IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
FILED
March 18, 2020
Lyle W. Cayce
Clerk

No. 19-20241
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

JORGE MADERO-GIL,

Defendant-Appellant

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:18-CR-594-1

Before KING, GRAVES, and WILLETT, Circuit Judges.

PER CURIAM:*

Jorge Madero-Gil pleaded guilty to illegal reentry and was sentenced to 15 months in prison and one year of supervised release. Although he was recently released from prison, his appeal 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).

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

Madero-Gil's guilty plea was conditional, reserving the right to challenge the district court's denial of a motion to dismiss the indictment. On appeal he reiterates his argument that the immigration court in his initial removal proceeding never acquired jurisdiction because his notice of removal failed to specify a date and time of appearance. As a result, he contends, the removal order entered against him is void, which left the Government unable to prove an essential element of the offense. As to the strictures of 8 U.S.C. § 1326(d), which limits an alien's ability to collaterally attack a removal order, Madero-Gil 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).

Madero-Gil 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 this argument to be both without merit and barred by § 1326(d) for failure to exhaust. 933 F.3d at 496-98. Madero-Gil's identical and similarly unexhausted jurisdictional argument must accordingly fail for the same reasons.

Pedroza-Rocha does not speak to Madero-Gil's contention that he can escape the strictures of § 1326(d)(1) and (2) under a "futility" exception, but other authority shows this argument to be of no moment here. An alien "must prove all three prongs" of § 1326(d) to successfully challenge a prior removal order. *United States v. Cordova-Soto*, 804 F.3d 714, 719 (5th Cir. 2015). In claiming fundamental unfairness under the final prong of § 1326(d), Madero-Gil 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).

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 of the district court.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit

FILED
March 23, 2020

Lyle W. Cayce
Clerk

No. 19-20283
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

RAFAEL MAJANO MALDONADO,

Defendant-Appellant

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:18-CR-590-1

Before DAVIS, SMITH, and HIGGINSON, Circuit Judges.

PER CURIAM:*

Rafael Majano Maldonado appeals his conviction under 8 U.S.C. § 1326 for illegal presence in the United States. Citing *Pereira v. Sessions*, 138 S. Ct. 2105 (2018), he contends that his prior removals do not satisfy the removal element of § 1326 because the notice to appear in his original removal proceeding did not state the date, time, and place of the removal hearing. In *United States v. Pedroza-Rocha*, 933 F.3d 490, 497-98 (5th Cir. 2019), *petition*

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for cert. filed (U.S. Nov. 6, 2019) (No. 19-6588), we relied on *Pierre-Paul v. Barr*, 930 F.3d 684, 688-89 (5th Cir. 2019), *petition for cert. filed* (U.S. Dec. 16, 2019) (No. 19-779), to conclude that (1) a notice to appear that lacked the date and time of the removal hearing was not defective, (2) in the alternative, any defect was cured by the subsequent mailing of a notice of hearing, and (3) the purported defect was not jurisdictional. Additionally, we held that the defendant could not collaterally attack the notice to appear without first exhausting administrative remedies. *Pedroza-Rocha*, 933 F.3d at 498. Conceding that *Pedroza-Rocha* and *Pierre-Paul* foreclose his claim, Majano Maldonado raises it to preserve it for further review.

The Government has filed an unopposed motion for summary affirmance, which is proper 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). Because Majano Maldonado correctly concedes that his claim is foreclosed by *Pierre-Paul* and *Pedroza-Rocha*, the 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
March 4, 2020

Lyle W. Cayce
Clerk

No. 19-20327
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

OMAR HERNANDEZ LOZANO,

Defendant-Appellant

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:18-CR-598-1

Before CLEMENT, ELROD, and OLDHAM, Circuit Judges.

PER CURIAM:*

Omar Hernandez Lozano appeals his conviction for illegal reentry into the United States after removal subsequent to a felony conviction, in violation of 8 U.S.C. § 1326. He challenges the district court's denial of his motion to dismiss the indictment as invalid, arguing that his initial removal order was void because the notice to appear in the removal proceedings failed to specify a date and time for his removal hearing. He concedes that this challenge is

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foreclosed by *United States v. Pedroza-Rocha*, 933 F.3d 490, 496-98 (5th Cir. 2019), *petition for cert. filed* (U.S. Nov. 6, 2019) (No. 19-6588), and *Pierre-Paul v. Barr*, 930 F.3d 684, 689-93 (5th Cir. 2019), *petition for cert. filed* (U.S. Dec. 16, 2019) (No. 19-779), 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* and *Pierre-Paul*.

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 496-98, this court applied *Pierre-Paul* to conclude 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. Thus, as Hernandez Lozano concedes, his arguments are 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 as unnecessary, 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
March 24, 2020

Lyle W. Cayce
Clerk

No. 19-40417
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

VICTOR REYNOSO-VALDEZ,

Defendant-Appellant

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 7:18-CR-1783-1

Before CLEMENT, ELROD, and OLDHAM, Circuit Judges.

PER CURIAM:*

Victor Reynoso-Valdez appeals his conviction for illegal reentry, for which he entered a conditional guilty plea, reserving the right to appeal the denial of his motion to dismiss the indictment. Reynoso-Valdez now argues that his indictment is invalid because his prior removal order was void due to a defective notice to appear (NTA) that failed to specify a date and time for his removal hearing, thus, depriving the immigration court of jurisdiction. He

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further argues that he satisfies 8 U.S.C. § 1326(d)'s three requirements to collaterally attack his removal order.

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 *Pierre-Paul v. Barr*, 930 F.3d 684 (5th Cir. 2019), *petition for cert. filed* (U.S. Dec. 16, 2019) (No. 19-779), but wishes to preserve his claims for further review. The Government has filed an unopposed motion for summary affirmance, agreeing that Reynoso-Valdez's arguments are foreclosed under *Pedroza-Rocha* and *Pierre-Paul*. Alternatively, the Government requests a 30-day extension of time to file a brief.

In *Pierre-Paul*, we held that lack of date-and-time information does not render an NTA defective and that, even if it did, the defect would not be jurisdictional. *Pierre-Paul*, 930 F.3d at 689-93. In *Pedroza-Rocha*, we reaffirmed that an NTA's failure to specify a date and time of hearing is not grounds for dismissing a later reentry prosecution and also determined that the defendant could not collaterally attack his underlying removal order without meeting the requirements of § 1326(d). *Pedroza-Rocha*, 933 F.3d at 498. Accordingly, Reynoso-Valdez's substantially similar arguments are foreclosed.

However, neither *Pierre-Paul* nor *Pedroza-Rocha* address Reynoso-Valdez's contention that he can escape the requirements of § 1326(d) under a "futility" exception. This argument is of no consequence. An alien "must prove all three prongs" of § 1326(d) to successfully challenge a prior removal order. *United States v. Cordova-Soto*, 804 F.3d 714, 719 (5th Cir. 2015). In claiming fundamental unfairness under the final prong of § 1326(d), Reynoso-Valdez relies solely on the jurisdictional argument that *Pedroza-Rocha* foreclosed.

