

APPENDIX

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UNPUBLISHED**UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

No. 20-4025

UNITED STATES OF AMERICA,

Plaintiff – Appellee,

v.

RODRIGO MARTINEZ-MENDOZA, a/k/a Rodrigo Martinez-Martinez,

Defendant – Appellant.

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond. Henry E. Hudson, Senior District Judge. (3:17-cr-00164-HEH-1)

Argued: May 7, 2021

Decided: July 26, 2021

Before AGEE, HARRIS, and RUSHING, Circuit Judges.

Affirmed by unpublished opinion. Judge Harris wrote the opinion, in which Judge Agee and Judge Rushing joined.

ARGUED: Caroline Swift Platt, Assistant Federal Public Defender, OFFICE OF THE FEDERAL PUBLIC DEFENDER, Alexandria, Virginia, for Appellant. Daniel Taylor Young, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Alexandria, Virginia, for Appellee. **ON BRIEF:** Jeremy C. Kamens, Federal Public Defender, Joseph S. Camden, Assistant Federal Public Defender, OFFICE OF THE FEDERAL PUBLIC DEFENDER, Alexandria, Virginia, for Appellant. G. Zachary Terwilliger, United States Attorney, Alexandria, Virginia, S. David Schiller,

Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY,
Richmond, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PAMELA HARRIS, Circuit Judge:

In 1997, Rodrigo Martinez-Mendoza was ordered deported in absentia, after he failed to attend his deportation hearing. Twenty years later, based on that order, he was charged with illegal entry under 8 U.S.C. § 1326. During his criminal proceedings, he sought to challenge the 1997 order collaterally, arguing that its entry in absentia violated his due process rights.

The district court denied Martinez-Mendoza’s motions to dismiss the indictment against him, finding that he could not establish the factual predicates for his collateral challenge, and Martinez-Mendoza was convicted. Because the district court’s factual findings were not clearly erroneous, we uphold the court’s denial of Martinez-Mendoza’s motions to dismiss and affirm the court’s judgment.

I.

A.

We begin with the facts surrounding the 1997 deportation order entered against Martinez-Mendoza, the subject of the collateral attack now before us. Martinez-Mendoza, a Mexican citizen who had entered the United States without inspection, was served personally with an Order to Show Cause on November 10, 1996. That Order initiated deportation proceedings against Martinez-Mendoza. It also told him that there would be a hearing before an immigration judge (“IJ”) on a date yet to be determined, and that notice of the hearing date would be mailed to his home address, which Martinez-Mendoza provided on the form. Martinez-Mendoza was warned that a deportation order would be

entered in his absence if he failed to attend the hearing, and informed of his right to challenge such an order.

Whether the Immigration and Naturalization Service (“INS”) properly served the notice of a hearing date that was supposed to follow – officially, a “Notice of Hearing” – is one of the disputes at the heart of this case. No certified mail return receipt was recorded or placed in Martinez-Mendoza’s file. The IJ later would determine, however, that the Notice of Hearing indeed had been sent by certified mail to Martinez-Mendoza’s home address in Houston, Texas, notwithstanding the missing return receipt.

On April 9, 1997 – before the scheduled hearing – INS officers stopped Martinez-Mendoza during a workplace raid in Galveston, Texas. Officer Ray Lamb of the INS filled out an I-213 form memorializing his interview with Martinez-Mendoza, on which he indicated that Martinez-Mendoza had a deportation hearing scheduled for May 1997. At the same time, Lamb noted that Martinez-Mendoza was “VR’d” to Mexico on his own request. J.A. 114. As subsequent testimony would make clear, “VR” refers to voluntary return, a process by which Mexican nationals were permitted to return to Mexico without entry of a formal removal order against them.

It is undisputed that Martinez-Mendoza in fact returned to Mexico in April 1997. The parties do dispute, however – in the second factual dispute relevant here – whether he was voluntarily returned by the INS or went to Mexico on his own. Either way, Martinez-Mendoza was in Mexico on May 6, 1997, the day of his deportation hearing.

At the hearing, the IJ addressed the notice issue disputed here, stating orally that notice had been sent to Martinez-Mendoza’s home address and entering what appears to

have been a copy of that notice as “Exhibit number 1.” J.A. 436. Because Martinez-Mendoza did not attend the hearing, the IJ ordered him removed in absentia. In his written order, the IJ indicated both that Martinez-Mendoza had been served with notice by certified mail and the absence of a return receipt. Notice of the in absentia deportation order was mailed to Martinez-Mendoza’s address in Houston. Martinez-Mendoza did not challenge the order then or at any time until the current criminal case.

B.

We turn now to the criminal proceedings before us on appeal. In December 2017, Martinez-Mendoza was charged with illegal reentry under 8 U.S.C. § 1326(a) and (b)(1), based on the in absentia deportation order entered against him in 1997.* Martinez-Mendoza moved to dismiss the indictment under § 1326(d), challenging the validity of the 1997 order.

In his motion, Martinez-Mendoza made two key claims: first, that he was not properly served with a notice of his hearing date, given the absence of a certified mail return receipt; and second, that he had been voluntarily returned to Mexico by the INS prior to his hearing date, making it impossible for him to attend. For both reasons, Martinez-Mendoza argued, entry of an in absentia order after his hearing was fundamentally unfair under § 1326(d). *See* 8 U.S.C. § 1326(d)(3) (allowing collateral attacks only where, *inter*

* This is the second time that Martinez-Mendoza has been convicted of illegal reentry. Martinez-Mendoza also was convicted of illegal reentry under § 1326(a) in 2009, based on the same 1997 deportation order at issue here. In the present proceeding, Martinez-Mendoza also was charged under § 1326(b)(1), which imposes additional penalties on defendants with prior felony convictions.

alia, entry of deportation order was “fundamentally unfair”). And, he finished, because those same procedural flaws also prevented him from seeking review of his deportation order when it was entered in 1997, he was now entitled to attack that order collaterally in his criminal proceeding. *See id.* § 1326(d)(2) (allowing collateral attacks where, *inter alia*, deportation proceedings “improperly deprived” defendant of judicial review); *United States v. El Shami*, 434 F.3d 659, 663–64 (4th Cir. 2005).

After holding two evidentiary hearings, the district court rejected Martinez-Mendoza’s collateral challenge, denying his motion to dismiss the indictment and then, in an oral ruling, his renewed motion to dismiss. *See United States v. Martinez-Mendoza*, No. 3:17-CR-164-HEH, 2019 WL 1293340, at *6 (E.D. Va. Mar. 20, 2019); J.A. 322–23. The court’s rulings were based on two critical factual findings. First, the district court found that Martinez-Mendoza had received actual notice of his deportation hearing. *Martinez-Mendoza*, 2019 WL 1293340, at *5. The IJ, the court explained, had indicated that notice had been sent by certified mail to Martinez-Mendoza’s home address. *Id.* Moreover, the “reasonable inference” was that the notice had been received: The notes taken by Officer Lamb in Galveston listed a May 1997 hearing date, suggesting that Martinez-Mendoza had informed Lamb of his May 6, 1997, deportation hearing. *Id.* And finally, the court noted, Martinez-Mendoza had neither testified that he did not receive notice nor provided any other evidence to that effect. *Id.*

The district court also found insufficient evidence to support Martinez-Mendoza’s allegation that he had been voluntarily returned to Mexico by the INS before his hearing date. *Id.* at *6. The court acknowledged that the “VR” notation on the April 1997 I-213

form filled out by Officer Lamb could refer to voluntary return. *Id.* But the court credited the testimony of Lamb and a DHS officer currently assigned to Martinez-Mendoza’s case that voluntary return was only a “remote possibility” in this case, given the absence in Martinez-Mendoza’s file of other documents that should accompany a voluntary return, local policies that would have precluded Martinez-Mendoza’s voluntary return at the time, and the possibility that Lamb had incorrectly noted a “VR” on the form. J.A. 322; *see Martinez-Mendoza*, 2019 WL 1293340, at *6.

