No. __-_____ (19A913)

IN THE

Supreme Court of the United States

JUAN CARLOS GARCIA TORRES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

GEREMY C. KAMENS
Federal Public Defender

Patrick L. Bryant
Appellate Attorney
Counsel of Record
Kevin E. Wilson
Assistant Federal Public Defender
Office of the Federal Public Defender
for the Eastern District of Virginia
1650 King Street, Suite 500
Alexandria, VA 22314
(703) 600-0800
Patrick_Bryant@fd.org

May 15, 2020

QUESTION PRESENTED

Whether an immigration court has jurisdiction to commence removal proceedings against a noncitizen if the "notice to appear" at the removal hearing fails to specify the hearing's time and place.

PARTIES TO THE PROCEEDINGS

All parties appear in the caption of the case on the cover page.

RELATED CASES

(1) *United States v. Garcia Torres*, No. 18-4714, United States Court of Appeals for the Fourth Circuit. Judgment entered October 24, 2019, and rehearing denied December 17, 2019.

(2) *United States v. Garcia Torres*, No. 1:18-CR-002, United States District Court for the Eastern District of Virginia. Judgment entered September 13, 2018.

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PETITION FOR WRIT OF CERTIORARI

Juan Carlos Garcia-Torres[1] respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINION BELOW

The opinion of the United States Court of Appeals appears at pages 1a to 4a of the appendix to the petition and is also available at 781 F. App'x 267 (4th Cir. 2019).

JURISDICTION

The district court in the Eastern District of Virginia had jurisdiction over this federal criminal case pursuant to 18 U.S.C. § 3231. The court of appeals had jurisdiction under 28 U.S.C. § 1291. That court issued its opinion and judgment on October 24, 2019. The Fourth Circuit denied a timely petition for rehearing on December 17, 2019. On February 19, 2020, the Chief Justice granted an extension of the time to file this petition until May 15, 2020, in application 19A913. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

8 U.S.C. § 1229(a)(1) provides:

> 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.

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[1] The Fourth Circuit and district court captions, along with the Fourth Circuit's opinion, list Mr. Garcia-Torres's last name as "Garcia Torres," so the caption to this petition will use that styling. The indictment and other documents in the record, including his briefs, use the hyphenated form, in line with Mr. Garcia-Torres's preference, so the body of this document will do so as well.

(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.

8 U.S.C. § 1326(d) provides:

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.

STATEMENT OF THE CASE

Introduction

Petitioner Juan Carlos Garcia-Torres was deported *in absentia* because the notice to appear for his removal hearing lacked a date and time. This Court, in *Pereira v. Sessions*, held that a notice to appear without this critical information is not a valid

notice to appear at all. 138 S. Ct. 2105, 2115-19 (2018). In the wake of *Pereira*, the circuits have fractured over the scope of this Court's holding. This Court's review is necessary to resolve the split.

The governing statute requires that noncitizens in removal proceedings be served with a notice to appear specifying the "time and place at which the proceedings will be held." 8 U.S.C. § 1229(a)(1)(G)(i). The regulations further provide that "[j]urisdiction vests, and proceedings before an Immigration Judge commence, when" the Department of Homeland Security files a notice to appear with the immigration court. 8 C.F.R. § 1003.14(a); *see also* 8 C.F.R. § 1003.13.

But the document given to Mr. Garcia-Torres and filed in immigration court lacked a hearing time. It stated he must appear before an immigration judge "on a date to be set at a time to be set." Because this empty form did not include the information that would have provided true notice, it was not a valid charging document and it could not have vested the immigration court with jurisdiction over Mr. Garcia-Torres's removal proceeding. This Court should clarify that *Pereira* means what it says, and it should reject the position of courts like the Fourth Circuit that have failed to faithfully apply its statutory interpretation.

Proceedings in the District Court

Mr. Garcia-Torres was indicted on one count of unlawful reentry after removal following a felony conviction, in violation of 8 U.S.C. § 1326(a), (b)(1). App. 2a.[2] He

[2] "App. __" refers to the appendix to this petition. "C.A.J.A." refers to the joint appendix filed in the court of appeals.

pled guilty without a plea agreement. After this Court issued its decision in *Pereira*, Mr. Garcia-Torres moved to withdraw his plea and to dismiss the indictment, arguing that *Pereira* rendered his underlying removal order invalid. C.A.J.A. 22. As a removal order is an element of the illegal re-entry offense, the invalidity of the order would mean that Mr. Garcia-Torres is legally innocent.

