that the government cannot prove illegal reentry without an original valid removal. (*Id.*).

Guevara is one of many defendants making these arguments following the Supreme Court's decision in *Pereira v. Sessions*, 138 S. Ct. 2105 (2018), based on the Notices to Appear used to set their hearings on removal. The issue is a Notice to Appear that does not state the date and time of the hearing. Three circuit courts have addressed the issue and found no jurisdictional defect or due process violation when such a Notice to Appear leads to removal. *See Karingithi v. Whitaker*, 913 F.3d 1158 (9th Cir. 2019); *Hernandez-Perez v. Whitaker*, 911 F.3d 305 (6th Cir. 2018); *Santos-*

Santos v. Barr, No. 18-3515, 2019 WL 961560 (6th Cir. Feb. 28, 2019); *Leonard v. Whitaker*, 746 F. App'x 269 (4th Cir. 2018) (per curiam). District courts have reached conflicting results.[1]

I. Procedural History

Guevara is charged with illegal reentry into the United States, in violation of 8 U.S.C. § 1326(a) and (b)(1). (*See* Docket Entry No. 10). The government alleges that Guevara illegally entered the United States sometime before August 2007, when he was arrested in Harris County, Texas for driving while intoxicated. (Docket Entry No. 18-2). He was released from the custody of the Texas Department of Corrections in June 2008, into the custody of U.S. Immigration and Customs Enforcement. (Docket Entry No. 18 at 2). The government began removal proceedings

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[1] Some district courts have dismissed the indictment without a § 1326(d) analysis based on a conclusion that a statutorily deficient Notice to Appear does not vest an immigration judge with jurisdiction. *See e.g.*, *United States v. Santiago Tzul*, No. 4:18-CR-521-KPE, 2018 WL 6613348 (S.D. Tex. Dec. 4, 2018), *notice of appeal filed*, 18-20802 (Dec. 6, 2018); *United States v. Alfredo-Valladares*, No. 1:17-CR-156-SS, 2018 WL 6629653 (W.D. Tex. Oct. 30, 2018), *notice of appeal filed*, 18-50953 (Nov. 1, 2018); *United States v. Pedroza-Rocha*, No. 3:18-CR-1286-DB, 2018 WL 6629649 (W.D. Tex. Sept. 21, 2018), *notice of appeal filed*, 18-50828 (Oct. 2, 2018); *United States v. Virgen-Ponce*, 320 F. Supp. 3d 1164 (E.D. Wash. 2018). Some district courts have concluded that although a statutorily deficient Notice to Appear does not vest an immigration judge with jurisdiction, the defendants must nonetheless satisfy the requirements of § 1326(d). *See e.g.*, *United States v. Rangel-Rodriguez*, No. 18-CR-581, 2019 WL 556725 (N.D. Ill. Feb. 12, 2019) ("[E]ven assuming that the 2010 was defective, [the defendant] must satisfy the requirements of section 1326(d) to collaterally attack the underlying removal order."); *United States v. Francisco Hernandez-Lopez*, No. 5:18-CR-625(1)-DAE, 2018 WL 6313292 (W.D. Tex. Dec. 3, 2018) (assuming jurisdiction without deciding and holding that the defendant was not entitled to relief under § 1326(d)); *United States v. Gerardo Sandoval-Cordero*, No. 3:18-CR-2370-KC, 342 F. Supp. 3d 722, 2018 WL 6253251 (W.D. Tex. Nov. 29, 2018) (defendant did not satisfy § 1326(d)); *United States v. Margarito Zapata-Cortinas*, No. 5:18-CR-343-OLG, 2018 WL 6061076 (W.D. Tex. Nov. 20, 2018) (same); *United States v. Lopez-Urgel*, No. 1.18-CR-310-RP, 2018 WL 5984845 (W.D. Tex. Nov. 14, 2018), *notice of appeal filed*, 18-50970 (Nov. 15, 2018) (defendant satisfied § 1326(d)). Other district courts have concluded that a statutorily deficient Notice to Appear does not affect an Immigration Court's jurisdiction and that a defendant must satisfy § 1326(d). *See e.g.*, *United States v. Hernandez-Aguilar*, No. 5:18-CR-137-FL-1, 2019 WL 456172 (E.D.N.C. Feb. 5, 2019) (defendant did not satisfy § 1326(d)); *United States v. Torres-Castelan*, No. 1:18-CR-354-LY, 2019 WL 361684 (W.D. Tex. Jan. 29, 2019); *United States v. Saravia-Chavez*, No. 3:18-CR-16-NKM, 2018 WL 5974302 (W.D. Va. Nov. 14, 2018) (defendant did not satisfy § 1326(d)); *United States v. Ramos-Delcid*, No. 3.18-CR-20-NKM, 2018 WL 5833081 (W.D. Va. Nov. 7, 2018), *notice of appeal filed*, 18-4859 (Nov. 28, 2018) (defendant who was removed in abstentia satisfied § 1326(d)).