Because Martinez-Mendoza had actual notice of his hearing and had not been voluntarily returned to Mexico by the INS, the district court concluded, he could not meet the requirements for a collateral challenge to a deportation order under § 1326(d). *See Martinez-Mendoza*, 2019 WL 1293340, at *5–6; J.A. 322–23. In particular, the court held, he could not establish that some procedural defect made it impossible for him to challenge his 1997 order directly and at the time of entry, by exhausting his administrative remedies or seeking judicial review. *Martinez-Mendoza*, 2019 WL 1293340, at *5–6; J.A. 323.

After the district court denied his motions to dismiss the indictment, Martinez-Mendoza proceeded to a bench trial and was convicted of illegal reentry, based on the 1997 deportation order. The district court sentenced him to 72 months’ imprisonment, varying upward from the Guidelines sentencing range.

Martinez-Mendoza filed this timely appeal, challenging only the district court’s denial of his motions to dismiss.

II.

On appeal of the denial of a motion to dismiss an indictment under § 1326(d), we review the district court’s legal conclusions de novo and its factual findings for clear error. *United States v. Lopez-Collazo*, 824 F.3d 453, 460 (4th Cir. 2016) (citation omitted). Here, the district court’s decision rested on two factual findings to which we owe substantial deference. *See United States v. Shea*, 989 F.3d 271, 277 (4th Cir. 2021) (citations omitted). So long as those findings are “plausible,” we will affirm them; “[w]here there are two permissible views of the evidence, the factfinder’s choice between them cannot be clearly erroneous.” *Anderson v. City of Bessemer City*, 470 U.S. 564, 574 (1985) (citation omitted).

The underlying question in this appeal is whether the government may rely on the 1997 deportation order, issued in absentia, to prove its unlawful reentry case against Martinez-Mendoza. To win a conviction under § 1326, the government must prove, as an element of the offense, a defendant’s prior removal or deportation. And as a general matter, the government may rely on a duly entered removal order to meet that burden. *See United States v. Cortez*, 930 F.3d 350, 356 (4th Cir. 2019) (citation omitted). “But there is an exception, allowing a defendant to collaterally attack a removal order – so that it no longer serves as a predicate for a criminal reentry charge – when there was a procedural flaw in the immigration proceeding that prevented the noncitizen from seeking review when the order was issued, thus violating his due process rights.” *Id.* (internal quotation marks omitted).

That exception is now codified at 8 U.S.C. § 1326(d). *See United States v. Moreno-Tapia*, 848 F.3d 162, 165–66 (4th Cir. 2017). In order to bring a successful collateral attack against a deportation order, the defendant must meet three requirements, showing that: (1) he “exhausted any administrative remedies” available to seek relief against the order; (2) the removal proceedings “improperly deprived [him] of the opportunity for judicial review” of the order; and (3) entry of the order was “fundamentally unfair.” *See* 8 U.S.C. § 1326(d)(1)–(3); *Moreno-Tapia*, 848 F.3d at 166 (describing three factors). A defendant may satisfy the first two of those requirements where a procedural defect in the immigration proceedings makes it impossible to seek administrative or judicial review when an order is entered. *See El Shami*, 434 F.3d at 664; *Moreno-Tapia*, 848 F.3d at 169. But importantly, the burden always remains on the defendant to make the necessary showing under each of § 1326(d)’s three prongs. *See El Shami*, 434 F.3d at 663; *Lopez-Collazo*, 824 F.3d at 458.

As noted above, Martinez-Mendoza relies primarily on two claims for his collateral attack on the 1997 deportation order: first, that he did not receive proper notice of the hearing at which he was ordered deported in absentia; and second, that because the INS had voluntarily returned him to Mexico, he could not attend his hearing in any event. The government has raised questions as to whether, even assuming a lack of notice or voluntary return to Mexico, Martinez-Mendoza could satisfy the requirements of § 1326(d). We need not consider those questions here, however. After holding two evidentiary hearings, the district court rejected Martinez-Mendoza’s collateral challenge because he could show neither of the factual predicates necessary to his claim – that he received no notice of his

hearing, or that he was voluntarily returned to Mexico by the INS. Because the district court's factual findings are not clearly erroneous, we affirm its judgment on that ground alone.

First, the district court's finding that Martinez-Mendoza had actual notice of his hearing date is an entirely "plausible" account of the record evidence. *See Anderson*, 470 U.S. at 574 (reviewing court will overturn factual finding only where it is not "plausible in light of the record viewed in its entirety"). As the district court emphasized, the IJ directly addressed this question back in 1997 – when evidence would have been more readily available – stating that notice *had* been mailed to Martinez-Mendoza's home address and entering a copy of that notice as a hearing exhibit. Moreover, Officer Lamb noted after his April 1997 interview with Martinez-Mendoza that a deportation hearing was scheduled for May. Like the district court, we think it reasonable to infer that Martinez-Mendoza informed Lamb of that fact. And finally, given that Martinez-Mendoza bears the burden of showing lack of notice, the district court properly factored in his failure to testify to that effect, or present any evidence that he did not know of his hearing date. *Cf. El Shami*, 434 F.3d at 664 (relying on testimony of defendant, corroborated by testimony of his wife, that he did not receive notice of his deportation hearing).

To the extent Martinez-Mendoza argues that any notice he received was improper because it failed to comply with statutory requirements – specifically, with a requirement for a certified mail return receipt – we need not address that contention. Which statute or what agency precedent governed the mechanics of service in Martinez-Mendoza's deportation proceedings is not relevant here. This appeal concerns a § 1326(d) challenge,

which means that a statutory shortcoming in the underlying deportation proceedings will matter only if it amounts to “fundamental[]” unfairness and also prevented Martinez-Mendoza from seeking administrative or judicial review of the 1997 deportation order. And if Martinez-Mendoza received *actual* notice of his hearing date, as the district court found, then no procedural flaw would have prevented him from attending his hearing and then seeking administrative or judicial relief for any statutory deficiency in his written notice.

Nor do we have reason to disturb the district court’s finding that the INS did not voluntarily return Martinez-Mendoza to Mexico prior to his hearing. In its oral ruling, the district court acknowledged a “possibility” that Martinez-Mendoza had been voluntarily returned, given the “VR” notation on the I-213 form filled out by Officer Lamb in Galveston. J.A. 322. But the burden is on Martinez-Mendoza under § 1326(d), and after holding a second evidentiary hearing, the district court credited the testimony of two government witnesses, including Lamb, explaining why they believed that Martinez-Mendoza in fact had *not* been voluntarily returned: because his file was missing documentation that would have been included had he been voluntarily returned, and because local policies would have precluded voluntary return in Martinez-Mendoza’s case. In effect, the district court chose one of “two permissible views of the evidence,” *Anderson*, 470 U.S. at 574 – the one in which the INS erred by noting an incorrect “VR” on a form, rather than by voluntarily returning Martinez-Mendoza without the requisite paperwork and contrary to local guidance. We owe special deference to a district court finding, like

this one, that is based on an assessment of witness credibility, *see id.* at 575, and discern no clear error in the district court's finding here.

In sum, we need not consider in this case whether § 1326(d) would entitle Martinez-Mendoza to collaterally challenge the 1997 deportation order if he could establish that he had no actual notice of his hearing date or that he had been voluntarily returned to Mexico before the hearing. The district court held that Martinez-Mendoza had not made either of the factual showings on which his claim rests, and we affirm that determination under the clear error standard of review.

III.

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

AFFIRMED

1 judicial review are the same here as in *El Shami*. Mr. El
2 Shami, after he got the in absentia deport, and attempted
3 to come back, also had notice of the order at that point,
4 and the Fourth Circuit still said motion to reopen means
5 at the time the order is entered and it doesn't mean later
6 on when you find out about it.

7 So I think we're in the same position as Mr. El
8 Shami if the Court determines that he was taken by
9 immigration officers to Mexico in April of '97.

10 THE COURT: All right.

11 The Court has heard evidence from Special Agents
12 Lamb and Chin concerning the documents that INS has, as
13 well as Agent Lamb describing his recollection refreshed
14 by documents of his contact with this defendant. Based
15 upon their testimony collectively, they raise a
16 possibility - possibility - remote possibility, that he
17 could have been allowed to voluntarily deport -- return.
18 But, however, they say that based upon their review, they
19 do not believe it happened in this case.

20 And Special Agent Lamb went through in detail
21 why he believed in this particular case the defendant was
22 not allowed to voluntarily deport himself back to Mexico.