Mr. Garcia-Torres argued that the notice to appear issued as part of his original removal proceeding in 2005 did not list a date and time for the hearing, which rendered the removal proceeding invalid. Specifically, the notice stated that Mr. Garcia-Torres was to appear before an immigration judge "on a date to be set at a time to be set." C.A.J.A. 33. The removal order notes that Mr. Garcia-Torres "was not present" at the hearing. C.A.J.A. 38. Subsequent reinstatements each refer to this 2005 deportation order as the basis for Mr. Garcia-Torres's removability. C.A.J.A. 40-42.

Citing *Pereira*, Mr. Garcia-Torres argued that the immigration judge lacked jurisdiction over his 2005 removal proceeding, because the notice to appear was invalid, as were the orders purporting to reinstate the 2005 order. C.A.J.A. 23-30. Mr. Garcia-Torres asserted that because a valid removal order is an element of the § 1326 offense, he could make a credible assertion of innocence and satisfy the standard for withdrawing his plea.

The district court denied the motion, concluding that *Pereira* only applied to the "stop-time rule," the specific immigration provision at issue in that case. According to the district court, the omission of a date and time for a hearing in a notice to appear was not a jurisdictional defect, and so the removal order remained valid. C.A.J.A.

67-68. The court later sentenced Mr. Garcia-Torres to serve 36 months in prison. C.A.J.A. 83.

Proceedings in the Court of Appeals

Mr. Garcia-Torres appealed the denial of his motion to the Fourth Circuit, which affirmed in a short, unpublished opinion. App. 2a. The court of appeals relied on its earlier decision in *United States v. Cortez*, 930 F.3d 350 (4th Cir. 2019). App. 3a-4a. *Cortez* had held that *Pereira* did not permit a collateral attack on a § 1326 conviction. The primary basis for the court's opinion there was its conclusion that a notice to appear that lacked a date and time for a hearing was not a "jurisdictional" defect rendering the resulting removal order *ultra vires*. 930 F.3d at 358-62.

Cortez addressed the "regulation central to this case, 8 C.F.R. § 1003.14(a), [which] provides that 'jurisdiction vests, and proceedings before an Immigration Judge commence, when a charging document is filed with the Immigration Court.'" *Cortez*, 930 F.3d at 358-59 (alteration omitted). The court held that this rule did not implicate the immigration court's adjudicatory authority, but rather was "more like a docketing rule." *Id.* at 362. According to the Fourth Circuit, because the immigration judge had subject-matter jurisdiction over Cortez, any defect in his notice to appear did not render his removal order invalid. The court went on to state that the notice to appear itself was adequate, despite lacking required information. *Id.* at 362-64.

The Fourth Circuit determined that Mr. Garcia-Torres's claim was "squarely foreclosed by *Cortez*." App. 3a. It therefore affirmed the district court's order denying Mr. Garcia-Torres's motions to withdraw his plea and to dismiss the indictment. App.

4a. The court later denied, without comment, Mr. Garcia-Torres's petition for rehearing. App. 5a.

REASONS FOR GRANTING THE PETITION

I. The circuit courts are intractably divided over the application of *Pereira v. Sessions*.

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

In light of this split, the Court should grant Mr. Garcia-Torres's petition and reverse the Fourth Circuit's judgment.

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

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

commencement[.]" *Perez-Sanchez v. U.S. Att'y Gen.*, 935 F.3d 1148, 1154 (11th Cir. 2019).

In contrast, the First, Second, Third, Fourth, Fifth, Sixth, Eighth, and Ninth Circuits have held that the regulatory definition of a notice to appear, which does not require a hearing time, applies for beginning removal proceedings. *See Goncalves Pontes v. Barr*, 938 F.3d 1, 6-7 (1st Cir. 2019); *Banegas Gomez v. Barr*, 922 F.3d 101, 110-12 (2d Cir. 2019); *Nkomo v. U.S. Att'y Gen.*, 930 F.3d 129, 133-34 (3d Cir. 2019); *United States v. Cortez*, 930 F.3d 350, 363 (4th Cir. 2019); *Pierre-Paul v. Barr*, 930 F.3d 684, 690 (5th Cir. 2019); *Santos-Santos v. Barr*, 917 F.3d 486, 490-91 (6th Cir. 2019); *Ali v. Barr*, 924 F.3d 983, 986 (8th Cir. 2019); *Karingithi v. Whitaker*, 913 F.3d 1158, 1161-62 (9th Cir. 2019); *see also* App. 3a (following *Cortez*).

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

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

it found "brushed too quickly over the Supreme Court's rationale in *Pereira*" and failed to consider significant legislative history. *Ortiz-Santiago*, 924 F.3d at 962.