against him through the issuance of a Notice to Appear on June 23, 2008. (Docket Entry No. 17-2). The Notice did not specify when the court would hold his hearing. (*See id.* (stating that Guevara was to appear "on a date to be set" and "at a time to be set")). Guevara attended his hearing, and, on June 30, 2008, the Immigration Judge ordered Guevara deported. Guevara was removed on July 1, 2008. (*See* Docket Entry No. 18-2 at 7–9). Guevara reentered the United States in 2014, his order of deportation was reinstated, and he was deported again that year. (*Id.* at 10–15). He reentered the United States again after the 2014 deportation and was arrested in 2018 for driving while intoxicated. (*See id.* at 17–21).

II. Guevara's Challenge to Subject-Matter Jurisdiction

Guevara argues that the Immigration Court lacked subject-matter jurisdiction to issue the 2009 removal order, making the order invalid. Without a valid removal order, he argues, the government cannot prove a necessary element of its reentry charge against him. (Docket Entry No. 17 at 3). Guevara argues that because the 2008 Notice to Appear did not state a date or time for his removal hearing, it was not a valid charging document under federal law. (*Id.*).

Under 8 U.S.C. § 1229a, Immigration Judges have the authority to "conduct proceedings for deciding the inadmissibility or deportability of an alien." 8 U.S.C. § 1229a(a)(1). These proceedings are "the sole and exclusive" means of "determining whether an alien may be . . . removed from the United States." § 1229a(a)(3). Immigration Courts have limited jurisdiction. "Jurisdiction vests, and proceedings before an Immigration Judge commence, when a charging document is filed with the Immigration Court." 8 C.F.R. § 1003.14(a). Charging documents for proceedings after April 1, 1997, are to "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." 8 C.F.R. § 1003.13.

Guevara argues that a valid Notice to Appear is a prerequisite to the commencement of a removal proceeding, making the lack of a valid Notice to Appear a bar to an Immigration Court's legally issuing a removal order. When an Immigration Court exceeds its delegated power, orders it issues are "a legal nullity." (Docket Entry No. 17 at 5 (citing *James v. Gonzales*, 464 F.3d 505, 513 (5th Cir. 2006))). Guevara argues that the Notice to Appear issued on in 2008, "was deficient because it had no information regarding the time and date of his hearing," making it an invalid Notice to Appear, depriving the Immigration Court of jurisdiction, and barring his removal proceedings from "commencing" under 8 C.F.R. § 1003.14(a). (*Id.* at 6).

These arguments are largely based on *Pereira v. Sessions*, 138 S. Ct. 2105 (2018), in which the Supreme Court held that a valid Notice to Appear under 8 U.S.C. § 1229(a) must include the time and place of a hearing for the "stop-time rule" to operate. *Id.* at 2118 ("[T]he statute makes clear that Congress fully intended to attach substantive significance to the requirement that noncitizens be given notice of at least the time and place of their removal proceedings. A document that fails to include such information is not a 'notice to appear under section 1229(a)' and thus does not trigger the stop-time rule."). The stop-time rule applies in a context different from the present case. Under § 1229b(b)(1)(A), a nonpermanent resident may seek cancellation of removal after 10 years of physical presence in the United States. Once a valid Notice to Appear is served on a nonpermanent resident, that period ends, and further presence in this country does not extend the nopermanent resident's time to seek cancellation of removal. § 1229b(d)(1)(A).

Pereira involved a nonpermanent resident who was served a § 1229(a) Notice that did not include the time and date of the hearing. When he later sought to cancel his removal under § 1229b, his request was denied because he had been served with the § 1229(a) notice. *Id.* at 2112. The Supreme Court held that the denial was improper because the Notice did not include the "time and place at which the [removal] proceedings will be held," § 1299(a)(1)(G)(I), and did not trigger the stop-time rule. The Court explained that "neighboring statutory provision[s]" suggested that the Notice to Appear must include the time and location of the removal proceedings to trigger the stop-time rule. The Court noted that the second paragraph of § 1229 states that "in the case of any change or postponement in the time and place of [removal] proceedings," the government must give the noncitizen "written notice" on the new time or location of the hearing," which the Court took to "presume[] that the Government has already served a 'notice to appear under section 1229(a)' that specified a time and place." *Pereira*, 138 S. Ct. at 2114. The Court also noted that "Section 1229(b)(1) gives a noncitizen 'the opportunity to secure counsel before the first [removal] hearing date' by mandating that such 'hearing date shall not be scheduled earlier than 10 days after the service of the notice to appear.'" *Id.* Without the date and location, a "putative notice to appear . . . is not a 'notice to appear under section 1229(a)(a).'" *Id.* at 2113–14 (quoting 8 U.S.C. § 1229b(d)(1)(A)).