Any arguments as to prongs one and two of § 1326(d) are, therefore, moot. *See Cordova-Soto*, 804 F.3d at 719.

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 of the district court.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
FILED
March 13, 2020
Lyle W. Cayce
Clerk

No. 19-20333
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

JAVIER ENRIQUE MELENDEZ-WISENTHAL, also known as Robert Diaz Isaguirre, also known as Luis A. Aguillar, also known as Marco Antonio Gonzalez,

Defendant-Appellant

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:18-CR-387-1

Before HIGGINBOTHAM, HO, and ENGELHARDT, Circuit Judges.

PER CURIAM:*

Javier Enrique Melendez-Wisenthal appeals his conviction for illegal reentry, in violation of 8 U.S.C. § 1326. He entered a conditional guilty plea, reserving the right to appeal the denial of his motion to dismiss the indictment. Melendez-Wisenthal asserts that the indictment was invalid because the removal order was void due to a defective notice to appear that failed to specify

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the date and time for his removal hearing. He concedes that the issue 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 it for further review. The Government has filed a motion for summary affirmance, agreeing that the issue is foreclosed under *Pedroza-Rocha* and *Pierre-Paul*. Alternatively, the Government requests an extension of time to file a brief.

In *Pedroza-Rocha*, we concluded that the notice to appear was not rendered deficient because it did not specify a date or time for the removal hearing, that any such alleged deficiency had not deprived the immigration court of jurisdiction, and that Pedroza-Rocha could not collaterally attack his underlying removal order without first exhausting his administrative remedies. *Pedroza-Rocha*, 933 F.3d at 496-98. 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 is AFFIRMED.

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

UNITED STATES OF AMERICA,	§	
	§	
Plaintiff,	§	
	§	
v.	§	CRIMINAL NUMBER H-18-594
	§	
JORGE MADERO-GIL,	§	
	§	
Defendant.	§	

MEMORANDUM OPINION AND ORDER

Defendant, Jorge Madero-Gil, has filed Defendant's Motion to Dismiss the Indictment ("Defendant's Motion") (Docket Entry No. 15), to which the United States has filed its Opposition to Defendant Jorge Madero-Gil's Motion to Dismiss the Indictment ("Government's Response") (Docket Entry No. 17).

The Government's Response (Docket Entry No. 17), which is supported by the exhibits attached thereto, establishes the following facts:

> Madero-Gil, a citizen of Mexico, is charged by indictment with illegal re-entry into the United States, a violation of 8 U.S.C. § 1326(a) and (b)(1). *See* Dkt. No. 1. Sometime before December 11, 2014, Madero-Gil entered into the United States without obtaining legal status. On December 11, 2014, Madero-Gil was arrested by the Harris County Sheriff's Office for the offense of Assault Public Servant. On January 22, 2015, the Defendant was convicted of a lesser offense of resisting arrest and sentenced to 180 days confinement in the Harris County Jail. *See* Exhibit 1. On February 26, 2015, Madero-Gil was

> encountered and interviewed at the Harris County Jail by an Immigration Officer, where it was determined that the Defendant was not a citizen of the United States and was in fact a citizen and national of Mexico who was not legally in the United States. Madero-Gil was given a copy of the I-247 Immigration and Detainer - Notice of Action. *See* Exhibit 2. . . .
>
> At some point prior to or on March 8, 2015, Madero-Gil was transferred from the Harris County Jail, to the custody of United States Immigration and Customs Enforcement (ICE) officials. On March 8, 2015, Madero-Gil received a Notice to Appear (NTA) before an Immigration Judge (IJ) for the purpose of a deportation hearing. *See* Exhibit 4.[1] Madero-Gil signed the notice and further requested an expedited hearing, waiving his right to the 10-day waiting period. Ex. 4. Madero-Gil's hearing was held on April 23, 2015, he attended, and he was ordered deported. *See* Exhibit 5. Madero-Gil was subsequently deported on April 27, 2015, *see* Exhibit 6, but re-entered the United States illegally on at least six subsequent occasions and was eventually detained. On each occasion, the 2015 order of his deportation was reinstated, resulting in Madero-Gil being deported each time, in 2015. *See* Exs. 7-15.

Defendant was indicted in this action for illegal reentry in violation of 8 U.S.C. § 1326(a) (Docket Entry No. 1). In his Motion 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 2015 removal order void. Defendant also argues that the underlying removal order "violated due process and violated 8 U.S.C. § 1326(d)" (Defendant's Motion, Docket Entry No. 15, page 1).

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[1]The NTA required defendant to appear at a date and time "to be set."

There is no authority by the United States Court of Appeals for the Fifth Circuit 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 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 does not argue that he exhausted available administrative remedies by appealing his April 23, 2015, removal order. The record reflects that defendant waived his right to appeal the order.[2] Defendant argues that he is not required to exhaust his administrative remedies because the immigration proceedings were 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.[3] 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,

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[2]April 23, 2015, Order of the Immigration Judge, Attachment 1 to Government's Response (Government Exhibit 5), Docket Entry No. 17-1, page 18.

[3]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 would have reasonably believed that jurisdiction existed.

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 2015 removal proceeding improperly deprived him of the opportunity for judicial review. After being served with the NTA, defendant requested an immediate hearing,[4] made no application for relief from removal, and waived his right to appeal the removal order.[5] Defendant's decision to waive his right to appeal the removal order 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). 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.

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[4]NTA, Attachment 1 to Government's Response (Government Exhibit 4), Docket Entry No. 17-1, page 17.

[5]April 23, 2015, Order of the Immigration Judge, Attachment 1 to Government's Response (Government Exhibit 5), Docket Entry No. 17-1, page 18.

Because defendant has failed to establish any of the three § 1326(d) requirements to challenge collaterally his prior removal order, Defendant's Motion to Dismiss the Indictment (Docket Entry No. 15) is **DENIED**.

SIGNED at Houston, Texas, on this 15th day of January, 2019.

SIM LAKE
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF TEXAS

The United States of America,	§	
	§	
Plaintiff,	§	
	§	
versus	§	Criminal H-18-590
	§	
Rafael Majano Maldonado,	§	
	§	
Defendant.	§	

Opinion Denying Dismissal

1. *Introduction.*

Rafael Majano Maldonado is a citizen of Honduras and is charged with his fourth illegal re-entry. Maldonado was ordered removed from this country on September 9, 1999. He has been deported from the United States three times since then. The 1999 order was reinstated each time he was deported, and Maldonado has not challenged its validity until now. Maldonado's challenge will fail; the indictment will not be dismissed.

2. *Background.*

On July 8, 1999, Maldonado was placed in the custody of the United States Immigration and Customs Enforcement at Los Angeles International Airport, where he admitted to being a citizen of Honduras and not authorized to be in the United States of America. He offered to return voluntarily to Honduras.

On July 9, Maldonado was served with a notice to appear at a deportation hearing before an immigration judge. The notice did not include the time or place of the hearing, rather it said that the time and place would be set. He was released from custody on bond. The bail bond paperwork required Maldonado to list his address, which he did. This address was the one that he gave ICE.

