

Docket No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
REFUGIO AGUSTIN-PINEDA
PETITIONER
Vs.
UNITED STATES OF AMERICA
RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPENDIX

DAN B. JOHNSON-Counsel of Record
Member of Supreme Court Bar
Attorney for Petitioner-CJA Counsel
Appointed under 18 U.S.C. Sect. 3006A
LAW OFFICE OF DAN B. JOHNSON, P.S.
1312 North Monroe Street, Suite 248
Spokane, WA 99201
(509) 483-5311
danbjohnsonlaw@gmail.com
Washington State Bar No. 11257

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APPENDIX A

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DEC 7 2020
MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

No. 19-30108

Plaintiff-Appellee,

D.C. No. 2:18-CR-00174-TOR-1

v.

REFUGIO AGUSTIN-PINEDA,

MEMORANDUM*

Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Washington
Thomas O. Rice, District Judge, Presiding

Submitted December 2, 2020**

Before: WALLACE, CLIFTON, and BRESS, Circuit Judges.

Refugio Agustin-Pineda appeals from the district court's judgment and challenges his guilty-plea conviction for being an alien in the United States after deportation, in violation of 8 U.S.C. § 1326. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

1 App

Agustín-Pineda contends that the immigration judge lacked jurisdiction to issue the removal order underlying his conviction, and therefore that the district court should have granted his motion to dismiss the indictment. We review de novo the denial of a motion to dismiss an indictment based on alleged due process defects in the underlying deportation proceeding. *See United States v. Ubaldo-Figueroa*, 364 F.3d 1042, 1047 (9th Cir. 2004).

As Agustín-Pineda concedes, his argument that the lack of a time and date on his Notice to Appear divested the immigration judge of jurisdiction over his underlying removal proceedings is foreclosed by our opinion in *Karingithi v. Whitaker*, 913 F.3d 1158, 1160 (9th Cir. 2019), *cert. denied sub nom. Karingithi v. Barr*, 140 S. Ct. 1106 (2020). Notwithstanding Agustín-Pineda’s assertion that *Karingithi* was wrongly decided, it controls our decision here. *See United States v. Boitano*, 796 F.3d 1160, 1164 (9th Cir. 2015) (“[A]s a three-judge panel we are bound by prior panel opinions and can only reexamine them when the reasoning or theory of our prior circuit authority is clearly irreconcilable with the reasoning or theory of intervening higher authority.” (internal quotation marks omitted)). Accordingly, the district court did not err in denying the motion to dismiss the indictment.

AFFIRMED.

2 app.

APPENDIX B

UNITED STATES DISTRICT COURT
Eastern District of Washington

May 15, 2019

SEAN F. MCVOY, CLERK

UNITED STATES OF AMERICA

v.

REFUGIO AGUSTIN-PINEDA

JUDGMENT IN A CRIMINAL CASE

Case Number: 2:18-CR-00174-TOR-1

USM Number: 21078-085

Nicholas Wright Marchi

Defendant's Attorney

THE DEFENDANT:

pleaded guilty to count(s) 1 of the Indictment

pleaded nolo contendere to count(s) _____ which was accepted by the court.

was found guilty on count(s) after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

<u>Title & Section</u>	/	<u>Nature of Offense</u>	<u>Offense Ended</u>	<u>Count</u>
8 U.S.C. § 1326 - ALIEN IN THE UNITED STATES AFTER DEPORTATION			08/29/2018	1

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

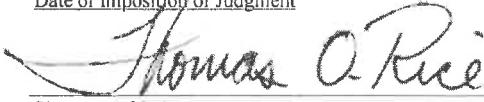
The defendant has been found not guilty on count(s) _____

Count(s) _____ is are dismissed on the motion of the United States

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

5/15/2019

Date of Imposition of Judgment



Signature of Judge

The Honorable Thomas O. Rice
Name and Title of Judge

Chief Judge, U.S. District Court

5/15/2019

Date

3 app.

DEFENDANT: REFUGIO AGUSTIN-PINEDA
Case Number: 2:18-CR-00174-TOR-1

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of: Time served (which amounts to 13-days).

The court makes the following recommendations to the Bureau of Prisons:

The defendant is remanded to the custody of the United States Marshal.

The defendant shall surrender to the United States Marshal for this district:

at _____ a.m. p.m. on _____

as notified by the United States Marshal.

The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

before 2 p.m. on _____

as notified by the United States Marshal.

as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

4 app.

DEFENDANT: REFUGIO AGUSTIN-PINEDA
Case Number: 2:18-CR-00174-TOR-1**SUPERVISED RELEASE**

Upon release from imprisonment, you shall be on supervised release for a term of: 1 year

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance, including marijuana, which remains illegal under federal law.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
 - The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. (*check if applicable*)
4. You must cooperate in the collection of DNA as directed by the probation officer. (*check if applicable*)
5. You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, et seq.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which you reside, work, are a student, or were convicted of a qualifying offense. (*check if applicable*)
6. You must participate in an approved program for domestic violence. (*check if applicable*)

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must be truthful when responding to the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If this judgment imposes restitution, a fine, or special assessment, it is a condition of supervised release that you pay in accordance with the Schedule of Payments sheet of this judgment. You shall notify the probation officer of any material change in your economic circumstances that might affect your ability to pay any unpaid amount of restitution, fine, or special assessments.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

Jaffi -

DEFENDANT: REFUGIO AGUSTIN-PINEDA
Case Number: 2:18-CR-00174-TOR-1

SPECIAL CONDITIONS OF SUPERVISION

1. If you are deported or removed from the United States, you are prohibited from returning to the United States without advance legal permission from the United States Attorney General or his designee. Should you reenter the United States, you are required to report to the probation office within 72 hours of reentry.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature

Date

6 app.

APPENDIX C

1
2
3
4
5 UNITED STATES DISTRICT COURT
6 EASTERN DISTRICT OF WASHINGTON

7 UNITED STATES OF AMERICA,

8 Plaintiff,

9 v.

10 REFUGIO AGUSTINE-PINEDA,

11 Defendant.

NO: 2:18-CR-0174-TOR

ORDER DENYING DEFENDANT'S
MOTION TO DISMISS AND
CONTINUING TRIAL DATE

12 BEFORE THE COURT is Defendant's Motion to Dismiss (ECF No. 35). A

13 hearing was held on January 3, 2019. Defendant was present and represented by

14 Nicholas W. Marchi, and assisted by the Court's certified interpreter. Matthew F.

15 Duggan appeared on behalf of the government.

16 At the hearing, the Court heard argument on Defendant's motion to dismiss,
17 and for the reasons stated on the record, denied the motion. Defendant then made
18 an oral motion to continue the jury trial currently scheduled for January 14, 2019,
19 to accommodate his counsel's trial schedule in another matter. In support of his
20 motion, Defendant executed a Speedy Trial waiver. ECF No. 38. With no

ORDER DENYING DEFENDANT'S MOTION TO DISMISS AND
CONTINUING TRIAL DATE ~1

7 app.

1 objection from the government, the Court granted the motion finding that
2 Defendant is entitled to continuity of counsel and requires additional time to
3 investigate and prepare for trial, taking into account the exercise of due diligence,
4 and that his interests would not be adequately represented without a continuance.

5 ACCORDINGLY, IT IS HEREBY ORDERED:

6 1. Defendant's Motion to Dismiss (ECF No. 35) is **DENIED** for the
7 reasons stated on the record at the January 3, 2019 hearing.

8 2. Defendant's oral Motion to Continue Trial is **GRANTED**.

9 3. A final pretrial conference is scheduled for **February 14, 2019**, at
10 **10:30 a.m.**, in Spokane, Washington. All pre-trial motions, including motions *in*
11 *limine* and *Daubert* motions, shall be filed and served on or before **January 31,**
12 **2019**, and noted for hearing at the pre-trial conference. Any response to a pre-trial
13 motion shall be filed and served in accordance with LCivR 7. If the Court
14 determines an evidentiary hearing is appropriate, the Court will notify the parties
15 of the date and time for such hearing.

16 4. The current jury trial scheduled for January 14, 2019, is vacated and
17 continued to **February 25, 2019, at 8:30 a.m.**, in Spokane, Washington. Counsel
18 shall appear in court at 8:30 a.m. on the first day of trial to address any pending
19 pretrial motions. Jury selection will begin at 9:00 a.m. Trial briefs, proposed voir
20

ORDER DENYING DEFENDANT'S MOTION TO DISMISS AND
CONTINUING TRIAL DATE ~2

8app.

1 dire, jury instructions, verdict forms, exhibit lists, and expert witness lists shall be
2 filed and served by all parties on or before **seven (7) calendar days** prior to trial.

3 5. Pursuant to 18 U.S.C. § 3161(h)(7)(A), (B)(iv), the time between
4 January 3, 2019, until February 25, 2019, is DECLARED EXCLUDABLE for
5 purposes of computing time under the Speedy Trial Act. The Court finds that the
6 ends of justice served by such a continuance outweigh the interests of the public
7 and Defendant in a speedy trial.

8 6. Counsel for the defense shall ensure Defendant's attendance at every
9 scheduled hearing and trial.

10 IT IS SO ORDERED. The District Court Executive is directed to enter this
11 order and provide copies to counsel, the United States Probation Office, and the
12 United States Marshal's Service.

13 DATED January 4, 2019.



14 The signature of Thomas O. Rice in cursive script.
15 THOMAS O. RICE
16 Chief United States District Judge
17
18
19
20

ORDER DENYING DEFENDANT'S MOTION TO DISMISS AND
CONTINUING TRIAL DATE ~3

9 app.

APPENDIX D

1 NICHOLAS MARCHI
2 Carney & Marchi, P.S.
3 7502 West Deschutes Place
Kennewick WA 99336
(509) 545-1055
4 Attorneys for Defendant

5

6 UNITED STATES DISTRICT COURT
7 IN AND FOR THE EASTERN DISTRICT OF WASHINGTON

8 UNITED STATES OF AMERICA,

Case No.2:18-CR-00174-TOR

9 Plaintiff,

MOTION AND MEMORANDUM RE:
DISMISS INDICTMENT

10 vs.

Note: January 3, 2018, at 10:30am

11 REFUGIO AUGUSTINE PINEDA,

Judge Rice at Spokane

12 Defendant

13

14

15 COMES NOW the defendant and moves this Court for an Order dismissing the
16 Indictment in this matter. The defendant maintains that the Removal Order in this matter is
17 fundamentally flawed and thus cannot support the Indictment.

18 DATED this 30th day of November 2018.

19 Respectfully Submitted,

20
21 *S/Nicholas Marchi*
22 Nicholas Marchi
CARNEY & MARCHI
23 Attorneys for Defendant

1 MEMORANDUM OF LAW

2 I. FACTS

3 Mr. Augustine Pineda was charged by Indictment with one count of Alien in the United
4 States without Permission after Deportation, 8 U.S.C 1326. Mr. Augustine Pineda was ordered
5 removed on November 13, 2012. Exhibit A Mr. Augustine Pineda was placed into proceedings
6 with the filing of a Notice to Appear charging him with removal pursuant to INA
7 212(a)(6)(A)(i). See Exhibit B Mr. Augustin Pineda maintains that the Removal Order is fatally
8 flawed pursuant to *Pereira v. Sessions*, 138 S.Ct. 2105 (2018) and thus can not support the
9 Indictment and this matter must be dismissed.