The government argues that the language in 8 C.F.R. § 1003.14 about when "jurisdiction vests" does not change the statutory jurisdictional requirements for Immigration Courts, but instead "create[s] a nonjurisdictional procedural rule." (Docket Entry No. 18 at 6). The government argues that a deficient Notice to Appear may impact the merits of a case, but it does not determine subject-matter jurisdiction, pointing to Supreme Court cases holding, in non-immigration contexts,

"that defects in a charging document do not deprive a court of subject[-]matter jurisdiction." (*Id.* (citing *United States v. Cotton*, 535 U.S. 625, 630-31 (2002); *United States v. Williams*, 341 U.S. 58, 66 (1951); *Lamar v. United States*, 240 U.S. 60, 64–65 (1916))).

The government also challenges Guevara's reading of *Pereira*. According to the government, the Court's narrow holding in *Pereira* did not alter the longstanding rule that a charging document does not determine jurisdiction. (*Id.* at 7). The government argues that the issue central to *Pereira* was how to read the stop-time rule, 8 U.S.C. § 1229b(d)(1)(A), in conjunction with § 1229(a), which establishes the requirements for Notices to Appear. (*Id.* at 8). "The Court's decision turned on the statute's explicit reference to the [Immigration and Nationality Act]'s definition of what constitutes a 'Notice to Appear," and did not discuss the effect of the [Immigration and Nationality Act]-defined Notice might have in other contexts." (*Id.* at 9).

Guevara is correct that § 1229(a) requires a Notice to Appear to specify the time and place of the removal proceeding. As some district courts have recognized, "[t]his reading is strengthened, yet not controlled in the Section 1326 context, by the Court's holding in *Pereira*" because § 1229(a) is unambiguous and does not give the Immigration Court discretion to decided whether to include the hearing's time and place in the Notice to Appear. *United States v. Chavez-Flores*, No. EP-18-CR-03229-FM, 2019 WL 453616, at *3 (W.D. Tex. Feb. 4, 2019). This leaves the question of whether a Notice lacking this information means that the Immigration Court lacks subject-matter jurisdiction to issue a removal order.

The government argues that 8 C.F.R. § 1003.14 "appear[s] to create a nonjurisdictional procedural rule, not a limit on the Immigration Court's power to conduct removal proceedings." (Docket Entry No. 18 at 6). The Fourth, Sixth, and Ninth Circuits have all recently held that *Pereira*

does not apply to cases in which, as here, a defendant challenges the Immigration Court's subject-matter jurisdiction over his removal proceeding on the ground that the Notice to Appear did not state the hearing date and time. *See Karingithi*, 913 F.3d at 1161 ("In short, *Pereira* simply has no application here. The Court never references 8 C.F.R. §§ 1003.13, 1003.14, or 1003.15, nor does the word 'jurisdiction' appear in the majority opinion."); *Hernandez-Perez*, 911 F.3d at 310–15 ("We therefore conclude that jurisdiction vests with the immigration court where, as here, the mandatory information about the time of the hearing, *see* 8 U.S.C. § 1229(a), is provided in a Notice of Hearing issued after the NTA," *id.* at 314–15); *Leonard*, 746 F. App'x at 269.

A number of district courts have rejected arguments similar to those Guevara presents. *See, e.g.*, *United States v. Torres-Castelan*, No. 1:18-CR-354-LY, 2019 WL 361684, at *5 (W.D. Tex. Jan. 29, 2019) (because § 1229 does not reference jurisdiction, "notice to appear is not of jurisdictional consequence"). While a number of district courts had reached a different result, the circuit court decisions have relied primarily on the Board of Immigration Appeals's recent precedential opinion that rejected an argument nearly identical to the one Guevara makes. In *Matter of German Bermudez-Cota*, 27 I. & N. Dec. 441 (B.I.A. Aug. 31, 2018), the Board rejected the argument that *Pereria* applied to determine an Immigration Court's jurisdiction when "the respondent is not seeking cancellation of removal, and the stop-time rule is not at issue." *Id.* at 443. The Board explained that "a notice to appear that does not specify the time and place of an alien's initial removal hearing vests an Immigration Judge with jurisdiction over the removal proceedings . . . so long as a notice of hearing specifying this information is later sent to the alien." *Id.* at 447. The Ninth and Sixth Circuits have emphasized that because an agency's interpretation of its own regulations is due "substantial deference" and is "controlling unless plainly erroneous or inconsistent

with the regulation," the Board's decision in *Bermudez-Cota* guides the interpretation of 8 C.F.R. § 1003.14. *See Auer v. Robbins*, 519 U.S. 452, 462 (1997); *see Karingithi*, 913 F.3d at 1161; *Hernandez-Perez*, 911 F.3d at 312.