On August 16, a notice of hearing was sent to Maldonado at the address he gave ICE and the bail bondsman. The notice of hearing specified the time, date, and location

of where Maldonado needed to appear. This notice said that if Maldonado did not appear, he may be deported. Maldonado did not appear, and was ordered deported again.

In May 2006, Maldonado was arrested in Maryland. The 1999 deportation order was reinstated and he was deported on May 11, 2006. He did not complain of the 1999 order or a lack of notice. The same is true for his illegal re-entry charges in 2008 and 2011.

3. *The 1999 Removal Order.*

For the first time, Maldonado complains that the 1999 removal order was defective. He also argues that removal was unfair. Neither is accurate.

A. *Paperwork.*

Maldonado's primary argument is that, under a recent decision,[1] the immigration court lacked subject jurisdiction because the notice to appear did not include a time, date, and location for him to appear. Maldonado is asking this court to extend that holding. It will not.

The case addressed one narrow question: whether a defective notice to appear triggers the "stop-time rule" under the immigration laws. The movant was a citizen of Brazil who remained in the United States after his visa expired. In 2006, he was arrested for driving under the influence and was served with a notice to appear. This notice to appear did not have the date and time – it said that it would be set in the future. Over one year later, he was mailed a more specific notice. This more specific notice was sent to the wrong address, and it was returned to the immigration court as undeliverable. The movant did not attend the hearing and he was ordered removed.

In 2013, the movant was arrested for a car wreck. This is when he learned of the supplemented removal order in 2007. He immediately challenged the removal order, arguing that he had been continuously present in the United States for ten years, and that the stop-time rule was not triggered by the initial notice because it lacked a date and time. The Supreme Court agreed, and held that a notice to appear lacking a specific time, date, and location does not trigger the stop-time rule because it is not a valid

[1] *See Pereira v. Sessions*, 138 S.Ct. 2105 (2018).

notice to appear under § 1229(a). The Supreme Court explained that a notice to appear must include this information because "[c]onveying such time-and-place information to a noncitizen is an essential function of a notice to appear" for "without it, the government cannot reasonably expect the noncitizen to appear for his removal proceedings."[2]

The facts underlying *Pereira*'s defective notice are far different from Maldonado's. Pereira, unlike Maldonado, was not at fault for failing to appear. The immigration court mailed the notice to the wrong address. Here, Maldonado neglected to update his address, despite being required to by the bail bond paperwork and the law.[3] Had Maldonado done what was required, he would have received notice of the hearing's time, place, and location.

The *Pereira* decision, notably, "did not disturb the well-settled precedent that an original defective notice to appear may be cured by a subsequent notice of hearing."[4] Similarly, a Wyoming case, which addressed this same issue, agreed with the government that "the government fulfills its obligations to provide notice to appear for removal hearings with two separate documents."[5]

This circuit has also addressed this issue, and held that a removal order may not be disturbed when the person fails to keep his mailing address current if the notice of hearing containing the time, date, and location is sent to the out-of-date address.[6] The Board of Immigration Appeals has found this to remain true post-*Pereira*, finding that the immigration court has jurisdiction "so long as a notice of hearing specifying this information is later sent to the alien."[7]

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[2] *Id.* at 2115.

[3] §§ 1229(a)(1)(F); 1229a(b)(5)(B).

[4] *United States v. Arreola-Zambrano*, No. 2:18-cr-01391, Dkt. No. 40 at 4 (D.Ariz. Nov. 16, 2018).

[5] *United States v. Maldonado-Abarca*, No. 2:18-cr-00082, Dkt. No. 41 at 18 (D.Wy. Oct. 31,2018).

[6] *See Gomez-Palacios v. Holder*, 560 F.3d 354 (5th Cir. 2009).

[7] *See Matter of German Bermudez-Cota*, 27 I&N Dec. 441 (BIA 2018).

B. *Hearing.*

Maldonado alternatively argues that the hearing was fundamentally unfair and violated his due process. His argument that the removal hearing was unfair is based on his first argument: that the notice to appear was defective because it did not state a time, date, or location of the hearing.

Maldonado cannot show that the removal order was unfair. A second notice containing the time, date, and location was mailed to the address that Maldonado gave ICE and the bail bondsman. Maldonado did not update his address with either. If anything, ICE was extraordinarily lenient. After four deportations, he was let out on bond. He attempted to take advantage of the bondsman and ice. He has been given more than fair treatment.

The government fulfilled its obligation to mail Maldonado a later notice; Maldonado did not satisfy his obligation to keep his contact information current. His collateral attack will fail.

4. *Conclusion.*

Maldonado has had at least three chances, over the course of twenty years, to complain that the 1999 removal order was unfair. He chose not to until now. Maldonado's case differs from *Pereira*, and the later notice of hearing cured the absence of a time, date, or location that the initial notice to appear may have lacked.

The indictment against Rafael Majano Maldonado will not be dismissed. (14)

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

Lynn N. Hughes
United States District Judge

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

UNITED STATES OF AMERICA, *Plaintiff*, v. OMAR HERNANDEZ LOZANO, *Defendant.*	§ § § § § § §	CRIMINAL ACTION NO. 4:18-CR-598
UNITED STATES OF AMERICA, *Plaintiff*, v. JUAN GABRIEL RUIZ-BAENA, *Defendant.*	§ § § § § § §	CRIMINAL ACTION NO. 4:18-CR-522

ORDER

Omar Hernandez Lozano ("Hernandez Lozano") and Juan Gabriel Ruiz-Baena ("Ruiz-Baena") are charged with illegal reentry into the United States in violation of 8 U.S.C. § 1326(b)(1) and § 1326(a) respectively. They seek to have their indictments dismissed because the Notices to Appear ("NTA") in their underlying deportations did not specify an exact time and location to appear. Hernandez Lozano claims that this omission voids not only his initial 1999 deportation, but all of his subsequent removals, while Ruiz-Baena makes similar claims as to his 2015 deportation. Consequently, they both claim this flaw in their underlying immigration proceedings deals a fatal blow to the Government's current attempts to prosecute them for illegal reentry.

I. Facts

A. Hernandez Lozano

The pertinent facts do not seem to be a source of controversy. Hernandez Lozano is a citizen of Mexico who entered into the United States in October 1997 pursuant to a non-immigrant visa. He was given permission to remain in the United States for six months. In April of 1999—well beyond the six-month period—he was arrested in Houston, Texas, for the offense of Endangering a Child. He later pleaded guilty to the lesser charge of deadly conduct, a Class A misdemeanor, and was sentenced to a term of imprisonment.

After being released from jail he was placed in the custody of the United States Immigration and Naturalization Service (hereinafter "INS"). While in INS custody, he was served with a Notice to Appear before an immigration judge for the purpose of a deportation hearing. The pertinent portion of that notice is reproduced below:

YOU ARE ORDERED to appear before an immigration judge of the United States Department of Justice at: To be calendared and notice provided by the office of the Immigration Judge. Notice will be mailed to the address provided by the respondent.
(Complete Address of Immigration Court, including Room Number, if any)
Office of the Immigration Judge, 15850 Export Plaza Drive, Houston, Texas 77032
on _____ at _____ to show why you should not be removed from the United States based on the charge(s) set forth above.