23 This Court, does not question the credibility of
24 his wife. I'm sure she's telling the absolute truth.
25 That doesn't necessarily mean that he voluntarily deported

1 with the authorization of immigration officials. It
2 merely means that he was present in Mexico at that time.

3 So the Court doesn't believe that he has
4 exhausted his administrative remedies in this case. I
5 don't think there's any evidence that the immigration
6 court proceedings were unfair, and there's no evidence in
7 this case that leads me to believe that he has been
8 deprived of judicial review.

9 Most importantly, he has not exhausted his
10 administrative remedies in this case, and he was subject
11 to a deportation order, and I think that the record is
12 clear on that. So I find no factual basis, or legal
13 basis, to reconsider my prior findings, so the motion to
14 dismiss is denied.

15 Anything further, gentlemen?

16 MR. CAMDEN: No, Your Honor.

17 THE COURT: Now, what is the posture of this
18 case?

19 MR. SCHILLER: If I may have one moment?

20 THE COURT: Yes, sir.

21 MR. CAMDEN: Your Honor, the government had
22 previously provided a proposed plea agreement that I think
23 we can adapt to include the motions most recently filed.
24 And I'll be able to go see Mr. Martinez about that next
25 week. And I can update the Court at that point, or we can

From: [Lamb, Ray](#)
To: [Joseph Camden](#)
Subject: RE: Martinez-Mendoza docs
Date: Monday, May 13, 2019 3:38:04 PM
Attachments: [image001.png](#)

I've spoken with a couple of other old timers here at the office. We generally agree that there might not be a document in an A file which confirms that a VR took place. And I think you are correct with the 205 only being for formal removals. One form which might indicate a VR is an I-216. If I remember right, this would be a list of passengers on a bus who are all VR'd at the same time. This form isn't always included in an A file, but I have seen it before.

Just out of curiosity, if you can't prove that he was VR'd, then how will the government prove he was deported?

From: Joseph Camden <Joseph_Camden@fd.org>
Sent: Monday, May 13, 2019 11:55 AM
To: Lamb, Ray <Ray.Lamb@ice.dhs.gov>
Subject: RE: Martinez-Mendoza docs

Thanks for clarifying,

The A file is pretty sparse. For example, for the August 1997 encounter, literally the only thing in the A file is the photograph and database entry we sent. Not even an I-213.

Last question (since you've been super patient with me); do you know what I'd be looking for if it was a quick VR to Mexico on the bus? I am under the impression that I-205s are only for removal orders, not VRs. Is there anywhere other than the I-213 it would be documented or referenced?

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From: Lamb, Ray <[Ray.Lamb@ice.dhs.gov](#)>
Sent: Monday, May 13, 2019 12:47 PM
To: Joseph Camden <[Joseph_Camden@fd.org](#)>
Subject: RE: Martinez-Mendoza docs

The "VR to Mex" is my handwriting. And again, this just reflects that his request was a VR. The Receiving Officer signature is that of my immediate supervisor at the time. I know his name was Robert Montgomery, however, that doesn't appear to be his signature. It could have been signed by someone acting on Montgomery's behalf. I cannot figure out whose signature it could be. Nonetheless, that signature just confirms that a supervisor reviewed the 213 after completion.

I would say that a VR prior to the hearing could possibly have happened. There is no doubt he requested a VR. And it is possible that he was very quickly shuffled onto a bus headed to the border. If there is any evidence supporting this, it would only exist in the A file.

Sorry I can't be of more help.

From: Joseph Camden <Joseph_Camden@fd.org>
Sent: Monday, May 13, 2019 11:14 AM
To: Lamb, Ray <Ray.Lamb@ice.dhs.gov>
Cc: Linda McGrew <Linda_McGrew@fd.org>
Subject: RE: Martinez-Mendoza docs

Thanks for taking a look at this. One last question -- here's the puzzle I've got:

In the "Disposition" line of the I-213, in the bottom right-hand box, someone wrote in "VR to Mex." and there's a signature of a "Receiving Officer" that doesn't look (now that I'm looking at it again) like your signature. I just realized your signature is the top one, but we don't know who did the bottom one. It also looks like the "VR" in the disposition line isn't same as your handwritten "VR." Do you know whose it might be?

HTS VIA I826/827

*hearing Scheduled
sts to be VR'd
hearing*

Ray Lamb SA.

(Signature and Title)

Received (subject and documents) (report of interview) from	
Officer:	<i>Lamb, Ray SA.</i>
Disposition	<i>479 1997 1630 (1) M.</i>
(Receiving Officer)	<i>VR to Mex</i>

Migration and Naturalization Service

In the prior I-213 from his original encounter in November 1996, when he was placed in proceedings, the disposition line say "OSC/RELEASED" (attached)

So I kind of figured that if he was released again after the April 1997 encounter, we'd see "released" or something on the disposition line.

Is it possible, given "VR to Mex." on the disposition line, that *that* officer VR'd him by mistake despite the pending immigration court date? This was under the pre-1996/IIRIRA scheme, so I'm not sure whether they could VR while proceedings were pending; but even if not, I've got to imagine that it happens sometimes by mistake in a situation like this (worksite inspection, lots of people to process).

Sorry to take up so much of your time on this. Mr. Martinez is coming here after a serious charge in state court, but he also has two US citizen kids in and out of the hospital due to kidney problems (one is a transplant patient) and two of his USC children have already died from the same type of thing. And the Supreme Court just heard an argument in February that might give him a narrow window to apply for cancellation; we just have to figure

out whether he was VR'd before his in absentia hearing.

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From: Lamb, Ray <Ray.Lamb@ice.dhs.gov>
Sent: Monday, May 13, 2019 11:26 AM
To: Joseph Camden <Joseph_Camden@fd.org>
Cc: Linda McGrew <Linda_McGrew@fd.org>
Subject: RE: Martinez-Mendoza docs

Mr. Camden,

I have reviewed the documents which were attached to your original email. I can confirm that I completed the I-213 and the I-826 on April 9, 1997. I can also confirm that the subject did request a voluntary return (VR) to Mexico. This is apparent from the annotation I made on the 213 and the initials of the subject on the I-826.

This, however, does not confirm that the subject was granted a VR by an immigration judge. The document from EOIR which is dated May 6, 1997, seems to confirm that a VR was not granted, but rather, he was ordered formally deported in absentia. This would have resulted in the issuance of a warrant of deportation. If he did, in fact, depart the U.S. after this order was issued, he "self deported" thereby executing the warrant of deportation. (my opinion)

If you have any additional questions, don't hesitate to contact me.

Ray Lamb
Special Agent
Homeland Security Investigations (HSI)
Houston
713-585-5681 cell

From: Joseph Camden <Joseph_Camden@fd.org>
Sent: Friday, May 10, 2019 1:40 PM
To: Lamb, Ray <Ray.Lamb@ice.dhs.gov>
Cc: Linda McGrew <Linda_McGrew@fd.org>
Subject: Martinez-Mendoza docs

Hi Officer Lamb,

Here are the documents we got from the A file. Thanks so much for taking a look at them.

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1 testimony which you are about to give, in this case,
2 before this Court, shall be the truth, the whole truth,
3 and nothing but the truth, so help you God?

4 THE COURT: Agent Lamb, have a seat on the
5 witness stood, sir.

6 Agent Lamb, would you please give us your full
7 name, sir. And spell your last name so the court reporter
8 gets it right.