Section 1229(a)(1) does not "explain when or how jurisdiction vests with the immigration judge—or, more specifically, denote which of the several requirements for [Notices to Appear] listed in § 1229(a)(1) are jurisdictional." *Hernandez-Perez*, 911 F.3d at 313. The regulations state that "[j]urisdiction vests, and proceedings before an Immigration Judge commence, when a charging document is filed with the Immigration Court," but the language listing the information necessary in a Notice to Appear does not require the time and date of the hearing be included. 8 C.F.R. §§ 1003.14(a), 1003.15. These regulations do not refer to § 1229(a), in contrast to *Pereira*, in which the stop-time rule at issue in § 1229(b)(1)(A) cross-referenced § 1229(a). *Pereira*, 138 S. Ct. at 2114.

Because the statute and regulations are ambiguous, the court defers to the agency's interpretation. *Pereira* does not show that the Board's interpretation is plainly erroneous. As the Sixth Circuit noted, "*Pereira*'s emphatically 'narrow framing' counsels in favor of distinguishing between" deficient Notices to Appear in the stop-time context and those related to questions of an Immigration Court's subject-matter jurisdiction. *Hernandez-Perez*, 911 F.3d at 314. The Fifth Circuit has also suggested that *Pereira* should be read narrowly, explaining in a footnote of its opinion upholding the Board of Immigration Appeals's decision to dismiss a petitioner's appeal of his motion to reopen removal proceedings that *Pereira*'s "narrow question was whether a NTA that does not specify the time or place of removal hearing triggers the 'stop-time rule' for purposes of a cancellation of removal." *Mauricio-Benitez v. Sessions*, 908 F.3d 144, 148 n.1 (5th Cir. 2018).

The more recent district court decisions on the issue are also in the direction of rejecting *Pereira*-based challenges similar to Guevara's. *See, e.g.*, *United States v. Gaeta-Galvez*, No. 18-CR-134-JPS-JPS, 2019 WL 989766, at *6 (E.D. Wis. Mar. 1, 2019) (denying motion to dismiss indictment based on the Notice to Appear's failure to include the hearing date and time); *United States v. Ramirez-Cruz*, No. 2:18-CR-206-FtM-38MRM, 2019 WL 952313, at *2 (M.D. Fla. Feb. 27, 2019) (same); *United States v. Gonzalez-Ferretiz*, No. 3:18-CR-117, 2019 WL 943388, at *6 (E.D. Va. Feb. 26, 2019) (same); *United States v. Calderon-Avalos*, No. EP-18-CR-3156-PRM, 2019 WL 919210, at *18 (W.D. Tex. Feb. 25, 2019) (same); *see also Lucas v. Nielson*, No. 18-CV-07763-HSG, 2019 WL 88402, at *4 (N.D. Cal. Feb. 22, 2019) (denying for motion for preliminary injunction and petition for writ of habeas corpus in part because the petitioner's original argument was precluded by Ninth Circuit's conclusion a Notice to Appear's failure to include the date and time does not deprive an Immigration Court of jurisdiction).

The law and the record fail to support the motion to dismiss.

III. Guevara's Related Due-Process Challenges

In the alternative, Guevara argues that the court should dismiss the indictment "[b]ecause the immigration court lacked jurisdiction to enter a removal order," which made "the prior removal proceedings . . . fundamentally unfair," in violation of Guevara's due-process rights. (Docket Entry No. 17 at 12). Because, Guevara argues, "the ostensible charging document filed in [his] removal proceedings was not a valid NTA under § 1229(a)(1)(G) and *Pereira*," the Immigration Court's "jurisdiction did not vest and removal proceedings did not commence under 8 C.F.R. § 1003.14(a)." (*Id.* at 13). Guevara contends that "[e]xhaustion of administrative remedies is not required where the remedies are inadequate, inefficacious, or futile . . . or where the administrative proceedings

themselves are void." (*Id.* at 14 (quoting *United Farm Workers of Am., AFL-CIO v. Ariz. Agr. Empl. Relations Bd.*, 669 F.2d 1249, 1253 (9th Cir. 1982)). He points to district courts holding that "the defendant 'need not show that he exhausted administrative remedies because th e immigration court proceedings were void,'" (*id.* (quoting *Virgen-Ponce*, 320 F. Supp. 3d 1164, 1166 (W.D. Tex. July 26, 2018))), and arguing that he suffered actual prejudice because he "was ordered removed when the court had no authority to issue such an order." (*Id.* at 15).

The government argues that Guevara's due-process argument is an invalid collateral attack on his prior removal order under 8 U.S.C. § 1326(d), which states:

> In a criminal proceeding under this section, an alien may not challenge the validity of the deportation order described in section (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 proceeding 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.

