

APPENDIX

Decision of the court of appeals

United States v. Gonzalez-Ferretiz, 813 F. App'x 837 (4th Cir. 2020). 1a

District court's memorandum opinion

United States v. Gonzalez-Ferretiz, No. 3:18-cr-117, 2019 WL 943388
(E.D. Va. Feb. 26, 2019). 9a

Department of Homeland Security Form I-851, Notice of Intent to Issue a

Final Administrative Removal Order. 18a

813 Fed.Appx. 837

This case was not selected for publication in West's Federal Reporter. See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S.Ct. of Appeals 4th Cir. Rule 32.1. United States Court of Appeals, Fourth Circuit.

UNITED STATES of America, Plaintiff - Appellee,
v.

Isidoro GONZALEZ-FERRETIZ, a/k/a Francisco Rodriguez-Vela, Defendant - Appellant.

No. 19-4409

Submitted: March 17, 2020

Decided: May 13, 2020

Synopsis

Background: Defendant was charged with one count of illegal reentry by removed alien. The United States District Court for the Eastern District of Virginia, [Robert E. Payne](#), Senior District Judge, denied defendant's motion which sought to dismiss indictment via collateral attack on underlying removal order, [2019 WL 943388](#), and, after defendant was convicted upon conditional guilty plea which preserved his right to appeal denial of motion, sentenced defendant to 21 months' imprisonment over defendant's objection that probation officer had incorrectly calculated length of defendant's sentence for prior offense. Defendant appealed.

Holdings: The Court of Appeals, [Thomas E. Johnston](#), Chief Judge, sitting by designation, held that:

[1] Immigration and Nationality Act (INA) limitations on collateral attacks on underlying removal orders barred defendant's collateral attack;

[2] defendant could not avoid INA limitations by challenging order as ultra vires agency action; and

[3] length of defendant's sentence for prior offense had been properly calculated.

Affirmed.

Procedural Posture(s): Appellate Review; Pre-Trial Hearing Motion; Sentencing or Penalty Phase Motion or Objection.

West Headnotes (3)

[1] **Aliens, Immigration, and Citizenship** 🔑 Denial of right to appeal; waiver of right

Deportation proceedings at which removal order had been issued had not improperly deprived defendant of opportunity for judicial review, and thus provision, of Immigration and Nationality Act (INA) section on reentry of removed aliens, which limited collateral attacks on underlying deportation orders applied to bar defendant charged with one count of illegal reentry by removed alien from collaterally attacking underlying removal order; defendant had given up administrative or judicial review in underlying removal proceedings by completing waivers on "Notice of Intent to Issue a Final Administrative Removal Order," and defendant did not assert that he could not understand English or make any other claim of limited capacity to make knowing waiver of judicial review in removal proceedings. Immigration and Nationality Act § 276,  8 U.S.C.A. § 1326.

[2] **Aliens, Immigration, and Citizenship** 🔑 Collateral Attack

Whether based on an official's authority to act or an incorrect application of that authority, a collateral challenge to a removal order cannot skirt the requirements of the provision, of the Immigration and Nationality Act (INA) section on reentry of removed aliens, which limits collateral attacks on underlying deportation orders. Immigration and Nationality Act § 276,  8 U.S.C.A. § 1326(d).

[3] **Sentencing and Punishment** Offense or adjudication in other jurisdiction

Prior prison sentence, of defendant convicted of illegal reentry by removed alien, for his Pennsylvania conviction for theft from motor vehicle exceeded one year and one month, for purposes of federal sentencing guidelines requiring addition of three criminal history points for each prior prison sentence of such length and addition of six points to base offense level for each prior felony conviction for which sentence imposed had been of such length, where, for theft conviction, defendant had been sentenced to approximately five to six weeks for time served to maximum of 23 months' imprisonment, with immediate parole.

Immigration and Nationality Act § 276,  8 U.S.C.A. § 1326(a); 18 Pa. Stat. Ann. § 3934(A);  U.S.S.G. §§ 2L1.2(b)(2)(C),  4A1.1(a).

*838 Appeal from the United States District Court for the Eastern District of Virginia, at Richmond. [Robert E. Payne](#), Senior District Judge. (3:18-cr-00117-REP-1)

Attorneys and Law Firms

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Before [KEENAN](#) and [RUSHING](#), Circuit Judges, and [Thomas E. JOHNSTON](#), Chief United States District Judge for the Southern District of West Virginia, sitting by designation.

Opinion

Affirmed by unpublished opinion. Judge Johnston wrote the opinion, in which Judge [Keenan](#) and Judge [Rushing](#) have joined.

Unpublished opinions are not binding precedent in this circuit.

JOHNSTON, District Judge:

Isidoro Gonzalez-Ferretiz (“Gonzalez”) was convicted of one count of illegal reentry by a removed alien. He now appeals his conviction and sentence on two grounds. First, Gonzalez argues that the district court erred in denying his motion to dismiss the indictment. Second, Gonzalez challenges the district court's application of the United States Sentencing Guidelines (“U.S.S.G.”) with respect to a prior conviction. For the following reasons, we affirm.

I.

Gonzalez is a Mexican citizen. He illegally entered the United States sometime before July 22, 2008, when he was encountered in Pennsylvania by immigration authorities from the Department of Homeland Security (“DHS”). Gonzalez was offered a voluntary departure to Mexico, with which he complied. He again entered the United States illegally on some unknown date prior to an arrest in July 2012. On July 23, 2012, immigration authorities interviewed Gonzalez while in state custody, and he admitted that he had entered the United States unlawfully. No further action was taken to remove him at that time.

On June 2, 2014, Gonzalez pled guilty to theft from a motor vehicle, in violation of Pennsylvania law, 18 Pa. Code § 3934(A). Pursuant to Pennsylvania's indeterminate sentencing scheme, Gonzalez was sentenced to a minimum term of confinement of “time served 4/24/14–6/2/14” and a maximum of “23 mos.” J.A. 148. Notably, the sentencing court also granted Gonzalez “immediate parole” as a “specific condition[].” *Id.*

The day after sentencing, the DHS initiated removal proceedings against Gonzalez by serving him with a Notice of Intent to Issue a Final Administrative Removal Order (“NOI”), also known as a Form I-851. The NOI stated that Gonzalez was removable due to his conviction of an aggravated felony as defined under  *839 8 U.S.C. § 1101(a)(43)(G) of the Immigration and Nationality Act (“INA”). The NOI included an attachment listing Gonzalez's prior conviction for theft from a motor vehicle, in violation of Pa. Code § 18-3934(A), for which he was sentenced to a term

of imprisonment of 23 months, as the basis for his removal. The NOI also contained a section explaining a charged alien's "Rights and Responsibilities," including the right to legal representation and the right to contest the charge. J.A. 149. The NOI was printed in English, and an immigration officer explained the form to Gonzalez in English. Gonzalez signed the NOI acknowledging service. In addition, he checked a box admitting the allegations in the charge and indicating that he did not contest his removal. He also checked a box waiving his right to remain in the United States for 14 days to apply for judicial review and signed below the assented waiver. A Final Administrative Removal Order issued on June 3, 2014, and Gonzalez was removed from the United States on June 19, 2014.

Sometime after his removal, Gonzalez again reentered the United States illegally and was discovered by immigration authorities. Pursuant to the 2014 removal order, he was deported to Mexico in March 2018. In September 2018, Gonzalez was again encountered by immigration authorities in Henrico County, Virginia. As a result, he was charged in a one-count indictment in the Eastern District of Virginia for illegal reentry, in violation of  8 U.S.C. § 1326(a).

Gonzalez filed a motion to dismiss the indictment, arguing that the underlying removal order was unlawful. The district court found after an evidentiary hearing that Gonzalez understood English at the time he completed the form and that he understood the waivers to which he assented. Gonzalez then entered a conditional guilty plea, preserving his right to appeal the motion to dismiss the indictment.

Prior to sentencing, the United States Probation Office prepared a presentence report ("PSR"). In the PSR, the probation officer determined that Gonzalez's base offense level under  U.S.S.G. § 2L1.2(a) was eight. He then applied a six-level enhancement under  U.S.S.G. § 2L1.2(b)(2) (C) based on Gonzalez's prior felony conviction, namely, the Pennsylvania theft from a motor vehicle conviction, for which the probation officer determined he had received a sentence exceeding one year and one month. After a two-level reduction for acceptance of responsibility, Gonzalez's offense level came to 12. His criminal history score was eight, which resulted in a criminal history category of IV. Based upon an offense level of 12 and a criminal history category of IV, Gonzalez's guidelines range was 21–24 months' imprisonment.

Gonzalez objected to the six-level enhancement and criminal history calculation, arguing that the probation officer incorrectly calculated the sentence of his prior theft offense in Pennsylvania. Specifically, Gonzalez argued that, although he was sentenced to time served to 23 months, he received immediate parole after serving five to six weeks, which constitutes a "suspended sentence" that should not be considered in calculating the guidelines range. The district court overruled the objection and, ultimately, imposed a sentence of 21 months' imprisonment. Gonzalez timely appealed.

II.

