randa-Díaz, 942 F.3d at 43; Flores-Machicote, 706 F.3d at 25; Gallardo-Ortiz, 666 F.3d at 811. Context matters, and the offense conduct in this case was egregious; as we have said, it involved the possession of two machine guns and four extended magazines on the heels of a previous felon-in-possession conviction. As if to rub salt in an open wound, the appellant committed the offenses of conviction while he was serving a supervised release term incident to that federal felon-in-possession conviction. And, finally, the appellant committed these new offenses against a backdrop of repeated probation violations.

[36] Facts are stubborn things, and a sentencing court is free to draw reasonable inferences from them. See United States v. Montañez-Quiñones, 911 F.3d 59, 67 (1st Cir. 2018), cert. denied, —— U.S. ——, 139 S. Ct. 1388, 203 L.Ed.2d 620 (2019). Viewed through this lens, we deem fully supportable the findings of the court below that the appellant's offenses were serious; that the prospect of the appellant's recidivism was real; that the need to protect the public was apparent; and that the appellant's earlier interactions with the judicial system seem to have taught him no lessons. Given these supportable findings, we cannot say that a sixty-month sentence was substantively unreasonable. See Flores-Machicote, 706 F.3d at 25; Gallardo-Ortiz, 666 F.3d at 818. Consequently, the district court's imposition of such a sentence was within the encincture of its discretion.

III. CONCLUSION

We need go no further. For the reasons elucidated above, the appellant's sentence is

Affirmed.

UNITED STATES of America, Appellee,

v.

Roberto MENDOZA-Sánchez, Defendant, Appellant.

No. 19-1091

United States Court of Appeals, First Circuit.

June 30, 2020

Background: Defendant, a Mexican citizen, pled guilty to one count of reentry after deportation. Prior to sentencing he filed a motion to withdraw his plea and dismiss the indictment. The United States District Court for the District of New Hampshire, Joseph A. DiClerico, Senior District Judge, denied the motion. Defendant appealed.

Holdings: The Court of Appeals, Torruella, Circuit Judge, held that the omission of the initial hearing date and time in the notice to appear did not deprive the immigration court of jurisdiction over defendant's prior removal proceeding, so as to render the prior removal order, upon which his reentry after deportation conviction was premised, invalid.

Affirmed.

1. Criminal Law ⚿1149

Review of a district court's denial of a plea-withdrawal motion is for abuse of discretion.

2. Criminal Law ⚿274(3.1), 1149

To make the assessment of whether the denial of a plea-withdrawal motion is an abuse of discretion, the Court of Ap-

Appendix A

peals considers the strength of the reasons offered in support of the motion, keeping in mind that a defendant may withdraw his plea so long as he shows that there is a fair and just reason for requesting the withdrawal.

3. Criminal Law ⚿1139

In determining whether the defendant offered a fair and just reason for seeking to withdraw his plea, the Court of Appeals reviews the district court's legal conclusions de novo.

4. Criminal Law ⚿1139

When reviewing the trial court's denial of a motion to dismiss an indictment, the Court of Appeals reviews questions of law de novo.

5. Criminal Law ⚿1139, 1158.3

Any factual findings made by the district court in ruling on motion to dismiss indictment are reviewed for clear error, and its ultimate ruling for abuse of discretion.

6. Aliens, Immigration, and Citizenship ⚿337

The omission of the initial hearing date and time in the notice to appear did not deprive the immigration court of jurisdiction over defendant's prior removal proceeding, so as to render the prior removal order, upon which his reentry after deportation conviction was premised, invalid and warrant dismissal of the indictment; the regulation that set forth the process by which the immigration court obtained jurisdiction over a removal proceeding did not require that the time and place of the initial hearing be included in the notice to appear in order to commence removal proceedings. 8 C.F.R. § 1003.14.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE [Hon. Joseph A. DiClerico, U.S. District Judge]

Christine DeMaso, Assistant Federal Public Defender, for appellant.

Seth R. Aframe, Assistant United States Attorney, with whom Scott W. Murray, United States Attorney, was on brief, for appellee.