8 U.S.C. § 1326(d).

The government argues that Guevara's failure to exhaust his administrative remedies is not excused or inapplicable in this context, characterizing the case Guevara cites as "an outlier among the district court decisions addressing similar motions to dismiss, [that] was erroneously decided." (Docket Entry No. 18 at 15–16). The government urges this court to follow other district courts denying similar defense motions to dismiss indictments because the defendants did not challenge the removal order or appeal from it at the time of the removal. (*Id.* at 16–17 (citing *Lira-Ramirez*, 2018 5013523, at *5; *Munoz-Alvarado*, 2018 WL 4762134, at *1)). The government highlights *De*

La Paz-Zaragoza v. Sessions, No. 18-3221, 2018 U.S. App. LEXIS 28780 (6th Cir. Oct. 11, 2018) (order), in which the Sixth Circuit rejected the defendant's interpretation of *Pereira* as requiring a proper notice to appear for an Immigration Court to have jurisdiction and instead emphasized the noncitizens need to exhaust administrative remedies. The government argues that exempting Guevara from the exhaustion requirement "because the immigration court proceeding was void [would] collapse[] the first and third prongs of § 1326(d)." (*Id.* at 17–18).

The government also argues that Guevara has and cannot show that the 2008 removal proceedings were unfair or otherwise violated due process. (*Id.* at 19). Guevara received and signed the Notice to Appear, "attended the June 2008 hearing," and "had the opportunity to appeal the removal order that resulted from that hearing," although there is no indication that he tried to appeal. (*Id.* at 19). The government contends that Guevara's actions waived any administrative remedies. (*Id.*).

Finally, the government argues that the 2008 removal proceeding was fundamentally fair because there was no actual prejudice to Guevara. (*Id.*). Guevara "participated in his hearing, curing any potential deficiency and removing the potential for prejudice," even if the Notice to Appear had included the hearing's date and time, "it is a near certainty that the proceedings would have taken place in the same manner, at the same time, and with the same result." (*Id.* at 20–21). Guevara cannot show, the government contends, that a Notice to Appear with the date and time would have changed the outcome of the 2008 removal hearing, or would have otherwise prejudiced Guevara, emphasizing that he did not miss his hearing. (*Id.*).

The primary basis for Guevara's argument that the Immigration Court's removal order violated his due process rights is that it lacked jurisdiction to issue that order. The lack of date or

time in the Notice to Appear did not deprive the Immigration Court of subject-matter jurisdiction. Guevara's related arguments that his due process rights were violated, or that fundamental unfairness prejudiced him, fail.

VI. Conclusion

The Fifth Circuit may soon squarely address the argument that the failure to include the date and time in a Notice to Appear deprives an Immigration Court of subject-matter jurisdiction. But based on the Supreme Court's decision in *Pereira*, the statutory and regulatory language, recent circuit court decisions, and the record of Guevara's proceedings, the court follows the three circuit courts that have already directly decided the issue and denies the motion to dismiss the indictment. (Docket Entry No. 17).

SIGNED on March 18, 2019, at Houston, Texas.

Lee H. Rosenthal
Chief United States District Judge

United States District Court
Southern District of Texas
ENTERED
March 01, 2019
David J. Bradley, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA,	§	
	§	
	§	
v.	§	**CASE NO. 4:19-CR-0024**
	§	
ODWAR PALOMENQUE-RAMOS,	§	
	§	
Defendant.	§	

ORDER

Pending before the Court is Defendant's Motion to Dismiss the Indictment. **(Instrument No. 19).**

Defendant's Motion to Dismiss, which identifies defects in his Notice to Appear, is a collateral attack on the immigration court's removal order. To collaterally attack the validity of the removal order, Defendant must first show that he exhausted any administrative remedies. 8 U.S.C. § 1326(d)(1); *see also United States v. Benitez-Villafuerte*, 186 F.3d 651, 658 n.8 (5th Cir. 1999).

Defendant does not deny that he did not exhaust administrative remedies in his case. Instead, he contends that he does not need to show exhaustion of administrative remedies because the immigration court never had subject matter jurisdiction. (Instrument No. 19 at 11-12).

Title 8 U.S.C. § 1229 directs immigration judges to conduct proceedings for deciding the inadmissibility or deportability of an alien in the United States. *See* 8 U.S.C. § 1229a(a)-(c) (directing that "immigration judge[s] shall conduct proceedings for deciding the inadmissibility or deportability of an alien" and stating that unless otherwise specified "a proceeding under this section shall be the sole and exclusive procedure for determining whether an alien may be

admitted to the United States or, if the alien has been so admitted, removed from the United States."). Section 1229 does not provide, however, when and how subject matter jurisdiction over a removal proceeding vests in an immigration court. Rather, separate federal regulations promulgated by the Attorney General dictate when and how an immigration court gains subject matter jurisdiction. *See* 8 U.S.C. § 1103(g)(2). Those regulations specify that "[j]urisdiction vests, and proceedings before an Immigration Judge commence, when a charging document is filed with the Immigration Court by the Service." 8 C.F.R. § 1003.14(a). While federal regulations provide that a "charging document" may include a Notice to Appear, the regulatory provisions that govern notices to appear do not require the time and place provisions Defendant contends make his removal order defective. *See* 8 C.F.R. § 1003.15 (listing the contents of the Notice to Appear and noting that "[f]ailure to provide any of these items shall not be construed as affording the alien any substantive or procedural rights."). Omission of the date and time of the removal hearing on Defendant's Notice to Appear did not extinguish the immigration court's subject matter jurisdiction. Defendant is therefore required to first exhaust his administrative remedies before collaterally attacking the removal order.