10 II. ARGUMENT

11 In a prosecution for violation of 8 U.S.C. 1326, the Due Process Clause requires the
12 meaningful review of the underlying deportation. *United States v. Zarate-Martinez*, 133 F.3d
13 1194 (9th Cir. 1998) A defendant charged with said crime has a right to collaterally attack the
14 removal order because the order serves as a predicate element of the conviction. *United States v.*
15 *Mendoza-Lopez*, 481 U.S. 828 (1987)

16 To sustain a collateral attack, a defendant must demonstrate that he exhausted his
17 administrative remedies; that the underlying proceedings were improper and denied an
18 opportunity for judicial review; and that the entry of the order was fundamentally unfair. 8
19 U.S.C. 1326(d), *United States v. Ramos*, 673 F.3d 672 (9th Cir. 2010)

20 A removal order is fundamentally unfair if an alien's due process rights were violated by
21 defects in the underlying deportation proceedings and he suffered prejudice. *United States v.*
22 *Ubaldo-Figueroa*, 364 F.3d 1024 (9th Cir. 2004)

1 Due process guarantees that a person will not forcibly be deported without an order
 2 complying with procedural due process. See *Mendez v. INS*, 563 F.2d 956, 958 (9th Cir. 1977)
 3 (holding that a forcibly deported alien must be readmitted to pursue judicial and administrative
 4 remedies where deportation did not comply with due process).

5 In *Pereira v. Sessions*, the Supreme Court stated, “A notice that does not inform a
 6 noncitizen when and where to appear for removal proceedings is not a “notice to appear under
 7 section [239(a)].” *Pereira*, slip op. 2. In the Defendant’s case, under *Pereira* the putative
 8 notice to appear issued against him is not a “notice to appear under section [239(a)]” and
 9 therefore is insufficient to establish jurisdiction over this matter for either the Immigration
 10 Court or the Board. Accordingly, the Immigration Court never had jurisdiction and the
 11 Removal Order entered was thus invalid.

12 Section 239 of the INA is titled “Initiation of removal proceedings,” and lays out
 13 various requirements for the government to commence removal proceedings against an
 14 individual. *See generally* INA § 239. INA § 239(a) requires the issuance of a “notice to
 15 appear” that contains certain specified information. *See* INA § 239(a)(1)(A)-(G). The
 16 required information includes the time and place of the first hearing before the immigration
 17 court. *See Pereira*, slip op. 3 (citing INA § 239(a)).

18 The implementing regulations for the commencement and procedures of removal
 19 proceedings specify that “[j]urisdiction vests, and proceedings before an Immigration Judge
 20 commence, when a charging document is filed with the Immigration Court by the Service.” 8
 21 C.F.R. § 1003.14(a). They further specify that the requisite “charging document” can include a
 22 “Notice to Appear, a Notice of Referral to Immigration Judge, and a Notice of Intention to
 23 Rescind and Request for Hearing by Alien.” 8 C.F.R. § 1003.13. In the Respondent’s case,
 24
 25

1 DHS filed a putative Notice to Appear¹ that failed to specify the time or place of his first
 2 hearing before the immigration court. *See Notice to Appear*, dated.

3 In *Pereira*, the noncitizen—like the Defendant here—was served with a document that
 4 was styled as a notice to appear (i.e., a “putative notice”), but that “did not specify the date and
 5 time of [his] removal hearing.” *Pereira*, slip op. at 6. “Pereira then applied for cancellation of
 6 removal” under INA § 240A(b)(1), but the Immigration Judge (IJ) pretermitted his application
 7 and ordered him removed. *Pereira*, slip op. at 6-7. This Board affirmed the IJ’s decision, and
 8 the First Circuit deferred to the Board. *Pereira*, slip op. 7.

9
 10 The Supreme Court reversed, holding, in the context of eligibility for cancellation of
 11 removal, that “[a] putative notice to appear that fails to designate the specific time or place of
 12 the noncitizen’s removal proceedings is not a “notice to appear under section [239(a)].”
 13 *Pereira*, slip op. 9. The Court found that the “plain text, the statutory context, and common
 14 sense all lead inescapably and unambiguously to that conclusion.” *Pereira*, slip op. at 2. The
 15 import of the *Pereira* decision in the Respondent’s case is the Supreme Court’s construing the
 16 statutory phrase “notice to appear under section [239(a)]” as requiring the inclusion of time
 17 and place information specified at INA § 239(a)(G). Under *Pereira*, a putative notice to
 18 appear that does not have this information is not a notice to appear as defined under the INA.

19
 20 Like the noncitizen in *Pereira*, the Defendant was ordered removed based on a putative
 21 notice to appear that did not contain the requisite time or place information under the INA and
 22 the implementing regulations. Therefore, immigration proceedings in this matter were not
 23 properly constituted because a proper Notice to Appear did not exist. See *Martinez-Garcia v.*
 24 *Ashcroft*. In light of the Supreme Court’s decision in *Pereira*, the Court should grant the

25
 1 The other documents listed at 8 C.F.R. § 1003.23 are not at issue in the Respondent’s case.

Motion to Dismiss. See also, Recent Decisions of Courts interpreting *Pereira*; *United States v. Virgen Ponce*, 320 F.Supp. 3d 1164 (E.D. Wash. 2018); *United States v. Zapata-Cortinas*, 2018 WL 47706868 (W.D.Tex. Oct 2, 2018); *United States v. Cruz-Jimenez*, 2018 WL 5779491 (W.D.TEX Nov. 2, 2018)

III. CONCLUSION

The defendant respectfully requests that this Court dismiss the Indictment based on the reasoning stated herein.

DATED this 30th day of November 2018.

Respectfully Submitted,
S/Nicholas Marchi
Nicholas Marchi
CARNEY & MARCHI
Attorneys for Defendant

CERTIFICATE OF SERVICE

I certify that a copy of the Motion and Memorandum to Dismiss Indictment was e-mailed via ECF on 12/2/2018, to M. Duggan, Assistant United States Attorney, P.O. Box 1494, Spokane, WA 99210.

S/ *Nicholas Marchi*
CARNEY & MARCHI, P.S.
Attorneys for Defendant

EXHIBIT A

15 a ff.

EXHIBIT B

17 app.

U.S. Department of Homeland Security

Notice to Appear

In removal proceedings under section 240 of the Immigration and Nationality Act:

Subject ID : 344516568

FIN #: 2952588

File No: A205 647 800

DOB: 02/14/1984

Event No: RIC1310000035

In the Matter of:

Refugio AGUSTIN-Pineda

Respondent:

1623 EAST J STREET #5 , TACOMA WASHINGTON 98421

(Number, street, city and ZIP code)

(Area code and phone number)

- 1. You are an arriving alien.
- 2. You are an alien present in the United States who has not been admitted or paroled.
- 3. You have been admitted to the United States, but are removable for the reasons stated below.

The Department of Homeland Security alleges that you:

- 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 arrived in the United States at or near San Ysidro, CA, on or about 2009;
- 4. You were not then admitted or paroled after inspection by an Immigration Officer.

On the basis of the foregoing, it is charged that you are subject to removal from the United States pursuant to the following provision(s) of law:

212(a)(5)(A)(i) of the Immigration and Nationality Act, as amended, in that you are an alien present in the United States without being admitted or paroled, or who arrived in the United States at any time or place other than as designated by the Attorney General.

- This notice is being issued after an asylum officer has found that the respondent has demonstrated a credible fear of persecution or torture.
- Section 235(b)(1) order was vacated pursuant to: 8CFR 208.30(f)(2) 8CFR 235.3(b)(5)(iv)

YOU ARE ORDERED to appear before an immigration judge of the United States Department of Justice at:
1623 E J Street #3 Tacoma WASHINGTON 98421

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

on a date to be set at a time to be set to show why you should not be removed from the United States based on the
(Date) (Time)

charge(s) set forth above.

JEFFREY L. FORTUN

DETENTION DEPORTATION OFFICE

(Signature and Title of Issuing Officer)

Date: October 15, 2012

Yakima, WA

(City and State)

See reverse for important information

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

US v. AGUSTIN-PINEDA

18 a pg.

00000022

Notice to Respondent

Warning: Any statement you make may be used against you in removal proceedings.

Alien Registration: This copy of the Notice to Appear served upon you is evidence of your alien registration while you are under removal proceedings. You are required to carry it with you at all times.

Representation: If you so choose, you may be represented in this proceeding, at no expense to the Government, by an attorney or other individual authorized and qualified to represent persons before the Executive Office for Immigration Review, pursuant to 8 CFR 3.16. Unless you so request, no hearing will be scheduled earlier than ten days from the date of this notice to allow you sufficient time to secure counsel. A list of qualified attorneys and organizations who may be available to represent you at no cost will be provided with this notice.

Conduct of the hearing: At the time of your hearing, you should bring with you any affidavits or other documents, which you desire to have considered in connection with your case. If you wish to have the testimony of any witnesses considered, you should arrange to have such witnesses present at the hearing.

At your hearing you will be given the opportunity to admit or deny any or all of the allegations in the Notice to Appear and that you are inadmissible or removable on the charges contained in the Notice to Appear. You will have an opportunity to present evidence on your own behalf, to examine any evidence presented by the Government, to object, on proper legal grounds, to the receipt of evidence and to cross examine any witnesses presented by the Government. At the conclusion of your hearing, you have a right to appeal an adverse decision by the immigration judge.

You will be advised by the immigration judge before whom you appear of any relief from removal for which you may appear eligible including the privilege of departure voluntarily. You will be given a reasonable opportunity to make any such application to the immigration judge.

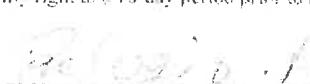
Failure to appear: You are required to provide the DHS, in writing, with your full mailing address and telephone number. You must notify the Immigration Court immediately by using Form EOIR-33 whenever you change your address or telephone number during the course of this proceeding. You will be provided with a copy of this form. Notices of hearing will be mailed to this address. If you do not submit Form EOIR-33 and do not otherwise provide an address at which you may be reached during proceedings, then the Government shall not be required to provide you with written notice of your hearing. If you fail to attend the hearing at the time and place designated on this notice, or any date and time later directed by the Immigration Court, a removal order may be made by the immigration judge in your absence, and you may be arrested and detained by the DHS.

Mandatory Duty to Surrender for Removal: If you become subject to a final order of removal, you must surrender for removal to one of the offices listed in 8 CFR 241.16(a). Specific addresses and locations for surrender can be obtained from your local DHS office or over the internet at <http://www.ice.dhs.gov/about/dro/contact.htm>. You must surrender within 30 days from the date the order becomes administratively final, unless you obtain an order from a Federal court, immigration court, or the Board of Immigration Appeals staying execution of the removal order. Immigration regulations at 8 CFR 241.1 define when the removal order becomes administratively final. If you are granted voluntary departure and fail to depart the United States as required, fail to post a bond in connection with voluntary departure, or fail to comply with any other condition or term in connection with voluntary departure, you must surrender for removal on the next business day thereafter. If you do not surrender for removal as required, you will be ineligible for all forms of discretionary relief for as long as you remain in the United States and for ten years after departure or removal. This means you will be ineligible for asylum, cancellation of removal, voluntary departure, adjustment of status, change of nonimmigrant status, registry, and related waivers for this period. If you do not surrender for removal as required, you may also be criminally prosecuted under section 243 of the Act.