On appeal, Gonzalez contends that the district court erred in failing to grant his motion to dismiss the indictment based on a collateral attack of the underlying removal order. He also maintains that the district court committed procedural error in applying a six-level enhancement and ***840** calculating his criminal history score based on the imposed length of a prior sentence. We address each argument in turn.

A. Collateral Attack of Removal Order

On a motion to dismiss an indictment under  8 U.S.C. § 1326(d), we review a district court's factual findings for clear error and the court's legal conclusions de novo. *See United States v. Hosford*, 843 F.3d 161, 163 (4th Cir. 2016). In 1987, the Supreme Court recognized a due process right for an alien charged with unlawful reentry after removal under  § 1326 to challenge the underlying removal order. *See*  *United States v. Mendoza-Lopez*, 481 U.S. 828, 837–38, 107 S.Ct. 2148, 95 L.Ed.2d 772 (1987) (explaining, "where a determination made in an administrative proceeding is to play a critical role in the subsequent imposition of a criminal sanction," due process requires "some meaningful review of the administrative proceeding.") (emphasis in original). Thus, the Supreme Court held that where a procedural defect in an immigration proceeding forecloses judicial review of a removal order, such proceeding may not be relied on to support a subsequent criminal conviction. *See*  *id.* at 838, 107 S.Ct. 2148; *United States v. Guzman-Velasquez*, 919 F.3d 841, 845 (4th Cir. 2019).

Thereafter, Congress codified this due process requirement in [8 U.S.C. § 1326\(d\)](#), which provides a limited avenue to attack a prior removal order. See *United States v. Moreno-Tapia*, 848 F.3d 162, 165–66 (4th Cir. 2017). This section provides that an alien may challenge the validity of a removal order only if “(1) the alien exhausted any administrative remedies that may have been available to seek relief against the order; (2) the deportation proceedings at which the order was issued improperly deprived the alien of the opportunity for judicial review; and (3) the entry of the order was fundamentally unfair.” [8 U.S.C. § 1326\(d\)](#). As indicated by the statutory language, a defendant must “satisfy all three” requirements to successfully attack an underlying removal order. *United States v. El Shami*, 434 F.3d 659, 663 (4th Cir. 2005). However, an alien may be excused from meeting certain [§ 1326\(d\)](#) requirements where the failure to do so “is itself the product of a procedural flaw in the immigration proceeding.” *Moreno-Tapia*, 848 F.3d at 169; *United States v. Lopez-Collazo*, 824 F.3d 453, 459–62 (4th Cir. 2016) (excusing [§ 1326\(d\)\(1\)](#) and [\(d\)\(2\)](#) requirements where language barrier prevented alien from understanding waivers contained in the I-851 form); *El Shami*, 434 F.3d at 662–64 (excusing [§ 1326\(d\)](#) requirements and finding due process violation where alien did not receive notice of his immigration proceedings).

In Gonzalez's case, the district court ruled that he could not mount a collateral attack on his 2014 removal order. The district court reviewed the three-part standard of [§ 1326\(d\)](#) and held that Gonzalez did not exhaust his administrative remedies and was not deprived of judicial review under requirements (1) and (2). We focus our discussion on the judicial review requirement under [§ 1326\(d\)\(2\)](#).

1. Opportunity for Judicial Review

[1] Gonzalez argues that his waivers on the I-851 form purportedly giving up any administrative or judicial review were not “considered and intelligent.” Br. of Appellant at 10. Notably, Gonzalez does not rely on any assertion that he could not understand English or any other claim of limited capacity to make a knowing waiver. Cf. [Mendoza-Lopez](#), 481 U.S. at 840, 107 S.Ct. 2148 (holding that

immigration proceedings deprived alien from seeking judicial review because language barrier prevented the waivers of right to appeal to be “*841 “considered and intelligent”). Instead, he argues that, as a matter of law, his waivers were ineffective because he was unaware of his right to contest whether his underlying conviction qualified as an aggravated felony. Thus, he maintains that he is excused from satisfying the judicial review requirement under [§ 1326\(d\)\(2\)](#).

Gonzalez primarily relies on *Etienne v. Lynch*, 813 F.3d 135 (4th Cir. 2015) for this proposition. In *Etienne*, however, the Court did not confront a collateral challenge to a removal order under [§ 1326\(d\)](#). Rather, we considered our jurisdiction under [8 U.S.C. § 1252\(d\)\(1\)](#) to review a petitioner's challenge to the designation of his underlying conviction as an aggravated felony under the INA at the time he was being deported. *Id.* at 138 (stating that an alien is required to “exhaust[] all administrative remedies available to the alien as of right” before a court has jurisdiction). We held that the exhaustion provision under [§ 1252\(d\)\(1\)](#) requires a petitioner to “us[e] all steps that the agency holds out, and do so properly.” *Id.* at 141 (quoting *Woodford v. Ngo*, 548 U.S. 81, 90, 126 S.Ct. 2378, 165 L.Ed.2d 368 (2006)) (emphasis in original). Etienne, unlike Gonzalez, checked the box on the I-851 form indicating that he wished to contest his removal, but he did not further indicate the nature of his argument. *Id.* at 137. In considering whether Etienne exhausted all administrative remedies, we concluded that, while the expedited removal procedures and the I-851 form allowed petitioners to raise factual challenges to their deportation, they do not provide an avenue to challenge the legal basis for their removal. *Id.* at 141–42. Thus, we held that Etienne “was not required to raise his legal challenge to removal in order to meet the [administrative] exhaustion requirement” necessary to invoke this Court's jurisdiction under [§ 1252\(d\)\(1\)](#). *Id.* at 142.

Gonzalez's case is not like *Etienne*. For one, *Etienne* arose in a different context, concerning an appellate court's jurisdiction to review in the first instance a petitioner's challenge to his expedited deportation, while Gonzalez's case involves a challenge to the validity of the removal order that formed the basis of his criminal prosecution. Most importantly, *Etienne* involved an alien who indicated on

his I-851 form that he wished to contest his removal, whereas Gonzalez plainly indicated that he waived his right to do so and consented to deportation.

Contrary to Gonzalez's argument, this Court's decision in *Etienne* does not support his assertion that he was deprived of judicial review for purposes of § 1326(d)(2). See *United States v. Segura-Virgen*, 390 F. Supp. 3d 681, 697 (E.D. Va. 2019), *aff'd*, 799 F. App'x 214 (4th Cir. 2020) (rejecting identical argument and holding that *Etienne*'s "application in the Section 1326 context is limited to, at most, the exhaustion of administrative remedies prong of Section 1326(d)(1), not to the judicial review prong of Section 1326(d)(2)."). Indeed, *Etienne* affirmatively establishes that a person in Gonzalez's circumstances may petition a court of appeals to review whether an offense is an aggravated felony in the immigration context, even when the DHS form utilized in the immigration proceedings does not allow for such a challenge. *Etienne*, 813 F.3d at 141–42. But again, unlike *Etienne*, Gonzalez waived any opportunity to pursue such a petition before a court of appeals or administrative tribunal.

Relatedly, Gonzalez asserts that the *Etienne* decision establishes that he had no opportunity to challenge the designation of his prior conviction as an aggravated felony in the immigration proceedings and, therefore, is excused from exhausting any administrative remedies from his 2014 removal *842 order under § 1326(d)(1). Assuming that proposition to be true, Gonzalez then emphasizes that the Court of Appeals for the Ninth Circuit has "generally found that where an alien was deprived of the opportunity to exhaust his administrative remedies, satisfying § 1326(d)(1), he also has shown that he was deprived of the opportunity to seek judicial review, satisfying § 1326(d)(2)." *United States v. Gonzalez-Villalobos*, 724 F.3d 1125, 1126 (9th Cir. 2013). Gonzalez therefore argues that, because *Etienne* excuses his failure to exhaust his administrative remedies, he also satisfies, or is excused from satisfying, the judicial review prong of § 1326(d)(2) under the *Gonzalez-Villalobos* decision.

Gonzalez's argument that the § 1326(d)(1) and (d)(2) requirements involve a single inquiry is based on an incomplete reading of *Gonzalez-Villalobos*. The Ninth Circuit recognized in *Gonzalez-Villalobos* that the analyses of § 1326(d)(1) and (d)(2) should be tethered only when a purported error in the immigration proceedings "affect[s] [the alien's] awareness of or ability to seek judicial review."¹ 724 F.3d at 1132. Here, there is nothing about Gonzalez's immigration proceedings that affected his "awareness of or ability to seek judicial review." *Id.* Gonzales understood that he could seek judicial review in his immigration proceedings as the I-851 form clearly set forth, but he decided to forego that opportunity. Accordingly, as Gonzalez has identified no impediment to his ability to seek judicial review of his removal order, neither *Etienne* nor *Gonzalez-Villalobos* advances his argument.

In sum, the district court properly concluded that Gonzalez was not deprived of an opportunity for judicial review. Therefore, we do not need to consider whether, under the rationale provided in *Etienne*, Gonzalez was prevented from exhausting his administrative remedies to challenge whether his underlying conviction qualified as an aggravated felony.