Defendant has not exhausted his administrative remedies. Additionally, Defendant has failed to show that relief under 8 U.S.C. § 1326 is warranted. To collaterally attack his removal order, Defendant must show that the entry of the deportation order was fundamentally unfair. 8 U.S.C. § 1326(d)(3). The fundamental unfairness prong requires a defendant to show "actual prejudice." *Benitez-Villafuerte*, 186 F.3d at 658. "In short, if the defendant was legally deportable and, despite the INS [Immigration and Naturalization Service]'s errors, the proceeding could not have yielded a different result, the deportation is valid for purposes of section 1326." *Id.* at 659 (internal quotations omitted). Defendant contends in a conclusory

fashion that he was not legally deportable because the immigration court had no jurisdiction over him. (Instrument No. 19 at 13). However, Defendant fails to show that he was not legally deportable and that, despite the omission of the specific date and time in his Notice to Appear, the proceeding could have yielded a different result.

Accordingly, **IT IS HEREBY ORDERED** that Defendant's Motion to Dismiss is **DENIED without prejudice. (Instrument No. 19).**

IT IS FURTHER ORDERED that this case is **ABATED** to allow Defendant an opportunity to exhaust his administrative remedies in the immigration court.

The Clerk shall enter this Order and provide a copy to all parties.

SIGNED on this the 1st day of March, 2019, at Houston, Texas.

VANESSA D. GILMORE
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF TEXAS

United States District Court
Southern District of Texas
ENTERED
March 20, 2019
David J. Bradley, Clerk

United States of America,	§	
	§	
Plaintiff,	§	
	§	
versus	§	Criminal Action H-18-570
	§	
Jose Antonio Vargas,	§	
	§	
Defendant.	§	

Order Denying Dismissal

Jose Antonio Vargas seeks to attack his removal order collaterally by moving to dismiss the indictment, but he has not met the requirements. Instead of exhausting his administrative remedies – as is required – he argues that he does not have to because the immigration court did not have subject jurisdiction. His basis for this argument is that the notice to appear at the removal proceeding did not specify its date and time, relying on *Pereira*. This case differs from *Pereira*, where a different part of regulatory authority governed the requirements for a notice-to-appear, the defendant was not present at the hearing, and it was a different type of proceeding.[1] Here, the notice-to-appear did not need to specify a date and time; their omission does not divest the immigration court of its jurisdiction.[2]

The notice's lack of a date and time did not eviscerate the hearing's fundamental fairness. Vargas, through counsel, attended and participated in the removal hearing. He cannot attack the order collaterally and claim that the immigration court lacked jurisdiction because the precise data for the hearing he attended had been omitted from the notice. He did not miss the hearing, nor did he object to the notice at it, and the Constitution only guarantees the right to an opportunity to be heard.

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[1] *Pereira v. Sessions*, 138 S. Ct. 2105, 2109-12 (2018); *see also Mauricio-Benitez v. Sessions*, 2018 WL 5839696 at *5 n.1 (5th Cir., Nov. 8, 2018).

[2] *See United States v. Morales-Hernandez*, 2018 U.S. Dist. LEXIS 159754 (D. Ariz., Sept. 14, 2018).

Vargas's argument must fail because he does not meet the requirements to attack the deportation order collaterally under 8 U.S.C. § 1326(d). The first element requires Vargas to prove that he has exhausted all of his administrative remedies. If shown, he must next prove that the deportation hearing deprived him of the opportunity for judicial review. The final requirement compels Vargas to show that the entry of the deportation order was fundamentally unfair.

Vargas has not shown that he exhausted his administrative remedies. He did not appeal the removal order to the Board of Immigration Appeals. Vargas was not deprived of judicial review because he was present at the hearing and he chose not to appeal. Nor has Vargas shown that the entry of the removal order was unfair. There is nothing to suggest that, had the notice to appear included the time and date, Vargas would not have been removed from this country.[3]

The motion to dismiss the indictment is denied. (13)

Signed on March 20, 2019, at Houston, Texas.

Lynn N. Hughes
United States District Judge

[3] *See United States of America v. Lara-Martinez*, 2018 WL 6590798 (S.D. Texas, Dec. 24, 2018).