Request for Prompt Hearing

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

Before:


Signature of Respondent

Date: 10-16-12

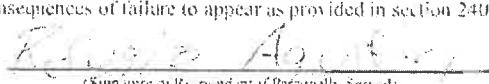
Signature and Title of Immigration Officer

Certificate of Service

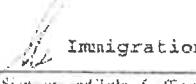
This Notice To Appear was served on the respondent by me on 10-16-12 in the following manner and in compliance with section 239(a)(1)(F) of the Act.

in person by certified mail, return receipt requested by regular mail
 Attached is a credible fear worksheet.
 Attached is a list of organization and attorneys which provide free legal services. Spanish

The alien was provided oral notice in the Spanish language of the time and place of his or her hearing and of the consequences of failure to appear as provided in section 240(b)(7) of the Act.


(Signature of Respondent if Personally Served)

SHAWN MILLER


Immigration Enforcement Agent

(Signature and Title of Officer)

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

BEFORE THE HONORABLE THOMAS O. RICE
CHIEF UNITED STATES DISTRICT COURT JUDGE

APPEARANCES:

10 For the Plaintiff: MATTHEW F. DUGGAN
11 U.S. Attorney's Office
12 920 W. Riverside Ave., Ste. 300
P.O. Box 1494
Spokane, Washington 99210

13 For the Defendant: NICHOLAS W. MARCHI
14 Attorney at Law
7502 W. Deschutes Place
Kennewick, Washington 99336

16 Court-Certified Interpreter: Bea Rump

18 Official Court Reporter: Allison R. Anderson, RMR, CRR
19 United States District Courthouse
20 P.O. Box 700
Spokane, Washington 99210
(509) 458-3465

25 Proceedings reported by mechanical stenography; transcript
produced by computer-aided transcription.

20 apr.

USA v. Agustin-Pineda/Case No. 2:18-cr-00174-TOR-1
Pretrial Conference & Motion Hearing

2

1 (Court convened on January 3, 2019, at 10:29 a.m.)

2 THE COURTROOM DEPUTY: The matter before the Court is
3 *United States of America versus Refugio Agustin-Pineda*, Case No.
4 2:18-cr-00174-TOR; time set for pretrial conference/motion
5 hearing.

6 Counsel, please state your presence for the Court and
7 record, beginning with the plaintiff.

8 MR. DUGGAN: Matt Duggan for the United States, Your
9 Honor.

10 THE COURT: Good morning.

11 MR. DUGGAN: Good morning.

12 MR. MARCHI: Good morning, Your Honor. Nicholas
13 Marchi on behalf of the defendant.

14 THE COURT: And good morning to both of you, as well
15 as the court-certified interpreter.

16 THE INTERPRETER: Good morning.

17 THE COURT: Mr. Marchi, the motion before the Court is
18 the motion to dismiss. I'll hear from you.

19 MR. MARCHI: Thank you, Your Honor.

20 THE COURT: Just for the record, I've read the entire
21 file and all the briefing in this matter, but I'll hear what you
22 have to say.

23 MR. MARCHI: Thank you, Your Honor. Your Honor, I
24 believe the Court, in reading all the briefing, is familiar with
25 the issues at hand here. The motion to dismiss on this matter,

21 aff.

1 Your Honor, is primarily based on *Pereira v. Sessions*. As the
2 Court is aware, the Supreme Court came down holding that a
3 notice to appear is invalid and lacks jurisdiction for the Court
4 if it does not provide a time and date and place for a hearing.

5 Now, we are maintaining that in this matter, the removal
6 order was dated November 13th, 2012, and was based on an NTA,
7 which we attached as an exhibit to our moving papers, showing
8 that no date or time was on that; and based on *Pereira v.*
9 *Sessions*, Your Honor, we move to dismiss, saying that the judge
10 -- immigration judge had no jurisdiction to file or sign off on
11 the removal order.

12 The Government has responded, and, Your Honor, I'll just
13 address their response. Namely, they maintain that *Pereira*
14 should be handled or reviewed in a very narrow analysis as that
15 they maintain that *Pereira* only dealt with the stop-time rule.
16 Stop-time rule would apply to cancellation of removal. The
17 issuance of an NTA can stop the ten-year period of time, which
18 is required under the statute -- I believe it's 8 U.S.C.
19 1229(b) -- which would allow an individual in the United States
20 with United States citizen children or LPR children or wife to
21 apply for cancellation or removal. Based on the issue of an
22 NTA, that would stop time.

23 Here, the Government maintains that *Pereira* should only
24 apply to those cases that involve the stop-time ruling. Your
25 Honor, it's our position that that, number one, is far too

22 a/fp.

1 narrow of an interpretation; and two, the decision by the
2 Supreme Court in *Pereira* wasn't limited to that. The analysis
3 was of an NTA and the use -- completing the NTA in the proper --
4 how it was properly executed to -- as jurisdiction with the
5 Court.

6 The Government goes on to cite to State -- or *Matter of*
7 *Bermudez-Cortez* (sic), which is a BIA decision. In that, the
8 BIA stated that as long as a defendant gets -- or a respondent
9 gets notice of the subsequent hearing, that would cure it.
10 Again, Your Honor, I don't believe that -- number one, that is
11 an agency decision that would apply to the agencies therein.
12 Number two, it's not to be given -- it's not precedential for
13 this Court. Number three, in their analysis, Your Honor, I
14 believe that their analysis wasn't as clear as to the issues
15 that were brought up in this case.

16 The Government then maintains that, well, even if the
17 statute wasn't followed, the regulations would cure any defect.
18 Again, *Pereira* dealt with the statutory interpretation, and
19 therefore, the statutory interpretation trumps any regulation.
20 Again, I think that the Government misses the point when they
21 rely on the regulations. I think it's C.F.R. 100.13 (sic) et
22 seq. The -- again, the case law is clear. An analysis by the
23 Supreme Court applies to any cases subsequent as well as a
24 holding.

25 The other argument the Government maintains, Your Honor, is

23 app.

1 that the subsequent hearing date would cure the defect, and they
2 rely on -- I believe it's *Popa v. Holder*. However, *Popa v.*
3 *Holder* is a 2008 case that doesn't even address the recent case
4 of *Pereira*, and therefore, it would not be controlling.

5 Finally, Your Honor -- or second to last is the Government
6 relies on the split in district court cases, and -- and, Your
7 Honor, I do have some of the most recent cases I can hand up to
8 the Court, one being *United States versus Juan Carlos Bastide-*
9 *Hernandez*, which is a case issued by the district court in this
10 district on the 20th of December. I have two other cases
11 issued, I believe, the second week of December from Arizona and
12 from Nevada, all dismissing indictments based on *Pereira*. And I
13 can hand those up if I can approach, Your Honor.

14 THE COURT: Yes, please.

15 MR. MARCHI: Those cases, Your Honor -- and
16 specifically if the Court looks to the decision in *Juan Carlos*
17 *Bastide-Hernandez*, which was issued by a court in this
18 jurisdiction on the 20th, those -- that case specifically is
19 very similar to this if not identical, and the court in that
20 case of *Juan Carlos Hernandez* addresses those arguments that
21 were raised in this case.

22 Finally, Your Honor, the Government maintains that Mr. --
23 my client, Mr. Agustin-Pineda, must show some sort of prejudice.
24 Here, Your Honor, I think the telling factor is, number one, I
25 don't even think we get to the prejudice issue because there was

24 aff.

1 no jurisdiction. Two, if we look at it, one could argue that
2 the prejudice would be that there's no indication that he was
3 ineligible for voluntary departure. He had a DUI and several
4 DWLS's when he was removed. Third, I don't believe that there's
5 an exhaustion argument the Government raises under 1326(d).
6 Again, I don't believe that that's applicable because there was
7 no jurisdiction here.

8 Basically, Your Honor, we're asking this Court to dismiss
9 this matter because Immigration didn't follow the -- the
10 regulations -- or the statute when they issued the NTA in the
11 case-in-chief -- or case at bar.

12 I would finally note, Your Honor, that the Executive Office
13 of Immigration Review issued recently a memo about the handling
14 of NTAs that did not provide the date of -- as issued on the NTA
15 and any other date that wasn't subsequently brought forth by the
16 EOIR, and there they said, Your Honor, any NTA that is invalid
17 as those that were filed prior to this would not be accepted.
18 So they now seem to have adopted the *Pereira* rationale. Your
19 Honor, I believe that Mr. Agustin-Pineda has met his burden, and
20 these matters should be dismissed.

21 THE COURT: I had a few questions.

22 MR. MARCHI: Yes, Your Honor.

23 THE COURT: First of all, there's no objection to the
24 authenticity or -- of the documents both that you submitted as
25 well as the Government's submitted?

25 aff.

1 MR. MARCHI: No, Your Honor.

2 THE COURT: And then I'm reading the document that you
3 submitted, which was the notice to appear. It appears on the
4 first page of that --

5 MR. MARCHI: If I can step away, Your Honor, and grab
6 that?

7 THE COURT: Yes. Yes, you can.

8 MR. MARCHI: Yes. Which document, Your Honor?

9 THE COURT: The notice to appear that you submitted.
10 It's your Exhibit B.

11 MR. MARCHI: Yes, Your Honor.

12 THE COURT: The first page of that shows that your
13 client was residing at 1623 East J Street, which is Immigration.

14 MR. MARCHI: That's a detention facility, yes, Your
15 Honor.

16 THE COURT: Yeah, he's in a detention facility.

17 MR. MARCHI: Yeah.

18 THE COURT: So he's in custody.

19 MR. MARCHI: He's in custody.

20 THE COURT: Unlike the *Pereira* case where the notice
21 to appear wasn't necessarily served on the defendant; his
22 whereabouts were unknown.

23 MR. MARCHI: True. And that would -- that would be
24 the issue of an in-absentia order, I suppose, but we don't have
25 that. We have a location and an address. He is in a detention

26 afg

1 facility.

2 THE COURT: And then the -- at the bottom of the first
3 page, we have the location of the hearing; again, the detention
4 facility.

5 MR. MARCHI: Well, Your Honor, there is no -- it says
6 to "a date to be set."

7 THE COURT: Well, that's the date and time. But right
8 above that, the line right above that, the hearing --

9 MR. MARCHI: True, Your Honor, it does say it's got a
10 place but --

11 THE COURT: So the place is identified.

12 MR. MARCHI: There is a place identified.

13 THE COURT: All right. And so it says the date and
14 time is to be set.

15 MR. MARCHI: Yes, Your Honor.

16 THE COURT: But then the second page of it contains
17 your client's signature under the request for prompt hearing.
18 "I waive my right to the 10-day period prior to appearing before
19 an immigration judge."

20 MR. MARCHI: That's correct, Your Honor.

21 THE COURT: And request an immediate hearing.

22 MR. MARCHI: That's correct. But again, Your Honor,
23 whether he signs it, receives it, or gets notice of it, the
24 document itself is invalid because it does not comply with the
25 statute. It does not put a date and time. If --

27 app.

1 THE COURT: Well, the date and time -- here's what I'm
2 saying, is right -- right before that, it says, "I request an
3 immediate hearing."

4 MR. MARCHI: That's correct, Your Honor. But while he
5 may request it on the second page, it also says that -- it says
6 "on a date to be set." This is exactly the issue that was
7 raised in *Pereira*.

8 THE COURT: Well, "on a date to be set," though, was
9 the notice of the charge and --

10 MR. MARCHI: That's the NTA, the charging document.

11 THE COURT: Yeah. Presumably, the first page is
12 filled out by the -- by the service. The second page is then
13 filled out by your client where he can request a prompt hearing;
14 and if he doesn't request the prompt hearing, I take it they
15 would set a date and time. But they set the date and time
16 because he requested an immediate hearing.