2. Jurisdiction

Alternatively, Gonzalez maintains that he may collaterally challenge his removal order apart from the requirements under § 1326(d) as "an *ultra vires* [agency] action." Br. of Appellant at 34. In that regard, Gonzalez asserts that the immigration officer who ordered his removal exceeded his statutory authority because such an officer is authorized only to order the removal of an alien who has actually been convicted of an aggravated felony. According to Gonzalez, the Pennsylvania theft offense for which he was convicted is not an aggravated felony, and, as a result, the immigration officer "lacked subject matter jurisdiction" to order his removal. *Id.* at 34–35.

Gonzalez has not cited a single case to support his *ultra vires* argument in the context of a § 1326 prosecution. Instead, he cites several appellate decisions wherein courts found in the first instance that the Board of Immigration Appeals lacked jurisdiction to remove an alien where an immigration

judge had not ordered removal. *See, e.g.,* [Noriega-Lopez v. Ashcroft](#), 335 F.3d 874, 884–85 (9th Cir. 2003); [James v. Gonzales](#), 464 F.3d 505, 514 (5th Cir. 2006); [Rhodes-Bradford v. Keisler](#), 507 F.3d 77, 80 (2d Cir. 2007); [Munoz Erazo v. United States](#), 506 F. App'x 938, 944 (11th Cir. 2013); [*843 Anderson v. Holder](#), 673 F.3d 1089, 1094 (9th Cir. 2012). Critically, these cases are distinct because the jurisdictional challenges were raised on direct petitions for review. Again, Gonzalez waived his right to apply for judicial review. Thus, these cases have no application here. More fundamentally, these cases highlight the differences between an agency with authority to act, but which acts based on factual or legal errors, and a governmental body with no authority to act at all. Only the latter is *ultra vires*.

[2] The Court finds Gonzalez's *ultra vires* argument unpersuasive for the reasons set forth in [United States v. Cortez](#), 930 F.3d 350 (4th Cir. 2019). There, the parties assumed that a successful challenge to the immigration court's subject matter jurisdiction would allow for a collateral attack of the removal order. [Id.](#) at 356. We rejected this notion, explaining that “there is no freestanding rule allowing for collateral attacks based on a lack of subject matter jurisdiction,” and a jurisdictional assertion “is not meaningfully distinct from a more routine claim that an immigration court has misconstrued the INA[,]” subject to the [§ 1326\(d\)](#) requirements. [Id.](#) at 357–58. Although the *ultra vires* assertion was addressed in dicta, the reasoning set forth in [Cortez](#) is convincing and applicable to Gonzalez's identical claim here. Whether based on an official's authority to act or an incorrect application of that authority, a collateral challenge to a removal order cannot skirt the requirements of [§ 1326\(d\)](#). Accordingly, Gonzalez must satisfy [§ 1326\(d\)](#)'s criteria to proceed with a collateral challenge to his removal order.

B. Sentencing Guideline Calculation

[3] Next, we turn to Gonzalez's argument that the district court committed procedural error in applying the sentencing guidelines. In assessing a district court's application of the sentencing guidelines, “we review factual findings for clear error and legal conclusions de novo.” [United States v. Savage](#), 885 F.3d 212, 225 (4th Cir. 2018), *cert. denied*, — U.S. —,

139 S. Ct. 238, 202 L. Ed. 2d 160 (2018). “[C]lear error occurs when a district court's factual findings are against the clear weight of the evidence considered as a whole.” [United States v. Span](#), 789 F.3d 320, 325 (4th Cir. 2015) (citations and internal quotation marks omitted). Under the clear error standard, we will only reverse if we are “left with the definite and firm conviction that a mistake has been committed.” [Id.](#) (internal quotation marks omitted).

Gonzalez maintains that the district court erred in attributing three criminal history points under [U.S.S.G. § 4A1.1\(a\)](#) and a six-level enhancement under [U.S.S.G. § 2L1.2\(b\)\(2\)\(C\)](#) for his prior Pennsylvania conviction for which he was sentenced to a minimum of approximately five to six weeks for time served to a maximum of 23 months, with immediate parole. [Section 4A1.1\(a\)](#) provides that three criminal history points must be added “for each prior sentence of imprisonment exceeding one year and one month.” In addition, [§ 2L1.2\(b\)\(2\)\(C\)](#) requires that six points be added to the base offense level for each prior felony conviction for which the sentence imposed exceeded one year and one month. The commentary to [§ 2L1.2](#) explains that the phrase “sentence imposed” has “the meaning given the term ‘sentence of imprisonment’ in Application Note 2 and subsection (b) of [§ 4A1.2](#).” [U.S.S.G. § 2L1.2](#), n.2.

Gonzalez relies on [U.S.S.G. § 4A1.2\(b\)\(1\)](#), which reads that a “‘sentence of imprisonment’ means a sentence of incarceration and refers to the maximum sentence imposed.” [Section 4A1.2\(b\)\(2\)](#) continues by stating, “[i]f part [*844](#) of a sentence of imprisonment was suspended, ‘sentence of imprisonment’ refers only to the portion that was not suspended.” Thus, any suspended portion of a sentence at the time of judgment does not count in determining criminal history points or a specific offense enhancement.

Pertinent here, the commentary to [§ 4A1.2](#) provides that, in applying this section to an indeterminate sentence, the “maximum sentence imposed” is the high end of the sentence range. *See* [U.S.S.G. § 4A1.2](#), n.2 (“[I]n the case of an indeterminate sentence of one to five years, the stated maximum is five years.”). The commentary also explains that “criminal history points are based on the sentence pronounced, not the length of time actually served.” *Id.*

Gonzalez contends that immediate parole, when ordered by a sentencing court, “functionally” qualifies as a suspended sentence under Pennsylvania law for purposes of the guidelines.² Gonzalez argues that because the sentencing court ordered him to immediate parole after serving five to six weeks, there was no possibility that he would serve 23 months in prison. Thus, he asserts that his sentence of confinement for time served to 23 months, with immediate parole, is neither “a conviction for a felony offense ... for which the sentence imposed exceeded one year and one month” under  U.S.S.G. § 2L1.2(b)(2)(C) nor a “sentence of imprisonment exceeding one year and one month” under  U.S.S.G. § 4A1.1(a). He submits that, under the guidelines, his sentence should have been calculated to include only his time served, being approximately five to six weeks. The district court disagreed, finding that Gonzalez's Pennsylvania sentence was indeterminate, “from time served at the low end to 23 months on the high end, and that was the sentence that was actually imposed.” J.A. 276–78. The district court reasoned that the imposed maximum should be used in calculating the guideline range, and that, although Gonzalez received immediate parole, the sentencing court did not order the sentence suspended.

In reaching this conclusion, the district court rejected Gonzalez's reliance on  *United States v. Tabaka*, 982 F.2d 100 (3d Cir. 1992). In  *Tabaka*, the defendant was sentenced in Pennsylvania to a minimum of 48 hours to a maximum of 15 months for driving under the influence.  *Id.* at 101. The “state judge entered an order stating that ‘the sentence as to imprisonment as above set forth be suspended during good behavior and the Defendant is placed on Parole for the unexpired portion of the maximum term.’”  *Id.* The Third Circuit found that this language explicitly imposed a suspended sentence for all but 48 hours and, accordingly, the enhancement for a maximum penalty exceeding one year and one month was not applicable.  *Id.* at 102–03.

The district court properly concluded that the present case is more in line with *United States v. Holmes*, 600 F. App'x 853 (3d Cir. 2015) (considering on plain error review a Pennsylvania court's imposition of sentence). There, the defendant argued, as Gonzalez does here, that “immediate parole is the functional equivalent of a suspended sentence.” *Id.* at 856. The Third Circuit rejected this argument,

concluding there was no precedent to support the defendant's assertion. *Id.* The district court also cited this Court's decision in ***845** *United States v. Jenkins*, 198 F.3d 238, 1999 WL 798880, at *1 (4th Cir. Oct. 7, 1999) (unpublished table decision) (affirming a district court's assignment of three criminal history points for a Pennsylvania conviction that resulted in sentence of nine days to 23 months, with immediate parole ordered after serving the minimum nine days).

The district court's conclusion was correct. The guideline's commentary explains that “criminal history points are based on the sentence *pronounced*, not the length of time actually served.”  § 4A1.2, n.2 (emphasis added). Gonzalez cites no authority that rejects this guidance and holds, to the contrary, that the functional effect of a sentencing order, rather than the language used in the sentencing judgment, defines a suspended sentence under the guidelines. Instead, Gonzalez cites cases that merely stand for the proposition that the term “suspended sentence” under the guidelines refers only to court ordered suspensions as opposed to administrative agency ordered suspensions. *See, e.g., United States v. Rodriguez-Bernal*, 783 F.3d 1002, 1004–05 (5th Cir. 2015) (holding that “[o]nly a court can suspend a sentence for purposes of the  § 4A1.2(b)(2) exception.”); *United States v. Garcia-Gomez*, 380 F.3d 1167, 1173 (9th Cir. 2004) (holding that the unserved portion of a sentence was not suspended for purposes of  § 4A1.2(b)(2) because the decision to release was not made by the sentencing judge); *United States v. Hernandez*, 27 F. App'x 36, 39 (2d Cir. 2001) (per curiam) (holding that “suspension” under the guidelines “refers to the judicial authority of a court”). These cases do not establish, as Gonzalez suggests, that immediate parole, when ordered by a sentencing court, constitutes a suspended sentence under Pennsylvania law. Accordingly, any reliance on these cases is misplaced.