United States District Court
Southern District of Texas
ENTERED
January 29, 2019
David J. Bradley, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA,	§	
	§	
v.	§	Criminal Action No. H-18-562
	§	
MARGARITO ZARATE-HERNANDEZ	§	
	§	
	§	

ORDER

Pending before the Court is Defendant's Motion to Dismiss the Indictment (Document No. 17). Having considered the motion, submissions, and applicable law, the Court determines the motion should be denied. On September 19, 2018, a federal grand jury returned a one-count indictment (the "Indictment") against Defendant Margarito Zarate-Hernandez ("Zarate-Hernandez"). The Indictment charges Zarate-Hernandez with illegal re-entry to the United States after deportation and conviction of a felony in violation of 8 U.S.C. § 1326(a) and § 1326(b)(1). On January 7, 2019, Zarate-Hernandez moved to dismiss the Indictment.

Zarate-Hernandez moves to dismiss the Indictment, contending he was deported from the United States pursuant to an invalid removal order. In a prosecution for illegal re-entry, an unlawful removal order can satisfy the element of a prior order of exclusion, deportation, or removal. *United States v. Lara-Martinez*, No. CR H-18-647, 2018 WL 6590798, at *2 (S.D. Tex. Dec. 14, 2018)

(Atlas, J.) (citing *United States v. Mendoza-Lopez*, 481 U.S. 828, 835 (1987); *United States v. Sandoval-Cordero*, —— F. Supp. 3d ——, ——, 2018 WL 6253251, *6 (W.D. Tex. 2018) (Cardone, J.)). A defendant seeking to challenge the underlying removal order as invalid must demonstrate: (1) he exhausted any administrative remedies that may have been available to seek relief against the order; (2) the removal proceedings resulting in the order deprived the defendant of the opportunity for judicial review; and (3) the entry of the underlying order was fundamentally unfair. 8 U.S.C. § 1326(d); *see also United States v. Cordova-Soto*, 804 F.3d 714, 718–19 (5th Cir. 2015). The Court addresses whether Zarate-Hernandez satisfies the requirements to challenge the underlying removal order.[1]

As to the first element, the Court examines whether Zarate-Hernandez exhausted any administrative remedies that may have been available to seek relief against the order. Zarate-Hernandez contends he did not need to exhaust his administrative remedies because the Immigration Court proceedings were void. Even if the Immigration Court lacked jurisdiction, a defendant is still required to

[1] The Court notes in *Pereira v. Sessions*, ___ U.S. ___, 138 S. Ct. 2105, 2110, 2115–16, 2119–20 (2018), the United States Supreme Court held that a notice to appear lacking the date and time does not satisfy the "stop-time rule" for purposes of satisfying ten years of continuous presence in the United States. *Pereira* did not involve or address any jurisdictional issues, nor was *Pereira* a criminal case. The Court need not decide whether *Pereira* applies here. *See United States v. Lara-Martinez*, No. CR H-18-647, 2018 WL 6590798, at *2 (S.D. Tex. Dec. 14, 2018) (Atlas, J.); *United States v. Hernandez-Lopez*, No. 5:18-CR-625(1)-DAE, 2018 WL 6313292, at *3 (W.D. Tex. Dec. 3, 2018) (Ezra, J.).

exhaust administrative remedies in order to challenge an underlying removal order. *Lara-Martinez*, 2018 WL 6590798, at *2; *United States v. Zapata-Cortinas*, Criminal No. SA-18-CR-99343-OLG, 2018 WL 6061076, at *12 (W.D. Tex. Nov. 20, 2018) (Garcia, C.J.). Zarate-Hernandez does not allege or produce any evidence showing he exhausted any administrative remedies that may have been available to seek relief against the order. The Court therefore finds Zarate-Hernandez cannot establish he exhausted his administrative remedies in order to challenge the underlying removal order. Thus, the Court finds the motion to dismiss the indictment should be denied.[2]

Accordingly, the Court hereby

ORDERS that Defendant's Motion to Dismiss the Indictment (Document No. 17) is **DENIED**.

SIGNED at Houston, Texas, on this 29 day of January, 2019.

DAVID HITTNER
United States District Judge

[2] Having found Zarate-Hernandez does not satisfy the first element under 8 U.S.C. § 1326(d), the Court need not address the remaining elements. *Lara-Martinez*, 2018 WL 6590798, at *2 ("If a defendant fails to establish any one prong of the three-part test, the Court need not consider the others." (citing *United States v. Mendoza-Mata*, 322 F.3d 829, 832 (5th Cir. 2003))).

United States District Court
Southern District of Texas
ENTERED
February 07, 2019
David J. Bradley, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA,	§	
	§	
	§	
v.	§	**CASE NO. 4:18-CR-0565**
	§	
JUAN DE DIOS	§	
TREVINO-VILLARREAL,	§	
	§	
Defendant.	§	

ORDER

Pending before the Court is Defendant's Motion to Dismiss the Indictment. **(Instrument No. 15).**

Defendant's Motion to Dismiss, which identifies defects in his Notice to Appear, is a collateral attack on the immigration court's removal order. To collaterally attack the validity of the removal order, Defendant must first show that he exhausted any administrative remedies. 8 U.S.C. § 1326(d)(1); *see also United States v. Benitez-Villafuerte*, 186 F.3d 651, 658 n.8 (5th Cir. 1999).