9 AGENT LAMB: My name is Ray Lamb. L-A-M-B.

10 THE COURT: All right. Go right ahead. You may
11 inquire.

12 MR. CAMDEN: Yes, Your Honor.

13 Whereupon, **Agent Ray Lamb**, having been
14 duly sworn in, testifies as follows:

15 **DIRECT EXAMINATION**

16 BY MR. CAMDEN:

17 Q Officer Lamb, how are you currently employed?

18 A I'm a special agent of Homeland Security
19 Investigations in Houston, Texas.

20 Q And how long have you been with the Department of
21 Homeland Security?

22 A Since its creation in 2003. Prior to that, I was a
23 special agent of INS in Houston since 1996.

24 Q Okay. And before that what were you doing?

25 A I was a border patrol agent in San Diego, California.

DIRECT EXAMINATION OF AGENT LAMB BY MR. CAMDEN

1 Q Okay. At the Chula Vista border patrol station?

2 A That's correct.

3 Q And how long -- when did you first start as a border
4 patrol agent?

5 A August of 1993. I'm sorry, August of 1994.

6 Q '94?

7 A Yes.

8 Q Okay.

9 A Yes.

10 MR. CAMDEN: If I could speak to opposing
11 counsel for a moment?

12 THE COURT: Sure. Go right ahead.

13 MR. CAMDEN: We're just going to keep with the
14 government's numbers.

15 BY MR. CAMDEN:

16 Q So I'm showing you a document which the government
17 previously admitted at the last hearing and marked as
18 Exhibit 4. It's the Record of Deportable Alien, the
19 I-213. There are actually two pages. One with a
20 photograph, and one with a photograph removed, to be able
21 to see the text on it.

22 So, Officer Lamb, could you take a look at the
23 bottom right-hand box of this document. Do you see it?

24 A Yes.

25 Q Is that your name and signature?

DIRECT EXAMINATION OF AGENT LAMB BY MR. CAMDEN

1 A It is.

2 Q Okay. So are you the officer who interviewed Rodrigo
3 Martinez-Mendoza on April 9, 1997?

4 A Yes.

5 Q Okay. So I want to talk a little bit about the
6 context. There was essentially an immigration raid on
7 this company, SRC Construction, right?

8 A Correct.

9 Q And this was to identify and arrest any individuals
10 who were present and working illegally in the United
11 States, right?

12 A That's correct.

13 Q Okay. And these employment enforcement actions are
14 planned ahead of time, right?

15 A Normally, yes.

16 Q And the I-213, if you look at the largest box in the
17 bottom half of the page, right?

18 A Yes.

19 Q And an ordinary I-213, that section would just be
20 blank and a place for the officer to write in or type in
21 something, right?

22 A Normally, yes.

23 Q And in this one, though, it's got some preprinted
24 statements, right?

25 A That's correct.

DIRECT EXAMINATION OF AGENT LAMB BY MR. CAMDEN

1 Q The blank spaces?

2 A Yes.

3 Q So that would be done in order to speed up the
4 interviews, right, so you don't have to write a lot?

5 A Correct.

6 Q And this is a standard set of questions that are
7 being asked, right?

8 A Yes.

9 Q And here you see where it's handwritten, "Subject has
10 deportation hearing scheduled for 5/97. Subject requests
11 to be VRd and to waive the hearing."

12 Do you see that?

13 A Yes, I do.

14 Q Is that your handwriting?

15 A That is.

16 Q I've got to ask, do you remember specifically
17 anything about this encounter?

18 A No.

19 Q Okay. Let's go to the bottom left-hand box for a
20 second. Do you see where it says "Distribution"?

21 A Uh-huh.

22 Q So it says "1-File," right?

23 A Uh-huh.

24 THE COURT: You have to answer yes or no, Agent
25 Lamb.

DIRECT EXAMINATION OF AGENT LAMB BY MR. CAMDEN

1 AGENT LAMB: I'm sorry, Your Honor.

2 Yes, that's correct.

3 BY MR. CAMDEN:

4 Q And that means one copy to the A-file?

5 A Yes. That's correct.

6 Q One to stats?

7 A Yes.

8 Q What is that?

9 A Local statistics. Arrest statistics.

10 Q Okay. And then one to -- what's this acronym here?

11 A DD&P. At the time it was called Detention and
12 Deportation. That was the component of INS that was
13 responsible for the actual removal of deportable aliens.

14 Q Okay. And so a copy of this I-213 went to the people
15 who were responsible for taking individuals back to
16 Mexico, right?

17 A Correct.

18 Q Okay. And in the disposition line in the box on the
19 right where it says disposition it says, "VR to Mex,"
20 right?

21 A Correct.

22 Q Okay. Now, look -- and VR in this context refers to
23 voluntary return to Mexico, right?

24 A That's correct.

25 Q And voluntary return is where an immigration officer

DIRECT EXAMINATION OF AGENT LAMB BY MR. CAMDEN

1 allows a person to return to Mexico without a formal entry
2 of an order of removal, right?

3 A That's correct.

4 Q Underneath VR to Mexico there's a line marked
5 "Receiving Officer." Do you see that?

6 A Yes.

7 Q Whose signature is that?

8 A I don't recognize the signature.

9 Q Okay. Who was your supervisor at the time?

10 A Robert Montgomery.

11 Q And that's not his signature?

12 A I don't believe that is his signature.

13 Q Okay. And you can't remember who would have signed
14 this, right?

15 A No.

16 Q Now, if a person is in fact voluntarily returned to
17 Mexico, you would expect -- would you expect that there be
18 some information, some other documentation of it, in the
19 A-file besides the I-213?

20 A Yes.

21 Q What would be there?

22 A It would depend on the circumstances of the
23 individual case. Regarding this individual, there are a
24 number of documents that should have been in the A-file
25 had he been VRd.

DIRECT EXAMINATION OF AGENT LAMB BY MR. CAMDEN

1 Q Is an I-826 one of those documents?

2 A In this particular case, yes.

3 Q Okay. Showing you what's been marked as Defense
4 Exhibit R-1.

5 MR. CAMDEN: Oh, sorry. This was from the
6 A-file.

7 BY MR. CAMDEN:

8 Q Take a look at the bottom where it says,
9 "Certification of Service."

10 A Yes, sir.

11 Q Do you see the name Lamb? "Read to subject by Lamb
12 in the Spanish language."

13 A Yes, sir.

14 Q And you see the name of Service Officer Lamb, right?

15 A Yes.

16 Q And you see the signature under that, right?

17 A Yes.

18 Q And that's your signature, isn't it?

19 A Yes.

20 Q In the box above it it says, "Request for
21 Disposition." The box is checked that says, "I admit I am
22 in the United States illegally, and I believe I do not
23 face harm if I return to my country. I give up my right
24 to a hearing before the immigration court. I wish to
25 return to my country as soon as arrangements can be made

CROSS-EXAMINATION OF AGENT LAMB BY MR. SCHILLER

1 to effect my departure. I understand that I may be held
2 in detention until my departure."

3 A Yes, sir.

4 Q Okay. And this form is dated April 9, 1997, right?

5 A Yes, sir.

6 Q The same day as the raid on the construction site?

7 A Correct.

8 Q And the time marked is 5:00 p.m., right?

9 A Yes, sir.

10 Q That's your handwriting, isn't it?

11 A Yes, sir.

12 MR. CAMDEN: No further questions, Your Honor.

13 THE COURT: Mr. Schiller, cross-examination of
14 Special Agent Lamb.

15 MR. SCHILLER: If I can ask the Court's
16 guidance. I mean, we still have a circumstance. There's
17 no exhaustion and there's no establishment of the D3
18 prong.

19 THE COURT: We will argue that at the close of
20 this witness. Yes, sir.

21 MR. SCHILLER: Okay.

22 THE COURT: You've waived nothing. Go right
23 ahead.

24 MR. SCHILLER: Yes, Your Honor. Thank you.

25 **CROSS-EXAMINATION**

CROSS-EXAMINATION OF AGENT LAMB BY MR. SCHILLER

1 BY MR. SCHILLER:

2 Q Officer Lamb, getting back to the I-213. With regard
3 to the writing, "Subject has deportation hearing
4 scheduled," and that date and time, where did you get that
5 information?

6 A That would have come from a records check, I'm sure.

7 Q Did the defendant tell you that as well?

8 A I suppose the defendant could have stated that to me
9 and then I --

10 MR. CAMDEN: Objection. Leading and
11 speculation.

12 THE COURT: Well, almost all of your questions
13 were leading, so --

14 MR. CAMDEN: Your Honor, he's an adverse
15 witness.

16 THE COURT: Pardon?

17 MR. CAMDEN: He's an adverse witness. He's a
18 government employee.

19 THE COURT: All right. Objection is overruled.

20 Let's move on here. Go ahead.

21 BY MR. SCHILLER:

22 Q Did the defendant tell you that he had an immigration
23 court hearing pending?

24 A I have to assume that is what happened.

25 MR. CAMDEN: Objection. Speculation, Your

CROSS-EXAMINATION OF AGENT LAMB BY MR. SCHILLER

1 Honor. Lack of foundation.

2 THE COURT: Well, why don't you just rephrase
3 your question here. Let's move on.

4 BY MR. SCHILLER:

5 Q Looking at the 213, is it your belief that the
6 defendant told you he had an immigration court hearing
7 pending?

8 A Yes.

9 MR. CAMDEN: Objection to foundation, Your
10 Honor.

11 THE COURT: Objection is overruled. Let's move
12 on here.

13 BY MR. SCHILLER:

14 Q And if -- at that time, if someone has an immigration
15 court proceeding pending, do you have the authority to
16 voluntarily remove an alien?