Assistant District Director for Investigations
(Signature and Title of Issuing Officer)

Date: July 24, 1999

Houston, Texas
(City and State)

As one can readily see, no hearing time or location was included in this notice. Instead the NTA indicates that the hearing will be calendared and notice will be given. This lack of specificity is the genesis of Hernandez Lozano's Motion to Dismiss the Indictment.

Hernandez Lozano signed the above notice to acknowledge receipt, waived his ten-day waiting period, and requested an immediate hearing. Five days later the hearing was held. He attended the hearing and conceded the underlying facts. The immigration judge ordered

Hernandez Lozano to be removed to Mexico—the country of which he is a citizen. He waived his appeal and was deported the next day.

Since that deportation Hernandez Lozano returned to the United States illegally at least five more times. He was deported/removed in 2000 after being convicted of Burglary of a Habitation, in 2007, in 2009 after being convicted of Assault on a Family Member, in 2011 after being convicted of Harassment of a Public Servant, and in 2014 after having been convicted of Illegal Reentry.

B. Ruiz-Baena

Juan Gabriel Ruiz-Baena also moves to dismiss the illegal reentry indictment against him. While the facts concerning his background and deportation are similar, they contain some differences from those concerning Hernandez Lozano.

Ruiz-Baena is a citizen of Mexico. He entered the United States illegally some time prior to September 27, 2015,[1] when he was arrested in Houston, Texas, for Assault Family Violence and Evading Arrest. Three days later he was released on bond from the Harris County jail to the custody of immigration officials. He received a Notice to Appear in which the blank for the location and time of the hearing was filled in with "[t]ime and date to be set." His actual NTA language is set out below:

YOU ARE ORDERED to appear before an immigration judge of the United States Department of Justice at:

Time and date to be set.

(Complete Address of Immigration Court, including Room Number, if any)

on To be set. *(Date)* at To be set. *(Time)* to show why you should not be removed from the United States based on the charge(s) set forth above.

J 0074 LEAL SUPERVISORY DEPORTATION OFFICER
(Signature and Title of Issuing Officer)

Date: September 30, 2015 Houston Processing Center
(City and State)

See reverse for important information

Form I-862 (Rev. 08/01/07)

[1] While the time and place of his first illegal entry into the United States is not in evidence, there is an indication that he has a 2009 Misdemeanor Driving Under the Influence conviction out of Angelina County, Texas, which, if true, would indicate his entry into the United States as early as 2009.

Ruiz-Baena signed the notice and waived his right to the ten-day waiting period.

On October 7, 2015, he was warranted back to state custody to deal with the two pending criminal charges. On October 27, he pleaded guilty to both state charges and was sentenced to 80 days in jail on each count to run concurrently. While Ruiz-Baena was in state custody, the immigration proceedings were suspended. When Ruiz-Baena was released from state custody on November 4, 2015, he was once again turned over to the immigration authorities and was re-calendared.

His deportation hearing was held on December 17, 2015. He attended the hearing, participated, and was ultimately ordered to be deported. He waived his right to appeal this order and was deported on December 21, 2015.

Ruiz-Baena re-entered the United States some time thereafter and was once again arrested for assault on September 25, 2017. This time he was charged with a third-degree felony assault on a family member. He pleaded guilty on November 9, 2017 to the assault charge and was sentenced to two (2) years in prison. After serving this sentence and being released to federal immigration authorities, Ruiz-Baena was charged with the instant offense.

II. Claims of the Parties

Hernandez Lozano claims that all his deportations (except for the original one) relate back to or are reinstatements of his 1999 removal and that his original 1999 removal was defective due to the lack of a designated time and place on the NTA. He claims that because of this defective notice, the immigration court lacked subject matter jurisdiction and thus his 1999 deportation was invalid and void. Consequently, he argues that there is no valid removal on which to base an illegal reentry indictment. Ruiz-Baena claims his 2015 deportation was void and the pending illegal reentry indictment are defective for the same reasons.

The United States ("Government") argues that these claims distort the two Supreme Court cases upon which Defendants rely and that not only were both Defendants informed of the date, time, and location of their respective hearings, but it is beyond dispute that each attended and participated. As a result, the Government contends that whatever ambiguities or defects may have existed in the original notices were cured by subsequent actual notice and that each immigration judge had jurisdiction when each Defendant was ordered deported. Further, the Government argues that these motions to dismiss the indictments are impermissible collateral attacks on the orders of removal and as such are contrary to 8 U.S.C. § 1326(d).

Both sides cite multiple court decisions which support their respective positions. Consequently, this Court has a number of different opinions from which to seek guidance. (See Appendix "A" for a list of opinions which support the position of the Defendants and Appendix "B" for a list of opinions supporting the Government's position.)

III. Discussion

A. Supreme Court Authority

While this Court has reviewed quite a number of opinions from a wide variety of different jurisdictions, the obvious starting point is the two Supreme Court cases underlying the Defendants' position: *Pereira v. Sessions*, 138 S. Ct. 2105 (2018) and *United States v. Mendoza-Lopez*, 481 U.S. 828 (1987).

While *Pereira* is not a criminal case, it is the genesis of the Defendants' arguments. In *Pereira*, the Supreme Court reviewed a Notice to Appear containing "notice" provisions similar to those cited in the instant cases but in a civil context. The exact question the Court answered was framed by Justice Sotomayor, the author of the majority opinion:

> Accordingly, the dispositive question in this case is much narrower, but no less vital: Does a "notice to appear" that does not

> specify the "time and place at which the proceedings will be held," as requested by § 1229(a)(1)(G)(i), trigger the stop-time rule?

Thus, the basic issue was whether ". . . if the Government serves a noncitizen with a document that is labeled 'notice to appear,' but the document fails to specify either the time or the place of the removal proceedings, does it trigger the stop-time rule [found in 8 U.S.C. § 1229b(d)(1) and which stops the time for which an alien might qualify for cancellation of removal]." *Id* at 2110. It is important to note that Pereira never received any notice of the time and place of the hearing and as a consequence did not attend the hearing.

The Supreme Court held that

> . . . common sense compels the conclusion that a notice that does not specify when and where to appear for a removal proceeding is not a "notice to appear" that triggers the stop-time rule. *If the three words "notice to appear" mean anything in this context, they must mean that, at a minimum, the Government has to provide noncitizens "notice" of the information, i.e., the "time" and "place," that would enable them "to appear" at the removal hearing in the first place.* Conveying such time-and-place information to a noncitizen is an essential function of a notice to appear, for without it, the Government cannot reasonably expect the noncitizen to appear for his removal proceedings. To hold otherwise would empower the Government to trigger the stop-time rule merely by sending noncitizens a barebones document labeled "Notice to Appear," with no mention of the time and place of the removal proceedings, even though such documents would do little if anything to facilitate appearance at those proceedings. " 'We are not willing to impute to Congress . . . such [a] contradictory and absurd purpose,' " *United States v. Bryan*, 339 U.S. 323, 342, 70 S.Ct. 724, 94 L.Ed. 884 (1950), particularly where doing so has no basis in the statutory text.