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

The Second and Eighth Circuits have held that a notice to appear, as defined by the regulations, confers "jurisdiction" on the immigration court. *Ali*, 924 F.3d at 986; *Banegas Gomez*, 922 F.3d at 112. The Sixth and Ninth Circuits adopted similar reasoning by deferring to the BIA. *Hernandez-Perez*, 911 F.3d at 314–15; *Karingithi*, 913 F.3d at 1161; *see Bermudez-Cota*, 27 I. & N. Dec. at 447.

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

The First and Third Circuits have rejected the contention that § 1229(a)(1) has jurisdictional significance but have not yet decided whether the regulations do. *Goncalves Pontes*, 938 F.3d at 7 n.3; *Nkomo*, 930 F.3d at 134.

In light of the fractured reasoning of the circuits' decisions on the jurisdictional significance of the statutory and regulatory definitions of "notice to appear," the Court should grant certiorari to resolve the disputes.

II. A notice to appear without a date and time is jurisdictionally defective and renders the resulting removal void.

The Fourth Circuit, and the other courts on its side of the circuit split, are wrong: the statutory notice to appear definition controls over the one in the regulations, and the statutory requirements are jurisdictional. Upon its plenary review, the Court should reverse the Fourth Circuit's judgment and resolve the split in favor of the courts that have read *Pereira* correctly.

Pursuant to 8 U.S.C. § 1229 ("Initiation of removal proceedings"), the initiation of removal proceedings under 8 U.S.C. § 1229a ("Removal proceedings") occurs through the provision of a written "notice to appear" under § 1229(a)(1) ("Notice to appear"). In light of the "plain text" of 8 U.S.C. § 1229(a)(1)(G)(i), a "notice to appear" in removal proceedings must specify several required pieces of information, including "the time and place at which the proceedings will be held." *Pereira*, 138 S. Ct. at 2114-15.

As the *Pereira* Court explained,

> 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.

Pereira, 138 S. Ct. at 2115.

The *Pereira* Court found that this interpretation of § 1229(a) was supported by § 1229(b), which gives a noncitizen "'the opportunity to secure counsel before the first hearing date'" by mandating that the hearing date "'shall not be scheduled earlier than

10 days after service of the notice to appear.'" *Id.* at 2114 (quoting § 1229(b)(1)). As the Court pointed out, the opportunity to secure counsel will not be meaningful if the alien has "minimal time and incentive to plan accordingly, and his counsel, in turn, receives limited notice and time to prepare adequately." *Id.* at 2115. The reasoning of *Pereira* makes clear that an immigration court lacks authority to commence proceedings, or to issue an order of removal, absent service of a notice to appear that specifies the time and place of the proceedings.

The entirety of the Court's analysis, together with the concurrence of Justice Kennedy, compel the conclusion that *Pereira*'s holding is about the scope of the immigration court's jurisdiction. First, the Court emphasized that a putative notice that did not contain time-and-place information would be "incomplete," would not meet "minimum" requirements, and would not be "authoriz[ed]." *Id.* at 2115-16, 2118-19. Second, the Court stated that a putative "notice to appear" that does not contain "integral information like the time and place of removal proceedings" would be deprived of its "essential character." *Id.* at 2115, 2116. Third, the Court found that time-and-place information is "substantive," and held that § 1229(a) uses "quintessential definitional language." *Id.* at 2114, 2116. Fourth, the Court rejected the dissent's claim that the omission of time-and-place information was similar to an unsigned notice of appeal, stating that the omission is not "some trivial, ministerial defect, akin to an unsigned notice of appeal." *Id.* at 2116-17. The Court expressly distinguished *Becker v. Montgomery*, 532 U.S. 757, 763, 768 (2001), in which the Court

had held that the signature requirement for notices of appeal is "nonjurisdictional." *Pereira*, 138 S. Ct. at 2116-17; *see Becker*, 532 U.S. at 765-66.

Justice Kennedy's concurrence also emphasized that the Court was resolving a question regarding the scope of the immigration court's authority and jurisdiction. As he stated, because the question of statutory interpretation pertained to the agency's own scope of authority, he found it "troubling" that lower courts had applied *Chevron* deference[3] to the agency's interpretation. *Pereira*, 138 S. Ct. at 2120 (Kennedy, J., concurring) (stating that "an agency's interpretation of the statutory provisions that concern the scope of its own authority" should not be subject to "reflexive deference"). Instead, in light of separation-of-powers principles, he suggested that questions regarding the jurisdiction of the agency should be resolved by the Judicial Branch:

> The proper rules for interpreting statutes and determining agency jurisdiction and substantive agency powers should accord with constitutional separation-of-powers principles and the function and province of the Judiciary.

Pereira, 138 S. Ct. at 2121 (Kennedy, J., concurring).