17 A No.

18 Q Who has the authority to remove -- to grant voluntary
19 removal in this procedural setting?

20 A If someone is already in removal proceedings, I would
21 say that only the immigration court that has venue over
22 the proceedings could cancel the proceedings and allow
23 that person to voluntarily return.

24 Q Did you determine at this time that the defendant had
25 a prior criminal conviction for forgery?

CROSS-EXAMINATION OF AGENT LAMB BY MR. SCHILLER

1 A Yes.

2 Q And do you have a belief as to whether that prevents
3 him for being eligible for voluntary removal?

4 A I know that at the very least there was a local
5 policy in Houston at the time that precluded anyone with
6 criminal history from VRg.

7 Q And that was in application at the time of this
8 April 9 interview of the defendant?

9 A Yes, sir.

10 Q And with regard to the disposition line down in the
11 bottom right-hand corner, is that the final decision of
12 immigration?

13 A No. No, that would not be the final decision.

14 Q With regard to this form, did you prefill in some of
15 this information before even confronting the defendant?

16 A From looking at this form I believe I did that, yes.

17 Q And can you tell the Court what you believe you
18 prefilled in before speaking with the defendant?

19 A I believe that I wrote the A number in. If you look
20 in the upper center of the form there's an A number
21 written number in there and then it's scratched through.
22 That would lead me to believe that I had a numeric series
23 of A-files in front of me, and therefore I preprinted the
24 corresponding 213s with those A numbers.

25 And then when I realized that this subject

CROSS-EXAMINATION OF AGENT LAMB BY MR. SCHILLER

1 already had an A number, I went back and scratched out
2 that portion that I had preprinted.

3 Q And that A number is the one attached to the
4 immigration court proceedings?

5 A Yes, sir. That's correct.

6 Q And so you scratched out the other one?

7 A Yes, sir.

8 Q Okay. That's your doing?

9 A Yes, sir. That's correct.

10 Q All right. Under the circumstances, do you think you
11 should have scratched out VRd to Mexico?

12 MR. CAMDEN: Objection. Leading. Calls for
13 speculation.

14 THE COURT: No. Objection is overruled. You
15 asked leading questions. He was -- he was practically
16 hostile, but not legally hostile.

17 So you can go right ahead and ask the question.
18 It's a follow-up to what he asked.

19 BY MR. SCHILLER:

20 Q The disposition line, you had, prior to talking to
21 the defendant, put in VRd to Mexico?

22 A Yes, sir.

23 Q Was it your practice at the time to do that before
24 one of these operations where you had a large number of
25 Mexican citizens?

CROSS-EXAMINATION OF AGENT LAMB BY MR. SCHILLER

1 A It -- I wouldn't call it a common practice, but I can
2 see where I would have done that. Yes, sir.

3 Q And once you determined that the defendant had
4 immigration court proceedings, would you have normally
5 scratched that line out the same way you fixed the A
6 number?

7 A Yes, sir.

8 Q You just didn't do it in this case?

9 A Correct.

10 Q But is that line, disposition VRd to Mexico,
11 indicative that he was in fact voluntarily removed?

12 A No, sir.

13 Q And in fact, did you send an email to that effect to
14 Mr. Camden saying that it was clear from the records he
15 had not been voluntarily removed?

16 A Yes, sir.

17 MR. CAMDEN: Objection. That mischaracterizes
18 the emails.

19 THE COURT: Pardon me?

20 MR. CAMDEN: Objection. That mischaracterizes
21 the emails.

22 THE COURT: You may clarify it on redirect. You
23 certainly have leave to do so.

24 BY MR. SCHILLER:

25 Q Now, if in fact there had been a voluntary removal

CROSS-EXAMINATION OF AGENT LAMB BY MR. SCHILLER

1 executed here, what would be the process for doing it in
2 the case of this defendant?

3 A To make sure I understand the question. Had we
4 intentionally granted a VR?

5 Q Yes, sir.

6 A The first thing that would have happened is his
7 custody status would have changed because he was out on
8 bond from the previous encounter. He was out on an
9 immigration bond.

10 For him to VR, he would have to come back into
11 custody and sit in custody until there were enough
12 individuals available to fill a bus for a VR run. So
13 there would be a document in the file that indicated that
14 custody change.

15 Additionally, there would be a document in the
16 file canceling the immigration proceedings or the removal
17 proceedings that he was already under.

18 Additionally, there would probably be some sort
19 of document in the file identifying him as a passenger on
20 the VR bus.

21 Q And are you aware of any of those documents being in
22 the A-file?

23 A No, sir.

24 MR. CAMDEN: Objection. Foundation. He hasn't
25 testified that he reviewed the A-file.

CROSS-EXAMINATION OF AGENT LAMB BY MR. SCHILLER

30

1 THE COURT: Did you review the A-file, Special
2 Agent Lamb?

3 AGENT LAMB: I have not, Your Honor. But I've
4 spoken to someone who has reviewed the A-file.

5 THE COURT: All right.

6 Go ahead. Let's go. Let's move on here.

7 BY MR. SCHILLER:

8 Q Once all those things are done what would happen to
9 the defendant?

10 A Once all of the forms that we discussed are
11 completed?

12 Q Yes. Would he be released in Galveston?

13 A No, he would be taken into custody and he would be --
14 I don't know whether this -- the processing took place in
15 Houston or in Galveston, but he would be taken to a
16 detention center in Houston and held there until he could
17 be VRd.

18 Q And at this operation was there a bus there at the
19 time?

20 A That would be very unusual. I don't remember, but
21 that would be unlikely.

22 Q In the course of doing this process, how long would
23 an alien in this defendant's position be held before being
24 bused out?

25 A That could vary. It could be from one day to one

CROSS-EXAMINATION OF AGENT LAMB BY MR. SCHILLER

1 week, would be my best guess.

2 Q Now, you were contacted by Mr. Camden earlier this
3 year?

4 A Yes, sir.

5 Q And that led to -- you had a number of conversations
6 with him?

7 A Yes, sir.

8 Q And with regard to those conversations, did you
9 follow up with emails?

10 A Yes, sir.

11 MR. SCHILLER: Your Honor, if I may pass a copy
12 of what was attached to the defendant's motions, a set of
13 emails?

14 THE COURT: All right. I probably have them in
15 front of me, but you may go right ahead.

16 MR. SCHILLER: I have another copy here, Your
17 Honor.

18 THE COURT: Okay. Fine.

19 I assume you have no objection, Mr. Camden,
20 since this is --

21 MR. CAMDEN: No, Your Honor. We stipulate to
22 its admission.

23 THE COURT: Okay. Very well. Thank you.

24 MR. SCHILLER: Your Honor, I guess that would be
25 R-2?

CROSS-EXAMINATION OF AGENT LAMB BY MR. SCHILLER

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1 THE CLERK: Government Exhibit 2?

2 MR. SCHILLER: Yes. I thought we were calling

3 them R.

4 THE CLERK: I thought defense was calling his R.

5 THE COURT: I think the government's exhibit are
6 R also, because that distinguishes them from exhibits
7 admitted during the original hearing.

8 THE CLERK: Yes, Your Honor.

9 MR. SCHILLER: That's all I'm trying to do, Your
10 Honor.

11 THE COURT: R-2?

12 MR. SCHILLER: Yes, Your Honor.

13 THE COURT: Okay.

14 MR. SCHILLER: There will be an R-1, which is a
15 transcript of the IJ hearing.

16 (Government's Exhibit R-2 is received.)