17 MR. MARCHI: Well, Your Honor, I guess my position
18 would be seeing that, they could've gotten a date and time at
19 the time that they served him because they were at the detention
20 facility and the court is there.

21 THE COURT: No, because that date and time would be
22 ten days out, at least, but your client requested an immediate
23 hearing. He waived the 10-day rule.

24 MR. MARCHI: Well --

25 THE COURT: So they've got to talk to him and say, "Do

28 a/f.

1 you want to wait the ten days in detention or do you want an
2 immediate hearing?"

3 MR. MARCHI: Your Honor, I think that's beyond the
4 fact that it doesn't comply with the statute, per the statute.
5 Whether he had notice of it, whether they said, "You can ask for
6 a hearing," I still say it doesn't comply with the statute in
7 *Pereira*.

8 THE COURT: Okay. The statute in *Pereira*, though,
9 dealt with the stop-clock rule with respect to whether or not a
10 defendant could accrue the seven or ten years of residency where
11 Congress says the stop-clock rule precludes that accrual if
12 there's been a valid notice to appear, but it doesn't address
13 jurisdiction for deportation. The regulations address
14 jurisdiction for deportation.

15 MR. MARCHI: The regulations set up what should be
16 filed and the procedures. However, I think that the statute
17 vests the jurisdiction with the -- the notice to appear, which
18 must have a date and time on the bottom. That's what I'm
19 saying.

20 THE COURT: All right. I understand your argument,
21 but the actual Statute 1229 doesn't say the agency gets
22 jurisdiction by the date and time. What -- what it says is the
23 comprehensive Immigration Act as well as the underlying
24 regulations, generally you get jurisdiction of an individual by
25 custody, and then you've got to provide proper notice as to the

29 aff.

1 charges or the proceeding against him, and that was done by the
2 notice to appear. All the other statutory or regulatory
3 information that is required to be provided to the defendant was
4 provided in the notice to appear, and he waived the 10-day rule
5 and requested an immediate hearing. So that will be my ruling,
6 that the Immigration service did have jurisdiction.

7 Pereira is distinguishable. The narrow question that the
8 Supreme Court granted cert. on was whether or not the stop-clock
9 rule was applicable to a notice to appear that wasn't
10 necessarily served and didn't have a date and time or place for
11 the hearing, but we have a place for the hearing. The defendant
12 was in custody. The hearing was set for the exact same address
13 as the detention center, and the defendant signed his right to a
14 10-day period of time before the hearing occurred and requested
15 an immediate hearing; and because -- because he requested the
16 immediate hearing in the notice to appear, I find the agency had
17 jurisdiction. There was no other defect in the proceeding, and
18 the motion to dismiss is denied for those reasons.

19 MR. MARCHI: Very good, Your Honor.

20 THE COURT: We're set for trial January 14th.

21 MR. MARCHI: Yes, Your Honor.

22 THE COURT: Any other issues --

23 MR. MARCHI: There is --

24 THE COURT: -- predicate to that?

25 MR. MARCHI: There is an issue to that, Your Honor. I

30 afg.

1 talked to the Government yesterday. I am starting a trial in
2 front of Judge Bastian on the 14th. We were not sure that that
3 case would go out because of the effect that the shutdown -- the
4 partial shutdown would affect the Government. This is a murder
5 case in which we have numerous witnesses coming out from
6 Quantico and evidence; and the Government, Mr. Hanlon, the U.S.
7 attorney on that, wasn't sure they were going to get the funding
8 to get people out here. I'm not sure what the issue was, but he
9 informed me on Friday that we were good to go and that the date
10 was solid.

11 I'm going to ask that we reset this to the last week in
12 February. I believe the 25th, that week, I am totally open.
13 The murder trial, I anticipate right now, is four to eight days.
14 It might be a little in there to finish it, but we're not sure.
15 This is a case that has been -- has had issues with witnesses
16 and things like that. On top of that, I do have another trial
17 that is trailing that.

18 My client has agreed to sign a speedy trial waiver until
19 the end of February, and I believe that is to assist me in
20 getting him prepared for trial as well as accommodating Judge
21 Bastian's trial, which has been pending for a while.

22 THE COURT: Mr. Duggan, what's your position with
23 respect to a trial continuance based on Counsel's trial
24 schedule?

25 MR. DUGGAN: Your Honor, I did speak to Counsel

31 app.

1 yesterday. As he indicated, I don't have any objection.

2 THE COURT: And Mr. Marchi --

3 MR. MARCHI: Yes, Your Honor.

4 THE COURT: -- you've indicated that you discussed
5 your client's right to a speedy trial.

6 MR. MARCHI: Yes, Your Honor. We have discussed it
7 when we came in. He filed a prior waiver, and we explained it
8 to him there also. But again this morning, I went over his
9 right to it and had the interpreter read the entire document to
10 him and was available for any questions he had.

11 THE COURT: All right. Well, the Court will grant
12 your oral motion to continue. The Speedy Trial Act includes a
13 provision where the Court -- to allow a continuance where the
14 denial of a continuance would unreasonably deny the defendant
15 continuity of counsel under 3161(h) (7) (B) (iv). And so because
16 of your double trial setting and the importance, I take it, of a
17 murder trial, I will grant the continuance until February 25th
18 at 8:30 in this courtroom. We'll begin trial at 8:30, and jury
19 selection will begin at 9 o'clock. A final pretrial conference
20 will be set for February 14th at 10:30; and if you get back to
21 your office and that pretrial conference is a problem, give my
22 chambers a call and we'll reschedule that.

23 The Court does find the time between the filing of the
24 motion today and the new trial date is declared excludable for
25 purposes of computing the time under the Speedy Trial Act. The

32 aff.

USA v. Agustin-Pineda/Case No. 2:18-cr-00174-TOR-1
Pretrial Conference & Motion Hearing

1 Court finds the ends of justice served by such continuance
2 outweigh the interest of the public and the defendant in a more
3 speedy trial, and it's based on continuity of counsel in
4 representation of this defendant.

5 I'll also hand back to you the cases, Mr. Marchi.

6 MR. MARCHI: Very good, Your Honor.

7 THE COURT: Anything further?

8 MR. MARCHI: Not from the defense, Your Honor.

9 THE COURT: All right. Mr. Duggan?

10 MR. DUGGAN: No, Your Honor. Thank you.

11 THE COURT: All right. We'll be in recess.

12 (Court adjourned on January 3, 2019, at 10:50 a.m.)

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25

33 app.

1 C E R T I F I C A T E
2

3 I, ALLISON R. ANDERSON, do hereby certify:

4 That I am an Official Court Reporter for the United States
5 District Court for the Eastern District of Washington in
6 Spokane, Washington;

7 That the foregoing proceedings were taken on the date and
8 place as shown on the first page hereto; and

9 That the foregoing proceedings are a full, true, and
10 accurate transcription of the requested proceedings, duly
11 transcribed by me or under my direction.

12 I do further certify that I am not a relative of, employee
13 of, or counsel for any of said parties, or otherwise interested
14 in the event of said proceedings;

15 DATED this 3rd day of July, 2019.

16 
17

18 ALLISON R. (STOVALL) ANDERSON, RMR, CRR
19 Washington CCR No. 2006
Official Court Reporter
Spokane, Washington

20
21
22
23
24
25
34 app.

APPENDIX F

TRANSCRIPT OF PROCEEDINGS

SENTENCING HEARING

BEFORE THE HONORABLE THOMAS O. RICE

APPEARANCES:

For the Plaintiff: U. S. ATTORNEY'S OFFICE
BY: Matt Duggan
Attorney at Law
P. O. Box 1494
Spokane, WA 99210

For the Defendant: CARNEY & MARCHI, PS
BY: Nick Marchi
Attorney at Law
108 S. Washington
Seattle, WA 98101

COURT REPORTER: Mark A. Snover, RPR, RMR, CRR, CSR
P. O. Box 1633
Spokane, WA 99210-1633
(509) 458-3434

Proceedings recorded by mechanical stenography, transcript produced by computer.

1 MAY 15, 2019 - 10:00 a.m.

2 (Whereupon Court reconvened

3 in the courtroom at 10:00 a.m.)

4 THE COURT: Good morning. Please be seated.

5 THE DEPUTY CLERK: The matter now before the Court is
6 United States of America versus Refugio Agustin-Pineda.

7 Case number 2:18-CR-00174-TOR-1.

8 Time set for sentencing.

9 Counsel, please state your appearances for the record,
10 beginning with the plaintiff.

11 MR. DUGGAN: Good morning, Your Honor, Matt Duggan for
12 the United States.

13 THE COURT: Good morning.

14 MR. MARCHI: Good morning, Your Honor, Nicholas Marchi
15 on behalf of the defendant.

16 THE COURT: And good morning to both of you as well as
17 the Court's certified interpreter.

18 THE INTERPRETER: Good morning, Judge.

19 THE COURT: Mr. Duggan, I'll hear from the government.

10:01AM 20 MR. DUGGAN: Thank you, Your Honor.

21 I have read the Presentence Investigation Report.

22 I do agree that the guideline range in this case is
23 zero to six months.

24 In the Presentence Investigation Report I did note
25 that the defendant has a total of, I believe, 10 convictions

1 that don't count in his criminal history composition.

2 I am asking for a sentence of 60 days in custody, to
3 be followed by one year of supervised release.

4 I believe the defendant has been in custody from
5 September 7th to September 19th, Your Honor.

6 THE COURT: All right. Thank you.

7 Mr. Marchi and Mr. Agustin-Pineda, can you come to the
8 podium, please.

9 Mr. Marchi, have you reviewed the Presentence

10:02AM 10 Investigation Report with Mr. Agustin-Pineda?

11 MR. MARCHI: We have, Your Honor.

12 THE COURT: Are there any outstanding objections?

13 MR. MARCHI: No, Your Honor.

14 We filed a sentencing memorandum, in which we noted no
15 objections and we concur with the guideline calculations.

16 THE COURT: All right.

17 And then I received, just before we came out on the
18 bench, these letters, three letters from family, and I've read
19 those.

10:02AM 20 Do you want those made part of the file or can I
21 return them?

22 MR. MARCHI: You can return them, Your Honor.

23 THE COURT: All right.

24 Let me make a finding and then I'll hear from you as
25 to disposition.

1 The Court adopts the Presentence Investigation Report
2 without change.

3 The Court finds the total offense level is six.

4 Criminal history category Roman Numeral I.

5 With an advisory guideline range of zero to six
6 months.

7 One year term of supervised release.

8 A fine range of a thousand to \$9,500.

9 With those findings I'll hear from you.

10:03AM 10 MR. MARCHI: Thank you, Your Honor.

11 Your Honor, we have filed a sentencing memorandum in
12 this matter and we are requesting the Court impose 12 days
13 custody.

14 It is anticipated, Your Honor, that at the completion
15 of this sentence Mr. Agustin-Pineda will be transferred to the
16 Northwest Detention Center, where he will return to or begin his
17 reinstatement proceedings.

18 He does have a reinstatement claim, meaning that when
19 he arrives at the Northwest Detention Center he will be
10:04AM 20 processed through that process, which means he will be
21 interviewed by a USCIS officer to determine if he has a credible
22 fear.