Importantly, although the later-sent notice of hearing had contained the time-and-place information, the *Pereira* Court emphasized that the relevant document for purposes of its analysis was the original notice to appear. *See id.* at 2114. As the Court explained, the fact that § 1229(a)(2) allows for "change or postponement" to "new time and place" "presumes that the Government has already served a 'notice to appear

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[3] *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

under section 1229(a)' that specified a time and place as required by § 1229(a)(1)(G)(i). Otherwise, there would be no time or place to 'change or postpone.'" *Id.*

Accordingly, although the specific issue in *Pereira* concerned the "stop time" rule for purposes of cancellation of removal, the Court's analysis makes clear that its holding applies more broadly. Under *Pereira*, the time-and-place requirement of § 1229(a)(1)(G)(i) imposes an important limitation on the agency's jurisdiction and authority. Without time-and-place information in the original notice to appear, that document is "incomplete," because it must specify, "at a minimum, the time and place of the removal proceedings." *Id.* at 2116.

An agency's power to act comes from Congress. *City of Arlington v. F.C.C.*, 569 U.S. 290, 298 (2013). Courts must "tak[e] seriously, and apply[ ] rigorously, in all cases, statutory limits on agencies' authority." *Id.* at 307. Without a notice to appear, the immigration court lacks authority to remove a noncitizen. 8 U.S.C. § 1229(a)(1). That is because service of the notice to appear is necessary for subject matter jurisdiction—the immigration judge's authority to preside over cases. *See United States v. Cotton*, 535 U.S. 625, 630 (2002) (describing subject matter jurisdiction as "the court's statutory or constitutional power to adjudicate the case") (quotation omitted).

After passage of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996, § 309(c)(2), Pub. L. No. 104-208, 110 Stat 3009 (1996), the INS acknowledged the need to "implement[ ] the language of the amended Act indicating that the time and place of the hearing must be on the Notice to Appear," and committed to providing a hearing time in the notices to appear "as fully as possible by

April 1, 1997[.]" Immigration and Naturalization Service and EOIR, Proposed Rules, Inspection and Expedited Removal of Aliens, 62 Fed. Reg. 444-01, 1997 WL 1514 (Jan. 3, 1997). But the agency created an exception for itself that hearing times could be omitted if providing them was not practicable, such as when "automated scheduling [is] not possible . . . (e.g., power outages, computer crashes/downtime)." *Id.* at 449; *see* 8 C.F.R. §§ 1003.15(b), (c); 1003.18. Now, almost 25 years later, "almost 100 percent of notices to appear omit the time and date of proceeding[.]" *Pereira*, 138 S. Ct. at 2111.

In *Pereira*, the Court recognized and corrected one long-standing flaw in how immigration authorities conducted removal proceedings. It should take the next step and apply its holding to cases like Petitioner's. The Court should grant certiorari to confirm the correct understanding of *Pereira* and rein in the wayward circuits.

III. This case is a good vehicle to decide these important questions.

Mr. Garcia-Torres's petition presents the Court with a suitable opportunity to settle important, recurring issues of federal immigration and criminal law. He fully litigated his claim in the district court and the court of appeals. Mr. Garcia-Torres brought the split of lower-court decisions to the Fourth Circuit's attention, but the court of appeals simply relied on its earlier ruling in *Cortez*. The *Pereira* issue is outcome-determinative, as a holding that the immigration court lacked authority to issue a removal order would eliminate one necessary element in his § 1326 conviction.

Moreover, the issue recurs frequently and will continue to generate conflicts absent this Court's intervention. In the past two decades, well over 200,000 notices to

appear were filed on average per year.[4] Most of those notices lacked hearing times. *Pereira*, 138 S. Ct. at 2111. As a result, millions of people have been deported by an agency without authority to do so. Many of those removed came back unlawfully. Illegal reentry continues to be the most prosecuted federal felony.[5] In fiscal year 2018, over 18,000 people were sentenced for illegal reentry.[6]

The INS and its successor, the DHS, have for years played by their own rules instead of those established by Congress. The sheer number of cases presenting this issue demonstrate the need for this Court's intervention. The Court should grant review in Mr. Garcia-Torres's case to restore the proper separation of powers between the executive agency and the legislature. It should re-affirm and apply its holding in *Pereira*.

CONCLUSION

The petition for a writ of certiorari should be granted

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

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

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

Respectfully submitted,

GEREMY C. KAMENS
Federal Public Defender

Patrick L. Bryant
Appellate Attorney
Counsel of Record
Kevin E. Wilson
Assistant Federal Public Defender
Office of the Federal Public Defender
for the Eastern District of Virginia
1650 King Street, Suite 500
Alexandria, VA 22314
(703) 600-0800
Patrick_Bryant@fd.org

May 15, 2020