17 BY MR. SCHILLER:

18 Q With regard to these emails, have you reviewed these?

19 A Yes, sir, I have.

20 Q And directing your attention, these are out of order
21 in time and date but if you go to the third page there's
22 one that is hand noted on the side, 3.

23 A Yes, sir.

24 Q And that is circled.

25 MR. SCHILLER: Your Honor, if I may, just for

CROSS-EXAMINATION OF AGENT LAMB BY MR. SCHILLER

1 the record, all of the notations on these and linings, and
2 whatnot, are my doing.

3 THE COURT: All right.

4 BY MR. SCHILLER:

5 Q In any event, would you review what's designated 3,
6 which is May 13 at 11:26 a.m.

7 A Yes, sir.

8 Q All right. And is it your view that there was no
9 voluntary removal done based on the information Mr. Camden
10 provided to you?

11 A Yes, sir.

12 Q All right. If you would turn back to the front of
13 this set of emails you see Number 5.

14 A Yes, sir.

15 Q And that's May 13th at 12:47. You've confirmed that
16 the signatures are yours and your supervisor, correct?

17 A Yes, sir.

18 Q Now, going to the second paragraph of this that
19 starts "I would say," you've reviewed that, correct?

20 A Yes, sir, I have.

21 Q And is this a complete explanation of your thought
22 here?

23 A I should have been much clearer and much more
24 detailed in that particular paragraph.

25 Q All right. First of all, was Mr. -- was the

CROSS-EXAMINATION OF AGENT LAMB BY MR. SCHILLER

1 defendant shuffled onto a bus in this case?

2 A No, I don't believe that happened. I don't believe
3 it could have happened.

4 MR. CAMDEN: Lack of foundation, Your Honor.

5 THE COURT: You better ask him how he knows
6 that.

7 How are you sure of that, Special Agent Lamb?

8 AGENT LAMB: Your Honor, I believe that that
9 could happen in certain parts of the country where things
10 are different. As an example, in a place closer to the
11 border. In Houston, Texas, we're about seven hours from
12 the border and it's not as logistically simple to
13 simply -- to shuffle someone onto a bus and VR them. It
14 takes a lot more coordination and a lot more time to VR
15 people from Houston than it does from other places in the
16 country.

17 THE COURT: Okay. Thank you, sir.

18 Go right ahead. Next question.

19 BY MR. SCHILLER:

20 Q After the sentence that ends "possibly have
21 happened," are there -- is there other information that
22 you were thinking of?

23 A Yes, sir. This was -- I saw this as a hypothetical
24 response. And the scenario could have happened; however,
25 had it happened, there would definitely be documents in

CROSS-EXAMINATION OF AGENT LAMB BY MR. SCHILLER

1 the A-file to support that. So the last sentence in my
2 response is, "If there is any evidence supporting this, it
3 would only exist in the A-file."

4 That should have said, had this happened there
5 would be supporting documents or supporting evidence in
6 the A-file.

7 Q And that's the document you've already testified to?

8 A Yes.

9 Q All right. And finally, I'd ask you to take a look
10 at Number 6 at the top of that first page, which is May 13
11 at 3:38.

12 A Yes, sir.

13 Q Is this a correct statement in general?

14 A I believe in general it would be possible for someone
15 to be VRD and there not be a corresponding document in the
16 A-file.

17 Q Would that be when someone is confronted at the
18 border by the border patrol?

19 A Correct.

20 Q With regard to the summary and the general statement
21 that you make here, does that apply to the defendant's
22 circumstances in the Galveston interview case as reflected
23 in your I-213?

24 A No, it does not.

25 Q And why doesn't it apply?

RE CROSS-EXAMINATION OF AGENT LAMB BY MR. CAMDEN

1 A I -- I believe that there would had to have been
2 documents in this particular case had the subject been
3 VRd. There would have been documents supporting that --
4 or evidence of that having happened in the A-file.

5 Q And at this time you knew that there was an
6 immigration court proceeding going on?

7 A Yes, sir.

8 Q And that would have prevented it as well?

9 A Yes, sir.

10 Q And you knew at this time the criminal record of the
11 defendant would have prevented it?

12 A Yes, sir.

13 Q Finally, I note that on the 213 there's attached a
14 resident alien card and a -- under the title Exhibit A.
15 Did this defendant confirm that he had false
16 identification for getting this employment?

17 A I don't have a copy of that 551. I'm sorry.

18 MR. SCHILLER: Nothing further, Your Honor.

19 THE COURT: All right.

20 Mr. Camden, redirect?

21 MR. CAMDEN: Yes, Your Honor.

REDIRECT EXAMINATION

23 BY MR. CAMDEN:

24 Q Officer Lamb, you testified that Houston is about a
25 seven hour drive from the border, right?

RECORD - EXAMINATION OF AGENT LAMB BY MR. CAMDEN

1 A Six to seven hours. Yes, sir.

2 Q Okay. And so for that reason, voluntary returns are

3 a little harder logistically to arrange, right?

4 A Yes, sir. We don't do them at all anymore.

5 Q Okay. But back in 1997, it's possible to get a

6 voluntary return from Houston, right?

7 A Yes, sir.

8 Q Just in general?

9 A Yes, sir.

10 Q Now, this was a raid on a construction site, right,

11 on April 9, 1997?

12 A Yes, sir.

13 Q Okay. And you said that the A number mixup happened

14 because you had a line, you would say, of consecutive A

15 numbers?

16 A Yes, sir.

17 Q And you said you also prefilled in VRD to Mexico for

18 each of those?

19 A No, sir. I said I could have done that. I -- at the

20 time, the majority of the people we encountered were

21 citizens of Mexico, so there were some things that I could

22 have prefilled in on the 213. I don't know that I went

23 and wrote VRD to Mexico on every single 213.

24 Q Okay.

25 A But clearly I wrote that on the bottom of this when I

RECORD - EXAMINATION OF AGENT LAMB BY MR. CAMDEN

1 shouldn't have.

2 Q How big are the buses?

3 A It depends on how many people there are.

4 Q Okay. But what's the smallest bus?

5 A Thirteen passengers.

6 Q And you said that they would stay in custody until
7 there were enough VRs to justify filling a bus, right?

8 A Correct.

9 Q Okay. And when you raid a construction site, you
10 anticipate a lot of people coming into custody at once,
11 right?

12 A It depends on the size of the construction site. If
13 it's a very small construction site with 10 people working
14 there then, no, we could transport them in our own
15 vehicles.

16 Q Okay. But a construction site big enough to justify
17 preprinting blank spaces on an I-213, that's unusual,
18 isn't it, preprinting these questions on the bottom half
19 of the I-213?

20 A This is designed for handling large numbers of people
21 at a time. However, if we went out on a work site
22 operation on a day when we -- there were only 10 people
23 apprehended, we might still use this same form just
24 because it's preprinted and available and it is a time
25 saver whether you have 100 people in custody or 10 people

1 in custody.

2 Q Okay. Do you remember talking to me last night?

3 A Yes, sir.

4 Q And do you remember saying you recognized SRC
5 Construction?

6 A I do remember the name SRC Construction. Yes, sir.

7 Q Do you remember saying that it was a big company?

8 A I do rem -- it seems to me that that is correct, but
9 I can't say with any certainty if that recollection is
10 correct or not.

11 Q Okay. You but told me that yesterday, right?

12 A I remember SRC Construction. I don't recall if it
13 was a big company or not.

14 Q But do you remember telling me yesterday that it was
15 a big company?

16 MR. SCHILLER: Argumentative three times now.

17 MR. CAMDEN: He still hasn't answered the
18 question, Your Honor.

19 THE COURT: You can give your answer, agent. Go
20 right ahead.

21 AGENT LAMB: I don't remember saying that. No.

22 THE COURT: Okay.

23 Next question.

24 BY MR. CAMDEN:

25 Q So let's talk about what happens to the I-213 after

RECORD-CROSS-EXAMINATION OF AGENT LAMB BY MR. CAMDEN

1 you -- well, let me ask this: At the bottom right-hand
2 corner of the I-213, if you can look at that.