Before TORRUELLA, BOUDIN, and KAYATTA, Circuit Judges.

TORRUELLA, Circuit Judge.

Defendant-Appellant Roberto Mendoza-Sánchez ("Mendoza"), a Mexican citizen, pleaded guilty to one count of reentry after deportation, in violation of 8 U.S.C. § 1326(a). Prior to sentencing, and in the wake of the Supreme Court's decision in Pereira v. Sessions, —— U.S. ——, 138 S. Ct. 2105, 201 L.Ed.2d 433 (2018),[1] Mendoza moved to withdraw his plea and dismiss the indictment, believing that the removal order underlying his conviction for reentering after deportation had been rendered null and void. According to Mendoza, the immigration court lacked jurisdiction to issue the removal order in the first place because his notice to appear -- the document served on a noncitizen and filed with the immigration court that initiates removal proceedings -- did not specify the date

1. In Pereira, the Supreme Court held that the stop-time rule, which governs the length of an alien's continuous physical presence in the United States for the purpose of an application for cancellation of removal, applies once "the alien is served a notice to appear under [8 U.S.C. § 1229(a)]." 138 S. Ct. at 2110. It concluded that a notice to appear "that does not inform a noncitizen when and where to appear for removal proceedings is not a 'notice to appear under section 1229(a)' and therefore does not trigger the stop-time rule." Id.

or time of the removal hearing. The district court denied the motion, finding that Mendoza did not satisfy any of the prerequisites set forth in 8 U.S.C. § 1326(d) for collaterally attacking the removal order during the criminal proceedings, and it sentenced Mendoza to time served. Mendoza now appeals this denial. He contends that: (1) the immigration court lacked jurisdiction to consider his removal because the notice to appear served on him did not include the date and time of the hearing; and (2) if the immigration court lacked jurisdiction, then for that reason he need not satisfy the requirements of section 1326(d) in order to successfully challenge in this subsequent criminal proceeding the order resulting in his removal. Because we conclude that the immigration court did not lack jurisdiction, we reject Mendoza's appeal without needing to consider whether he would need to satisfy section 1326(d) if he could show that the immigration court lacked jurisdiction over his removal.

I.

Mendoza is a native and citizen of Mexico. In 2003 and 2009, he was arrested for being unlawfully present in the United States and was granted voluntary departure to Mexico on both occasions. Mendoza returned to the United States without approval later in 2009.

On May 7, 2014, U.S. Immigration and Customs Enforcement ("ICE") agents arrested Mendoza in New Hampshire. The next day, the U.S. Department of Homeland Security ("DHS") personally served Mendoza with a notice to appear, which informed him that he was being charged with removability based on his unlawful presence in the United States and directed him to appear before an immigration judge in Boston at an unspecified date and time. On May 28, 2014, the immigration court issued a notice of hearing, which directed Mendoza to appear in the Boston immigration court in seven days -- on June 4, 2014, at 8:00 a.m. -- for his removal proceeding. According to annotations on the document, personal service was made by delivery to Mendoza's attorney or representative and to DHS. However, the name of his attorney on the document was inexplicably crossed out. At the hearing, Mendoza requested voluntary departure, but the immigration judge ordered him removed to Mexico. Mendoza subsequently waived any appeal. Ultimately, he was deported on June 26, 2014.

Years later, on November 28, 2017, New Hampshire State Police conducted a stop of a commercial vehicle. Mendoza was the driver. He admitted to the state trooper that he did not have a driver's license, that he was unlawfully present in the United States, and that he had been previously deported. After confirming his identity, ICE arrested Mendoza.

II.

On December 13, 2017, a grand jury sitting in the U.S. District Court for the District of New Hampshire returned a one-count indictment charging Mendoza with reentry after deportation, in violation of 8 U.S.C. § 1326(a). Mendoza pleaded guilty to the offense on May 31, 2018.