The Court of Appeals for the Third Circuit recently rejected an identical argument based on Pennsylvania's distinctions between parole and suspension. *See United States v. Parsons*, 664 F. App'x 187, 192 (3d Cir. 2016) (emphasizing that, “even though a defendant may serve the same amount of time under a suspended sentence and a sentence with immediate parole,” parole and suspension are not the same); *see also United States v. Frias*, 338 F.3d 206, 211 (3d Cir. 2003) (explaining that, under Pennsylvania law, “parole is not equivalent to other actions, such as suspension, that result in a shorter sentence served”); *Commonwealth v.*

Filius, 346 Pa.Super. 434, 499 A.2d 1078, 1079 (1985) (making distinction between immediate parole and suspended sentence); cf.  *Fleegle v. Commonwealth*, 110 Pa.Cmwlth. 227, 532 A.2d 898, 899 (1987) (explaining that “[p]arole is a conditional release from sentence[,]” while “[p]robation is a suspended sentence of incarceration served upon such terms and conditions as imposed by the sentencing court” (citations omitted)). In Gonzalez’s case, the sentencing court’s order plainly imposed “immediate parole,” not a suspended sentence. Although there appears to be no available box to check for a “suspended sentence” in the judgment order, Gonzalez offers no binding precedent, nor is this Court aware of any, to show that courts in Pennsylvania are not permitted to issue suspended sentences. We, therefore, conclude that

the district court properly calculated Gonzalez’s offense level and criminal history score based on the imposed maximum indeterminate sentence of 23 months.

III.

For the foregoing reasons, the judgment of the district court is

AFFIRMED.

All Citations

813 Fed.Appx. 837

Footnotes

- 1 In applying this rationale, the *Gonzalez-Villalobos* court held that while an alien had exhausted his administrative remedies, he could not collaterally attack the validity of his deportation order because he had not demonstrated that an “error or obstacle related to (Continued) his deportation proceedings improperly deprived him of the opportunity for judicial review as required by  8 U.S.C. § 1326(d)(2).” 724 F.3d at 1126.
- 2 According to Gonzalez, a suspended sentence is governed by who makes the sentencing decision, not the language stated in the judgment order. Specifically, Gonzalez contends that, under Pennsylvania law, where an administrative agency decides to release an offender, the sentence constitutes parole, but where the sentencing court makes the decision to release an offender, the sentence is deemed suspended.

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Richmond Division.

UNITED STATES of America,

v.

Isidoro GONZALEZ-FERRETIZ, Defendant.

Criminal No. 3:18-cr-117

Signed 02/25/2019

Filed 02/26/2019

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MEMORANDUM OPINION

Robert E. Payne, Senior United States District Judge

*1 This matter is before the Court on DEFENDANT'S MOTION TO DISMISS THE INDICTMENT (ECF No. 16) (the "Motion"). For the following reasons, this motion was denied by an ORDER entered January 23, 2019 (ECF No. 21).

BACKGROUND

I. Procedural Context

Isidoro Gonzalez-Ferretiz ("Gonzalez-Ferretiz") was charged in a one-count indictment with illegal reentry pursuant to  8 U.S.C. § 1326(a). ECF No. 3. On November 27, 2018, Gonzalez-Ferretiz filed DEFENDANT'S MOTION TO DISMISS THE INDICTMENT (ECF No. 16) (the "Motion").¹ The Government filed a brief (ECF No. 17) in opposition to the Motion. No reply brief was filed by Gonzalez-Ferretiz. On January 22, 2019, the Court received evidence and heard oral argument on the Motion.

II. Factual Background

Gonzalez-Ferretiz is a Mexican citizen. ECF No. 17 at 1. He came to the United States illegally sometime before July

2008, when he was encountered by Immigration and Customs Enforcement ("ICE") officials in Pennsylvania. *Id.* He was granted voluntary departure² to Mexico, and was removed to Mexico on August 5, 2008. *Id.* He then reentered the United States on some date before July 23, 2012. On that date, he gave a sworn statement (written in English) to immigration officials while in state custody in Pennsylvania.³ *See* Gov't Ex. 1.

Then, on June 2, 2014, Gonzalez-Ferretiz was convicted in Pennsylvania of "Theft from a Motor Vehicle" and received a sentence of up to 23 months in prison, which appears to be time served as of June 2, 2014. ECF No. 17 at 1; Gov't Ex. 2; Def.'s Ex. 1. Following that conviction, Gonzalez-Ferretiz was served with a "Notice of Intent to Issue a Final Administrative Removal Order," or Form I-851 (hereinafter, the "I-851"), advising him that, because of the conviction for an "aggravated felony" under  8 U.S.C. § 1101(a) (43) (G), he was a deportable alien. ECF No. 17 at 2; Gov't Ex. 3; ECF No. 16 at 1-2. On the continuation page attached to the I-851 form, Gonzalez-Ferretiz was informed of the specific conviction that served as the basis for his removal; to wit: "Theft From a Motor Vehicle, in violation of Title 18 Section 3934 Subsection A of the Pennsylvania Criminal Code." Gov't Ex. 3.

Like all I-851 forms, the one served on Gonzalez-Ferretiz contained a "Certificate of Service." Gov't Ex. 3. This "Certificate of Service" reports that it had been served on Gonzalez-Ferretiz "in person" on June 3, 2014; and it recites that it had been "explained and/or served" on Gonzalez-Ferretiz in English. *Id.* Gonzalez-Ferretiz acknowledged the service and explanation by affixing his signature. *Id.* Further down on the same page of the I-851 form, Gonzalez-Ferretiz selected a check-box that stated: "I Do Not Wish to Contest and/or to Request Withholding of Removal." *Id.* He also selected a check-box that stated:

*2 I admit the allegations and charge in this Notice of Intent. I admit that I am deportable and acknowledge that I am not eligible for any form of relief from removal. I waive my right to rebut and contest the above charges. I do not wish to request withholding

or deferral of removal. I wish to be removed to [Mexico].

Id. Lastly, he selected a check-box that stated: “I understand that I have the right to remain in the United States for 14 calendar days in order to apply for judicial review. I do not wish this opportunity. I waive this right.”⁴ Id. After making these selections, Gonzalez-Ferretiz once again signed the I-851 form. Id. Deportation Officer Matt Garrison signed below Gonzalez-Ferretiz’s signature as a witness. Id.

At the evidentiary hearing, Officer Garrison and Deportation Officer Richard Tine explained the process by which I-851 forms are served on an alien. They both testified that, if an alien indicates that he or she does not speak or understand English, the alien is provided the I-851 form in his or her native language. This is accomplished either by bringing into the interview a native-speaking immigration official to explain the document to the alien, or by connecting to the so-called “language line,” which provides around-the-clock translation services for immigration officials. If the “language line” is called, the I-851 form is read to the alien in his native language. Providing those translations is standard ICE practice, and Officer Garrison testified that, because no translation was provided in this case, Gonzalez-Ferretiz would have advised that he spoke and understood English. At the evidentiary hearing in this case, counsel for Gonzalez-Ferretiz represented that Gonzalez-Ferretiz spoke and understood English, but was using an interpreter in these proceedings because of the nature of the proceedings.

Based on the state conviction in Pennsylvania and waivers of his rights to challenge the removal, a Final Administrative Removal Order (“Final Order”) was issued on June 3, 2014.⁵ The Final Order found that Gonzalez-Ferretiz had a final conviction for an “aggravated felony” under  8 U.S.C. § 1101(a) (43) (G) and that he was removable. Gov’t Ex. 4; ECF No. 17 at 2; ECF No. 16-1 at 1. Pursuant to the Final Order, Gonzalez-Ferretiz was removed from the United States on June 19, 2014. ECF No. 17 at 2.

Sometime thereafter, Gonzalez-Ferretiz again reentered the United States illegally, was discovered by ICE officials, and came into ICE custody pursuant to a “Reinstatement of the Removal Order of June 19, 2014.”⁶ ECF No. 17 at 3. On February 20, 2018, Gonzalez-Ferretiz received a copy of the Notice of Intent/Decision to Reinstate Removal Order, and

pursuant to the 2014 Final Order, he was removed from the United States on March 7, 2018. Id.; see also Aff. ¶ 17 (ECF No. 1). Thereafter, Gonzalez-Ferretiz reentered the United States illegally again.⁷ ECF No. 17 at 3. He was indicted on the illegal reentry charge on September 19, 2018 (ECF No. 3) and was arrested pursuant to the indictment on October 23, 2018. ECF No. 5; ECF No. 17 at 3.

*3 Officer Tine testified that he interviewed Gonzalez-Ferretiz in early 2018; that they spoke in English; and that Gonzalez-Ferretiz gave no indication that he did not speak and understand English. Officer Tine was satisfied that Gonzalez-Ferretiz understood all that was said to him.