3 A Yes, sir.

4 Q Where your signature appears, right?

5 A Yes.

6 Q Is that the last thing that goes on this paper?

7 A I'm not sure I understand the question.

8 Q Meaning do you fill out the entire I-213 before you
9 sign it?

10 A Typically I would say, yes.

11 Q Okay. And you make sure the whole thing is filled
12 out before you give it to your supervisor, right?

13 A Typically, yes.

14 Q Okay. And your supervisor is free to direct you to
15 change anything on this, correct?

16 A I suppose so.

17 Q Okay. So at the time you submitted this to your
18 supervisor, you knew that he had an immigration hearing
19 pending in May?

20 A I made an annotation there indicating that so I must
21 have known that, yes.

22 Q Okay. And what time is written in on this on the
23 bottom right-hand corner?

24 A 16:30.

25 Q So that would be 4:30 p.m. in civilian time, right?

RECORD - EXAMINATION OF AGENT LAMB BY MR. CAMDEN

1 A Yes, sir.

2 Q Okay. The I-826, take a look at that. What is the
3 time on the bottom right-hand corner of that?

4 A 5:00 p.m.

5 Q And you would agree that 5:00 p.m. is after 4:30 p.m.
6 right?

7 A I would agree, yes.

8 Q Okay. Let's talk a little bit about how we got in
9 touch with you.

10 A Okay.

11 Q I'm not going to -- you got -- somebody from the
12 Houston Federal Public Defender's Office either called or
13 left a card on your door, is that correct?

14 A No.

15 Q Okay. Did anybody try to contact you from a Federal
16 Public Defender's Office?

17 A No.

18 Q You were, at one point, represented by an attorney in
19 an unrelated issue, correct?

20 A Correct. Yes.

21 Q And your attorney told you at some point that
22 somebody from the Federal Public Defender's Office was
23 trying to call you, right?

24 A Yes, sir.

25 Q Okay. Before that, had somebody called anybody

RECORD - EXAMINATION OF AGENT LAMB BY MR. CAMDEN

1 related to you?

2 A My daughter received a call from someone, yes.

3 Q Okay. And you did not return that call?

4 A No, I did not.

5 Q Okay. But after you heard from your attorney that
6 somebody from the Federal Public Defender's were trying to
7 contact you, you returned that call, right?

8 A Yes, sir, I did.

9 Q Okay. And after that first phone call we exchanged
10 these emails that you have seen a copy of, right?

11 A Yes, sir.

12 Q Okay. And in the course of these emails I sent you
13 -- you saw, and you were sent, a copy of the I-213, right?

14 A Yes.

15 Q And the I-826?

16 A Yes, I believe so.

17 Q And the order of removal?

18 A Yes, sir, I believe so.

19 Q Okay. And again on the I-826 it lists his forgery
20 conviction, right? Served two months, fraud.

21 A I saw that written somewhere. Yes, sir. I remember
22 seeing it. I don't recall which form it was on.

23 Q As we said already, the I-213 also reflects that he
24 had a pending immigration court hearing, right?

25 A Yes. Yes, sir.

RECORD-CROSS - EXAMINATION OF AGENT LAMB BY MR. CAMDEN

1 Q Okay. And so you had that information in front of
2 you as these emails are going back and forth, right?

3 A Yes, sir. I didn't get -- I don't believe I got all
4 the information at once though. I believe it was sent
5 piecemeal.

6 Q Okay. You testified on cross-examination that what
7 you meant here in these emails was that voluntary return
8 was generally possible, and then you clarified on
9 cross-examination that it wouldn't have been likely in
10 this particular scenario, right?

11 A Yes, sir.

12 Q Okay. And -- but do you remember -- let's get to
13 what documentary evidence would be in the A-file if it
14 were a voluntary return. You said on direct examination
15 that one of the documents you would expect to see is an
16 I-826, and that's there, right?

17 A Well, I'm not sure I understand your question. And
18 to clarify, you're asking me if a VR was intentionally
19 granted and we're talking about those documents, is that
20 --

21 Q No. Hold on. I don't necessarily mean intentionally
22 granted. I mean regardless of what the policies were at
23 the time what actually might have happened. Universe of
24 possibilities.

25 A There -- there are two different answers to that

RECORD - EXAMINATION OF AGENT LAMB BY MR. CAMDEN

1 depending on which way you're phrasing the question. If
2 he was volunteered -- or, I'm sorry, voluntarily returned
3 intentionally, that's one scenario. If he was
4 accidentally returned voluntarily when he wasn't entitled
5 for that to happen, that is a different scenario.

6 So which question are you asking me? Which
7 scenario are you referring to?

8 Q Accidentally. Is it possible that he was
9 accidentally returned?

10 A In -- with everything I know about --

11 MR. SCHILLER: Objection, Your Honor. Now
12 that's the speculation he was objecting to before.

13 THE COURT: That does call for speculation. You
14 may want to refer the question.

15 MR. CAMDEN: Your Honor, he's testified so far
16 based on that he doesn't recall anything specifically, but
17 he knows the policies and he knows the practices.

18 THE COURT: He can talk about policies and
19 practices. He certainly can.

20 MR. CAMDEN: And he's testified as to inferences
21 of what could have happened given those policies and
22 practices.

23 THE COURT: You can talk about the policies and
24 practices. You can go right ahead. That was raised. Go
25 right ahead.

RE CROS S - EXAMINATI ON O F A G E N T L A M B B Y M R . C A M D E N

Rephrase your question for the agent, please.

2 | BY MR. CAMDEN:

3 Q Actually, let me shift gears a little bit. If you
4 take a look at the emails, right. And on the front page
5 of the emails, there's an email dated from me to you dated
6 Monday, May 13, 2019. Do you see that?

7 A Yes, sir.

8 Q In middle of the front page?

9 A Yes, sir.

10 Q In the second paragraph of the email, the last
11 question was, quote, is there anywhere other than the
12 I-213 that it will be documented or referenced?

13 Meaning a voluntary return. Do you see that
14 question?

15 A No, sir. What number paragraph am I looking at?

16 Q So this is the middle of the front page. And it
17 the -- the email starts, "Thanks for clarifying."

18 A Oh, I see. Okay.

19 Q So the last --

20 THE COURT: Number 4. Paragraph Number 4.

21 AGENT LAMB: Yes, Your Honor.

22 BY MR. CAMDEN:

23 Q And you see the question, "Is there anywhere other
24 than the I-213 that it will be documented or referenced?"
25 Do you see that?

RE CROSS-EXAMINATION OF AGENT LAMB BY MR. CAMDEN

1 A Yes.

2 Q Okay. Now, at this point you knew that there was a
3 pending criminal case against Mr. Martinez-Mendoza, right?

4 A Sir, when I responded to your emails, I admit that I
5 did not take the time to absorb all of the details and all
6 of the documents. I took your questions as hypothetical,
7 and my answers were hypothetical. So, when I answered
8 your questions, I had not studied the material as well as
9 I should have.

10 Q Okay. Do you see Mr. Martinez sitting here?

11 A Yes.

12 Q Do you understand he has a pending criminal case?

13 A When I responded to your question, I did not consider
14 that.

15 Q Okay. You know that I am with the Federal Public
16 Defender's Office, right?

17 A Yes, sir. I'm sorry. I misunderstood the question.
18 I thought you were referring to the previous criminal
19 conviction at the time that I had --

20 Q No, I'm talking about --

21 THE COURT: Let him respond.

22 Finish your answer, agent.

23 A Yes, sir. I understand there is a pending criminal
24 case. I'm sorry. I misunderstood the question.

25 Q Okay. Okay. And you knew that I was investigating a

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1 particular concrete instance and not simply hypotheticals,
2 right?

3 A Yes, sir.

4 Q Okay. And before you answered me you actually went
5 and talked to other people in your office who were there
6 around in the mid '90s, right?

7 A Yes.

8 Q And you said, "I've spoken with a couple of other old
9 timers here at the office," right?

10 A Yes.

11 Q And by "old timers," you mean people that were there
12 at the time in the office?

13 A Or that had been around as long as I've been around,
14 yes.

15 Q And you wrote, quote, we generally agree that there
16 might not be a document in an A-file which confirms that a
17 VR took place, right?