While Mendoza awaited sentencing, the Supreme Court decided Pereira, 138 S. Ct. at 2105. As a result, Mendoza filed a motion to withdraw his guilty plea and dismiss the indictment, contending that, under Pereira, the notice to appear in his underlying immigration case was defective because it failed to include the date and time of the removal hearing and, consequently, that defect "deprive[d] the immigration court of jurisdiction to issue [the removal order]." In Mendoza's view, because the 2014 removal was invalid, he was

legally innocent of reentry after deportation.

The district court denied Mendoza's motion, rejecting his argument that the immigration court lacked subject-matter jurisdiction in 2014.[2] It further concluded that, in any event, Mendoza had to satisfy the requirements set forth in 8 U.S.C. § 1326(d) in order to challenge the validity of the underlying removal order during his criminal case, which Mendoza had failed to do. Thus, the court held that Mendoza could not withdraw his guilty plea or challenge the indictment. This appeal ensued.

III.

[1–3] Our review of a district court's denial of a plea-withdrawal motion is for abuse of discretion. United States v. Caramadre, 807 F.3d 359, 367 (1st Cir. 2015). To make that assessment, we consider "the strength of the reasons offered in support of the motion," keeping in mind that a defendant may withdraw his plea so long as he shows that there is "a fair and just reason" for requesting the withdrawal. United States v. Powell, 925 F.3d 1, 4 (1st Cir. 2018); see United States v. González-Arias, 946 F.3d 17, 28 (1st Cir. 2019). "In determining whether the defendant offered such a 'fair and just reason,' " we review the district court's legal conclusions de novo.Powell, 925 F.3d at 4 (citing United States v. Gates, 709 F.3d 58, 69 (1st Cir. 2013)).

[4, 5] Similarly, "[w]hen reviewing the trial court's denial of a motion to dismiss an indictment, we review questions of law de novo." United States v. Doe, 741 F.3d 217, 226 (1st Cir. 2013) (citing United States v. López-Matías, 522 F.3d 150, 153 (1st Cir. 2008)). Any factual findings made by the district court are reviewed for clear error, and its "ultimate ruling" for abuse of discretion. Id.

IV.

[6] Mendoza's overarching reason for requesting the withdrawal of his guilty plea is that, in his view, the immigration court's 2014 removal order -- upon which his reentry after deportation conviction is premised -- is invalid because the immigration court lacked jurisdiction over his removal proceedings. His theory rests on the contention that the notice to appear that initiated his removal proceedings in 2014 was defective because it did not contain the date or time of his removal hearing. Mendoza avers that the inclusion of that information was required both by statute, see 8 U.S.C. § 1229(a)(1), and by the Supreme Court's decision in Pereira. Because his removal is a "nullity," his argument goes, it cannot support his conviction, and he is innocent of that offense. Thus, he contends that the district court erred in not allowing him to withdraw his guilty plea.

We have already squarely rejected the contention that the omission of the initial hearing date and time in a notice to appear deprives the immigration court of jurisdiction over a removal proceeding. See Goncalves Pontes v. Barr, 938 F.3d 1 (1st Cir. 2019); see also Arévalo v. Barr, 950 F.3d 15, 20 (1st Cir. 2020); Ferreira v. Barr, 939 F.3d 44, 45 (1st Cir. 2019). We held in Goncalves Pontes that the jurisdiction of an immigration court is governed by agency regulation, see 8 C.F.R. § 1003.14(a), not by 8 U.S.C. § 1229(a) -- the statute upon which Mendoza relies -- and that the

2. The district court aptly noted that there was a split among the lower courts on whether removal orders entered after a defective notice to appear under Pereirahad been served were void for lack of subject-matter jurisdiction and that, at the time, no court of appeals had addressed the issue.

regulations do not concern the written notice contemplated in that statute. See 938 F.3d at 3-4, 6. While section 1229(a) governs the information that must be provided to noncitizens about their impending removal hearings -- i.e., "the 'time' and 'place,' that would enable them 'to appear' at the removal hearing in the first place," id. at 6 (quoting Pereira, 138 S. Ct. at 2115) -- the regulations "set forth the process by which the immigration court obtains jurisdiction over a removal proceeding," id. (citing 8 C.F.R. § 1003.14). And the regulations do not require that the time and place of the initial hearing be included in the notice to appear in order to commence removal proceedings. Id. at 4. Thus, we concluded that an undated notice to appear that complies with the regulations is effective to confer jurisdiction upon the immigration court. Id. at 7.