Pereira v. Sessions, 138 S. Ct. at 2115-2116 (emphasis added). The majority opinion emphasized that the Court was only answering the narrow question posed to it:

> It therefore follows that, if a "notice to appear" for purposes of § 1229(b)(1) must include the time-and-place information, a "notice to appear" for purposes of the stop-time rule under § 1229b(d)(1) must as well. After all, "it is a normal rule of statutory construction

> that identical words used in different parts of the same act are intended to have the same meaning." *Taniguchi v. Kan Pacific Saipan, Ltd.*, 566 U.S. 560, 571, 132 S.Ct. 1997, 182 L.Ed.2d 903 (2012) (internal quotation marks omitted).

Id. at 2115. The instant cases obviously do not involve the stop-time rule.

Mendoza-Lopez is a criminal case that discusses the very statute under which Hernandez Lozano and Ruiz-Baena are charged. In that case, the Supreme Court addressed whether a defendant in a § 1326 case could collaterally attack his prior deportation. In that case it was conceded, for purposes of the appeal, that the group of deportees, including the Respondent, were deported in proceedings that did not comport with due process requirements. Because the prior deportation is an element of a 1326 violation, the Court held that if the prior deportation involved a lack of due process, the Respondent could collaterally attack the current illegal reentry prosecution. Many courts throughout the nation have subsequently reached similar conclusions if there were underlying due process deprivations in the deportation process.

B. The Application of These Supreme Court Decisions to the Instant Cases

Defendants' attack on their pending indictments really involves two interrelated questions: 1) Can they collaterally attack their prior removals in this 1326 criminal case; and 2) Are their prior deportations void? The Court will take them in reverse order.

1. The Validity of The Prior Removals

Defendants essentially claim that *Pereira* stands for the proposition that a NTA without the exact time and date of the deportation hearing renders the entire hearing process jurisdictionally fatal. They contend that if the notice was flawed, then the immigration judge lacked jurisdiction and any subsequent deportation is void and of no effect. Moreover, their argument further suggests that this notice, if initially defective, cannot later be remedied by actual notice. In support of their contentions Defendants cite an array of district court cases from

throughout the country including many from this Circuit and this District.[2] As the reasoning in support of Defendants' position is fairly consistent between cases, this Court will address their reasoning generally through the discussion of one or two cases, as well as the applicable statutory and regulatory framework.

Initially, 8 U.S.C. § 1229(a), which sets the requirements for the contents of a NTA, states:

> In removal proceedings under section 1229(a) of this title, written notice shall be given in person to the alien . . . specifying the following: . . .
>
> (G)(i) the time and place at which the proceedings will be held.

Current immigration regulations provide that "jurisdiction [in the immigration court] vests . . . when a charging document is filed with the Immigration Court." 8 C.F.R. § 1003.14(a). Some courts have concluded that if the initial Notice to Appear is lacking in any manner, it does not constitute a Notice to Appear. If it does not constitute a Notice to Appear, then those courts conclude the immigration judge did not have jurisdiction. Without the removal must be void. If the removal is void, the alien cannot subsequently be prosecuted for illegal reentry. *See e.g.*, *United States v. Pedroza-Rocha*, No. 3:18-CR-1286, 2018 WL 6629649 (W.D. Tex. Sept. 21, 2018); *United States v. Virgen-Ponce*, 320 F. Supp. 1164 (E.D. Wash. 2018); *United States v. Leon Gonzales*, No. 3:18-CR-2593, Dkt. No. 32 (W.D. Tex. Nov. 20, 2018); *United States v. Santiago Tzul*, No. 4:18-CR-521, Dkt. No. 35 (S.D. Tex. Dec. 4, 2018). These cases necessarily entail a broad reading of *Pereira* in that they explicitly hold that the Supreme Court found that no jurisdiction exists if a specific time and place is not included on the initial NTA.

This Court cannot agree with that basic proposition because the Supreme Court never made such a holding. In fact, it is clear that the majority opinion was purposefully narrow. The

[2] See Appendix "A"

word "jurisdiction" does not appear anywhere in the *Pereira* majority opinion. To read that requirement into the majority's opinion either assumes that the majority of the Supreme Court did not understand the significance of that term or that they were purposefully trying to hide the opinion's real meaning from the rest of the federal judiciary. This Court will not presume either. If the Supreme Court had wanted to reach this result it could have easily held that the failure to include the time and place of a hearing in the NTA is jurisdictional. It did not.

Indeed, the Fifth Circuit has already noted that *Pereira* is to be narrowly read:

> The Supreme Court's recent decision in *Pereira v. Sessions*, 138 S. Ct. 2105 (2018), does not impact this conclusion. As the Supreme Court emphasized, "[t]he narrow question in [that] case" was whether a NTA that does not specify the time or place of the removal hearing triggers the "stop-time rule" for purposes of a cancellation of removal. *Id.* at 2109–10; *see also id.* at 2113 ("[T]he dispositive question in this case is much narrower[.]"). But cancellation and reopening are two entirely different proceedings under immigration law with different standards of review. *Compare Tula-Rubio v. Lynch*, 787 F.3d 288, 290–91 (5th Cir. 2015), *with Hernandez-Castillo*, 875 F.3d at 203–04.
>
> * * *
>
> Because the issues in this case pertain only to reopening, *Pereira*'s rule regarding cancellation is inapplicable. *See, e.g., Ramat v. Nielsen*, 317 F. Supp. 3d 1111, 1116–17 (S.D. Cal. 2018) (declining to read *Pereira* as applying more broadly than in stop-time rule cancellation cases); *United States v. Ibarra-Rodriguez*, No. CR-18-190-M, 2018 WL 4608503, at *3 (W.D. Okla. Sept. 25, 2018) (finding *Pereira* distinguishable because "the 'stop-time rule' [was] not at issue" in the case).

Mauricio-Benitez v. Sessions, No. 17-60792 (5th Cir. Nov. 8, 2018) at note 1.

If *Pereira* is inapplicable to a motion to reopen removal proceedings—which are factually and legally more similar to *Pereira*'s cancellation scenario than a 1326 illegal reentry prosecution—logic dictates *Pereira* does not control a criminal prosecution wherein the defendant not only had notice, but attended his removal proceeding.

Other courts have noted the same hole in the Defendants' argument. For example:

> In *Pereira*, the Supreme Court addressed whether an NTA that does not specify the time and place of the removal hearing triggers the "stop-time rule," which impacts an immigrant's eligibility for certain forms of relief. *Id.* at 2109–10, 2113. The Supreme Court held that an NTA that lacks this information does not trigger the rule. *Id.* at 2113. The Supreme Court did not discuss the issue of jurisdiction. *Id.* at 2107.
>
> *Pereira* is distinguishable on two grounds. First, it addresses the "narrow question" of whether a defective NTA triggers the "stop-time rule" in determining relief under the immigration laws. *Id.* at 2109–10. Second, the appellant in that case never received notice of his hearing and never appeared for or participated in that hearing. Here, the "stop-time rule" is not at issue. Moreover, despite the statutory defect in his initial NTA, Defendant appeared for his hearing on October 19, 2000, and at the hearing had an opportunity to be heard. Defendant was then personally served with a Notice of Hearing indicating the date, time, and place for his second and third hearings, where he also appeared and had an opportunity to be heard.
>
> In short, given that Defendant appeared for his initial removal hearing on October 19, 2000, along with two subsequent hearings, any statutory defect in the initial NTA was cured. Because the NTA's defect was cured, Defendant's due process rights were not violated.