23 I anticipate that he will be found to have a credible
24 fear, as I currently represent his family member,
25 Edgar Agustin-Pineda, who is currently in reasonable fear or

1 reinstatement proceedings, based on the violence the family has
2 suffered in Guerrero because they are landowners.

3 Once he has the credible fear determination, he will
4 then be placed in front of an immigration judge.

5 What this means, Your Honor, is he will be detained
6 for approximately eight months in the Northwest Detention Center
7 while he contests removability.

8 While he may prevail on that claim, he will not be
9 eligible for release on bond as USCIS and ICE take the position
10:05AM 10 that he has a prior removal order and he is mandatory detention.

11 So he is likely to sit in ICE custody for
12 approximately eight months.

13 I understand that his criminal history that has not
14 scored is approximately nine or ten.

15 I would note that they are all driving offenses.

16 He does have one DUI offense which he has completed
17 and complied with probation.

18 He has four United States citizen children, all very
19 young.

10:05AM 20 One of the problems that Mr. Agustin-Pineda has been
21 facing is he is unemployed and because U.S. Probation indicated
22 he needed a work permit, he maintained that he did not work and
23 so he did not violate those conditions.

24 That has put additional hardship on his family. His
25 wife has had to go back to work. Other family members are

1 having to support him and his children.

2 The bottom line, Your Honor, is, as this Court is
3 aware, we have reserved the right to appeal the decision of
4 denying our motion to dismiss.

5 That's more procedural because of the interaction of
6 the reinstatement proceedings, which I'll be dealing with once
7 he gets to Tacoma.

8 I believe that a sentence of time served is
9 reasonable, given the requirements of 3553 A.

10:06AM 10 Mindful that he has had one voluntary return and one
11 removal. The removal was in 2012.

12 As this Court is aware, we handle these cases a
13 majority of time and we see a lot of removal orders, a lot of
14 re-entries after removal, and they don't get to this stage until
15 they have had three or four.

16 The last one I had down in Richland there were six
17 re-entries after removal.

18 Your Honor, I think my client is understanding the
19 consequences of his actions, he just wants to move forward with
10:07AM 20 his life and take the next step.

21 THE COURT: Mr. Agustin-Pineda, this is your
22 opportunity to tell me anything you want me to know in
23 mitigation or explanation before I pronounce sentence.

24 THE INTERPRETER: I would like to apologize for having
25 entered the country without permission. I know I did wrong.

1 And that's it.

2 THE COURT: Mr. Agustin-Pineda, I'm not impressed by
3 the fact that -- I realize you had driving offenses, but two
4 serious driving offenses were the DUI's, driving under the
5 influence of alcohol.

6 Those are serious matters.

7 For the first one you received a day in jail.

8 For the second one you received approximately 10 days
9 in jail.

10:08AM 10 You've been punished for those, but those are
11 concerning to the Court.

12 In this case you're charged with being an illegal
13 Alien in the United States After Deportation, because you've
14 been removed once and deported once.

15 My calculation is that you served 13 days in custody
16 so far.

17 The sentence I impose is time served, which amounts to
18 the 13 days.

19 You're placed on a one-year term of supervised
10:09AM 20 release.

21 During the next year you must not commit another
22 federal, state or local crime.

23 You must cooperate in the collection of a DNA sample
24 as provided by your probation officer.

25 You're subject to the 13 standard conditions of

41 app.

1 supervision.

2 Including the one special condition of supervision,
3 which is you are prohibited from returning to the United States
4 without advance legal permission from the United States Attorney
5 General or his designee.

6 Should you reenter the United States you're required
7 to report to the probation office within 72 hours of reentry.

8 Of course, this condition is only applicable if you
9 are removed or deported again from the United States.

10:10AM 10 Mr. Duggan, I waive imposition of fine, but does the
11 government seek the \$100 Special Penalty Assessment or is it
12 uncollectible?

13 MR. DUGGAN: No, Your Honor, I would ask the Court to
14 remit that.

15 THE COURT: All right.

16 The \$100 is remitted.

17 Mr. Agustin-Pineda, you have a right to appeal.

18 You have a right to an attorney at no expense to you
19 and a right to a transcript of these proceedings at no expense
10:10AM 20 to you.

21 You must file a notice of appeal within 14 days.

22 I note for the record that the Ninth Circuit has ruled
23 precisely as I've ruled in this case.

24 MR. MARCHI: They have, Your Honor, and I concede that
25 point.

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MARK A. SNOVER
OFFICIAL COURT REPORTER

1 However, immigration practitioners were bringing up
2 other issues around that decision in the Ninth Circuit.

3 THE COURT: All right. All right.

4 Anything else, Mr. Marchi?

5 MR. MARCHI: Nothing from me, Your Honor.

6 THE COURT: Mr. Duggan, anything further?

7 MR. DUGGAN: No, Your Honor. Thank you.

8 THE COURT: All right. We'll be in recess.

9 (Whereupon Court was recessed at 10:10 a.m.)

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MARK A. SNOVER

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1 STATE OF WASHINGTON)

2 : Reporter's Certificate

3 COUNTY OF SPOKANE)

4

5

6 I, Mark A. Snover, a Registered
7 Professional Reporter and Official United States District Court
8 Reporter;

9 DO HEREBY CERTIFY:

10 That the foregoing transcript
11 contains a true and accurate transcription of my shorthand notes
12 of all requested matters held in the foregoing captioned case.

13 Further, that the transcript was
14 prepared by me or under my direction.

15 DATED this 26th day of June,
16 2019.

17

18

19

20

/s/ Mark A. Snover

21

MARK A. SNOVER, RPR, CSR

22

OFFICIAL U. S. COURT REPORTER

23

24

25

MARK A. SNOVER

OFFICIAL COURT REPORTER

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APPENDIX G

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,) Case No. 2:18-cr-00174-TOR-1
)
Plaintiff,) February 14, 2019
) Spokane, Washington
vs.) Change of Plea Hearing
REFUGIO AGUSTIN-PINEDA,)
)
Defendant.) Pages 1 - 11

BEFORE THE HONORABLE THOMAS O. RICE
CHIEF UNITED STATES DISTRICT COURT JUDGE

APPEARANCES:

10 For the Plaintiff: MATTHEW F. DUGGAN
11 U.S. Attorney's Office
12 920 W. Riverside Ave., Ste. 300
P.O. Box 1494
Spokane, Washington 99210

13 For the Defendant: NICHOLAS W. MARCHI
14 Attorney at Law
7502 W. Deschutes Place
Kennewick, Washington 99336

17 Court-Certified Interpreter: Bea Rump

19 Official Court Reporter: Allison R. Anderson, RMR, CRR
20 United States District Courthouse
21 P.O. Box 700
Spokane, Washington 99210
(509) 458-3465

24 Proceedings reported by mechanical stenography; transcript
25 produced by computer-aided transcription.

45 aff.

1 (Court convened on February 14, 2019, at 10:28 a.m.)

2 THE COURTROOM DEPUTY: The matter before the Court is
3 *United States of America versus Refugio Agustin-Pineda*, Case No.
4 2:18-cr-0174-TOR-1; time set for change of plea.

5 Counsel, please state your presence for the Court and
6 record, beginning with the plaintiff.

7 MR. DUGGAN: Good morning, Your Honor. Matt Duggan
8 for the United States.

9 THE COURT: Good morning.

10 MR. MARCHI: Good morning, Your Honor. Nicholas
11 Marchi on behalf of Mr. Agustin-Pineda.

12 THE COURT: Good morning to both of you, as well as
13 the court-certified interpreter, Ms. Rump.

14 THE INTERPRETER: Good morning.

15 THE COURT: Mr. Duggan, any preliminary statements?

16 MR. DUGGAN: No, Your Honor.

17 THE COURT: All right. Mr. Marchi and Mr. Agustin-
18 Pineda, could you come to the podium, please?

19 Mr. Marchi, any preliminary statements you'd like to make
20 before I begin?

21 MR. MARCHI: No, Your Honor.

22 THE COURT: Mr. Agustin-Pineda, as you know, this is a
23 serious matter; so I'm going to have you take an oath to tell
24 the truth. Could you raise your hand and be sworn by the Clerk
25 of Court?

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1 REFUGIO AGUSTIN-PINEDA,

2 having first been duly sworn,

3 testified under oath as follows:

4 THE COURT: Mr. Agustin, what is your full legal name?

5 THE DEFENDANT: Refugio Agustin-Pineda.

6 THE COURT: Is it spelled correctly on the pleadings,
7 the documents?

8 THE DEFENDANT: Yes.

9 THE COURT: Where were you born?

10 THE DEFENDANT: Guerrero, Mexico.

11 THE COURT: And how old are you?

12 THE DEFENDANT: 35.

13 THE COURT: How far in school did you go?

14 THE DEFENDANT: Six.

15 THE COURT: As you stand before me, are you suffering
16 from any mental illness, addiction to drugs, or are you under
17 the influence of any drug, medicine, or alcohol that affects
18 your --

19 THE DEFENDANT: No.

20 THE COURT: -- ability to understand today's
21 proceeding?

22 THE DEFENDANT: No.

23 THE COURT: And have you received a copy of the
24 charges against you?

25 THE DEFENDANT: Yes.

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1 THE COURT: And did you fully discuss the charge with
2 your attorney?

3 THE DEFENDANT: Yes.

4 THE COURT: Are you satisfied with your attorney's
5 advice and representation?

6 THE DEFENDANT: Yes.

7 THE COURT: And I have before me a written plea
8 agreement. Have you reviewed this written plea agreement with
9 your attorney?

10 THE DEFENDANT: Yes.

11 THE COURT: Was it fully interpreted to you in the
12 Spanish language?

13 THE DEFENDANT: Yes.

14 THE COURT: Do you understand the terms of the plea
15 agreement?

16 THE DEFENDANT: Yes.

17 THE COURT: Has anybody made any promises to you of
18 any kind other than the ones in this document to get you to
19 plead guilty?

20 THE DEFENDANT: No.

21 THE COURT: Has anybody threatened you in any way to
22 get you to plead guilty?

23 THE DEFENDANT: No.

24 THE COURT: You understand the terms of this plea
25 agreement are the parties will make recommendations to me at the

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1 time of sentencing. I may accept or reject those
2 recommendations, but you won't be allowed to withdraw your
3 guilty plea. Do you understand that?

4 THE DEFENDANT: Yes.

5 THE COURT: Also, do you understand the offense that
6 you're pleading guilty to is a felony offense? Because of that,
7 in this country, you would lose certain valuable civil rights:
8 the right to vote, the right to hold public office, the right to
9 serve on a jury, and the right to possess any type of firearm.
10 Do you understand those consequences?

11 THE DEFENDANT: Yes.

12 THE COURT: In your case, you're not a citizen of the
13 United States, and you will be deported from or removed from
14 this country as a consequence of your plea here. Do you
15 understand that?

16 THE DEFENDANT: Yes.

17 THE COURT: The maximum penalty for this offense
18 charging you with being an alien in the United States after
19 deportation is not more than two years in prison, a fine not to
20 exceed \$250,000, not more than a one-year term of supervised
21 release, and a \$100 special penalty assessment. Do you
22 understand those penalties associated with this crime?

23 THE DEFENDANT: Yes.

24 THE COURT: There's a reference to the Federal
25 Sentencing Guidelines in your plea agreement. The guidelines

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1 are just that; they're advisory. It's a guideline. In other
2 words, they don't bind the Court to that range. The Court can
3 sentence you up to two years. Do you understand that?