In this case, there is no suggestion that Mendoza's notice to appear did not comply with the regulations. Therefore, pursuant to our holding in Goncalves Pontes, Mendoza's jurisdictional quarrel is unavailing.

However, Mendoza resists this conclusion by arguing that our holding in Goncalves Pontes depends on the proper service of a notice of hearing that "cures" an undated notice to appear. Because he was not properly or timely served with the notice of hearing, he says, the defect in the notice to appear was not cured, and thus, this "two-step process" did not vest the immigration court with jurisdiction.

Contrary to Mendoza's contention, we did not tie our holding in Goncalves Pontes to a successful service of a notice of hearing.[3] In fact, we held -- without mentioning service of a notice of hearing -- that other documents, such as a notice of referral to an immigration judge and a notice of intention to rescind and request for hearing by an alien, see 8 C.F.R. § 1003.13, are charging documents that "establish the immigration court's jurisdiction over a case, commencing removal proceedings against an alien without resort to a Notice to Appear." Goncalves Pontes, 938 F.3d at 6-7. We merely added at the end of the opinion, as a "coda" -- meaning in addition to what we had previously expressed -- that the Board of Immigration Appeals (the "BIA") had "likewise concluded that [a notice to appear] that is served without specification of the time and place of the initial hearing may be sufficient to confer subject-matter jurisdiction on an immigration court in removal proceedings." Id. at 7 (emphasis added) (citing In re Bermúdez-Cota, 27 I. & N. Dec. 441, 447 (BIA 2018)). And in Bermúdez-Cota, the BIA "clarified its view" that a notice to appear " 'vests an Immigration Judge with jurisdiction over the removal proceedings' when a notice of hearing is sent to the alien in advance of those proceedings." Id. (quoting Bermúdez-Cota, 27 I. & N. Dec. at 447). We simply concluded from this that the agency's interpretation of its regulations was "entitled to great deference." Id. (quoting Sidell v. Comm'r., 225 F.3d 103, 109 (1st Cir. 2000)). Notably, we clarified in a footnote that we did not decide the question of whether a two-step process could satisfy the time and date requirements of the statute at issue in Pereira. Id. at 7 n.2. Moreover, we have confirmed the holding in Goncalves Pontes that jurisdiction vests with the issuance of a notice to appear that complies with the regulations in subsequent cases without resorting to an inquiry

3. This is not to say that Mendoza could not have successfully objected to the timing of his removal hearing due to inadequate or untimely service of notice. He made no such argument, and instead waived his right to appeal to the Board of Immigration Appeals from the decision of the immigration court. Nor, for that matter, does he contend that he can satisfy the requirements of section 1326.

into whether service of a notice of hearing was appropriate or was even made. See, e.g., Ferreira, 939 F.3d at 45. Therefore, even if neither Mendoza nor his counsel was served with the notice of hearing, as Mendoza avers, that does not defeat the application of Goncalves Pontes's holding, which confirms that the immigration court had jurisdiction over his removal.

Next, Mendoza attempts to circumvent Goncalves Pontes's holding by arguing that it was wrongly decided. But the law of the circuit doctrine dooms this claim, as we are "bound by prior panel decisions that are closely on point," United States v. Wurie, 867 F.3d 28, 34 (1st Cir. 2017) (quoting San Juan Cable LLC v. P.R. Tel. Co., 612 F.3d 25, 33 (1st Cir. 2010)), "absent any intervening authority," Mass. Delivery Ass'n v. Healey, 821 F.3d 187, 192 (1st Cir. 2016) (quoting United States v. Mouscardy, 722 F.3d 68, 77 (1st Cir. 2013)). Mendoza does not suggest that there is any such authority, nor does he "offer[ ] a sound reason for believing that the [Goncalves Pontes] panel would change its collective mind," Wurie, 867 F.3d at 34. Hence, Goncalves Pontes controls our decision here, and Mendoza's jurisdictional argument fails, and since he does not otherwise argue that he can satisfy the requirements of section 1326(d) for collaterally challenging his removal order in this subsequent criminal proceeding, his appeal fails.

V.

For the foregoing reasons, the district court's denial of Mendoza's motion to withdraw his guilty plea and dismiss the indictment is affirmed.

Affirmed.

UNITED STATES of America, Appellee,

v.

Juan ángel NAPOUT, José Maria Marin, Defendants-Appellants.[1]

Nos. 18-2750 (L), 18-2820 (Con)
August Term, 2019
18-2820

United States Court of Appeals, Second Circuit.

Argued: November 7, 2019

Decided: June 22, 2020

Background: Defendants were convicted in the United States District Court for the Eastern District of New York, Pamela K. Chen, J., of Racketeer Influenced and Corrupt Organizations (RICO) Act conspiracy, conspiracy to commit honest services wire fraud, and money laundering conspiracy, all arising out of alleged payments of bribes to officials of the global and regional soccer organizations in exchange for valuable broadcasting and marketing contracts. Defendants appealed.

Holdings: The Court of Appeals, Sack, Senior Circuit Judge, held that:

(1) government overcame presumption against territoriality in connection with conspiracy to commit honest services wire fraud;

(2) honest services wire fraud statute was not void for vagueness as applied to defendants;

(3) evidence supported defendants' convictions for honest services wire fraud;

(4) probative value of evidence or questioning of witnesses about whether com-

1. The Clerk of Court is respectfully directed to amend the official caption as listed above.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

United States of America

v.

Roberto Mendoza-Sanchez

Criminal No. 17-cr-189-JD
Opinion No. 2018 DNH 218

O R D E R

The United States charged Roberto Mendoza-Sanchez with one count of illegally reentering the United States after removal in violation of 8 U.S.C. § 1326(a). Mendoza-Sanchez pleaded guilty but now moves to withdraw his guilty plea and dismiss the indictment on the ground that he is legally innocent of the offense. The government objects.

Standard of Review

A defendant may withdraw his plea of guilty if he "can show a fair and just reason for requesting the withdrawal." Fed. R. Crim. P. 11(d)(2)(B). A colorable assertion that the defendant is legally innocent of the offense to which he pleaded guilty is among the factors to be considered when evaluating whether a defendant may withdraw his guilty plea. See United States v. Fernandez-Santos, 856 F.3d 10, 15 (1st Cir. 2017). The government does not appear to contest the facts alleged by

Mendoza-Sanchez or that the court should allow him to withdraw his guilty plea if those facts show that he is legally innocent.

Background

Immigration authorities arrested Mendoza-Sanchez on May 7, 2014. On May 8, Mendoza-Sanchez was served with a notice to appear ("NTA") at a removal hearing at a date and time "[t]o be set." Doc. 27-1 at 1. On May 28, 2014, the government served Mendoza-Sanchez with a "notice of hearing" that included the date and time for the hearing, which was June 4, 2014. Mendoza-Sanchez appeared at the removal hearing on June 4, requested voluntary departure, and waived his right to appeal the immigration judge's findings.

The immigration judge denied Mendoza-Sanchez's request for voluntary departure and ordered removal. Mendoza-Sanchez was removed to Mexico on June 26, 2014. He was found back in the United States on November 28, 2017. The government thereafter brought the illegal reentry charges against Mendoza-Sanchez that are at issue in this case.

Discussion

Mendoza-Sanchez argues that he is legally innocent because, under Pereira v. Sessions, 138 S. Ct. 2105 (2018), the NTA served on him was deficient. Because the NTA was deficient, Mendoza-Sanchez contends, the removal order was entered without

Appendix B

2

jurisdiction pursuant to 8 C.F.R. § 1003.14(a), which only vests subject matter jurisdiction in the immigration court when an NTA has been served. The government objects on the ground that Mendoza-Sanchez's challenge to the removal order is a collateral attack, and he does not meet the prerequisites listed under § 1326(d) for making a collateral attack.

A. Pereira's Effect on Immigration Courts' Subject Matter Jurisdiction

In Pereira, the Supreme Court addressed whether the "stop-time rule" is triggered when the government serves on a noncitizen an NTA that is defective. Pereira, 138 S. Ct. at 2109-10. A nonpermanent-resident noncitizen may be eligible for a disposition known as "cancellation of removal" if, among other requirements, he has been physically present in the United States for a continuous period of ten years or more. 8 U.S.C. § 1229b(b)(1)(A). The aptly-named "stop-time rule" stops the accumulation of time for cancellation of removal eligibility if the United States serves the noncitizen with an NTA. Id. § 1229b(d)(1)(A); Pereira, 138 S. Ct. at 2109.

The NTA, however, must inform the noncitizen about the time and place of the removal proceedings at which he is required to appear. 8 U.S.C. § 1229(a)(1)(G)(i). Considering this statutory provision, the Supreme Court in Pereira held that "[a] notice that does not inform a noncitizen when and where to

Appendix B

appear for removal proceedings is not a 'notice to appear under § 1229(a)' and therefore does not trigger the stop-time rule." 138 S. Ct. at 2110.

Relying on Pereira's holding that a defective NTA is "not" an NTA and 8 C.F.R. § 1003.14(a), which vests subject matter jurisdiction in the immigration court only when a noncitizen has been served with an NTA, some district courts have found that removal orders entered after a defective NTA are void for lack of subject matter jurisdiction. United States v. Virgen-Ponce, 320 F. Supp. 3d 1164 (E.D. Wash. 2018); United States v. Zapata-Cortinas, 2018 WL 4770868 (W.D. Texas Oct. 2, 2018). Therefore, in the view of those courts, any illegal reentry criminal charge premised on the void removal order must be dismissed. E.g., Virgen-Ponce, 320 F. Supp. 3d at 1166. Other courts, however, have rejected that conclusion if the government cured the defect in the NTA by timely informing the noncitizen about the date and time of his or her removal proceedings. See, e.g., United States v. Romero-Colindres, 2018 WL 5084877, at *2 (N.D. Ohio Oct. 18, 2018); United States v. Larios-Ajualat, 2018 WL 5013522, at *4-*6 (D. Kan. Oct. 15, 2018). No court of appeals has yet addressed the issue.

Appendix B

B. Application to Mendoza-Sanchez

The NTA the government served on Mendoza-Sanchez was deficient under Pereira because it did not provide a date and time for the removal hearing at which he was ordered to appear. Nevertheless, the government argues that Mendoza-Sanchez cannot challenge the validity of the removal order in this criminal proceeding because he fails to establish the prerequisites to make a collateral attack on a prior removal order specified by § 1326(d).

Under 8 U.S.C. § 1326(d), a noncitizen charged with illegal reentry under § 1326(a) can collaterally challenge a prior order of removal in the criminal proceeding, but only when three prerequisites have all been met. The defendant must demonstrate (1) that he "exhausted any administrative remedies that may have been available to seek relief against the order"; (2) that "the deportation proceedings at which the order was issued improperly deprived the alien of the opportunity for judicial review"; and (3) that "the entry of the order was fundamentally unfair." 8 U.S.C. § 1326(d).

Mendoza-Sanchez does not address the requirements of § 1326(d). Instead, he appears to assert that the court should follow the lead of cases such as Virgen-Ponce and declare the removal order void without requiring him to meet § 1326(d)'s prerequisites to collateral attack. Virgen-Ponce and Zapata-

Cortinas[1] are distinguishable because Mendoza-Sanchez was served with a supplemental notice that cured the defect in the initial NTA, ensuring that the immigration court had subject matter jurisdiction.[2] See Dababneh v. Gonzales, 471 F.3d 806, 809 (7th Cir. 2006) ("The fact that the government fulfilled its obligations under [§ 1229(a)] in two documents—rather than one—did not deprive the [immigration judge] of jurisdiction to initiate removal proceedings."); Guamanrrigra v. Holder, 670 F.3d 404, 410 (2d Cir. 2012) (holding that stop-time rule was triggered when the government cured defective NTA by serving second NTA that included date and time for hearing).

The court also disagrees with Virgen-Ponce and Zapata-Cortinas to the extent they held that a noncitizen need not meet § 1326(d)'s prerequisites for a collateral attack where the removal order is alleged to be void for lack of subject matter jurisdiction. Generally, a final order, even if issued without jurisdiction, remains effective until it is declared void through a direct attack or, when authorized, a collateral attack. See Chicot Cnty. Drainage Dist. v. Baxter State Bank,

[1] Zapata-Cortinas was issued after Mendoza-Sanchez submitted his motion to withdraw guilty plea.

[2] Virgen-Ponce and Zapata-Cortinas appeared at their removal hearings because they were in custody, but those cases did not address whether a supplemental notice would have cured a jurisdictional defect. See Virgen-Ponce, 320 F. Supp. 3d at 1165-66; Zapata-Cortinas, 2018 WL 4770868, at *1.

Appendix B

308 U.S. 371, 319-20 (1940) ("Whatever the contention as to jurisdiction may be, whether it is that the boundaries of a valid statute have been transgressed, or that the statute itself is invalid, the question of jurisdiction is still one for judicial determination."); Kalb v. Feurstein, 308 U.S. 433, 439 (1940) (describing state court bankruptcy orders that exceeded the courts' subject matter jurisdiction as "nullities subject to collateral attack"). Therefore, Mendoza-Sanchez must satisfy § 1326(d)'s requirements in order to challenge the validity of the removal order that underlies the illegal reentry charge.

As the government contends, Mendoza-Sanchez cannot meet § 1326(d) under the facts he alleges. First, Mendoza-Sanchez did not exhaust the administrative remedies available to him because he did not appeal the removal order to the Board of Immigration Appeals ("BIA"). See 8 C.F.R. 1003.3(b) (providing that a removal order issued by an immigration judge may be appealed to the BIA).

Second, Mendoza-Sanchez does not present any evidence or even argue that he was deprived of the opportunity for judicial review of the removal order. It is undisputed that Mendoza-Sanchez knowingly and voluntarily waived his right to appeal the removal order to the BIA and the First Circuit.

Third, because Mendoza-Sanchez had actual notice of the date and time of the hearing, the lack of a date and time on the

first NTA did not prejudice him, and, therefore, the entry of the removal order was not fundamentally unfair. See United States v. Luna, 436 F.3d 312, 320-21 (1st Cir. 2006) (observing that a defendant must show prejudice to render the entry of an order of removal fundamentally unfair under § 1326(d)(3)). The due process concerns advanced by the Supreme Court in Pereira do not apply when the government cures a defective NTA and the alien appeared at his removal hearing. See e.g., United States v. Fernandez, 2018 WL 4976804, at *1 (E.D.N.C. Oct. 15, 2018) ("[U]nlike in Pereira, defendant was personally served with a second NTA which included the specific date and time of her removal hearing. Defendant was also present at her removal hearing, unlike the defendant in Pereira."); Larios-Ajualat, 2018 WL 5013522, at *7 ("Defendant does not dispute that, unlike the alien in Pereira, he was in fact present at the removal hearing. . . . Absent from the motion [to dismiss] is any suggestion that he suffered prejudice from the lack of notice, which means Defendant's collateral challenge to the 2008 removal order is also barred by § 1326(d)(3)."). Because he does not satisfy any of the three prerequisites to make a collateral attack on the removal order, Mendoza-Sanchez cannot challenge the immigration court's order of removal in this proceeding.

Appendix B

Conclusion

For the foregoing reasons, Mendoza-Sanchez's motion to withdraw his plea agreement and to dismiss the indictment (doc. 25) is denied.

SO ORDERED.

Joseph A. DiClerico, Jr.
United States District Judge

November 5, 2018

cc: Anna Z. Krasinski, Esq.
Jonathan R. Saxe, Esq.
U.S. Probation
U.S. Marshal

Appendix B
9