18 A That means that a VR could possibly happen and there
19 not be a document in the A-file.

20 Q Okay. I want to talk a little bit about your role in
21 these immigration raids.

22 A Yes, sir.

23 Q So, you pick the site. You know the site you're
24 going to ahead of time, right?

25 A Not always.

RECORD - EXAMINATION OF AGENT LAMB BY MR. CAMDEN

1 Q Okay.

2 A Generally, yes, but that doesn't always apply.

3 Q Okay. In any case, let's skip to the part where
4 you're at the site and you have a certain number of people
5 in custody.

6 A Yes, sir.

7 Q Your job, at that point, would have been to interview
8 these individuals, right?

9 A Yes, sir.

10 Q And to fill out the I-213s, right?

11 A Correct.

12 Q Okay. And then after that what happens to them?

13 A Well, any number of things could have happened to
14 them. They're interviewed regard -- if there's a criminal
15 investigation, they're interviewed regarding the criminal
16 investigation.

17 Q Okay.

18 A They're interviewed regarding their immigration
19 status. They're placed into formal removal proceedings if
20 that's appropriate. Part of them could be granted VRS.
21 But all of them would go into custody until they could be
22 VRD or until the proceedings got under way, the formal
23 proceedings got under way.

24 Q So going back to DD&P. You weren't part of DD&P,
25 right?

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1 A No, sir.

2 Q Which is, again, detentions --

3 A Detention and Deportation is what it stood for.

4 Q Okay. Got it. What was -- what division or what
5 part were you in?

6 A At the time it was INS Investigations.

7 Q Okay. Got it. And so once you're done with the
8 interviews or with the processing of -- you're part of the
9 processing. If they stay in custody, then they're handed
10 over to DD&P, right?

11 A Correct.

12 Q Okay. And you don't have anything to do with how
13 DD&P does share job, right?

14 A Correct.

15 Q The policy you talked about about no -- in Houston at
16 the time about no criminal history -- or, I'm sorry, not
17 giving voluntary returns to people with a criminal
18 history, right?

19 A Yes, sir.

20 Q Okay. And that was your supervisor's policy?

21 A Sir, at the very least it was the local policy. I
22 don't know if it went higher than that or not. I don't
23 know.

24 I do know that we did not grant VRs to people
25 with criminal history, especially people with a conviction

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1 for a crime involving moral turpitude, which I believe his
2 conviction was.

3 Q And that was your supervisor's policy?

4 A At the very least it was my supervisor's policy. It
5 may have been an office policy, it may have been an agency
6 policy. I don't know.

7 Q The highest you know personally that it went was your
8 supervisor?

9 A Yes, sir.

10 MR. CAMDEN: No further questions, Your Honor.

11 Sorry. If I could make sure?

12 THE COURT: Take your time.

13 BY MR. CAMDEN:

14 Q Once a person is either deported or voluntarily
15 returned to Mexico -

16 A Yes, sir.

17 Q - do they thereafter still have an obligation to
18 update their address within Mexico with either the
19 immigration service or an immigration court?

20 A I don't know.

21 MR. CAMDEN: What number are we up to now? I
22 think we're up to R-5, Your Honor. I'm going to mark this
23 as Defense Exhibit R-5. This was submitted in connection
24 with the motion. I'm going to show you a copy of this.

25 THE COURT: All right.

RECORD - EXAMINATION OF AGENT LAMB BY MR. CAMDEN

1 MR. CAMDEN: This is the August 1997 database
2 entry, Your Honor.

3 THE COURT: August 1997?

4 MR. CAMDEN: Yes. August 11, 1997.

5 THE COURT: Okay.

6 BY MR. CAMDEN:

7 Q So you've talked about I-213s, and when they're
8 filled out, right?

9 A Yes, sir.

10 Q Okay. And you were also a border patrol agent,
11 correct?

12 A Yes, sir.

13 Q So let's talk a little bit about the difference.

14 Border patrol is stationed generally along the actual
15 border, the physical territorial border, between the ports
16 of entry, right?

17 A Generally, yes.

18 Q Okay. And then customs and border protection is at
19 the ports of entry, right?

20 A Generally -- the border patrol falls under customs
21 and border protection. But you're referring to the
22 inspectors?

23 Q Right.

24 A Yes. They work at the ports of entry, correct.

25 Q And any ICE or Immigrations and Customs Enforcement

RECORD-CROSS - EXAMINATION OF AGENT LAMB BY MR. CAMDEN

1 is throughout the entire country, right?

2 A Including along the border, yes.

3 Q Okay. So do you recognize what database this
4 document, R-5, comes from?

5 A No.

6 Q Okay. Do you see where it says --

7 MR. CAMDEN: And, Your Honor, this came from
8 Mr. Martinez-Mendoza's A-file. So, I mean, we can call
9 Mr. Chin to authenticate it, but if the government is
10 willing to stipulate, I'd ask that it be admitted.

11 THE COURT: Stipulate that it's an authentic
12 part of the file?

13 MR. CAMDEN: Yes, Your Honor.

14 MR. SCHILLER: Yes, Your Honor. It came from
15 the A-file, and it is what it is.

16 THE COURT: No objection. All right. Go right
17 ahead, sir.

18 BY MR. CAMDEN:

19 Q Do you see where it says location of apprehension is
20 Refugio, Texas?

21 A Yes, sir.

22 Q Is that a town near the border, if you know?

23 A Three hours north of the border, approximately.

24 Q Okay. And the date and time is August 11, 1997,
25 right?

RECORDS - EXAMINATION OF AGENT LAMB BY MR. CAMDEN

1 A Yes, sir.

2 Q And the length of time illegally in the United States
3 it says, "at entry," right?

4 A Yes, sir.

5 Q Okay. So if a person is encountered either by border
6 patrol or ICE, and arrested, an I-213 should be filled
7 out, right?

8 A Yes, sir.

9 Q And the I-213 should be placed in the alien's A-file,
10 correct?

11 A No. Not always.

12 Q Not always?

13 A No, sir. If a person is encountered at the border
14 and immediately VRD, there may not even be an A-file
15 created.

16 Q Okay. But if the person previously already had an
17 A-file, right?

18 A Yes, sir. Then the answer is yes.

19 Q Okay. Then they would actually create a T-file,
20 right?

21 A If the A-file is not immediately accessible then,
22 yes, a T-file, a temporary file, would be created.

23 Q I was going to ask. T stands for temporary, right?

24 A Yes.

25 Q And then at some point those files are merged back

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1 together, right?

2 A Correct.

3 Q But for an arrest by a person who has previously been
4 ordered removed, and who has an A number already in
5 existence, an I-213 should be filled out at the time of a
6 new arrest, right?

7 A Yes, sir.

8 Q And that I-213 should appear in the A-file, correct?

9 A Correct.

10 Q Okay. You didn't review the A-file personally, did
11 you?

12 A No, sir. I have not.

13 Q Okay. But you spoke with somebody you said that
14 reviewed the A-file?

15 A Yes, sir.

16 Q And is there an I-213, if you know, from this August
17 11, 1997, encounter?

18 A I don't know.

19 Q If it turned out that there was not an I-213, what
20 would that mean?

21 A It would mean there was an error made, I suppose.

22 Q There would be two errors, right? It could be that
23 no I-213 was ever completed, right?

24 THE COURT: I think we're calling for
25 speculation now.

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1 MR. CAMDEN: Your Honor, his testimony relied on
2 the integrity of the A-file to say he would expect to see
3 certain documents there, and now it turns out you would
4 expect to see other documents that are missing. So one of
5 two things I think could have happened, and I'd like to
6 explore that with him given his 20-some years of
7 experience both between --

8 THE COURT: You can certainly explore with him
9 what the typical practice and policy is, but he's not
10 going to speculate as to why a document is not there.

11 MR. CAMDEN: Okay.

12 THE COURT: So you can talk about the rules, you
13 can talk about the practices, but the agent is not going
14 to speculate.

15 MR. CAMDEN: No further questions then, Your
16 Honor.

17 THE COURT: All right.

18 May Special Agent Lamb be excused at this point?

19 MR. SCHILLER: Yes, Your Honor.

20 MR. CAMDEN: Yes, Your Honor.

21 THE COURT: Agent Lamb, thank you so much for
22 coming up. We appreciate your testimony, sir.

23 AGENT LAMB: Thank you, Your Honor.

24 THE COURT: You're excused and free to go.

25 Next witness.