United States v. Ornelas-Dominguez, Case No. 5:18-CV-00110-CJC (C.D. Cal. Aug. 10, 2018) (emphasis added).

This Court finds the opinion in *United States v. Cortez*, No. 6:18-CR-22, 2018 WL 6004689 (W.D. Vir. Nov. 15, 2018), to be most instructive. Facing similar facts, the court found the NTA failed to specify a time and place of the hearing. It then proceeded to analyze the effect of this failure. Its analysis of the jurisdictional issue concluded that neither the language of the pertinent legislation nor the dictates of the Supreme Court supported the proposition that the deportation of an individual was void for lack of jurisdiction due to the failure to list a time and place in the initial NTA.

> Neither *Pereira* nor 8 U.S.C. § 1229(a) control when and how subject matter jurisdiction over a removal proceeding vests in an immigration court.

* * *

> *Pereira* and 8 U.S.C. § 1229(a)(1) concern the required content of notices to appear . . . and neither . . . address the immigration court's subject matter jurisdiction over the proceeding.

Id. at *3. That court held that "neither *Pereira* nor 8 U.S.C. § 1229(a) control 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." *Id.*

Specifically the court noted that Congress explicitly granted the Attorney General the authority to establish such regulations as he/she determines to be necessary for carrying out the Immigration and Nationality Act ("INA"). 8 U.S.C. § 1103(g)(2).

> For all proceedings "initiated after April 1, 1997," a "charging document" is defined by a separate regulation to "include a Notice to Appear." 8 C.F.R. § 1003.13. Yet another regulation—8 C.F.R. § 1003.15(b)-(c)—lists the specific items that should be included in a notice to appear filed with the immigration court for jurisdictional purposes. But neither § 1003.15(b) nor § 1003.15(c) list the time and date of the removal proceedings as required criteria for a notice to appear filed with the immigration court for jurisdictional purposes. Moreover, neither § 1003.15(b) nor § 1003.15(c) cross-reference 8 U.S.C. § 1229(a)(1).
>
> By contrast to these regulations concerning the required content of notices to appear filed with the immigration court for jurisdictional purposes, *Pereira* and 8 U.S.C. § 1229(a)(1) concern the required content of notices to appear "given . . . to the alien" either in person, by mail, or by delivery to the alien's counsel. Section 1229(a)(1)(A)-(G) lists ten items that must be specified in notices to appear given to the alien, including "[t]he time and place at which the proceedings will be held." 8 U.S.C. § 1229(a)(1)(G)(i). Neither §1229(a)(1) nor *Pereira* address the immigration court's subject matter jurisdiction over the proceeding.

Id.

This Court agrees. If jurisdiction existed, then the arguments of Hernandez Lozano and Ruiz-Baena necessarily collapse.

C. Any Statutory Deficiencies Were Cured

While it is a basic proposition of federal jurisprudence that parties cannot confer subject matter jurisdiction where none exists, and while it is likewise clear that the initial NTAs did not contain a time and place designation, in the instant cases both NTAs were supplemented and cured by actual notice. Both Defendants not only had notice, but both appeared and participated. This Court rejects the argument that actual notice cannot cure an initially deficient NTA.

Specifically, 8 C.F.R. § 1003.14(a) states that "[j]urisdiction vests, and proceedings before an Immigration Judge commence, when a charging document is filed with the Immigration Court by the Service." Charging documents were filed in both of these two cases. One cannot draw a hint from this regulation that the lack of a time and location on the initial notice is jurisdictional or fatally defective to subject matter jurisdiction or that actual or subsequent notice cannot cure information the initial NTA lacks.

Obviously, a complete lack of notice, as occurred in *Pereira*, would trigger due process concerns. Due process requires notice and an opportunity to be heard. Each Defendant herein was afforded both. In fact, both Defendants requested expedited hearings and both knowingly waived their appeals. *See Chambers v. Mukasey*, 520 F.3d 445 (5th Cir. 2008) (actual notice and appearance waived any challenge to the NTA). This very argument has been addressed in the context of *Pereira* in the Ninth Circuit by an Arizona District Court and reached the same conclusion. *United States v. Arreola-Zambrano*, No. CR-18-01391-001-PHX-OJH, Dkt. No. 40 (D. Ariz. Nov. 16, 2018).

> Notably, the Supreme Court did not disturb the well-settled precedent that an original defective notice to appear may be cured by a subsequent notice of hearing. *See Popa v. Holder*, 571 F.3d 890, 895-96 (9th Cir. 2009) (collecting cases) ("We hold a Notice to Appear that fails to include the date and time of an alien's deportation hearing, but that states that a date and time will be set later, is not defective so long as a notice of the hearing is in fact later sent to the alien").

> Notably, in *Popa*, the Ninth Circuit concurred with the Fifth, Seventh and Eighth Circuits in announcing its holding. (*Id.*)

Id. at 4. In the instant cases both Defendants received actual notice.

D. Compliance with § 1326(d)

Both Defendants had the right and opportunity to appeal their removal. Both concede they waived these appellate rights and did not appeal their respective orders of deportation.

A defendant cannot collaterally attack his/her deportation in a subsequent § 1326 prosecution unless he/she can demonstrate that he/she: 1) exhausted his/her administrative remedies; 2) was improperly deprived of judicial review; and 3) the entry of the removal order was fundamentally unfair. *United States v. Cordova-Soto*, 804 F.3d 714, 719 (5th Cir. 2015). Defendants must prove all three prongs in order to collaterally attack their removals.

Defendants basically concede their failure to comply with § 1326(d); yet maintain their non-compliance is excused. Their contention is based on two overlapping arguments. First, they maintain that because a prior removal is an element of a § 1326(a) offense, they are always entitled to attack an element of the offense of which they are charged: reentry in violation of an existing removal order. Second, they argue that if the immigration court that ordered their removal did not have jurisdiction, then their deportations were void *ab initio* and cannot be the basis for prosecution for illegal entry. This, of course, is based on their expansive reading of *Pereira* which the Court has already discussed.

They also rely, however, on the Supreme Court's language and holding in *United States v. Mendoza-Lopez*, 481 U.S. 828 (1987). There the Court held that due process requires that a defendant possess "some meaningful review of immigration proceedings." *Id.* at 838.

> The Supreme Court [in *Mendoza*] then stated that "[d]epriving an alien of the right to have the disposition in a deportation hearing reviewed in a judicial forum requires, at a minimum, that review be made available in any subsequent

> proceeding in which the result of the deportation proceeding is used to establish an element of a criminal offense." *Id.* at 839. The *Mendoza* decision established three requirements to satisfy this constitutional imperative, and Congress subsequently codified these requirements by amending § 1326 to add subsection (d). *See United States v. Lopez-Vasquez*, 227 F.3d 476, 483 n.13 (5th Cir. 2000). Importantly, before this amendment, the Supreme Court in *Mendoza* concluded that § 1326 contained no avenue for reviewing the underlying judicial proceeding. The *Mendoza* decision established a review process for the first time, and the amendment codifying *Mendoza* [present day §1326(d)] now represents the sole avenue for such a challenge.

United States v. Escobar-Espinosa, 1:18-CR-842 (S.D. Tex. Dec. 4, 2018) (Rodriguez).

In *Mendoza* the Supreme Court found that the immigration judge permitted appellate waivers that "were not the result of [the defendant's] considered judgments" and that the defendants "were deprived of judicial review of their deportation hearings." *Id.* at 840. Defendants here do not contend that they were so deprived. The facts before this Court support the opposite conclusion.

To avoid the § 1326(d) requirement, Defendants rely on their void *ab initio* argument again predicated on their overly expansive reading of *Pereira*. This Court finds that, at best, their argument supports the conclusion that their deportations were voidable, not void. In so holding, this Court finds the reasoning concerning § 1326(d) by Judge Orlando Garza in *United States v. Zapata-Cortinas*, No. SA-18-CR-00343-OLG, 2018 WL 6061076 (W.D. Tex. Nov. 20, 2018), to be persuasive. In that decision, the court first addressed the very same argument that is being made here.

> Thus, according to Defendant, jurisdiction did not vest in the immigration court because no *valid* charging document was filed in this case. 8 C.F.R. § 1003.14(a); *DeLeon-Holguin v. Ashcroft*, 253 F.3d 811, 815 (5th Cir. 2001) ("[R]emoval proceedings commence when the [Department of Homeland Security] files the appropriate charging document with the immigration court."). *Because orders exceeding a court's jurisdiction may be void, Defendant contends that § 1326(d) need not necessarily be satisfied in order to collaterally attack the prior Removal Order. See* docket no. 40 p. 9; *see also Matter of Reitnauer*, 152 F.3d 341, 344 n.12 (5th Cir. 1998) ("It is true that (1) jurisdictional defects render a judgment

void, and (2) void judgments are subject to collateral attack."); *Puc-Ruiz v. Holder*, 629 F.3d 771, 782 (8th Cir. 2010) ("When the [immigration judge] lacks jurisdiction, [the judge's] decisions are nullities.") Multiple district courts (including at least two in this District) have adopted this line of reasoning in the period since *Pereira*, and those courts have exempted defendants from satisfying § 1326(d)'s requirements because "an element of illegal reentry under § 1326" is not satisfied when the underlying removal order is void. *Alfredo-Valladares*, No. 1:17-CR-156-SS, docket no. 44 p. 17; *Pedroza-Rocha*, No. EP-18-CR-1286-DB, docket no. 53 p. 9 (quoting 8 U.S.C. § 1326(a)(1)) (holding that a "void removal means [defendant] was not 'removed' as a matter of law" and "the Government cannot satisfy the plain language of § 1326, which applies only to noncitizens who reenter the United States after having been 'denied admission, excluded, deported, or removed.'"); *Ortiz*, 2018 WL 6012390, at *3-4 (holding that the Government cannot prove the "removal" element of the offense and stating that "[d]efendant need not satisfy section 1326(d)'s strict requirements because the Immigration Judge lacked jurisdiction from the outset.").

Having considered both lines of arguments and the numerous decisions that have come out in the period since Pereira, the Court concludes that (i) a removal order that suffers jurisdictional defects may serve as the basis for a § 1326(a) prosecution, and (ii) a § 1326 defendant must satisfy the requirements of § 1326(d) in order to collaterally attack the underlying removal order.

By enumerating the specific requirements that must be satisfied in order for a defendant to collaterally attack a prior removal order, § 1326(d) necessarily contemplates that flawed or invalid removal proceedings may still serve as the basis of a "prior removal" in a § 1326(a) prosecution if the requirements are not met. *Indeed, in United States v. Mendoza-Lopez, the Supreme Court noted that the language chosen by Congress when drafting § 1326 does not limit § 1326(a) prosecutions only to those cases in which the underlying removal was "lawful." 481 U.S. 828, 834-35 (1987). Instead, the Supreme Court held that the constitutional requirement of due process requires that, "at the very least, where the defects in an administrative proceeding foreclose judicial review of that proceeding, an alternative means of obtaining judicial review must be made available before the administrative order may be used to establish conclusively an element of a criminal offense." Id. at 838.*

* * *

Accordingly, there is no constitutional, statutory or judicial doctrine that mandates that *all* collateral attacks on subject-matter jurisdiction must be entertained, and in fact, the express statutory language of § 1326(d) limits the exact scope of collateral attacks that are permissible. *See Lira-Ramirez*, 2018 WL 5013523 at *7 *("Congress made clear by adopting § 1326(d) that knowingly giving up the opportunity for judicial review in a removal proceeding precludes an alien from challenging the validity of the removal order in a § 1326 prosecution.")* Notably,

> in *Castelan-Jaimes*, the Fifth Circuit affirmed a district court decision that had determined that a jurisdictional defect in the removal proceedings rendered the decision "voidable but not void." 575 Fed. App'x at 254. Because the defendant in *Castelan-Jaimes* had not challenged the BIA's non-authorized issuance of his removal order on direct appeal [as opposed to an order of an Immigration Judge], both the district court and the Fifth Circuit held that the defendant had not satisfied the requirements of § 1326(d) and his indictment should not be dismissed. *Id.*; *United States v. Castelan-Jaimes*, No. A-13-CR-111-SS, docket no. 27 p. 4 (W.D. Tex. May 13, 2013) *("[T]he BIA's removal order appears to the Court to have been voidable, not void, and it was incumbent upon [defendant] to appeal to the Fifth Circuit.").*
>
> The Court believes the present circumstances closely parallel those found in *Castelan-Jaimes*. Here, Defendant received a deficient NTA, and thus, it appears the immigration judge issued a removal order that was outside of her authority and for which there was no formal, vested jurisdiction. However, prior to *Pereira*, the immigration judge certainly had an "arguable basis" for believing she had jurisdiction over Defendant's removal proceedings, and there was no "clear usurpation of power" in issuing the underlying Removal Order. *Thus, the legislative history and plain language of § 1326 and relevant Fifth Circuit demonstrate that Defendant is not automatically permitted to collaterally attack his Removal Order for want of jurisdiction. Instead, Defendant may only collaterally attack his Removal Order if he can satisfy the elements of § 1326(d). As discussed below, Defendant cannot do so in this case.*

United States v. Zapata-Cortinas, No. SA-18-CR-00343-OLG, 2018 WL 6061076, at *7-*10 (W.D. Tex. Nov. 20, 2018) (emphasis added).

This Court agrees. In the instant cases Defendants cannot prevail on any of the prongs of § 1326(d), despite the requirement that they must prevail on all three. The Defendants' sole argument in the instant cases is that the immigration judge did not have jurisdiction because of the lack of specificity in the initial NTAs. Both defendants were subsequently given adequate notice. They appeared and participated. They also had more than adequate opportunities for judicial reviews which they both rejected. They both knowingly waived their appellate rights and did not pursue either administrative or judicial remedies. They even admitted the allegations supporting their removals. Consequently, there was nothing fundamentally unfair about the deportations in either case.

IV. Conclusion

This Court denies the motions to dismiss the indictments in question. Neither the legislation passed by Congress nor the dictates of the Supreme Court suggest that the immigration judges in question in either case lacked jurisdiction. The Defendants had actual notice, appeared and participated in their respective hearings, and admitted their removability. At most, *Pereira* suggests that the removals in some circumstances might be voidable if the NTA lacked times and locations and if, as in *Pereira*, the immigrant did not get notice and could not appear. These defenses might be the basis of a conclusion that the removals were voidable, but they do render the proceedings in question here void. This Court holds that the lack of specificity in the NTAs in question do not render the proceedings to be *per se* void due to lack of jurisdiction. Even if the lack of a time and location in the NTA rendered these notices deficient, such that they were open to challenge, these deficiencies were cured by actual notice.

This Court further holds the Defendants cannot collaterally attack their removals as neither has met the requirements of § 1326(d). They have not even tried to show that they exhausted their administrative remedies or that they were deprived of their judicial appellate rights. Aside from their theoretical jurisdiction argument, the Defendants have not tried to demonstrate that any aspect of the removal proceedings or the subsequent entry of the removal order were fundamentally unfair. Therefore, the motions to dismiss the indictments are denied.

SIGNED at Houston, Texas this 15th day of January, 2019.

Andrew S. Hanen
United States District Court Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
MCALLEN DIVISION

UNITED STATES OF AMERICA	§	
	§	
VS.	§	CRIMINAL ACTION NO. 7:18-CR-1783
	§	
VICTOR REYNOSO-VALDEZ	§	

ORDER

Pending before the Court is a motion to dismiss filed by Defendant in the above-referenced case. The gist of Defendant's argument is that the immigration court that ordered his removal had no jurisdiction because the original notice to appear did not include the requisite date and time information. On this basis, Defendant contends that the Government cannot meet the necessary elements of an 8 U.S.C. § 1326 charge and further that dismissal is warranted because Defendant's due process rights were violated.

Various district courts have dealt with, and are dealing with, this issue. Pertinent here, the Fifth Circuit has not yet addressed the issue. In the absence of controlling precedent, this Court adopts the opinion of Judge Diana Saldana of the Southern District of Texas in *United States v. Guillermo Malagamba De Leon*, Case No. 5:18-cr-691, issued on December 14, 2018.[1]

After considering the motion, the Court finds Defendant cannot meet the requirements of 8 U.S.C.A. § 1326(d). In particular, Defendant makes no claim that he exhausted any administrative remedies that may have been available to seek relief against the order or that he was deprived of the opportunity for judicial review. Additionally, Defendant asserts in a conclusory fashion that the proceeding was fundamentally unfair because the immigration court lacked jurisdiction. Such conclusory statement is insufficient to show that "the removal proceeding was fundamentally unfair in the sense that it resulted in 'a denial of justice' or of due process of law."[2]

The Court finds that Defendant is required to meet the requirements of 8 U.S.C.A. § 1326(d) but that by his own admission, he has not. As such, the motion to dismiss is DENIED.

IT IS SO ORDERED.

DONE at McAllen, Texas, this 4th day of January, 2019.

Micaela Alvarez
United States District Judge

[1] Not surprisingly, the motion to dismiss in that case is almost identical to the motion to dismiss in this case. Both are filed by the Federal Public Defender.
[2] See *United States v. Hernandez-Avalos*, 251 F.3d 505, 507 (5th Cir. 2001).

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

UNITED STATES OF AMERICA,	§	
	§	
v.	§	Criminal Action No. H-18-387
	§	
JAVIER ENRIQUE MELENDEZ-WISENTHAL	§	
	§	

ORDER

Pending before the Court is Defendant's Motion to Dismiss (Document No. 19). Having considered the motion, submissions, and applicable law, the Court determines the motion should be denied. On July 11, 2018, a federal grand jury returned a one-count indictment (the "Indictment") against Defendant Javier Enrique Melendez-Wisenthal ("Melendez-Wisenthal"). The Indictment charges Melendez-Wisenthal 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 (b)(1). On January 11, 2019, Melendez-Wisenthal moved to dismiss the Indictment.

Melendez-Wisenthal 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*, 342 F. Supp. 3d 722, 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 Melendez-Wisenthal satisfied the requirements to challenge his underlying removal order.[1]

As to exhaustion of administrative remedies, Melendez-Wisenthal 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 exhaust his administrative remedies in order to challenge an underlying removal order. *Lara-Martinez*, 2018 WL 6590798, at *2;

[1] The Court notes in *Pereira v. Sessions*, 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.).

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.). Melendez-Wisenthal does not allege nor produce any evidence that he exhausted his administrative remedies. The Court therefore finds Melendez-Wisenthal cannot establish that he exhausted his administrative remedies in order to challenge the underlying removal order. Thus, the Court finds Melendez-Wisenthal's motion to dismiss the indictment should be denied.[2] Accordingly, the Court hereby

ORDERS that Defendant's Motion to Dismiss (Document No. 19) is **DENIED**.

SIGNED at Houston, Texas, on this 4 day of February, 2019.

DAVID HITTNER
United States District Judge

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

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.

End of Document

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)

Current through November 28, 2019; 84 FR 65606.

End of Document

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.

End of Document

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.

End of Document

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

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

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

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

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

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

(A) In general

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

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

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

(B) Exception

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

(3) Central address files

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

(b) Securing of counsel

(1) In general

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

(2) Current lists of counsel

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

(3) Rule of construction

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

(c) Service by mail

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

(d) Prompt initiation of removal

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

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

(e) Certification of compliance with restrictions on disclosure

(1) In general

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

(2) Locations

The locations specified in this paragraph are as follows:

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

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

CREDIT(S)

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

Notes of Decisions (107)

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

End of Document

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

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

8 U.S.C.A. § 1326

§ 1326. Reentry of removed aliens

Effective: September 30, 1996
Currentness

(a) In general

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

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

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

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

(b) Criminal penalties for reentry of certain removed aliens

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

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

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

(3) who has been excluded from the United States pursuant to section 1225(c) of this title because the alien was excludable under section 1182(a)(3)(B) of this title or who has been removed from the United States pursuant to the provisions of subchapter V, and who thereafter, without the permission of the Attorney General, enters the United States, or attempts to

do so, shall be fined under Title 18 and imprisoned for a period of 10 years, which sentence shall not run concurrently with any other sentence. [1] or

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

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

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

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

(d) Limitation on collateral attack on underlying deportation order

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

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

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

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

CREDIT(S)

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

Notes of Decisions (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.

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

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

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

Currentness

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

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

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

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

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

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

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

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

U.S.C.A. Const. Amend. V full text, USCA CONST Amend. V full text
Current through P.L. 116-72.

End of Document