Defendant does not deny that he did not exhaust administrative remedies in his case. Instead, he contends that he does not need to show exhaustion of administrative remedies because the immigration court never had subject matter jurisdiction. (Instrument No. 15 at 13-15).

Title 8 U.S.C. § 1229 directs immigration judges to conduct proceedings for deciding the inadmissibility or deportability of an alien in the United States. *See* 8 U.S.C. § 1229a(a)-(c) (directing that "immigration judge[s] shall conduct proceedings for deciding the inadmissibility or deportability of an alien" and stating that unless otherwise specified "a proceeding under this

section shall be the sole and exclusive procedure for determining whether an alien may be admitted to the United States or, if the alien has been so admitted, removed from the United States."). Section 1229 does not provide, however, when and how subject matter jurisdiction over a removal proceeding vests in an immigration court. Rather, separate federal regulations promulgated by the Attorney General dictate when and how an immigration court gains subject matter jurisdiction. *See* 8 U.S.C. § 1103(g)(2). Those regulations specify that "[j]urisdiction vests, and proceedings before an Immigration Judge commence, when a charging document is filed with the Immigration Court by the Service." 8 C.F.R. § 1003.14(a). While federal regulations provide that a "charging document" may include a Notice to Appear, the regulatory provisions that govern notices to appear do not require the time and place provisions Defendant contends make his removal order defective. *See* 8 C.F.R. § 1003.15 (listing the contents of the Notice to Appear and noting that "[f]ailure to provide any of these items shall not be construed as affording the alien any substantive or procedural rights."). Omission of the date and time of the removal hearing on Defendant's Notice to Appear did not extinguish the immigration court's subject matter jurisdiction. Defendant is therefore required to first exhaust his administrative remedies before collaterally attacking the removal order.

Defendant has not exhausted his administrative remedies. Additionally, Defendant has failed to show that relief under 8 U.S.C. § 1326 is warranted. To collaterally attack his removal order, Defendant must show that the entry of the deportation order was fundamentally unfair. 8 U.S.C. § 1326(d)(3). The fundamental unfairness prong requires a defendant to show "actual prejudice." *Benitez-Villafuerte*, 186 F.3d at 658. "In short, if the defendant was legally deportable and, despite the INS [Immigration and Naturalization Service]'s errors, the proceeding could not have yielded a different result, the deportation is valid for purposes of

section 1326." *Id.* at 659 (internal quotations omitted). Defendant contends in a conclusory fashion that he was not legally deportable because the immigration court had no jurisdiction over him. (Instrument No. 15 at 15). However, Defendant fails to show that he was not legally deportable and that, despite the omission of the specific date and time in his Notice to Appear, the proceeding could have yielded a different result. Specifically, on February 3, 2011, the Government and Defendant signed a Stipulation whereby Defendant elected to represent himself, waived his right to a hearing, admitted that all of the factual allegations against him were true, and waived appeal of the written order of removal. (Instrument No. 19-2). In light of Defendant's knowing and voluntary waiver of appeal, Defendant cannot show actual prejudice, and his collateral attack before this Court is barred.

Accordingly, **IT IS HEREBY ORDERED** that Defendant's Motion to Dismiss is **DENIED. (Instrument No. 15).**

The Clerk shall enter this Order and provide a copy to all parties.

SIGNED on this the 6th day of February, 2019, at Houston, Texas.

VANESSA D. GILMORE
UNITED STATES DISTRICT JUDGE

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. § 1003.13

§ 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 (13)

Current through November 28, 2019; 84 FR 65606.

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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. § 1003.14

§ 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, 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 (38)

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KeyCite Red Flag - Severe Negative Treatment
Unconstitutional or PreemptedHeld Invalid United States v. Cruz-Candela, D.Md., July 03, 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

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

(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 (22)

Current through November 28, 2019; 84 FR 65606.

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KeyCite Red Flag - Severe Negative Treatment
Unconstitutional or PreemptedHeld Invalid Ortiz-Santiago v. Barr, 7th Cir., May 20, 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. § 1003.18

§ 1003.18 Scheduling of cases.

Currentness

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

(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 (7)

Current through November 28, 2019; 84 FR 65606.

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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 IV. Inspection, Apprehension, Examination, Exclusion, and Removal (Refs & Annos)

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.

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(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

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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.

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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 (107)

8 U.S.C.A. § 1229, 8 USCA § 1229
Current through P.L. 116-72.

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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

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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 (1389)

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. 116-72.

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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
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