4 THE DEFENDANT: Yes.

5 THE COURT: According to the plea agreement, you're
6 expressly waiving your right to appeal your conviction and your
7 sentence except you're reserving the right to appeal this
8 Court's order denying your motion to dismiss. Do you
9 understand -- and you're expressly waiving your right to file
10 any postconviction motion attacking your conviction and sentence
11 except one based on ineffective assistance of counsel based on
12 information not now known by you or, in the exercise of due
13 diligence, could be known by you by the time the Court imposes
14 sentence. Do you understand you're giving up your rights under
15 these terms?

16 THE DEFENDANT: Yes.

17 THE COURT: Mr. Agustin, do you understand you have a
18 right to plead not guilty and to have a jury trial where you are
19 presumed innocent and the Government has to prove your guilt
20 beyond a reasonable doubt to 12 jurors who must be unanimous in
21 their decision? At trial, you have a right to assistance of a
22 lawyer at no expense to you. You have a right to see and hear
23 all the witnesses and have them cross-examined in your defense.

24 You have a right to present evidence and to testify. If
25 you asked me, I would issue court orders, or subpoenas, to

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1 witnesses to have them brought into the courtroom to testify on
2 your behalf. Additionally, you have a right to remain silent
3 and you -- if you elected not to testify, I would tell the jury
4 they could not use that fact against you. The Government has
5 the burden of proof. If I accept your guilty plea here, there
6 will be no jury trial. Do you understand that?

7 THE DEFENDANT: Yes.

8 THE COURT: The charge that you're pleading guilty to
9 is being an alien in the U.S. after deportation. Essentially,
10 the Government has to prove that on or about November 27th,
11 2012, you were deported from the United States. Second, after
12 that date, you voluntarily reentered the United States. Third,
13 at that time and afterwards, you knew you were in the United
14 States and knowingly remained. Fourth, on or about August 29th,
15 2018, you were found in the United States without having
16 obtained the permission of the Attorney General or the Secretary
17 of the Department of Homeland Security to reapply for admission
18 into the United States. And fifth, you are an alien; and at the
19 time of your entry into the United States, you were an alien.
20 Do you understand the elements the Government has to prove
21 beyond a reasonable doubt?

22 THE DEFENDANT: Yes.

23 THE COURT: I read the factual statement, I understand
24 what's written here, but I need to hear from you in your own
25 words what you did to violate this law. Could you just briefly

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1 tell me what you did wrong?

2 THE DEFENDANT: That I reentered without permission.

3 THE COURT: And you're a citizen of Mexico, not the
4 United States?

5 THE DEFENDANT: Yes.

6 THE COURT: Mr. Agustin, to the one-count indictment
7 charging you with being an alien in the United States after
8 deportation, how do you plead; guilty or not guilty?

9 THE DEFENDANT: Guilty.

10 THE COURT: Mr. Marchi, is there any reason not to
11 accept this plea?

12 MR. MARCHI: No. As the Court will notice, we are
13 reserving appeal on the motion to dismiss because Mr. Agustin-
14 Pineda is in reinstatement proceedings before the EIOR, and we
15 are challenging the removal order in those proceedings. So I
16 have nothing else to add, Your Honor.

17 THE COURT: All right. Mr. Agustin, I find that
18 you're fully competent and capable of entering an informed plea.
19 You're aware of the nature of the charges and the consequences
20 of the plea. Your plea is knowing and voluntary. It's
21 supported by an independent basis in fact containing each of the
22 essential elements of the offense. Your plea is therefore
23 accepted.

24 I'm going to order a presentence investigation report. A
25 probation officer will contact you and your attorney, put

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Change of Plea Hearing

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1 together a written biographical history of your life, the facts
2 and circumstances surrounding this offense, and a calculation of
3 the advisory guideline range. When that report's done, it will
4 be given to your attorney. He'll share it with you. Make any
5 corrections or objections to make sure the report is accurate
6 and complete because I'll use it in deciding how to sentence you
7 in this matter. I'll set sentencing for May 15th, 2019, at
8 10 o'clock a.m.

9 Mr. Marchi?

10 MR. MARCHI: Yes, Your Honor.

11 THE COURT: Anything further?

12 MR. MARCHI: Nothing from me, Your Honor.

13 THE COURT: Mr. -- well, Mr. Agustin, you've been
14 released up to this point; is that correct?

15 THE DEFENDANT: Yes.

16 THE COURT: And do you have any questions regarding
17 your terms of release?

18 THE DEFENDANT: No.

19 THE COURT: I'm going to continue under -- you under
20 those same exact terms until the sentencing date. Do you
21 understand that?

22 THE DEFENDANT: Yes.

23 THE COURT: All right. If you have any questions, you
24 contact your attorney or the probation officer as to the terms
25 and conditions of your release.

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Change of Plea Hearing

10

1 Mr. Duggan, anything further?

2 MR. DUGGAN: No, thank you, Your Honor.

3 THE COURT: All right. We'll be in recess.

4 (Court adjourned on February 14, 2019, at 10:40 a.m.)

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Change of Plea Hearing

11

1 C E R T I F I C A T E
2

3 I, ALLISON R. ANDERSON, do hereby certify:

4 That I am an Official Court Reporter for the United States
5 District Court for the Eastern District of Washington in
6 Spokane, Washington;

7 That the foregoing proceedings were taken on the date and
8 place as shown on the first page hereto; and

9 That the foregoing proceedings are a full, true, and
10 accurate transcription of the requested proceedings, duly
11 transcribed by me or under my direction.

12 I do further certify that I am not a relative of, employee
13 of, or counsel for any of said parties, or otherwise interested
14 in the event of said proceedings;

15 DATED this 3rd day of July, 2019.

16 
17

18 ALLISON R. (STOVALL) ANDERSON, RMR, CRR
19 Washington CCR No. 2006
20 Official Court Reporter
21 Spokane, Washington
22
23
24
25

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APPENDIX H

1 Joseph H. Harrington
2 United States Attorney
3 Eastern District of Washington
4 Matthew F. Duggan
5 Assistant United States Attorney
6 Post Office Box 1494
7 Spokane, WA 99210-1494
8 Telephone: (509) 353-2767

U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON
FEB 14 2019
SEAN F. MCAVOY, CLERK
SPOKANE, WASHINGTON DEPUTY

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,

Plaintiff,
v.
REFUGIO AGUSTINE-PINEDA,
Defendant.

Case No.: 2:18-CR-00174-TOR
Plea Agreement
Fed. R. Crim. P. 11(a)(2)

Plaintiff, United States of America, by and through Joseph H. Harrington, United States Attorney for the Eastern District of Washington, and Matthew F. Duggan, Assistant United States Attorney for the Eastern District of Washington, and Defendant, REFUGIO AGUSTINE-PINEDA, and the Defendant=s counsel, Nicholas Marchi, agree to the following Plea Agreement, pursuant to Fed. R. Crim. P. 11(a)(2):

1. Conditional Guilty Plea and Maximum Statutory Penalties:

The Defendant, REFUGIO AGUSTINE-PINEDA, agrees to enter a conditional plea of guilty to the Indictment charging the Defendant with Alien in the United States After Deportation in violation of 8 U.S.C. § 1326.

The Defendant and the United States acknowledge that this is a conditional Plea Agreement, pursuant to Fed. R. Crim. P. 11(a)(2), in that that the Defendant reserves the right to appeal the District Court's pretrial ruling denying the Defendant's Motion to Dismiss the Indictment (ECF No. 39).

1 The Defendant understands that this charge carries a maximum penalty of not
2 more than a 2-year term of imprisonment; a fine not to exceed \$250,000; not more than
3 a 1-year term of supervised release; and a \$100 special penalty assessment.

4 The Defendant, REFUGIO AGUSTINE-PINEDA, understands that a violation
5 of a condition of supervised release carries an additional penalty of re-imprisonment for
6 all or part of the term of supervised release without credit for time previously served on
7 post-release supervision.

8 2. The Court is Not a Party to the Agreement:

9 The Court is not a party to this Plea Agreement and may accept or reject this Plea
10 Agreement. Sentencing is a matter that is solely within the discretion of the Court. The
11 Defendant understands that the Court is under no obligation to accept any
12 recommendations made by the United States and/or by the Defendant; that the Court
13 will obtain an independent report and sentencing recommendation from the U.S.
14 Probation Office; and that the Court may, in its discretion, impose any sentence it deems
15 appropriate up to the statutory maximums stated in this Plea Agreement.

16 The Defendant acknowledges that no promises of any type have been made to
17 the Defendant with respect to the sentence the Court will impose in this matter. The
18 Defendant understands that the Court is required to consider the applicable sentencing
19 guideline range, but may depart upward or downward under the appropriate
20 circumstances.

21 Defendant also understands that should the sentencing judge decide not to accept
22 any of the parties' recommendations, that decision is not a basis for withdrawing from
23 this Plea Agreement or a basis for withdrawing this plea of guilty.

24 3. Effect on Immigration Status:

25 The Defendant recognizes that pleading guilty may have consequences with
26 respect to his immigration status if he is not a citizen of the United States. Under federal
27 law, a broad range of crimes are removable offenses, including the offense to which the
28 Defendant is pleading guilty. Indeed, because the Defendant is pleading guilty to Alien

1 in United States after Deportation, removal is presumptively mandatory. Removal and
2 other immigration consequences are the subject of a separate proceeding, however, and
3 the Defendant understands that while deportation and/or removal appears to be a virtual
4 certainty, no one, including his attorney or the district court, can predict with absolute
5 certainty the effect of his conviction on his immigration status. The Defendant
6 nevertheless affirms that he wants to plead guilty regardless of any immigration
7 consequences that his plea may entail, even if automatic removal from the United States
8 is a virtual certainty.

9 4. Waiver of Constitutional Rights:

10 The Defendant, REFUGIO AGUSTINE-PINEDA, understands that by entering
11 this plea of guilty the Defendant is knowingly and voluntarily waiving certain
12 constitutional rights, including:

- 13 a) The right to a jury trial;
- 14 b) The right to see, hear and question the witnesses;
- 15 c) The right to remain silent at trial;
- 16 d) The right to testify at trial; and
- 17 e) The right to compel witnesses to testify.

18 While the Defendant is waiving certain constitutional rights, the Defendant
19 understands the Defendant retains the right to be assisted through the sentencing and
20 any direct appeal of the conviction and sentence by an attorney, who will be appointed
21 at no cost if the Defendant cannot afford to hire an attorney. The Defendant also
22 acknowledges that any pretrial motions currently pending before the Court are waived.

23 5. Elements of the Offense:

24 The United States and the Defendant agree that in order to convict the Defendant
25 of Alien in the United States After Deportation, in violation of 8 U.S.C. § 1326, the
26 United States would have to prove beyond a reasonable doubt the following elements:

- 27 a) First, on or about November 27, 2012, the Defendant, REFUGIO
28 AGUSTINE-PINEDA, was deported from the United States;

- b) Second, after the Defendant was deported he voluntarily entered the United States; and
- c) Third, at the time and after the Defendant entered the United States he knew he was in the United States and knowingly remained;
- d) Fourth, on or about August 29, 2018, the Defendant was found in the United States without having obtained the consent of the Attorney General or the Secretary of the Department of Homeland Security to reapply for admission into the United States; and
- e) Fifth, the Defendant was an alien at the time of his entry into the United States.