DISCUSSION

A. Framework for Collateral Challenges to Prior Deportation Orders

Gonzalez-Ferretiz has been charged with illegal reentry under  8 U.S.C. § 1326(a). To prove that charge, one of the elements that the Government will have to establish is that Gonzalez-Ferretiz “has been denied admission, excluded, deported, or removed” and thereafter reentered the United States without, *inter alia*, the permission of the United States Attorney General.  8 U.S.C. § 1326(a). In   United States v. Mendoza-Lopez, 481 U.S. 828 (1987), the Supreme Court of the United States held that, in illegal reentry cases, an alien has a due process right to challenge the underlying deportation order. Thereafter, Congress codified the due process requirements in  8 U.S.C. § 1326(d). See United States v. Moreno-Tapia, 848 F.3d 162, 165-66, 169 (4th Cir. 2017). At bottom,  Section 1326(d) “is concerned with failures of due process in an immigration proceeding that would make it fundamentally unfair to rely on a removal order coming out of that proceeding.” Id. at 169. The statute focuses the inquiry on whether there were “procedural defect [s] in an immigration proceeding [that] insulate [] the resulting order from judicial review....” Id.

 Section 1326(d) sets out three elements that an alien must prove to challenge the underlying deportation order. In full, that subsection reads:

In a criminal proceeding under this section [ 8 U.S.C. § 1326], an alien may not challenge the validity of

the deportation order described in subsection (a) (1) or subsection (b) unless the alien demonstrates that—

- (1) the alien exhausted any administrative remedies that may have been available to seek relief against the order;
- (2) the deportation proceedings at which the order was issued improperly deprived the alien of the opportunity for judicial review; and
- (3) the entry of the order was fundamentally unfair.

8 U.S.C. § 1326(d) (emphasis added). To satisfy Section 1326(d) (3), the Fourth Circuit has held that an alien “must show that (1) his due process rights were violated by defects in his underlying deportation proceeding, and (2) he suffered prejudice as a result of the defects.” United States v. El Shami, 434 F.3d 659, 664 (4th Cir. 2005) (quoting United States v. Wilson, 316 F.3d 506, 510 (4th Cir. 2003)). To show prejudice, the alien must show that, “but for the errors complained of, there was a reasonable probability that he would not have been deported.” Id. at 665. An alien may be excused from meeting certain Section 1326(d) requirements if the underlying deportation proceeding was procedurally flawed. See Moreno-Tapia, 848 F.3d at 169; United States v. Lopez-Collazo, 824 F.3d 453, 459-62 (4th Cir. 2016) (due process violation where alien was served the I-851 form in language he did not understand); El Shami, 434 F.3d at 662-64 (excusal from Sections 1326(d) (1) and (d) (2) where alien did not receive notice of his immigration proceeding).

It is evident from the statutory text that the defendant must satisfy (or be excused from) all three elements of Section 1326(d) to succeed in a collateral challenge. And, the Fourth Circuit has so held. El Shami, 434 F.3d at 663. The burden of proof to establish that these elements have been satisfied “rests with the defendant.” United States v. Galicia, No. 1:15cr59, 2016 WL 4054926, *2 (E.D. Va. July 26, 2016). And, that burden must be met by “a preponderance of the evidence.” Id. (citing several cases). If the alien meets his burden, “the illegal reentry charge must be dismissed as a matter of law.” El Shami, 434 F.3d at 663 (citing Wilson).

*4 The text of 8 U.S.C. § 1326 and Fourth Circuit precedent establishes that the alien may only collaterally challenge prior deportation orders in a Section 1326(a) prosecution by following the requirements of Section 1326(d). In Moreno-Tapia, the Fourth Circuit held that, “[u]nder [8 U.S.C. § 1326 (d)], in order to bring a successful collateral attack against a removal order, the defendant in an illegal reentry prosecution must meet [the] three requirements [listed in the statute].” 848 F.3d at 166. In a well-reasoned recent decision, Judge Ellis confirmed this view in holding that:

Congress has made clear that an alien who demonstrates these three prerequisites has been denied meaningful judicial review in the initial removal proceeding and thus has the right to attack collaterally the prior removal order and related proceeding under § 1326(d). Importantly, the three prerequisites are listed in the conjunctive, and thus, as the Fourth Circuit has recognized, the defendant must satisfy all three prerequisites in order to be able to challenge collaterally the underlying removal order. United States v. El Shami, 434 F.3d 659, 663 (4th Cir. 2005). Therefore, defendant here may not challenge the June 2007 Removal Order unless he meets all three § 1326(d) requirements. But if defendant meets all three requirements, the Indictment's illegal re-entry charge under § 1326(a) and (b) (1) must be dismissed. Id.

United States v. Romero-Caceres, No. 1:18-cr-354, 2018 WL 6059381, at *3 (E.D. Va. Nov. 19, 2018) (emphasis added); see also id. at *5 n.7. That reasoning applies fully here.⁸

The Court recognizes that language in Moreno-Tapia and a recent opinion by Judge Brinkema suggest that

collateral challenges outside of  [Section 1326 \(d\)](#) might be possible. See [Moreno-Tapia](#), 848 F.3d at 170 (“We need not decide today...whether due process might in some circumstances demand that an immigration order based on an unconstitutional conviction be subject to collateral attack.”); [United States v. Rivera Lopez](#), No. 1:18-cr-381(LMB), 2018 WL 6834363, at *3 (E.D. Va. Dec. 28, 2018) (it “remains an open question” whether “due process requires that a defendant be given an opportunity to bring a collateral attack beyond the requirements and limitations of  § 1326 (d)”) (emphasis in original).

At this juncture, however, given the clear language of the statute and the fact that [Moreno-Tapia](#), [Lopez-Collazo](#), and [El Shami](#) all perform the collateral attack analysis solely within the  [Section 1326\(d\)](#) framework, the cogent, well-reasoned approach taken in [Romero-Caceres](#) correctly sets out the proper framework for resolving challenges such as the one made here by Gonzalez-Ferretiz. And, so the Court holds that an alien may only challenge his underlying deportation order by satisfying the three requirements of  [Section 1326\(d\)](#). Allowing collateral challenges in  [Section 1326](#) prosecutions outside of  [Section 1326\(d\)](#) flies in the face of the clear statutory text and Congress’ intent.⁹ Accordingly, if the Court determines that Gonzalez-Ferretiz has failed to satisfy any of the three elements of  [Section 1326\(d\)](#), his collateral challenge must be rejected, and his motion denied.¹⁰

B. Analysis

*5 Before assessing whether Gonzalez-Ferretiz has met his burden under  [Section 1326 \(d\)](#), it is appropriate to resolve Gonzalez-Ferretiz’s contention that, wholly apart from the requirements of  [Section 1326 \(d\)](#), an alien may collaterally attack the removal order by showing that his prior removal is void for lack of jurisdiction. As set out below, Gonzalez-Ferretiz argues that his 2014 removal was void for lack of jurisdiction because he was not convicted of an aggravated felony. After analyzing this argument, the Court will assess whether Gonzalez-Ferretiz has met his burden under  [Section 1326\(d\)](#).

a. Jurisdiction

Gonzalez-Ferretiz first argues that he can challenge his 2014 removal outside of the  [Section 1326\(d\)](#) requirements. See generally ECF No. 16 at 3-15. In sum, he argues that his conviction under the Pennsylvania theft statute was not an “aggravated felony” and that, therefore, he was not amenable to removal on the ground charged. *Id.* As Gonzalez-Ferretiz sees it, the immigration official made an error of law in 2014 (there was no “aggravated felony”), and, as a result, the “officer who entered [the removal order] lacked subject matter jurisdiction to enter the order at all.” *Id.* at 3. Thus, the argument goes, the underlying deportation is void and there is no need for him to satisfy the  [Section 1326\(d\)](#) factors.

The nub of Gonzalez-Ferretiz’s argument here is that a legal error by immigration officials in 2014 means that those immigration officials never had jurisdiction over his case, and that his 2014 removal is void. In his briefing, Gonzalez-Ferretiz has not cited a single case that supports this claim in a  [Section 1326\(a\)](#) prosecution. *Id.* at 3-6. That is, he has not cited any authority involving a prosecution under  8 U.S.C. § 1326(a) whereby a defendant is permitted to challenge the classification of the predicate offense underlying his removal other than pursuant to the requirements of  [Section 1326\(d\)](#). Instead, Gonzalez-Ferretiz cites several appellate decisions wherein courts have found that the Board of Immigration Appeals lacked jurisdiction to order an alien’s removal where an immigration judge had not ordered removal. See  [Rhodes-Bradford v. Keisler](#), 507 F.3d 77 (2d Cir. 2007);   [James v. Gonzales](#), 464 F.3d 505 (5th Cir. 2006);  [Noriega-Lopez v. Ashcroft](#), 335 F.3d 874 (9th Cir. 2003). Those decisions did not arise in the context of a  [Section 1326](#) prosecution.

Moreover, in the  [Section 1326](#) context, it appears that courts address arguments about whether a predicate offense was an “aggravated felony” under the  [Section 1326\(d\)](#) requirements. See, e.g.,  [United States v. Martinez-Hernandez](#), 912 F.3d 1207, 1211-15 (9th Cir. 2019) (analyzing argument under  [Section 1326 \(d\) \(3\)](#)); [United States v. Almanza-Vigil](#), 912 F.3d 1310, 1316 (10th Cir. 2019)

(same). Thus, the Court does not find the cases cited by Gonzalez-Ferretiz in his briefing to direct the inquiry here.

At the evidentiary hearing, counsel for Gonzalez-Ferretiz stated that cases decided in the wake of [Pereira v. Sessions](#), 138 S. Ct. 2105 (2018), support his jurisdictional attack. In [Pereira](#), the Supreme Court held that “[a] putative notice to appear that fails to designate the specific time or place of the noncitizen’s removal proceedings is not a ‘notice to appear under section 1229 (a),’ and so does not trigger the stop-time rule.” [Id.](#) at 2113-14. Since [Pereira](#), in [Section 1326](#) prosecutions, some courts have been asked to determine whether [Pereira](#) invalidates underlying deportations that were begun¹¹ by “notices to appear” that were defective under [Pereira](#) because they did not contain the time or place of the immigration proceeding. See [Romero-Caceres](#), 2018 WL 6059381, at *5 n.7 (citing cases). That is, the defendants in those cases argue that they may collaterally attack their prior deportations because “the immigration court... [lacked] jurisdiction to order” the alien’s removal due to the defective “notice to appear.” [Id.](#) at 5 & n.7.

*6 To decide this case, the Court need not wade into the merits of these decisions and whether [Pereira](#) does impact the jurisdiction of the immigration court because the validity of a “notice to appear” is not at issue here. Gonzalez-Ferretiz was removed pursuant to [8 U.S.C. § 1228](#) (“Expedited removal of aliens convicted of committing aggravated felonies”), where proceedings “commence upon personal service of the Notice of Intent upon the alien”; the “Notice of Intent shall constitute the charging document.” [8 CFR § 238.1\(b\)\(2\)\(i\)](#); see also [8 C.F.R. § 1003.14\(a\)](#); [Lopez-Collazo](#), 824 F.3d at 456-58 (describing the expedited removal procedures). Whatever [Pereira](#)’s impact, it is clear that it did not have anything to say about the “Notice of Intent” at issue in this case. Rather, Gonzalez-Ferretiz is attempting to extend the line of cases post-[Pereira](#) dealing with the “notice to appear” to a new context.¹²

The Court does not find Gonzalez-Ferretiz’s jurisdictional argument persuasive. At bottom, he disagrees with the legal conclusion that immigration officials made in 2014 about his Pennsylvania conviction. He has not cited any authority that such an error may be raised in the way he proposes (i.e. outside of the requirements of [Section 1326 \(d\)](#)) in a [Section 1326](#) prosecution. And, as discussed above,

the post-[Pereira](#) cases arise in a different context and are not controlling on this issue. Accordingly, the Court rejects Gonzalez-Ferretiz’s attempt to skirt the requirements of [Section 1326 \(d\)](#) by raising this jurisdictional argument. Such an argument must be raised within the structure of [Section 1326\(d\)](#), likely under [Section 1326\(d\) \(3\)](#). See, e.g., [Martinez-Hernandez](#), 912 F.3d at 1211-15.

b. [Section 1326 \(d\)](#)

Next, the Court considers whether Gonzalez-Ferretiz has satisfied the three elements of [Section 1326\(d\)](#) that control a collateral challenge to the 2014 removal. See [Moreno-Tapia](#), 848 F.3d at 166; [Romero-Caceres](#), 2018 WL 6059381, at *3. Gonzalez-Ferretiz’s argument here is that he has satisfied (or is excused from satisfying) the [Section 1326\(d\)](#) factors, and therefore the indictment in this case must be dismissed. See generally ECF No. 16 at 15-20.

Gonzalez-Ferretiz has the burden to show that he has satisfied all three requirements of [Section 1326\(d\)](#) by a preponderance of the evidence. [Galicia](#), 2016 WL 4054926, at *2. For the reasons set forth below, Gonzalez-Ferretiz has failed to establish compliance with (or excusal from) either [Section 1326\(d\) \(1\)](#) or [Section \(d\) \(2\)](#). Accordingly, Gonzalez-Ferretiz’s collateral attack on the 2014 deportation order fails. Therefore, it is not necessary to reach the merits of his arguments under [Section 1326\(d\) \(3\)](#).

(1) Exhaustion of Available Administrative Remedies

It is uncontroverted that Gonzalez-Ferretiz never sought “any administrative remedies that may have been available to seek relief against the [2014 removal order].” [8 U.S.C. § 1326\(d\) \(1\)](#); see also ECF No. 17 at 5 n.1 (describing the steps that Gonzalez-Ferretiz could have taken to challenge his removal). Instead, the record proves, by a preponderance of the evidence, that Gonzalez-Ferretiz signed an I-851 form that expressly waived his right to review the 2014 removal order and consented to his removal. See, e.g., Gov’t Ex. 3. Indeed, Gonzalez-Ferretiz does not argue that he satisfied the exhaustion requirement (nor could he). Instead, he argues that the waiver of the right to review reflected on the I-851 form that he signed was invalid.

*7 The parties agree that the validity of Gonzalez-Ferretiz's waiver of his right to administrative review comes down to whether he spoke or understood English when he was served with, and given explanation of, the I-851 form and the Final Order in June 2014. An invalid waiver could excuse his failure to exhaust. See [United States v. Ortiz](#), 488 Fed. Appx. 717, 718 (4th Cir. 2012) (unpublished); [United States v. Sosa](#), 387 F.3d 131, 136 (2d Cir. 2004); cf. [Lopez-Collazo](#), 824 F.3d at 459 (4th Cir. 2016) (assuming without deciding that waiver on an I-851 form was invalid where defendant did not sufficiently read or understand English).¹³ “If, however, [Gonzalez-Ferretiz] knowingly and voluntarily waive[d] his right to appeal an order of deportation, then his failure to exhaust administrative remedies...bar[s] [his] collateral attack on the order in [the instant] illegal reentry prosecution under [§ 1326\(d\)](#).” [United States v. Lopez](#), 667 Fed. Appx. 837, 838 (4th Cir. 2016) (unpublished) (per curium).

The record establishes quite clearly that Gonzalez-Ferretiz sufficiently understood and spoke English at the time he was provided the I-851 form in June 2014. First, Gonzalez-Ferretiz does not contend that, at the time, he did not understand English. Instead, he argues that the I-851 form was not served in his “native language” of Spanish. ECF No. 16 at 16-17. That sleight of hand is not enough. The fact that Spanish is Gonzalez-Ferretiz's native language is not at all dispositive. What matters is whether he also “understands” English.¹⁴

Second, the Government proved that Gonzalez-Ferretiz gave a sworn, written statement in July 2012 in English. See Gov't Ex. 1. That fact shows that, two years before being served the I-851 form at issue, Gonzalez-Ferretiz understood English. Third, two immigration officials, Officers Tine and Garrison, testified that when serving I-851 forms, if an alien indicated that he did not understand English, interpretive services would have been provided and the I-851 form would have been read to the alien in a language that he understood. There is no record evidence to the contrary. Officer Garrison witnessed Gonzalez-Ferretiz's signing of the I-851 form (and affirmed this fact with his signature). While Garrison did not remember Gonzalez-Ferretiz specifically, he testified that the fact that the I-851 form was explained in English shows that Gonzalez-Ferretiz would have demonstrated an understanding of English at the time, or, under the standard

practice, the form would not have been read in English and an interpreter would have been used.

Fourth, Officer Tine interviewed Gonzalez-Ferretiz in person in February 2018. At that time, Officer Tine spoke with Gonzalez-Ferretiz in English and Gonzalez-Ferretiz gave no indication that he did not speak or understand English. Finally, counsel for Gonzalez-Ferretiz—when asked why an interpreter was present at the evidentiary hearing—represented that Gonzalez-Ferretiz spoke conversational English, and that an interpreter was present because legal terminology was more complex.

*8 Based on the record as a whole, the Court finds that Gonzalez-Ferretiz did speak and understand English when he was served the I-851 form and Final Order in June 2014. He also understood that part of the form that contains the written waiver of his right to challenge his deportation. Gonzalez-Ferretiz has offered no evidence to rebut this conclusion. His waiver of these rights is therefore valid and does not excuse his failure to exhaust administrative remedies. Accordingly, the Court finds that Gonzalez-Ferretiz has failed to establish that he has satisfied, (or is excused from), the requirement of

[Section 1326 \(d\)\(1\)](#).

(2) Deprivation of an Opportunity for Judicial Review

It is uncontroverted that Gonzalez-Ferretiz did not seek judicial review of the 2014 deportation order until now. The I-851 form informed him of his right to remain in the United States for 14 calendar days to “petition for review of this order to the appropriate U.S. Circuit Court of Appeals as provided for in section 242 of the Act, [8 U.S.C. 1252](#).” Gov't Ex. 1 at 1.

Instead of availing himself of this right, Gonzalez-Ferretiz waived it by selecting a check-box that read: “I understand that I have the right to remain in the United States for 14 calendar days in order to apply for judicial review. I do not wish this opportunity. I waive this right.” Gov't Ex. 3 at 2 (emphasis added). Based on the record evidence, the Court finds that this waiver was valid because Gonzalez-Ferretiz understood English at the time he signed the waiver. Because he validly waived judicial review, Gonzalez-Ferretiz cannot now claim that the 2014 deportation proceeding “improperly deprived [him] of the opportunity for judicial review.” [8 U.S.C. § 1326\(d\) \(2\)](#); see also [Lopez-Collazo](#), 824 F.3d at 459.

Undeterred by this clear waiver of his right to judicial review, Gonzalez-Ferretiz argues that the Fourth Circuit's decision in  [Etienne v. Lynch](#), 813 F.3d 135 (4th Cir. 2015), excuses his failure to satisfy the judicial review prong of  [Section 1326\(d\)](#). He argues that [Etienne](#) held that the I-851 form and the administrative removal statute “do not provide an alien an ‘opportunity to challenge the legal basis of his removal.’ ” ECF No. 16 at 17 (quoting  [Etienne](#), 813 F.3d at 138). Therefore, says Gonzalez-Ferretiz, “an alien's failure to appeal a legal determination underlying an administrative removal order cannot be held against him.” ECF No. 16 at 17. Accordingly, the argument goes, Gonzalez-Ferretiz is “excused from appealing the legal issue of whether his forgery [sic] conviction constituted an aggravated felony.” [Id.](#) at 18.

When asked specifically at the evidentiary hearing where, in [Etienne](#), the Fourth Circuit had established that principle or made that holding, counsel for Gonzalez-Ferretiz highlighted on the Court's copy of the [Etienne](#) decision the following language:

As we explain below, we join the Fifth Circuit in holding that, in expedited removal proceedings, an alien has no opportunity to challenge the legal basis of his removal. The INA's administrative—exhaustion requirement therefore does not deprive us of jurisdiction to consider such a challenge in the first instance on appeal.

 [813 F.3d at 138](#). While it is true that both this case and [Etienne](#) deal with the I-851 form and a removal based on an “aggravated felony” under  [8 U.S.C. § 1101\(a\) \(43\)](#), the language above illustrates a key difference overlooked by Gonzalez-Ferretiz. In [Etienne](#), the Court of Appeals was deciding whether it had jurisdiction to review Etienne's expedited removal order under  [8 U.S.C. § 1252\(d\) \(1\)](#), which requires that an alien “exhaust[] all administrative remedies available to the alien as of right” before the Court of Appeals has jurisdiction.  [Etienne](#), 813 F.3d at 138. The Court of Appeals concluded that the expedited

removal proceedings and the I-851 form did not provide a way for aliens like Etienne to challenge the legal basis for their removal. [Id.](#) Because there was no way to raise such a challenge, Etienne “was not required to raise his legal challenge to removal in order to meet the exhaustion requirement,” and the Court thus had jurisdiction to proceed.

 [Id.](#) at 142.

*9 However, [Etienne](#) does not address collateral attacks under  [8 U.S.C. § 1326\(d\)](#).¹⁵ Indeed, it does not even cite to  [Section 1326](#). Rather, that case dealt with the Court of Appeals' jurisdiction to hear an appeal of the alien's expedited deportation at the time he was being deported. That is not what this case is about. Moreover, here, Gonzalez-Ferretiz expressly and knowingly waived the right to judicial review. There is also another important factual difference between this case and [Etienne](#): Etienne indicated during his removal proceedings that he wanted to challenge his removal.  [813 F.3d at 137](#). Here, Gonzalez-Ferretiz waived that right and consented to deportation.

For the foregoing reasons, the Court does not find that [Etienne](#) controls its analysis here. Thus, contrary to Gonzalez-Ferretiz's argument, it does not somehow negate his express waiver of his right to judicial review. Because the Court concludes that Gonzalez-Ferretiz understood English at the time he was served the I-851 form and Final Order and that [Etienne](#) does not apply, the Court finds that Gonzalez-Ferretiz validly waived his right to judicial review. Thus, he fails to establish that he has met  [8 U.S.C. § 1326\(d\) \(2\)](#).

(3) Fundamental Unfairness

Since the  [Section 1326\(d\)](#) requirements “are listed in the conjunctive...[Gonzalez-Ferretiz] must satisfy all three in order to prevail” on a collateral attack of his prior deportation order.  [El Shami](#), 434 F.3d at 663 (internal quotations omitted). Because the Court concludes that Gonzalez-Ferretiz has failed to meet either  [Section 1326\(d\) \(1\)](#) or  [\(d\) \(2\)](#), his collateral attack fails. It is thus not necessary to consider arguments raised under  [Section 1326\(d\) \(3\)](#), that “the entry of the order was fundamentally unfair.”

CONCLUSION

For the foregoing reasons, DEFENDANT'S MOTION TO DISMISS THE INDICTMENT (ECF No. 16) was denied pursuant to the ORDER of January 23, 2019 (ECF No. 21).

All Citations

Not Reported in Fed. Supp., 2019 WL 943388

It is so ORDERED.

Footnotes

- 1 The Defendant initially filed his Motion on November 15, 2018 (ECF No. 13). Because the Motion was filed late, the Defendant sought leave to file out of time (ECF No. 14); and that request was granted on November 20 (ECF No. 15).
- 2 At the evidentiary hearing, there was some dispute raised about the 2008 removal. Counsel for Gonzalez-Ferretiz called the 2008 removal "voluntary return," rather than "voluntary departure." Because the resolution of the Motion does not turn on the meaning of those terms, it is unnecessary to resolve the difference between the two terms.
- 3 It is unclear why Gonzalez-Ferretiz was in custody in 2012.
- 4 The I-851 form also included a half-page explanation (in English) of Gonzalez-Ferretiz's "Rights and Responsibilities," including his right to have an attorney in the immigration proceedings and his right to challenge his removal. See Gov't Ex. 3 at 1. Additionally, on the page where Gonzalez-Ferretiz selected that he did not wish to contest his removal, there was a check-box that stated "I Wish to Contest and/or to Request Withholding of Removal," and listed several grounds upon which Gonzalez-Ferretiz could make such a challenge. Id. at 2. Gonzalez-Ferretiz did not select that option, but rather chose not to challenge his deportation.
- 5 At the evidentiary hearing, Officer Tine explained that the Final Order is typically signed on the same day that the alien is served with the I-851 form where, as here, the alien has indicated that he does not wish to challenge his deportability.
- 6 The AFFIDAVIT IN SUPPORT OF CRIMINAL COMPLAINT (ECF No. 1) avers that, on December 25, 2017, Gonzalez-Ferretiz "was encountered by the [ICE] Lorton Command Center following GONZALEZ-FERRETIZ's arrest in Virginia for DUI 1st in violation of [V.A. Code § 18.2-266](#) in Caroline County Virginia." Aff. at ¶ 14. He was taken into ICE custody in Richmond on February 16, 2018, id. ¶ 15, and, on February 20, 2018, he was served with the order to reinstate the prior removal order. Id. ¶ 16.
- 7 While the exact details of this time period are unclear, the AFFIDAVIT IN SUPPORT OF CRIMINAL COMPLAINT (ECF No. 1) states: "On September 11, 2018, GONZALEZ-FERRETIZ was encountered in Laguna Niguel, California, following GONZALEZ-FERRETIZ's arrest in Caroline County for probation violation. GONZALEZ-FERRETIZ is currently in state custody at the Pamunkey Regional Jail. An ICE detainer I-247 was issued to the Pamunkey Regional Jail." Aff. ¶ 19.
- 8 Like many courts facing [Section 1326](#) prosecutions in the wake of [Pereira v. Sessions](#), 138 S. Ct. 2105 (2018), Judge Ellis analyzed (and rejected) the defendant's argument that the original immigration proceeding was void for lack of jurisdiction. 2018 WL 6059381, at *5-9. His opinion, however, analyzed this argument only after "assuming, arguendo that defendant could clear the hurdle imposed by the three [§ 1326 \(d\)](#) requirements," clearly requiring a satisfaction of the [Section 1326 \(d\)](#) requirements before the jurisdictional argument could even be entertained. Id. at *5.
- 9 The "Section-by-Section" analysis of the legislation that added [Section 1326\(d\)](#) states that the new subsection "allow[s] a court in a criminal proceeding against a deported alien who re-enters the U.S. to re-

examine the underlying deportation order only if the alien” satisfies the three requirements of  [Section 1326\(d\)](#). 140 Cong. Rec. S.5558-01 (daily ed. May 11, 1994), 1994 WL 181390, at *S5571 (emphasis added).

“This language taken from   [United States v. Mendoza-Lopez](#), 481 U.S. 828 (1987), is intended to ensure that minimum due process was followed in the original deportation proceeding while preventing wholesale, time consuming attacks on underlying deportation orders.” *Id.*

- 10 Because it has been raised, the Court will briefly address Gonzalez-Ferretiz’s jurisdictional argument too.
- 11 In certain immigration proceedings (not at issue here), procedures before the immigration judge begin upon the filing of a “notice to appear.” See [Romero-Caceres](#), 2018 WL 6059381, at *6-9 (describing how such procedures operate). Because the “notice to appear” serves as a charging document, and the regulations state that “[j]urisdiction vests, and proceedings before an Immigration Judge commence, when a charging document is filed with the Immigration Court by the Service,” 8 C.F.R. § 1003.14(a) (emphasis added), the argument is that a faulty “notice to appear” means that jurisdiction never properly vested with the immigration court. See [Romero-Caceres](#), 2018 WL 6059381, at *6-9.
- 12 The Court also notes that in a recent unpublished decision, the Fourth Circuit declined to give a broad reading to *Pereira*. See  [United States v. Perez-Arellano](#), No. 18-4301, 2018 WL 6617703, at *3 (4th Cir. Dec. 17, 2018) (unpublished) (per curium) (“Simply put, *Pereira* did not address the question of an immigration judge’s jurisdiction to rule on an alien’s removability, and it certainly does not plainly undermine the jurisdiction of the 2004 removal proceeding.”). See also  [Leonard v. Whitaker](#), 746 Fed. Appx. 269, 269-70 (4th Cir. Dec. 31, 2018) (unpublished) (per curium).
- 13 In *Lopez-Collazo*, the District Court concluded that the defendant “understood almost no English” and that it was “patently clear that Lopez-Collazo in 2007 did not read or understand English to an extent sufficient to enable him to comprehend the NOI or the Waiver form...or to make a knowing and informed decision on the basis of forms that he could not read.”  [Lopez-Collazo](#), 824 F.3d at 459 (internal quotations omitted).
- 14 Immigration officials must “provide the alien with a written translation of the Notice of Intent or explain the contents of the Notice of Intent to the alien in the alien’s native language or in a language that the alien understands.” 8 C.F.R. § 238.1 (b) (2) (v) (emphasis added);  [Lopez-Collazo](#), 824 F.3d at 462 (quoting this language).
- 15 Though not raised by the parties, the Court has found one district court case expanding the reasoning of *Etienne* to the  [Section 1326\(d\)](#) context. [United States v. Cazares-Rodriguez](#), No. 3:17-cr-00327-GPC-1, 2017 WL 2212031 (S.D. Cal. May 19, 2017). There, the court held that *Etienne*’s reasoning that the I-851 does not permit a legal challenge of the aggravated felony determination “applies with equal force in the context of the  § 1326(d) requirements.” *Id.* at *5. The Defendant’s waiver of his right to challenge his deportation was invalid where he did not know he could challenge his state conviction as not being an “aggravated felony.” *Id.* [Cazares-Rodriguez](#) supports the decision reached here because it confirms that *Etienne* was not about collateral attacks under  [Section 1326\(d\)](#). See [Cazares-Rodriguez](#), at *4 n.3. And, absent direction from the Court of Appeals on this issue, this Court will not follow an out-of-Circuit district court case that expands a Fourth Circuit precedent to new contexts.

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GOVERNMENT
EXHIBIT

3

Notice of Intent to Issue a Final Administrative Removal Order

In removal proceedings under section 238(b) of the Immigration and Nationality Act

Event No: PHI1406000035

File Number 098 241 431

To: ISIDORO GONZALEZ-FERRETIZ AKA: SALAZAR MENDOZA, ANTONIO

Address: [REDACTED] Coatesville, PENNSYLVANIA, 19320

(Number, Street, City, State and ZIP Code)

Telephone:

(Area Code and Phone Number)

Pursuant to section 238(b) of the Immigration and Nationality Act (Act) as amended, 8 U.S.C. 1228(b), the Department of Homeland Security (Department) has determined that you are amenable to administrative removal proceedings. The determination is based on the following allegations:

1. You are not a citizen or national of the United States.
2. You are a native of MEXICO and a citizen of MEXICO
3. You entered the United States (at)(near) UNKNOWN on or about Unknown Date
4. At that time you entered Without Inspection
5. You are not lawfully admitted for permanent residence.
6. You were, on _____, convicted in the See I-831 Court
_____ for the offense of _____
in violation of _____
for which the term of imprisonment imposed was _____

Charge:

You are deportable under section 237(a)(2)(A)(iii) of the Act, 8 U.S.C. 1227(a)(2)(A)(iii), as amended, because you have been convicted of an aggravated felony as defined in section 101(a)(43)(G) of the Act, 8 U.S.C. 1101(a)(43)(G).

Based upon section 238(b) of the Act, 8 U.S.C. 1228(b), the Department is serving upon you this NOTICE OF INTENT TO ISSUE A FINAL ADMINISTRATIVE REMOVAL ORDER ("Notice of Intent") without a hearing before an Immigration Judge.

Your Rights and Responsibilities:

You may be represented (at no expense to the United States government) by counsel, authorized to practice in this proceeding. If you wish legal advice and cannot afford it, you may contact legal counsel from the list of available free legal services provided to you.

You must respond to the above charges in writing to the Department address provided on the other side of this form within 10 calendar days of service of this notice (or 13 calendar days if service is by mail). The Department must **RECEIVE** your response within that time period.

In your response you may: request, for good cause, an extension of time; rebut the charges stated above (with supporting evidence); request an opportunity to review the government's evidence; admit deportability; designate the country to which you choose to be removed in the event that a final order of removal is issued (which designation the Department will honor only to the extent permitted under section 241 of the Act, 8 U.S.C. 1231); and/or, if you fear persecution in any specific country or countries on account of race, religion, nationality, membership in a particular social group, or political opinion or, if you fear torture in any specific country or countries, you may request withholding of removal under section 241(b)(3) of the Act, 8 U.S.C. 1231(b)(3), or withholding/deferral of removal under the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (Convention Against Torture). A grant of withholding or deferral of removal would prohibit your return to a country or countries where you would be persecuted or tortured, but would not prevent your removal to a safe third country.

You have the right to remain in the United States for 14 calendar days so that you may file a petition for review of this order to the appropriate U.S. Circuit Court of Appeals as provided for in section 242 of the Act, 8 U.S.C. 1252. You may waive your right to remain in the United States for this 14-day period. If you do not file a petition for review within this 14-day period, you will still be allowed to file a petition from outside of the United States so long as that petition is filed with the appropriate U.S. Circuit Court of Appeals within 30 calendar days of the date of your final order of removal.

B 0432 MCSHANE - SDDO

(Signature and Title of Issuing Officer)

Philadelphia, PA

(City and State of Issuance)

June 3, 2014 00:00

(Date and Time)

Certificate of Service

I served this Notice of Intent. I have determined that the person served with this document is the individual named on the other side of the form.

- IEA

(Signature and Title of Officer)

6/3/2014

In Person

(Date and Manner of Service)

☒ I explained and/or served this Notice of Intent to the alien in the English language.

(Name of Interpreter)

(Signature of Interpreter)

Location/Employer: Philadelphia, PA

I Acknowledge that I Have Received this Notice of Intent to Issue a Final Administrative Removal Order.

Isidoro Gonzalez

(Signature of Respondent)

6/3/2014

13:35

(Date and Time)

☐ The alien refused to acknowledge receipt of this document.

(Signature and Title of Officer)

(Date and Time)

☐ I Wish to Contest and/or to Request Withholding of Removal

☐ I contest my deportability because: (Attach any supporting documentation)

- ☐ I am a citizen or national of the United States.
- ☐ I am a lawful permanent resident of the United States.
- ☐ I was not convicted of the criminal offense described in allegation number 6 above.
- ☐ I am attaching documents in support of my rebuttal and request for further review.

☐ I request withholding or deferral of removal to _____ [Name of Country or Countries]:

- ☐ Under section 241(b)(3) of the Act, 8 U.S.C. 1231(b)(3), because I fear persecution on account of my race, religion, nationality, membership in a particular social group, or political opinion in that country or those countries.
- ☐ Under the Convention Against Torture, because I fear torture in that country or those countries.

(Signature of Respondent)

(Printed Name of Respondent)

(Date and Time)

☒ I Do Not Wish to Contest and/or to Request Withholding of Removal

☒ I admit the allegations and charge in this Notice of Intent. I admit that I am deportable and acknowledge that I am not eligible for any form of relief from removal. I waive my right to rebut and contest the above charges. I do not wish to request withholding or deferral of removal. I wish to be removed to

Mexico

☒ I understand that I have the right to remain in the United States for 14 calendar days in order to apply for judicial review. I do not wish this opportunity. I waive this right.

Isidoro Gonzalez

(Signature of Respondent)

Isidoro Gonzalez

(Printed Name of Respondent)

6/3/2014 13:35

(Date and Time)

Matt Garrison

(Signature of Witness)

Matt Garrison

(Printed Name of Witness)

6/3/2014 13:55

(Date and Time)

**RETURN THIS FORM TO:
Department Of Homeland Security**

ATTENTION:

The Department office at the above address must **RECEIVE** your response within 10 calendar days from the date of service of this Notice of intent (13 calendar days if service is by mail).