6. Factual Basis and Statement of Facts:

The United States and the Defendant stipulate and agree that the following facts are accurate; that the United States could prove these facts beyond a reasonable doubt at trial; and these facts constitute an adequate factual basis for REFUGIO AGUSTINE-PINEDA=s guilty plea. This statement of facts does not preclude either party from presenting and arguing, for sentencing purposes, additional facts which are relevant to the guideline computation or sentencing, unless otherwise prohibited in this agreement.

The Defendant, REFUGIO AGUSTINE-PINEDA, is not a citizen of the United States. The Defendant is a citizen of Mexico. The Defendant was granted a voluntary return on May 1, 1999, at Tecate, California. In 2012, the Defendant returned to the United States and was personally served a notice to appear which did not specify a date or time of his initial hearing before an Immigration Judge. Subsequently, on October 23, 2012, the Defendant was served with a Notice of Hearing in Removal Proceedings notifying him that his initial hearing before an Immigration Judge had been scheduled for November 13, 2012. The hearing notice, as indicated on the certificate of service, was served upon the Defendant through the Department of Homeland Security (DHS) care of custodial officers. The Defendant appeared before an Immigration Judge on November 13, 2012, and was ordered that he be removed to Mexico. The Defendant was deported and removed from the United States on or about November 27, 2012, at El Paso, Texas. On August 29, 2018, the Defendant was located by immigration

1 authorities in the Eastern District of Washington. Fingerprints taken from the Defendant
2 were submitted to the FBI via the Integrated Automated Fingerprint Identification
3 System (IAFIS), the comparison of which revealed an exact match with the Defendant's
4 FBI file which correlates to the Defendant's Alien File (A-File). A review of the
5 Defendant's A-File revealed no evidence that the Defendant has ever sought or received
6 permission to lawfully reenter the United States.

7 By entering a guilty plea, Defendant admits he was an alien and voluntarily entered the
8 United States, and at the time and after he entered the United States, he knew he was in
9 the United States and knowingly remained without having obtained the consent of the
10 Attorney General or the Secretary of the Department of Homeland Security to reapply
11 for admission into the United States.

12 7. United States Sentencing Guideline Calculations:

13 The Defendant understands and acknowledges that the United States Sentencing
14 Guidelines (hereinafter A.U.S.S.G. @) are applicable to this case and that the Court will
15 determine the Defendant=s applicable sentencing guideline range at the time of
16 sentencing.

17 A. Acceptance of Responsibility:

18 If the Defendant pleads guilty and demonstrates a recognition and an affirmative
19 acceptance of personal responsibility for the criminal conduct; provides complete and
20 accurate information during the sentencing process; does not commit any obstructive
21 conduct; accepts this Plea Agreement; and enters a plea of guilty no later than the next
22 pretrial conference, the United States will recommend that the Defendant receive a two
23 (2) level downward adjustment for acceptance of responsibility, and if the Defendant's
24 adjusted offense level is sixteen (16) or greater the United States will move for a one
25 (1) level reduction if this guilty plea is entered on or before the date set for the pretrial
26 conference. *See U.S.S.G. '3E1.1(a) and (b).*

27 Furthermore, the Defendant agrees to pay the \$100 mandatory special penalty
28 assessment to the Clerk of Court for the Eastern District of Washington, at or before

1 sentencing, and shall provide a receipt from the Clerk to the United States before
2 sentencing as proof of this payment, as a condition to this recommendation by the
3 United States.

4 B. Criminal History:

5 The United States and the Defendant understand that the Defendant=s criminal
6 history computation is tentative and that ultimately the Defendant=s criminal history
7 category will be determined by the Court after review of the Presentence Investigative
8 Report. The United States and the Defendant have made no agreement and make no
9 representations as to the criminal history category, which shall be determined after the
10 Presentence Investigative Report is completed.

11 8. Incarceration:

12 The United States agrees to recommend a sentence within the sentencing
13 guideline range as determined by the Court at sentencing. The Defendant may ask for
14 any sentence.

15 9. Supervised Release:

16 The parties are free to recommend any term of supervised release.

17 10. Mandatory Special Penalty Assessment:

18 The Defendant agrees to pay the \$100 mandatory special penalty assessment to
19 the Clerk of Court for the Eastern District of Washington, pursuant to 18 U.S.C. § 3013.

20 11. Payments While Incarcerated:

21 If the Defendant lacks the financial resources to pay the monetary obligations
22 imposed by the Court, the Defendant agrees to earn the money to pay toward these
23 obligations by participating in the Bureau of Prisons= Inmate Financial Responsibility
24 Program.

25 12. The United States Agrees:

26 The United States Attorney=s Office for the Eastern District of Washington
27 agrees not to bring additional charges against the Defendant involving illegal activity
28

charged in this Indictment, unless the Defendant breaches this Plea Agreement any time before or after sentencing.

13. Appeal Rights:

Defendant hereby expressly waives his right to appeal his conviction and the sentence with the following exception: pursuant to Fed. R. Crim. P. 11(a)(2), Defendant reserves the right to appeal the order denying the motion to dismiss filed in this case on January 4, 2019, in ECF 39. Defendant further expressly waives his right to file any post-conviction motion attacking his conviction and sentence, including a motion pursuant to 28 U.S.C. § 2255, except one based upon ineffective assistance of counsel based on information not now known by Defendant and which, in the exercise of due diligence, could not be known by Defendant by the time the Court imposes the sentence.

14. Integration Clause:

The United States and the Defendant acknowledge that this document constitutes the entire Plea Agreement between the United States and the Defendant, and no other promises, agreements, or conditions exist between the United States and the Defendant concerning the resolution of the case. This Plea Agreement is binding only upon the United States Attorney=s Office for the Eastern District of Washington, and cannot bind other federal, state or local authorities. The United States and the Defendant agree that this agreement cannot be modified except in a writing that is signed by the United States and the Defendant.

Approvals and Signatures

Agreed and submitted on behalf of the United States Attorney=s Office for the Eastern District of Washington.

Joseph H. Harrington
United States Attorney

m m m

2-14-19

1 Matthew F. Duggan
2 Assistant U.S. Attorney

Date

3 I have read this Plea Agreement and have carefully reviewed and discussed every
4 part of the agreement with my attorney. I understand and voluntarily enter into this Plea
5 Agreement. Furthermore, I have consulted with my attorney about my rights, I
6 understand those rights, and I am satisfied with the representation of my attorney in this
7 case. My attorney has advised me that by pleading guilty to the charge relevant to this
8 Plea Agreement, as of this date deportation appears to be a virtual certainty. No other
9 promises or inducements have been made to me, other than those contained in this Plea
10 Agreement and no one has threatened or forced me in any way to enter into this Plea
11 Agreement. I am agreeing to plead guilty because I am guilty.

12 X Refugio Agustin
13 REFUGIO AGUSTINE-PINEDA
14 Defendant

2/13/2019
Date

15 I have read the Plea Agreement and have discussed the contents of the agreement
16 with my client. The Plea Agreement accurately and completely sets forth the entirety of
17 the agreement between the parties. I concur in my client's decision to plead guilty as
18 set forth in the Plea Agreement. I have further advised my client by pleading guilty to
19 the charge relevant to this Plea Agreement, as of this date deportation appears to be a
20 virtual certainty. There is no legal reason why the Court should not accept the
21 Defendant's plea of guilty.

22 
23 Nicholas Marchi
24 Attorney for the Defendant

2/14/2019
Date

25
26 I hereby certify that I have read and translated the entire foregoing document to
27 the Defendant in a language with which he is conversant. If questions have arisen, I
28

1 have notified the Defendant's counsel of the questions and have not offered nor given
2 legal advice or personal opinions.
3

4 
5 Interpreter

6 02/13/2019
7 Date
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APPENDIX I

1 Joseph H. Harrington
2 United States Attorney
3 Eastern District of Washington
4 Matthew F. Duggan
5 Assistant United States Attorney
6 Post Office Box 1494
7 Spokane, WA 99210-1494
8 Telephone: (509) 353-2767

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

SEP 18 2018

SEAN P. McAVOY, CLERK
DEPUTY
EASTERN DISTRICT OF WASHINGTON

7 UNITED STATES DISTRICT COURT
8 FOR THE EASTERN DISTRICT OF WASHINGTON

9
10 UNITED STATES OF AMERICA,

2:18-CR-174-TOR

11 Plaintiff,

12 v.
13
14 REFUGIO AGUSTIN-PINEDA,
15 Defendant.

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17
18 The Grand Jury charges:
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20 On or about August 29, 2018, the Defendant, REFUGIO AGUSTIN-
21 PINEDA, a citizen and national of Mexico, who had theretofore been denied
22 admission, excluded, deported and removed from the United States, on or about
23 November 27, 2012, at El Paso, Texas, was found in the United States, in the
24 Eastern District of Washington, and he then did not have the express consent of
25 the Attorney General, or the Attorney General's successor, the Secretary of the
26
27
28

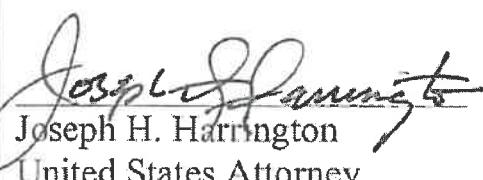
INDICTMENT
Vio: 8 U.S.C. § 1326
Alien in the United States After
Deportation

1 Department of Homeland Security (6 U.S.C. §§ 101, 202(3), (4), 402, 557), to
2 reapply for admission into the United States, all in violation of 8 U.S.C. § 1326.

3 DATED this 10 day of September, 2018.
4

5 A TRUE BILL
6

7 [REDACTED]
8 Foreperson
9

10 
11 Joseph H. Harrington
12 United States Attorney

13 
14 _____
15 Matthew F. Duggan
16 Assistant United States Attorney
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PENALTY SLIP

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

SEP 18 2018

SEAN P. MURDOCK, CLERK DEPUTY
SPOKANE INSPECTOR

DEFENDANT NAME: **REFUGIO AGUSTIN-PINEDA**

TOTAL NO. COUNTS: **1**

VIO: 8 U.S.C. § 1326

Alien in the United States after Deportation

**PENALTY: CAG not more than 10 years;
and/or \$250,000 fine;
3 years supervised release;
a \$100 special penalty assessment**

CASE NO. **2:18-CR-174-TOR-1**

AUSA **MFD**
INITIAL

APPENDIX J

APPENDIX J- STATUTES

8 U.S.C. Sect. 1229:

(a) NOTICE TO APPEAR

(1) IN GENERAL. In removal proceedings under section 1229a of this title, written notice (in this section referred to as a “notice to appear”) shall be given in person to the alien (or, if personal service is not practicable, through service by mail to the alien or to the alien’s counsel of record, if any) specifying the following:

- (A) The nature of the proceedings against the alien.
- (B) The legal authority under which the proceedings are conducted.
- (C) The acts or conduct alleged to be in violation of law.
- (D) The charges against the alien and the statutory provisions alleged to have been violated.
- (E) The alien may be represented by counsel and the alien will be provided (i) a period of time to secure counsel under subsection (b)(1) and (ii) a current list of counsel prepared under subsection (b)(2).
- (F)
 - (i) The requirement that the alien must immediately provide (or have provided) the Attorney General with a written record of an address and telephone number (if any) at which the alien may be contacted respecting proceedings under section 1229a of this title.

68 app

(ii) The requirement that the alien must provide the Attorney General immediately with a written record of any change of the alien's address or telephone number.

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

(G)

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

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

(2) NOTICE OF CHANGE IN TIME OR PLACE OF PROCEEDINGS

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

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

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

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

69 a/f.

(3) CENTRAL ADDRESS FILES

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

(b) SECURING OF COUNSEL

(1) IN GENERAL

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

(2) CURRENT LISTS OF COUNSEL

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

(3) RULE OF CONSTRUCTION

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

7a app.

(c) SERVICE BY MAIL

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

(d) PROMPT INITIATION OF REMOVAL

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

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

(e) CERTIFICATION OF COMPLIANCE WITH RESTRICTIONS ON DISCLOSURE

(1) IN GENERAL

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

(2) LOCATIONS. The locations specified in this paragraph are as follows:

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

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

(June 27, 1952, ch. 477, title II, ch. 4, § 239, as added Pub. L. 104–208, div. C, title III, § 304(a)(3), Sept. 30, 1996, 110 Stat. 3009–587; amended Pub. L. 109–162, title VIII, § 825(c)(1), Jan. 5, 2006, 119 Stat. 3065; Pub. L. 109–271, § 6(d), Aug. 12, 2006, 120 Stat. 763.)

8 U.S.C. Sect 1229(a):

“In removal proceedings under section 1229a of this title, written notice (in this section referred to as a "notice to appear") shall be given in person to the alien (or, if personal service is not practicable, through service by mail to the alien or to the alien's counsel of record, if any) specifying the following:

(A) The nature of the proceedings against the alien.

(B) The legal authority under which the proceedings are conducted.

72 a pg .

- (C) The acts or conduct alleged to be in violation of law.
- (D) The charges against the alien and the statutory provisions alleged to have been violated.
- (E) The alien may be represented by counsel and the alien will be provided (i) a period of time to secure counsel under subsection (b)(1) and (ii) a current list of counsel prepared under subsection (b)(2).
- (F)(i) The requirement that the alien must immediately provide (or have provided) the Attorney General with a written record of an address and telephone number (if any) at which the alien may be contacted respecting proceedings under section 1229a of this title. (ii) The requirement that the alien must provide the Attorney General immediately with a written record of any proceedings under section 1229a of this title. (ii) The requirement that the alien change of the alien's address or telephone number. (iii) The consequences under section 1229a(b)(5) of this title of failure to provide address and telephone information pursuant to this subparagraph.

73 aff.

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

(ii) The consequences under section 1229a(b)(5) of this title of the failure, except under exceptional circumstances, to appear at such proceedings.” 8 U.S.C. § 1229 (West).

8 U.S.C. Sect. 1326:

(a) IN GENERAL. Subject to subsection (b), any alien who—

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

(2) enters, attempts to enter, or is at any time found in, the United States, unless

(A) prior to his reembarkation at a place outside the United States or his application for admission from foreign contiguous territory, the Attorney General has expressly consented to such alien’s reapplying for admission; or (B) with respect to an alien previously denied admission and removed, unless such alien shall establish that he was not required to obtain such advance consent under this chapter or any prior Act, shall be fined under title 18, or imprisoned not more than 2 years, or both.

(b) CRIMINAL PENALTIES FOR REENTRY OF CERTAIN REMOVED

ALIENS

74 app.

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

- (1) whose removal was subsequent to a conviction for commission of three or more misdemeanors involving drugs, crimes against the person, or both, or a felony (other than an aggravated felony), such alien shall be fined under title 18, imprisoned not more than 10 years, or both;
- (2) whose removal was subsequent to a conviction for commission of an aggravated felony, such alien shall be fined under such title, imprisoned not more than 20 years, or both;
- (3) who has been excluded from the United States pursuant to section 1225(c) of this title because the alien was excludable under section 1182(a)(3)(B) of this title or who has been removed from the United States pursuant to the provisions of subchapter V, and who thereafter, without the permission of the Attorney General, enters the United States, or attempts to do so, shall be fined under title 18 and imprisoned for a period of 10 years, which sentence shall not run concurrently with any other sentence.[1] or
- (4) who was removed from the United States pursuant to section 1231(a)(4)(B) of this title who thereafter, without the permission of the Attorney General, enters, attempts to enter, or is at any time found in, the United States (unless the Attorney

75 app.

General has expressly consented to such alien's reentry) shall be fined under title 18, imprisoned for not more than 10 years, or both.

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

(c) REENTRY OF ALIEN DEPORTED PRIOR TO COMPLETION OF TERM OF IMPRISONMENT

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

(d) LIMITATION ON COLLATERAL ATTACK ON UNDERLYING DEPORTATION ORDER

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

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

76 aff.

- (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.

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

18 U.S.C. Sect. 3231:

The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States.

Nothing in this title shall be held to take away or impair the jurisdiction of the courts of the several States under the laws thereof.

(June 25, 1948, ch. 645, 62 Stat. 826.)

28 U.S.C. Sect. 1291:

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be

27 aff.

limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

(June 25, 1948, ch. 646, 62 Stat. 929; Oct. 31, 1951, ch. 655, § 48, 65 Stat. 726; Pub. L. 85-508, § 12(e), July 7, 1958, 72 Stat. 348; Pub. L. 97-164, title I, § 124, Apr. 2, 1982, 96 Stat. 36.)

28 U.S.C. Sect. 1254(1):

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

- (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;...

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APPENDIX K

APPENDIX K: REGULATIONS

8 C.F.R. Sect. 1003.13 Definitions.

As used in this subpart:

Administrative control means custodial responsibility for the Record of

Proceeding as specified in § 1003.11.

Charging document means the written instrument which initiates a proceeding

before an Immigration Judge. For proceedings initiated prior to April 1, 1997,

these documents include an Order to Show Cause, a Notice to Applicant for

Admission Detained for Hearing before Immigration Judge, and a Notice of

Intention to Rescind and Request for Hearing by Alien. For proceedings initiated

after April 1, 1997, these documents include a Notice to Appear, a Notice

of Referral to Immigration Judge, and a Notice of Intention to Rescind and Request

for Hearing by Alien.

Filing means the actual receipt of a document by the appropriate Immigration

Court.

Service means physically presenting or mailing a document to the appropriate party

or parties; except that an Order to Show Cause or Notice of Deportation Hearing

shall be served in person to the alien, or by certified mail to the alien or the

alien's attorney and a Notice to Appear or Notice of Removal Hearing shall be

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served to the alien in person, or if personal service is not practicable, shall be served by regular mail to the alien or the alien's attorney of record.

[62 FR 10332, Mar. 6, 1997]

8 C.F.R. Sect. 1003.14 Jurisdiction and commencement of proceedings:

(a) Jurisdiction vests, and proceedings before an Immigration Judge commence, when a charging document is filed with the Immigration Court by the Service. The charging document must include a certificate showing service on the opposing party pursuant to § 1003.32 which indicates the Immigration Court in which the charging document is filed. However, no charging document is required to be filed with the Immigration Court to commence bond proceedings pursuant to §§ 1003.19, 1236.1(d) and 1240.2(b) of this chapter.

(b) When an Immigration Judge has jurisdiction over an underlying proceeding, sole jurisdiction over applications for asylum shall lie with the Immigration Judge.

(c) Immigration Judges have jurisdiction to administer the oath of allegiance in administrative naturalization ceremonies conducted by the Service in accordance with § 1337.2(b) of this chapter.

(d) The jurisdiction of, and procedures before, immigration judges in exclusion, deportation and removal, rescission, asylum-only, and any other proceedings shall remain in effect as it was in effect on February 28, 2003, until the regulations in

80 app.

this chapter are further modified by the Attorney General. Where a decision of an officer of the Immigration and Naturalization Service was, before March 1, 2003, appealable to the Board or an immigration judge, or an application denied could be renewed in proceedings before an immigration judge, the same authority and procedures shall be followed until further modified by the Attorney General.

[57 FR 11571, Apr. 6, 1992, as amended at 60 FR 34089, June 30, 1995; 62 FR 10332, Mar. 6, 1997. Redesignated and amended at 68 FR 9830, 9832, Feb. 28, 2003]

§1 app.

§ 1003.15 Contents of the order to show cause and notice to appear and notification of change of address.

(a) In the Order to Show Cause, the Service shall provide the following administrative information to the Executive Office for Immigration Review. Omission of any of these items shall not provide the alien with any substantive or procedural rights:

- (1) The alien's names and any known aliases;
- (2) The alien's address;
- (3) The alien's registration number, with any lead alien registration number with which the alien is associated;
- (4) The alien's alleged nationality and citizenship;
- (5) The language that the alien understands;

(b) The Order to Show Cause and Notice to Appear must also include the following information:

- (1) The nature of the proceedings against the alien;
- (2) The legal authority under which the proceedings are conducted;
- (3) The acts or conduct alleged to be in violation of law;
- (4) The charges against the alien and the statutory provisions alleged to have been violated;
- (5) Notice that the alien may be represented, at no cost to the government, by counsel or other representative authorized to appear pursuant to 8 CFR 1292.1;
- (6) The address of the Immigration Court where the Service will file the Order to Show Cause and Notice to Appear; and

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(7) A statement that the alien must advise the Immigration Court having administrative control over the Record of Proceeding of his or her current address and telephone number and a statement that failure to provide such information may result in an *in absentia* hearing in accordance with § 1003.26.

(c) *Contents of the Notice to Appear for removal proceedings.* In the Notice to Appear for removal proceedings, the Service shall provide the following administrative information to the Immigration Court. Failure to provide any of these items shall not be construed as affording the alien any substantive or procedural rights.

- (1)** The alien's names and any known aliases;
- (2)** The alien's address;
- (3)** The alien's registration number, with any lead alien registration number with which the alien is associated;
- (4)** The alien's alleged nationality and citizenship; and
- (5)** The language that the alien understands.

(d) *Address and telephone number.*

(1) If the alien's address is not provided on the Order to Show Cause or Notice to Appear, or if the address on the Order to Show Cause or Notice to Appear is incorrect, the alien must provide to the Immigration Court where the charging document has been filed, within five days of service of that document, a written notice of an address and telephone number at which the alien can be contacted.

The alien may satisfy this requirement by completing and filing Form EOIR-33.

83 aff

(2) Within five days of any change of address, the alien must provide written notice of the change of address on Form EOIR-33 to the Immigration Court where the charging document has been filed, or if venue has been changed, to the Immigration Court to which venue has been changed.

[57 FR 11571, Apr. 6, 1992, as amended at 60 FR 34089, June 30, 1995; 62 FR 10332, Mar. 6, 1997]

8 CFR § 1003.18 Scheduling of cases.

(a) The Immigration Court shall be responsible for scheduling cases and providing notice to the government and the alien of the time, place, and date of hearings.

(b) In removal proceedings pursuant to section 240 of the Act, the Service shall provide in the Notice to Appear, the time, place and date of the initial removal hearing, where practicable. If that information is not contained in the Notice to Appear, the Immigration Court shall be responsible for scheduling the initial removal hearing and providing notice to the government and the alien of the time, place, and date of hearing. In the case of any change or postponement in the time and place of such proceeding, the Immigration Court shall provide written notice to the alien specifying the new time and place of the proceeding and the consequences under section 240(b)(5) of the Act of failing, except under exceptional circumstances as defined in section 240(e)(1) of the Act, to attend such

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proceeding. No such notice shall be required for an alien not in detention if the alien has failed to provide the address required in section 239(a)(1)(F) of the Act.

[62 FR 10332, Mar. 6, 1997]

89aff: