

No. _____

IN THE
Supreme Court of the United States

ANTONIO ROSAS-RAMIREZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

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MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

v.

ANTONIO ROSAS-RAMIREZ,

Defendant-Appellee.

No. 20-10001

D.C. No. 5:18-cr-00053-LHK-1
Northern District of California,
San Jose

ORDER

Before: CANBY, CALLAHAN, and BADE, Circuit Judges.

The government's motion for summary reversal (Docket Entry No. 30) is granted. We vacate the district court's order dated November 26, 2019, and remand for further proceedings consistent with *United States v. Palomar-Santiago*, 141 S. Ct. 1615 (2021), and *United States v. Bastide-Hernandez*, 39 F.4th 1187 (9th Cir. 2022) (en banc).

VACATED and REMANDED.

United States District Court
Northern District of California

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

UNITED STATES OF AMERICA,
Plaintiff,
v.
ANTONIO ROSAS-RAMIREZ,
Defendant.

Case No. 18-CR-00053-LHK-1

**ORDER GRANTING MOTION TO
DISMISS INDICTMENT AS TO 2014
REMOVAL**

Re: Dkt. No. 59

Before the Court is Defendant Antonio Rosas-Ramirez's ("Defendant") motion to dismiss the indictment for illegal reentry following deportation in violation of 8 U.S.C. § 1326. ECF No. 59 ("Mot."). Having considered the filings of the parties, the relevant law, and the record in this case, the Court GRANTS Defendant's motion to dismiss the Indictment as to the 2014 removal.

I. BACKGROUND

A. Factual Background

In 1996, Defendant was convicted of one count of a violation of Cal. Health & Safety Code § 11352. ECF No. 29-1 at Ex. F. Defendant was sentenced to three years of imprisonment. *Id.* On June 24, 1998, an immigration officer served Defendant with a "Notice of Intent to Issue a Final Administrative Removal Order" ("Notice of Intent"). *Id.* at Ex. A. The Notice of Intent

1 stated that Defendant was a citizen of Mexico and that Defendant had entered the United States on
 2 or about January 1994 without inspection. *Id.* The Notice of Intent further stated that Defendant
 3 had been convicted in the California Superior Court for the County of Santa Cruz for violating
 4 Cal. Health & Safety Code § 11352. *Id.* The Notice of Intent indicated that Defendant was
 5 deportable without appearing before an Immigration Judge because Defendant had been convicted
 6 of an aggravated felony “as defined in section 101(a)(43) of the Act, 8 U.S.C. 1101(a)(43).” *Id.*

7 The Notice of Intent contained a section entitled “I Wish to Contest,” which contained four
 8 checkbox options for grounds on which Defendant could have contested Defendant’s
 9 deportability. *Id.* Defendant did not check any of the boxes to complete this section. *Id.* By
 10 contrast, Defendant signed and completed a section of the Notice of Intent entitled “I Do Not Wish
 11 to Contest.” *Id.* Defendant signed the “I Do Not Wish to Contest” section on June 24, 1998 at
 12 13:00, witnessed by the immigration officer who served the Notice of Intent. *Id.* On June 26,
 13 1998, the immigration officer served Defendant with a “Final Administrative Removal Order,”
 14 dated June 25, 1998. *Id.* at Ex. B. On or about July 15, 1998, Defendant was deported to Mexico.
 15 *Id.* at Ex. C.

16 Defendant eventually returned to the United States. It is unclear from the record when
 17 Defendant was apprehended in the United States. However, on January 23, 2002, a “Notice of
 18 Intent/Decision to Reinstate Prior Order” was issued that required Defendant’s removal from the
 19 United States based on the prior 1998 removal order. *Id.* at Ex. D. Thus, Defendant was removed
 20 from the United States without a hearing before an immigration judge. On or about February 25,
 21 2002, Defendant was once again deported to Mexico. ECF No. 1.

22 Eventually, at an unspecified time, Defendant returned to the United States once more. On
 23 February 12, 2014, United States Immigration and Customs Enforcement (“ICE”) agents
 24 apprehended Defendant in Redwood City, California, and took Defendant into custody. ECF No.
 25 60-1 ¶ 3. On February 13, 2014, the United States Department of Homeland Security prepared a
 26 Form I-862, Notice to Appear (“NTA”). ECF No. 59-1. The NTA alleged that Defendant would
 27 be placed in removal proceedings under 8 U.S.C. § 1229. *Id.* The NTA did not identify the

1 address of the Immigration Court at which the NTA would be filed. *Id.* Instead, the space on the
2 NTA that specified the “Complete Address of Immigration Court, including Room Number, if
3 any,” stated only “to be set.” *Id.* Defendant was detained by ICE through the pendency of the
4 removal proceedings. ECF No. 60 at 2.

5 On February 18, 2014, the Immigration Court sent Defendant a “Notice of Hearing in
6 Removal Proceedings.” ECF No. 59-2. The Notice of Hearing in Removal Proceedings indicated
7 that Defendant’s hearing would occur on February 27, 2014, at 9:30 a.m. before the Immigration
8 Court in San Francisco. *Id.* Defendant appeared at the Immigration Court in San Francisco on
9 February 27, 2014. Mot. at 2. Defendant was assisted by a translator, and Defendant was not
10 represented by counsel. *Id.* At the conclusion of the hearing, an immigration judge ordered that
11 Defendant be removed to Mexico. ECF No. 59-3. On or about March 1, 2014, Defendant was
12 again deported to Mexico. ECF No. 1.

13 On or about April 24, 2014, Defendant was apprehended in the United States once again.
14 *Id.*

15 **B. Procedural History**

16 On February 8, 2018, a grand jury in the Northern District of California returned an
17 indictment (“Indictment”) that charged Defendant with one count of a violation of 8 U.S.C. §
18 1326, Illegal Reentry Following Deportation. ECF No. 1 (“Indictment”). Specifically, the grand
19 jury charged as follows: “On or about April 24, 2014, in Santa Clara County in the Northern
20 District of California, the [D]efendant, . . . an alien, previously having been excluded, deported
21 and removed from the United States on or about July 15, 1998, February 25, 2002, and March 1,
22 2014, was found in the United States, with the Attorney General of the United States and the
23 Secretary for Homeland Security not having expressly consented to a re-application by the
24 [D]efendant for admission into the United States.” *Id.*

25 Defendant filed a motion to dismiss the Indictment as to Defendant’s 2014 removal on
26 December 5, 2019. ECF No. 13. The government opposed the motion on January 16, 2019. ECF
27 No. 19. Defendant filed a reply on January 23, 2019. ECF No. 20. On February 4, 2019, the

1 Court denied Defendant's motion to dismiss the Indictment as to Defendant's 2014 removal. ECF
2 No. 23.

3 On February 27, 2019, Defendant filed a motion to dismiss the Indictment as to
4 Defendant's 1998 administrative removal and the 2002 reinstatement. ECF No. 29. The
5 government opposed the motion on March 28, 2019, ECF No. 34, and Defendant replied on April
6 9, 2019, ECF No. 36. On April 19, 2019, the Court ordered supplemental briefing from both
7 parties. ECF No. 38. Defendant filed a supplemental brief on May 8, 2019, ECF No. 43, and the
8 government filed a supplemental brief on May 9, 2019, ECF No. 45. On June 26, 2019, the Court
9 granted Defendant's motion to dismiss the Indictment as to Defendant's 1998 administrative
10 removal and the 2002 reinstatement. ECF No. 52. The Court explained, however, that
11 Defendant's 2014 removal served as a valid predicate removal, and that therefore "Defendant's
12 2014 removal still independently supports the indictment." *Id.* at 18. The 2014 removal is the
13 sole remaining removal that serves as a predicate for the single count violation of 8 U.S.C. § 1326,
14 Illegal Reentry Following Deportation, charged in the Indictment.

15 On October 2, 2019, Defendant filed the instant motion to dismiss the Indictment as to the
16 Defendant's 2014 removal. Mot. On October 23, 2019, the government opposed the motion, ECF
17 No. 60 ("Opp'n"), and on November 6, 2019, Defendant replied, ECF No. 61 ("Reply").

18 **II. LEGAL STANDARD**

19 **A. Motion to Dismiss Indictment**

20 Under Federal Rule of Criminal Procedure 12(b)(3)(B)(v), a defendant may move to
21 dismiss an indictment on the ground that the indictment "fail[s] to state an offense." In
22 considering a motion to dismiss an indictment, a court must accept the allegations in the
23 indictment as true and "analyz[e] whether a cognizable offense has been charged." *United States*
24 *v. Boren*, 278 F.3d 911, 914 (9th Cir. 2002). "In ruling on a pre-trial motion to dismiss an
25 indictment for failure to state an offense, the district court is bound by the four corners of the
26 indictment." *Id.* A motion to dismiss an indictment can be determined before trial "if it involves
27 questions of law rather than fact." *United States v. Shortt Accountancy Corp.*, 785 F.2d 1448,

1452 (9th Cir.), *cert. denied*, 478 U.S. 1007 (1986).

2 **B. Collateral Attack on a Deportation**

3 “For a defendant to be convicted of illegal reentry under 8 U.S.C. § 1326, the Government
4 must establish that the defendant left the United States under order of exclusion, deportation, or
5 removal, and then illegally reentered.” *United States v. Raya-Vaca*, 771 F.3d 1195, 1201 (9th Cir.
6 2014) (internal quotation marks and citation omitted). “A defendant charged under § 1326 has a
7 due process right to collaterally attack his removal order because the removal order serves as a
8 predicate element of his conviction.” *Id.* (internal quotation marks and citation omitted).

9 To demonstrate that a prior deportation cannot serve as the basis for an indictment for
10 illegal reentry, 8 U.S.C. § 1326(d) requires that a defendant “demonstrate that (1) he exhausted the
11 administrative remedies available for seeking relief from the predicate removal order; (2) the
12 deportation proceedings ‘improperly deprived [him] of the opportunity for judicial review’; and
13 (3) the removal order was ‘fundamentally unfair.’” *Id.* (quoting 8 U.S.C. § 1326(d)) (brackets in
14 original). “To satisfy the third prong—that the order was fundamentally unfair—the defendant
15 bears the burden of establishing both that the deportation proceeding violated his due process
16 rights and that the violation caused prejudice.” *Id.* (internal quotation marks, citation, and brackets
17 omitted).

18 **III. DISCUSSION**

19 In Defendant’s motion to dismiss the Indictment as to Defendant’s 2014 removal,
20 Defendant asserts that the United States Department of Homeland Security’s failure to file a
21 proper Form I-862, Notice to Appear (“NTA”), with the Immigration Court deprived the
22 Immigration Court of jurisdiction to remove Defendant. Defendant asserts that this failure
23 provides the grounds for Defendant to collaterally attack the 2014 removal under 8 U.S.C. §
24 1326(d).

25 For the reasons below, the Court agrees with Defendant. The Immigration Court lacked
26 jurisdiction over Defendant because of the defective NTA. Further, this lack of jurisdiction
27 permits Defendant to collaterally attack the 2014 removal under 8 U.S.C. § 1326(d).

A. The Immigration Court Lacked Jurisdiction over Defendant

Defendant argues that the 2014 removal cannot constitute a prior lawful deportation that supports the single count violation of 8 U.S.C. § 1326, Illegal Reentry Following Deportation, charged in the Indictment. Mot. at 1. This is so, Defendant claims, because the NTA “did not identify the immigration court address where the putative NTA would be filed, which is a jurisdictional requirement under the regulatory scheme and 8 C.F.R. § 1003.15(b)(6).” *Id.* at 2. The government makes two responses to this argument. First, the government asserts that the requirements of 8 C.F.R. § 1003.15(b) are not actually jurisdictional in nature. Instead, the government maintains that 8 C.F.R. § 1003.15(b) contains only “claim-processing rules” that do not limit the Immigration Court’s adjudicatory authority. Opp’n at 3–9. Second, the government asserts that even if 8 C.F.R. § 1003.15(b) is jurisdictional in nature, Defendant had “actual notice” of the removal hearing such that jurisdiction adequately vested in the Immigration Court in any event. *Id.* at 9–10. The Court agrees with Defendant. The defective NTA deprived the Immigration Court of jurisdiction over Defendant for the purposes of the 2014 removal. The government’s actions following the filing of the defective NTA did not vest the Immigration Court with jurisdiction.

The Court begins by providing a brief background of the statutory and regulatory scheme that sets forth the contents an NTA must contain. The Court then analyzes the question of whether 8 C.F.R. § 1003.15(b) sets forth a jurisdictional rule. Finally, the Court examines whether Defendant’s purported “actual notice” of the address of the Immigration Court in which the NTA was filed may remedy a jurisdictional defect in the NTA.

1. Statutory and Regulatory Background

The Court begins by providing background on the regulatory scheme that sets forth the content that an NTA must contain. The Immigration and Nationality Act, 8 U.S.C. § 1101, *et seq.*, broadly delegates authority to the Attorney General to “establish such regulations . . . as the Attorney General determines to be necessary for carrying out this section.” 8 U.S.C. § 1103(g)(2). Pursuant to this grant of authority, the Attorney General has promulgated regulations that speak to

1 the “[j]urisdiction and commencement of proceedings” in Immigration Court. 8 C.F.R. § 1003.14.
 2 In particular, 8 C.F.R. § 1003.14(a) dictates that “[j]urisdiction vests, and proceedings before an
 3 Immigration Judge commence, when a charging document is filed with the Immigration Court by
 4 the Service.” 8 C.F.R. § 1003.14(a). A “charging document” is defined in the regulations to
 5 consist of several types of documents, potentially including “a Notice to Appear.” 8 C.F.R. §
 6 1003.13. Finally, the regulations require that an NTA contain certain information. 8 C.F.R. §
 7 1003.15(b). Importantly for the instant case, the regulations dictate that an NTA “must” include
 8 the “address of the Immigration Court where the Service will file” the NTA. 8 C.F.R. §
 9 1003.15(b)(6).

10 It is undisputed that the NTA at issue in the instant case lacked the “address of the
 11 Immigration Court where the Service” would file the NTA, as required by 8 C.F.R. §
 12 1003.15(b)(6). ECF No. 59-2. Accordingly, the first question before the Court is whether 8
 13 C.F.R. § 1003.15(b) sets forth a jurisdictional rule, such that the NTA’s failure to include the
 14 “address of the Immigration Court where the Service will file” the NTA deprived the Immigration
 15 Court of jurisdiction over Defendant’s 2014 removal.

16 **2. 8 C.F.R. § 1003.15(b) Sets Forth a Jurisdictional Rule**

17 Defendant’s motion to dismiss the Indictment as to the 2014 removal is premised on the
 18 argument that 8 C.F.R. § 1003.15(b) sets forth a rule that governs the jurisdiction of the
 19 Immigration Court. As Defendant puts it, the “regulation requiring identification of the court
 20 address where the NTA will be filed goes to the authority of the immigration court to adjudicate a
 21 case—*i.e.*, to the court’s subject matter jurisdiction.” Reply at 9. The government disagrees, and
 22 argues that the regulation only sets forth a “claim-processing rule.” Opp’n at 4. Thus, the
 23 government claims that the failure to include the Immigration Court address in the NTA did not
 24 deprive the Immigration Court “of ‘jurisdiction’ over Defendant’s removal proceedings insofar as
 25 it concerned the court’s adjudicatory authority.” *Id.*

26 The Court agrees with Defendant. The requirement that an NTA include the “address of
 27 the Immigration Court where the Service will file” the NTA, 8 C.F.R. § 1003.15(b)(6), is

1 jurisdictional in nature. The Court reaches this conclusion because it is bound by a recent Ninth
 2 Circuit decision, *Karingithi v. Whitaker*, 913 F.3d 1158 (9th Cir. 2019). According to Defendant,
 3 the Ninth Circuit’s recent decision in *Karingithi* held that the applicable regulations “govern the
 4 subject matter jurisdiction” of the Immigration Court. Reply at 1. Thus, because “*Karingithi* is
 5 binding on this Court,” Defendant claims that the Court must reject Defendant’s argument that 8
 6 C.F.R. § 1003.15(b) only sets forth a claim-processing rule. The Court agrees. *Karingithi* stands
 7 for the proposition that 8 C.F.R. § 1003.15(b) is jurisdictional in nature.

8 In *Karingithi*, the Ninth Circuit considered the question of whether the Immigration Court
 9 lacked jurisdiction over removal proceedings when the NTA that served as the charging document
 10 failed to specify the date and time of the removal hearing as required by 8 U.S.C. §
 11 1229(a)(1)(G)(i). *Id.* at 1159–60. The Ninth Circuit answered this question in the negative. *Id.* at
 12 1160. In the course of doing so, the Ninth Circuit held that “the regulations, not § 1229(a), define
 13 when jurisdiction vests.” Accordingly, because the operative regulations indicate that the date and
 14 time of the removal hearing need only be provided “where practicable,” 8 C.F.R. § 1003.18(b), the
 15 Ninth Circuit held that omission of that information did not affect the Immigration Court’s ability
 16 to hold a removal hearing. 913 F.3d at 1160. As the Ninth Circuit put it, “[t]he regulatory
 17 definition, not the one set forth in § 1229(a), governs the Immigration Court’s jurisdiction. A
 18 notice to appear need not include time and date information to satisfy this standard. *Karingithi*’s
 19 notice to appear *met the regulatory requirements and therefore vested jurisdiction in the IJ.*” *Id.*
 20 (emphasis added).

21 The natural import of the *Karingithi* court’s holding is that “[t]he regulatory definition” of
 22 an NTA “governs the Immigration Court’s jurisdiction.” *Id.* The regulatory definition of an NTA
 23 includes the requirement that an NTA include the “address of the Immigration Court where the
 24 Service will file” the NTA, 8 C.F.R. § 1003.15(b)(6). Thus, the requirement outlined in 8 C.F.R. §
 25 1003.15(b)(6) “governs the Immigration Court’s jurisdiction.” This is precisely the conclusion at
 26 which most of the district courts in the Ninth Circuit have arrived when confronted with the
 27 applicability of *Karingithi*’s holding to the question before the Court. *See, e.g., United States v.*

1 *Suchite-Ramirez*, No. 19-CR-00118-RMP, 2019 WL 4396142, at *2 (E.D. Wash. Sept. 13, 2019)
 2 (holding that the government’s argument that 8 C.F.R. § 1003.15(b)(6) is claim-processing
 3 “directly contradicts the Ninth Circuit’s reasoning in *Karingithi*”); *United States v. Gutierrez-*
 4 *Ramirez*, No. 18-CR-00422-BLF, 2019 WL 3346481, at *6 (N.D. Cal. July 25, 2019) (“[I]t is clear
 5 that *Karingithi* contemplates that Section 1003.15 is jurisdictional.”); *United States v. Ramos-*
 6 *Urias*, No. 18-CR-00076-JSW, 2019 WL 1567526, at *2 (N.D. Cal. Apr. 8, 2019) (“*Karingithi*
 7 and *Bermudez-Cota* teach that satisfying the regulations, not the statute, is crucial to establish the
 8 Immigration Court’s jurisdiction.”).

9 As discussed *supra*, the language of the regulations governing the jurisdiction of the
 10 Immigration Court also supports the *Karingithi* court’s conclusion. The regulations provide that
 11 jurisdiction “vests” only “when a charging document is filed with the Immigration Court,” 8
 12 C.F.R. § 1003.14, and a “Notice to Appear,” is such a “charging document,” 8 C.F.R. § 1003.13.
 13 The regulation at 8 C.F.R. § 1003.15(b)(6) provides that an NTA “must also include” “[t]he
 14 address of the Immigration Court where the Service will file the Order to Show Cause and Notice
 15 to Appear.” *Id.* Thus, by the plain language of the regulations, a document that lacks “[t]he
 16 address of the Immigration Court where the Service will file the Order to Show Cause and Notice
 17 to Appear” is not an NTA, and therefore cannot “vest” jurisdiction with the Immigration Court. 8
 18 C.F.R. §§ 1003.14, 1003.15(b)(6).

19 Further, as United States District Judge Jeffrey White has noted, 8 C.F.R. §§ 1003.15(a)
 20 and (c) contain a disclaimer that omission of the information mandated by those sections “shall not
 21 be construed as affording the alien any substantive or procedural rights.” 8 C.F.R. § 1003.15(a),
 22 (c); *Ramos-Urias*, 2019 WL 1567526, at *2. By contrast, the regulation at issue in the instant
 23 motion, 8 C.F.R. § 1003.15(b), lacks such a disclaimer, which further confirms the jurisdictional
 24 scope of 8 C.F.R. § 1003.15(b).

25 For instance, as Judge White noted, 8 C.F.R. § 1003.15(c) dictates that “[i]n the Notice to
 26 Appear for removal proceedings, the Service shall provide the following administrative
 27 information to the Immigration Court.” Section 1003.15(c) goes on to list various pieces of

1 information, such as the “alien’s names and any known aliases,” and the “alien’s address.” *Id.*
 2 However, the section contains the aforementioned disclaimer, and the regulation thus dictates that
 3 omission of the required information “shall not be construed as affording the alien any substantive
 4 or procedural rights.” *Id.* Section 1003.15(a), which only concerns orders to show cause, also
 5 contains the foregoing disclaimer. 8 C.F.R. § 1003.15(a).

6 By contrast, 8 C.F.R. § 1003.15(b), the regulatory section at issue in the instant motion,
 7 does not contain the disclaimer. The natural reading of the lack of disclaimer is that omission of
 8 the information required by 8 C.F.R. § 1003.15(b)(6) *does* afford the alien “substantive or
 9 procedural rights,” in contrast to 8 C.F.R. §§ 1003.15(a) and (c). *See, e.g., United States v.*
 10 *Ramos-Urias*, 2019 WL 1567526, at *2 (“The Court agrees with Mr. Ramos-Urias that the
 11 absence of the disclaimer in subsection (b) is significant. . . . Drafters of regulations and statutes
 12 are presumed to choose their words with precision.” (citations omitted)).

13 As Judge White noted, this distinction “is particularly sensible.” *Id.* at *3. While 8 C.F.R.
 14 §§ 1003.15(a) and (c) both “describe categories of identifying information of which an alien is
 15 likely already aware,” such as the alien’s name and known aliases, 8 C.F.R. § 1003.15(b) demands
 16 that an NTA include information about *the removal process itself*. *Id.* “It is logical that an NTA’s
 17 failure to include an alien’s alias or preferred language, for example, would not carry the same
 18 consequences as an NTA’s failure to include . . . the address of the Immigration Court where the
 19 NTA would be filed.” *Id.*

20 In response, the government argues that insofar as *Karingithi* may be read to discuss the
 21 jurisdictional import of 8 C.F.R. § 1003.15(b)(6), this discussion is dicta. Opp’n at 3–4; *see also*
 22 *United States v. Diaz-Lastra*, No. 19-CR-00396-DWL, 2019 WL 4394542, at *3 (D. Ariz. Sept.
 23 13, 2019) (“Those passages, however, are arguably dicta because they were unnecessary to the
 24 [sic] resolve the narrow issue before the court. . . .”). The Court disagrees. The *Karingithi* court’s
 25 discussion of the jurisdictional nature of the regulations served as the point of comparison that the
 26 *Karingithi* court used to resolve the question that the *Karingithi* court faced. The *Karingithi* court
 27 thus squarely confronted “an issue germane to the eventual resolution of the case, and resolve[d] it

1 after reasoned consideration in a published opinion.” *Miranda B. v. Kitzhaber*, 328 F.3d 1181,
2 1186 (9th Cir. 2003). The *Karingithi* court’s determination that the regulations set forth
3 jurisdictional requirements for the Immigration Court is not dicta. *Id.*; see also *Gutierrez-*
4 *Ramirez*, 2019 WL 3346481, at *6 (“*Karingithi* clearly contemplates that the requirements in
5 Section 1003.15 are ‘for jurisdictional purposes.’”).

6 Additionally, according to the government, “*Karingithi* did not address the meaning of the
7 term ‘jurisdiction’ as recited in 8 C.F.R. § 1003.14(a).” Opp’n at 3; see also *United States v.*
8 *Medina*, No. 18-CR-653-GW, 2019 WL 4462701, at *6 (C.D. Cal. Sept. 4, 2019) (“[N]owhere in
9 decision [sic] does the Circuit indicate that the reference to ‘jurisdiction’ means ‘subject matter
10 jurisdiction’ rather than other types of jurisdiction.”). Thus, the government argues, *Karingithi*
11 may be read to refer to only to a claim-processing rule. The plain import of the *Karingithi* court’s
12 language, however, suggests that the *Karingithi* court was concerned with more than just a claim-
13 processing rule. For instance, the *Karingithi* court repeatedly pointed to the regulations as
14 dispositive of when jurisdiction “vests” with the Immigration Court, and when the Immigration
15 Court has jurisdiction “over [] removal proceedings.” 913 F.3d at 1160, 1162. This language
16 suggests that the Ninth Circuit’s references to jurisdiction refer to subject matter jurisdiction. See
17 *United States v. Cruz-Aguilar*, 394 F.Supp.3d 1313, 1318–19 (E.D. Wash. 2019) (reading
18 *Karingithi* to proscribe “subject matter jurisdiction over a noncitizen’s removal proceeding”).

19 Indeed, other federal courts of appeals have understood the *Karingithi* language in this
20 way. See, e.g., *United States v. Cortez*, 930 F.3d 350, 359 (4th Cir. 2019) (citing *Karingithi* as an
21 example of a case in which a court “treat[ed] § 1003.14(a) as though it implicates an immigration
22 court’s adjudicatory authority or ‘subject matter jurisdiction’”). The parties in *Karingithi* also
23 clearly briefed the issue in this way. See, e.g., *Karingithi*, CA No. 16-70885, Supp’l Brief for
24 Pet’r, Dkt. 56 at 19 (discussing the regulations’ impact on “subject matter jurisdiction”); *id.*,
25 Supp’l Brief for Resp., Dkt. 57 at 7 (“Under the controlling regulations, the Immigration Court
26 had subject-matter jurisdiction over *Karingithi*’s removal proceedings.”).

27 Some district courts have attempted to limit the import of *Karingithi* by concluding that

1 only some of the applicable regulations are jurisdictional in nature. For instance, in *United States*
 2 *v. Arteaga-Centeno*, No. 18-CR-00332-CRB, 2019 WL 3207849 (N.D. Cal. July 16, 2019), the
 3 court held that *Karingithi* should be read to indicate that “the jurisdictional provisions of the
 4 regulations are limited to §§ 1003.13–14,” and do not include 8 C.F.R. § 1003.15. *Id.* at *7; *see*
 5 *also Diaz-Lastra*, 2019 WL 4394542, at *3 (same). The government does not press this
 6 interpretation of *Karingithi* in the instant case. On the contrary, the government’s argument
 7 specifically hinges on the proposition that 8 C.F.R. § 1003.14 is *also* not jurisdictional. *E.g.*,
 8 Opp’n at 6 (“8 C.F.R. § 1003.14(a) is a claim-processing rule, not a jurisdictional one.”). As a
 9 general matter, the Court agrees that it would be improper to needlessly “contort *Karingithi*” when
 10 “it is clear that *Karingithi* contemplates that Section 1003.15 is jurisdictional.” *Gutierrez-*
 11 *Ramirez*, 2019 WL 3346481, at *6.

12 Finally, in the course of its argument, the government cites various decisions from “the
 13 Fourth, Fifth, Seventh, and Eleventh Circuits” as persuasive authority for the proposition that 8
 14 C.F.R. § 1003.15(b) is not jurisdictional. Opp’n at 8–9. These cases undercut the government’s
 15 argument, however. This is so because the authoring courts recognized that their decisions
 16 contradict *Karingithi*, and hence reached a conclusion contrary to Ninth Circuit law. *See, e.g.*,
 17 *Perez-Sanchez v. United States Attorney Gen.*, 935 F.3d 1148, 1155 (11th Cir. 2019) (listing the
 18 Ninth Circuit as a circuit that has “accepted the proposition that 8 C.F.R. § 1003.14 sets forth a
 19 jurisdictional rule”); *Cortez*, 930 F.3d at 359 (4th Cir. 2019) (citing *Karingithi* as an example of a
 20 case in which a court “treat[ed] § 1003.14(a) as though it implicates an immigration court’s
 21 adjudicatory authority or ‘subject matter jurisdiction’”). This Court is bound by the case law of
 22 the Ninth Circuit.

23 Accordingly, the Court agrees with Defendant that “[t]his Court is bound by *Karingithi*,”
 24 and *Karingithi* stands for the proposition that 8 C.F.R. § 1003.15(b) sets forth a jurisdictional
 25 rule.¹ Reply at 2, 6. The Court proceeds to consider the government’s argument that Defendant’s
 26

27 ¹ In light of the controlling nature of *Karingithi*, the Court need not reach Defendant’s argument
 28 that the government is judicially estopped from adopting the litigation position it adopts in the

1 “actual notice” of the “address of the Immigration Court where the Service will file” the NTA, 8
2 C.F.R. § 1003.15(b)(6), nonetheless remedied this jurisdictional defect.

3 **3. Defendant’s Purported “Actual Notice” of the Address of the Immigration Court**
4 **Did Not Vest the Immigration Court with Jurisdiction**

5 The government asserts that even if the Court concludes that the requirement of 8 C.F.R. §
6 1003.15(b)(6) is jurisdictional, the Court should still find that the Immigration Court had
7 jurisdiction over removal proceedings in the instant case. Opp’n at 10. According to the
8 government, “multiple documents” may be used to provide “the requisite notice under” 8 C.F.R. §
9 1003.15(b)(6). *Id.* Further, the government claims that because “Defendant was personally
10 brought to the Immigration Hearing as he was in custody,” Defendant “had actual notice and
11 personally appeared” at the removal hearing. *Id.* The government asserts that these facts are
12 sufficient to “properly vest” jurisdiction in the Immigration Court. *Id.* Defendant responds that
13 the government’s arguments are invalid under another Ninth Circuit decision, *Lopez v. Barr*, 925
14 F.3d 396 (9th Cir. 2019). The Court agrees with Defendant that Defendant’s purported “actual
15 notice” of the address of the Immigration Court in the instant case was inadequate to confer
16 jurisdiction on the Immigration Court in light of the defective NTA.

17 District Judge Beth Labson Freeman confronted a similar set of issues in *United States v.*
18 *Gutierrez-Ramirez*, 2019 WL 3346481. In *Gutierrez-Ramirez*, United States District Judge
19 Freeman examined the government’s argument that even though an NTA was deficient under 8
20 C.F.R. § 1003.15(b), a subsequent “Notice of Hearing and actual proceedings cured this
21 deficiency.” *Id.* at *6. Judge Freeman held that this argument failed “for both factual and legal
22 reasons.” *Id.* First, with respect to the factual reasons that the argument failed, Judge Freeman
23 explained that “there is no evidence that Defendant’s Notice of Hearing was ever served on him or
24 that it was ever filed with the Immigration Court.” *Id.* Thus, “even if a properly served and filed
25 Notice of Hearing could cure a faulty Notice to Appear,” Judge Freeman held that there was
26 insufficient evidence that anything to that effect had happened in *Gutierrez-Ramirez*. *Id.* Second,

27 _____
28 instant case. Reply at 2.

1 Judge Freeman relied on the Ninth Circuit’s decision in *Lopez*, 925 F.3d 396, to conclude that
 2 “[n]othing in the regulations supports” a holding that a Notice of Hearing or a “Defendant’s
 3 appearance at the proceeding” could cure a violation of 8 C.F.R. § 1003.15(b)(6). *Id.* at *7 (citing
 4 *Lopez*, 925 F.3d 396 (9th Cir. 2019)).

5 The Court agrees with Judge Freeman’s analysis of this issue. Here, both factual and legal
 6 issues preclude the government’s arguments in the instant case as well. As a factual matter, the
 7 government argues that “multiple documents [may] provide the requisite notice under 8 C.F.R. §§
 8 1003.14(a) and 1003.15(b),” but there is no evidence that additional documents ever fulfilled the
 9 requirements of 8 C.F.R. § 1003.15(b) in the instant case. While the government cites a
 10 declaration that discusses a hypothetical “‘Notice of Filing’ that provides the address at which the
 11 individual’s Notice to Appear will be filed,” ECF No. 60-1 at 3, there is no indication that
 12 Defendant ever received any such document.

13 The record does contain a “Notice of Hearing,” on the other hand, but this document does
 14 not contain a complete address for Defendant’s removal hearing.² ECF No. 59-2. Further, similar
 15 to *Gutierrez-Ramirez*, 2019 WL 334648, the Notice of Hearing only indicates that the Notice of
 16 Hearing was mailed to Defendant through a “custody officer.”³ *Id.* “There is no evidence that the
 17 Custodian Officer ever actually served the Notice of Hearing on Defendant.” *Gutierrez-Ramirez*,
 18 2019 WL 334648, at *6. Moreover, “there is no evidence that the Notice of Hearing was ever
 19 filed with the Immigration Court,” as would be required for it to independently function as a kind
 20 of “amended charging document” under 8 C.F.R. § 1003.14. *Id.* These “issues render the Notice
 21 of Hearing non-curative here.” *Id.* In light of the foregoing, the government largely seeks to rely
 22 on the fact that Defendant was “personally brought to the Immigration Hearing as he was in
 23

24 ² As a general matter, Defendant also notes that “[t]he location of the initial removal hearing need
 25 not necessarily be the address where the Immigration Court is located.” *Gutierrez-Ramirez*, 2019
 26 WL 3346481, at *5; Reply at 12. Defendant does not affirmatively contend that these locations
 27 differed in the instant case, however. The Court therefore assumes for the sake of the instant
 28 motion that the two addresses in Defendant’s case were the same.

³ The Notice of Hearing identifies a “custody officer” as the recipient address for Defendant even
 though the Notice of Hearing provides that the Defendant himself can be the recipient. ECF No.
 59-2.

1 custody.” Opp’n at 10.

2 However, the government’s arguments are also legally foreclosed. With respect to the
3 curative potential of a Notice of Hearing, as Judge Freeman observed, “nothing in the regulations
4 indicates that the Government can cure a non-compliant Notice to Appear by serving a non-
5 compliant Notice of Hearing, even if the Notice of Hearing includes the information the Notice to
6 Appear originally omitted.” *Gutierrez-Ramirez*, 2019 WL 334648, at *7.

7 In *Lopez*, the Ninth Circuit concluded that “a Notice to Appear that is defective under
8 *Pereira* cannot be cured by a subsequent Notice of Hearing.” *Id.* at 405. As Judge Freeman
9 explained, the Ninth Circuit’s logic in *Lopez* is applicable to the instant case. As in *Lopez*, “the
10 regulations define the enumerated requirements of a Notice to Appear, such that any document
11 containing less than the full set of requirements is not a Notice to Appear within the meaning of
12 the regulations.” 2019 WL 334648, at *7 (internal quotation marks and alterations omitted)
13 (quoting *Lopez*, 925 F.3d at 400). The *Lopez* court also explained that the “phrase ‘notice of
14 hearing’—or anything resembling it—does not appear in the law.” *Lopez*, 925 F.3d at 401.
15 Further, the *Lopez* court relied on the fact that the applicable statutory provision contemplated
16 “service of a single document—not multiple.” *Id.* at 402. The same is true under the regulations
17 in the instant case, which describe “a charging document,” 8 C.F.R. § 1003.14(a), and “[t]he
18 Notice to Appear,” 8 C.F.R. §§ 1003.13, 1003.15(b). Finally, the Ninth Circuit emphasized the
19 fact that the “requirements of a Notice to Appear . . . are ‘substantive.’” *Lopez*, 925 F.3d at 404.
20 In the instant case, the regulations similarly suggest that 8 C.F.R. § 1003.15(b) provides
21 “substantive or procedural rights,” since it does not include the disclaimer contained in 8 C.F.R.
22 §§ 1003.15(a), (c). 8 C.F.R. § 1003.15(b). *See Gutierrez-Ramirez*, 2019 WL 3346481, at *7
23 (explaining that 8 C.F.R. § 1003.15(b) appears to contemplate “substantive and procedural”
24 rights); *see also Ramos-Urias*, 2019 WL 1567526, at *3 (“[T]he Court can find no regulatory
25 support for the proposition that a notice of hearing cures a regulatorily-deficient NTA or can serve
26 as a separate charging document.”).

27 The Court also finds the government’s argument that an alien’s physical presence at a

1 removal hearing alone can cure a jurisdictional defect under 8 C.F.R. § 1003.15(b) to be
 2 unavailing for the “same reasoning” as above, and because “[n]othing in the regulations supports
 3 such a holding.” *Id.*; *see also United States v. Rojas Osorio*, No. 17-CR-00507-LHK, 2019 WL
 4 235042, at *9 (N.D. Cal. Jan. 16, 2019), *vacated on other grounds by United States v. Rojas-*
 5 *Osorio*, 381 F. Supp. 3d 1216 (N.D. Cal. 2019) (“[T]he Defendant’s appearance at the removal
 6 hearing does not satisfy the ‘charging document’ requirement to vest the IJ with jurisdiction.”).
 7 To accept the government’s argument on this front would be to “all but eliminate the need to
 8 ensure that a Notice to Appear actually conforms to the enumerated mandates of § 1003.15,” and
 9 would “render the mandates of § 1003.15 illusory and unenforceable.” *United States v. Martinez-*
 10 *Aguilar*, No. 18-CR-00300-SVW, 2019 WL 2562655, at *4 (C.D. Cal. June 13, 2019); *see also*
 11 *Rojas Osorio*, 2019 WL 235042 (“Subject matter jurisdiction cannot be waived.”).

12 The Court therefore concludes that Defendant’s purported “actual notice,” based on either
 13 the Notice of Hearing or Defendant’s presence at the removal proceeding, did not cure the
 14 jurisdictional defect caused by the NTA’s violation of 8 C.F.R. § 1003.15(b). The Court therefore
 15 concludes that the Immigration Court lacked jurisdiction over the 2014 removal. The Court
 16 proceeds to consider whether Defendant satisfies the requirements of 8 U.S.C. § 1326(d).

17 **B. Defendant Satisfies the Requirements of 8 U.S.C. § 1326(d)**

18 The Court now analyzes the above findings in the context of 8 U.S.C. § 1326(d), which
 19 provides three prongs that a defendant must establish to successfully collaterally attack his prior
 20 removal order. “To satisfy the third prong—that the order was fundamentally unfair—the
 21 defendant bears the burden of establishing both that the deportation proceeding violated his due
 22 process rights and that the violation caused prejudice.” *Raya-Vaca*, 771 F.3d at 1201 (internal
 23 quotation marks, citation, and brackets omitted). Accordingly, the government argues that
 24 Defendant cannot satisfy the third prong of 8 U.S.C. § 1326(d). *Opp’n* at 13–15.

25 The Court notes that numerous district courts have held that the requirements of 8 U.S.C. §
 26 1326(d) do not apply to defendants who challenge the validity of a deportation order when the
 27 Immigration Court lacked jurisdiction over the removal proceeding. *See, e.g., Martinez-Aguilar*,

2019 WL 2562655, at *4 (“[B]ecause the Notice to Appear issued to Defendant was jurisdictionally deficient, the subsequent removal order which caused Defendant to be deported was invalid as issued without proper jurisdiction, and Defendant does not need to show that he was prejudiced by the lack of jurisdiction before the Immigration Court.”); *United States v. Quijada-Gomez*, 360 F. Supp. 3d 1084, 1094 (E.D. Wash. 2018) (“[A] challenge to the immigration court’s jurisdiction need not comply with § 1326(d)’s limitations on collateral attacks.”).

United States District Judge Charles Breyer explained this conclusion in *United States v. Arteaga-Centeno*, 353 F. Supp. 3d 897 (N.D. Cal. 2019), *vacated on other grounds by United States v. Arteaga-Centeno*, 2019 WL 1995766. In *Arteaga-Centeno*, Judge Breyer explained that for the purposes of 8 U.S.C. § 1326(d), there is a distinction between “jurisdictionally-invalid orders and orders that are invalid for any other reasons.” 353 F. Supp. 3d at 903. Judge Breyer noted that Ninth Circuit precedent compels the conclusion “that if the order is void on its face for want of jurisdiction, it is the duty of this and every other court to disregard it.” *Id.* (internal alteration and quotation marks omitted) (quoting *Wilson v. Carr*, 41 F.2d 704, 706 (9th Cir. 1930)). The government’s argument that 8 U.S.C. § 1326(d) applies “to jurisdictionally-invalid orders, . . . is thus precluded by the Ninth Circuit’s requirement that courts must disregard invalid orders and that such orders are legal nullities.” *Id.* (internal alteration and quotation marks omitted) (quoting *Wilson*, 41 F.2d at 706). Simply put, a Defendant’s challenge to a jurisdictionally deficient removal order “is not a ‘collateral challenge’ to his deportation order, because there is no removal order to be collaterally attacked.” *Id.*

In the instant case, the Court need not resolve the question of whether the foregoing analysis is correct, because Defendant meets the requirements of 8 U.S.C. § 1326(d). The Court finds that the 2014 removal was “fundamentally unfair” under 8 U.S.C. § 1326(d)(3). First, because jurisdiction never vested in the Immigration Court, the 2014 removal violated Defendant’s due process rights. Courts in this circuit have held that when the Immigration Court enters a removal order without jurisdiction over a defendant, the Immigration Court violates the

defendant's due process rights. *See, e.g., United States v. Erazo-Diaz*, No. 18-CR-00311-TUC, 2018 WL 63222168, at *5 (D. Ariz. Dec. 4, 2018) ("The Court agrees that the order of removal is fundamentally unfair under § 1326(d)(3). Because it was entered without jurisdiction, it was a violation of Defendant's due process rights."); *see also United States v. Rodriguez-Rosa*, No. 18-CR-00079-MMD, 2018 WL 6635286, at *4 (D. Nev. Dec. 11, 2018) (finding fundamental unfairness where the immigration court did not have jurisdiction).

Second, in light of the defective NTA, Defendant was prejudiced because he was "removed when he should not have been." *See United States v. Aguilera-Rosa*, 769 F.3d 626, 630, 636 (9th Cir. 2014); *see also United States v. Camacho-Lopez*, 540 F.3d 928, 930 (9th Cir. 2006) ("Camacho was removed when he should not have been and clearly suffered prejudice."). The government attempts to distinguish the foregoing case law, and argues that the case law has "nothing to do with the content of an NTA." Opp'n at 14. However, the Ninth Circuit's holdings are readily applicable to the context of a jurisdictionally defective NTA. As the Ninth Circuit has explained, even if the Immigration Court would have otherwise been able to remove Defendant "through a formal removal proceeding" that was jurisdictionally sound, Defendant's "removal on illegitimate grounds is enough to show prejudice." *United States v. Ochoa-Oregel*, 904 F.3d 682, 686 (9th Cir. 2018). Having shown a due process violation and prejudice, the Court concludes that Defendant has met his burden to show "fundamental unfairness."

In the instant case, Defendant has demonstrated a violation of his due process rights. Accordingly, Defendant "need not show exhaustion of administrative remedies or that he was denied judicial review pursuant to § 1326(d)(1) and (2)." *Ramos-Urias*, 348 F. Supp. 3d at 1037; *see also Gutierrez-Ramirez*, 2019 WL 3346481, at *8 ("Because Defendant has demonstrated that his removal was fundamentally unfair, 'he need not show exhaustion of administrative remedies or that he was denied judicial review pursuant to § 1326(d)(1) and (2).'", *Lazaro v. Mukasey*, 527 F.3d 977, 980 (9th Cir. 2008) ("A petitioner is entitled to relief from a defective [Notice to Appear] if he 'show[s] that the Immigration Court lacked jurisdiction'" (citation omitted)); *United Farm Workers of Am., AFL-CIO v. Ariz. Agric. Emp't Relations Bd.*, 669 F.2d 1249, 1253 (9th

United States District Court
Northern District of California

Cir. 1982) (“Exhaustion of administrative remedies is not required where . . . the administrative proceedings themselves are void.”); *Reese Sales Co. v. Hardin*, 458 F.2d 183, 187 (9th Cir. 1972) (explaining that exhaustion of administrative remedies is not required where “the agency lacks power or jurisdiction to proceed”).

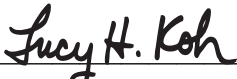
In sum, Defendant has shown that Defendant is entitled to relief. Defendant’s 2014 removal is void because the Immigration Court lacked jurisdiction over the removal proceedings. As the 2014 removal is void, the Court finds that the government cannot establish a predicate element—the prior removal or deportation of Defendant—of the sole offense in the Indictment. *See Raya-Vaca*, 771 F.3d at 1201. Accordingly, the Court GRANTS the motion to dismiss the Indictment with prejudice.

IV. CONCLUSION

For the foregoing reasons, the Court GRANTS Defendant’s motion to dismiss the Indictment as to the 2014 removal. The Indictment in the instant case is DISMISSED with prejudice.

IT IS SO ORDERED.

Dated: November 26, 2019



LUCY H. KOH
United States District Judge

United States District Court
Northern District of California

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

UNITED STATES OF AMERICA,
Plaintiff,
v.
ANTONIO ROSAS-RAMIREZ,
Defendant.

Case No. 18-CR-00053-LHK-1

**ORDER DENYING MOTION FOR
LEAVE TO FILE MOTION FOR
RECONSIDERATION**

Re: Dkt. No. 25

On February 4, 2019, the Court denied Defendant Antonio Rosas-Ramirez's ("Defendant") motion to dismiss Defendant's 8 U.S.C. § 1326 indictment. ECF No. 23 ("2/4/19 Order"). Specifically, Defendant brought a challenge to the immigration judge's jurisdiction over Defendant's 2014 removal proceedings based on *Pereira v. Sessions*, 138 S. Ct. 2105 (2018). This Court's 2/4/19 Order relied on the Ninth Circuit's January 28, 2019 decision in *Karingithi v. Whitaker*, 913 F.3d 1158 (9th Cir. 2019). In *Karingithi*, the Ninth Circuit held that an immigration judge had jurisdiction over removal proceedings even though the Notice to Appear lacked removal hearing date and time information. Thus, in the instant case, this Court found that the immigration judge had jurisdiction over the Defendant's 2014 removal proceedings, and therefore, Defendant's collateral attack failed. *See id.* Before the Court is Defendant's motion for leave to file a motion

1 for reconsideration. ECF No. 25 (“Mot.”). Having considered the Defendant’s motion, the relevant
2 law, and the record in this case, the Court DENIES Defendant’s motion for leave to file a motion
3 for reconsideration.

4 **I. BACKGROUND**

5 Defendant is a noncitizen who was previously ordered removed from the United States on
6 or about July 15, 1998, February 25, 2002, and March 1, 2014. ECF No. 1 (“Indictment.”). On or
7 about April 24, 2014, Defendant was found in the United States. *See id.* On February 8, 2018, a
8 grand jury in the Northern District of California returned an indictment, charging Defendant with
9 one count of a violation of 8 U.S.C. § 1326, Illegal Re-Entry Following Deportation. *See id.*

10 Defendant filed a motion to dismiss on December 5, 2019. ECF No. 14. The government
11 filed an opposition on January 16, 2019. ECF No. 19. Defendant filed a reply on January 23, 2019.
12 ECF No. 20. The government filed supplemental authority, specifically the Ninth Circuit’s
13 *Karingithi v. Whitaker* decision, on January 28, 2019. ECF No. 21. The United States also filed a
14 statement of recent decision, attaching the order of United States District Judge Beth Labson
15 Freeman denying a motion to dismiss, on January 29, 2019. ECF No. 22. The hearing on
16 Defendant’s motion to dismiss was set for February 6, 2019. *See* ECF No. 14.

17 On February 4, 2019, two days before the hearing was set for Defendant’s motion to
18 dismiss, the Court decided the motion on the papers and denied Defendant’s motion to dismiss
19 Defendant’s 8 U.S.C. § 1326 indictment (“February 4, 2019 Order”). *See* 2/4/19 Order.

20 On February 5, 2019, Defendant filed the instant motion for leave to file a motion for
21 reconsideration. *See* Mot. The government did not respond.

22 **II. DISCUSSION**

23 Defendant seeks reconsideration of this Court’s February 4, 2016 Order. *See* Mot. The
24 Criminal Local Rules indicate that “[t]he provisions of the Civil Local Rules of the Court shall
25 apply to criminal actions and proceedings, except where they may be inconsistent with these
26 criminal local rules.” Crim. L.R. 2-1. Under Civil Local Rule 7- 9(a), “[b]efore the entry of a
27 judgment adjudicating all of the claims and the rights and liabilities of all the parties in a case, any

1 party may make a motion before a Judge requesting that the Judge grant the party leave to file a
2 motion for reconsideration of any interlocutory order on any ground set forth in Civil L.R. 7-9
3 (b).” Thus, before Defendant may seek reconsideration of this Court’s February 4, 2019, the Court
4 must grant leave for Defendant to file a motion for reconsideration. The Court first addresses
5 whether Defendant has satisfied the requirements for granting leave to file a motion for
6 reconsideration. The Court then discusses whether, if leave were granted, Defendant has satisfied
7 the standard for a motion for reconsideration

8 **A. Leave to File a Motion for Reconsideration**

9 As noted above, to seek reconsideration of an interlocutory order, Defendant must obtain
10 leave under Civil Local Rule 7-9 on one of the grounds described in Civil Local Rule 7-9(b). Civil
11 Local Rule 7-9(b) only allows for reconsideration of an interlocutory order where:

- 12 (1) That at the time of the motion for leave, a material difference in fact or law exists
13 from that which was presented to the Court before entry of the interlocutory order
14 for which reconsideration is sought. The party also must show that in the exercise
15 of reasonable diligence the party applying for reconsideration did not know such
16 fact or law at the time of the interlocutory order; or
- 17 (2) The emergence of new material facts or a change of law occurring after the time
18 of such order; or
- 19 (3) A manifest failure by the Court to consider material facts or dispositive legal
20 arguments which were presented to the Court before such interlocutory order.

21 Civil L.R. 7-9(b).

22 Defendant argues that he satisfies the requirements of Rule 7-9(b) because the defense “has
23 exercised reasonable diligence under Civil L.R. 7-9(b)(1) in researching and briefing the
24 inapplicability of *Karingithi* since it was issued on January 28, 2019.” Mot. at 2. Defendant argues
25 that he intended to present arguments to the Court regarding the inapplicability of the Ninth
26 Circuit’s January 28, 2019 decision in *Karingithi* through written briefing on February 5, 2019 and
27 oral argument at the scheduled February 6, 2019 hearing. *Id.* Defendant takes issue with the fact
28 that “without prior notice to the parties, the Court issued its order on February 4, 2019,” before the
February 6, 2019 hearing. *Id.*

The Court finds that Defendant has not satisfied the requirements of Rule 7-9(b). As an

1 initial matter, the Court has discretion pursuant to Civil Local Rule 7-1(b) and Federal Rule of
 2 Civil Procedure 78(b) to determine a motion without oral argument. *See* Civil L.R. 7-9(b); *see also*
 3 Fed. R. Civ. P. 78(b). Therefore, the Court was permitted to decide the Defendant's motion on the
 4 papers. Moreover, while the motion was pending, the government filed a statement of recent
 5 decision presenting *Karingithi* to the Court on January 28, 2019, the day *Karingithi* was decided.
 6 ECF No. 22. At that point, Defendant could have filed a request to file a supplemental brief and
 7 informed the Court that Defendant would have liked to file his supplemental brief by February 5,
 8 2019. Instead, the Defendant remained silent on Monday, January 28, 2019; Tuesday, January 29,
 9 2019; Wednesday, January 30, 2019; Thursday, January 31, 2019; Friday, February 1, 2019;
 10 Saturday, February 2, 2019; Sunday, February 3, 2019; and Monday, February 4, 2019. The Court
 11 filed its 2/4/19 Order on Monday, February 4, 2019 at 3:09 p.m. ECF No. 23. Accordingly,
 12 because the Court had discretion to decide the motion on the papers pursuant to Civil Local Rule
 13 7-1(b) and Federal Rule of Civil Procedure 78(b), and because the Court considered *Karingithi* in
 14 its February 4, 2019 Order, the Court DENIES Defendant's motion for leave to file a motion for
 15 reconsideration.

16 **B. Motion for Reconsideration**

17 Even if the Court were to grant Defendant leave to file a motion for reconsideration, the
 18 Court would deny the motion for reconsideration. "[M]otions for reconsideration in criminal cases
 19 are governed by the rules that govern equivalent motions in civil proceedings." *United States v.*
 20 *Mendez*, 2008 WL 2561962, at *2 (C.D. Cal. June 25, 2008) (citing *United States v. Hector*, 368
 21 F. Supp. 2d 1060, 1063 (C.D. Cal. 2005), *rev'd on other grounds*, 474 F.3d 1150 (9th Cir. 2007)).
 22 In ruling on motions for reconsideration in criminal cases, courts have relied on the standards
 23 governing Rule 59(e) and Rule 60(b) of the Federal Rules of Civil Procedure. *See id.* (applying the
 24 standard governing Rule 60(b)); *Hector*, 368 F. Supp. 2d at 1063 (analyzing a reconsideration
 25 motion as a Rule 59(e) motion). The district court generally applies the same analysis under both
 26 rules, and its decision is reviewed for abuse of discretion. *See Fidelity Fed. Bank, FSB v. Durga*
 27 *Ma Corp.*, 387 F.3d 1021, 1023 (9th Cir. 2004) (discussing Rule 60(b)); *Fuller v. M.G. Jewelry*,

1 950 F.2d 1437, 1441 (9th Cir. 1991) (discussing Rule 59(e)).

2 Under Rule 59(e), “reconsideration is appropriate if the district court (1) is presented with
3 newly discovered evidence, (2) committed clear error or the initial decision was manifestly unjust,
4 or (3) if there is an intervening change in controlling law.” *Sch. Dist. No. 1J, Multnomah Cnty.,*
5 *Or. v. ACandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993) (citation omitted); *see Snider v. Greater*
6 *Nev. LLC*, 426 F. App’x 493, 495 (9th Cir. 2011). Under Rule 60(b), reconsideration is permitted
7 upon a showing of: “(1) mistake, inadvertence, surprise, or excusable neglect; (2) newly
8 discovered evidence that, with reasonable diligence, could not have been discovered in time to
9 move for a new trial under Rule 59(b); (3) fraud (whether previously called intrinsic or extrinsic),
10 misrepresentation, or misconduct by an opposing party; (4) the judgment is void; (5) the judgment
11 has been satisfied, released, or discharged; it is based on an earlier judgment that has been
12 reversed or vacated; or applying it prospectively is no longer equitable; or (6) any other reason that
13 justifies relief.” Fed. R. Civ. P. 60(b). Relief under the sixth category “requires a finding of
14 ‘extraordinary circumstances.’” *Backlund v. Barnhart*, 778 F.2d 1386, 1388 (9th Cir. 1985)
15 (quoting *McConnell v. MEBA Med. & Benefits Plan*, 759 F.2d 1401, 1407 (9th Cir. 1985)).

16 Defendant’s proposed motion for reconsideration raises several arguments for why the
17 Ninth Circuit’s *Karingithi* decision was wrongly decided. *See* Mot. at 2–14. Although the Ninth
18 Circuit panel may ultimately prove incorrect in its determination, “once a federal circuit court
19 issues a decision, the district courts within that circuit are bound to follow it and have no authority
20 to await a ruling by the Supreme Court before applying the circuit court’s decision as binding
21 authority.” *Yong v. I.N.S.*, 208 F.3d 1116, 1119 n.2 (9th Cir. 2000). Thus, the Court declines
22 Defendant’s invitation to second guess the Ninth Circuit’s *Karingithi* decision. Accordingly, the
23 Court DENIES Defendant’s motion for reconsideration.

24 **IT IS SO ORDERED.**

25 Dated: April 8, 2019

26 
27 LUCY H. KOH
United States District Judge

United States District Court
Northern District of California

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

UNITED STATES OF AMERICA,
Plaintiff,
v.
ANTONIO ROSAS-RAMIREZ,
Defendant.

Case No. 18-CR-00053-LHK

**ORDER DENYING MOTION TO
DISMISS INDICTMENT**

Re: Dkt. No. 13

Before the Court is Defendant Antonio Rosas-Ramirez's ("Defendant") motion to dismiss the indictment for illegal reentry following deportation in violation of 8 U.S.C. § 1326. ECF No. 13 ("Mot."). Relying on *Pereira v. Sessions*, 138 S. Ct. 2105 (2018), Defendant contends that the immigration judge who issued Defendant's 2014 removal order did not have jurisdiction to issue such an order because Defendant's Notice to Appear for his removal proceedings did not state a date, time, and place for the removal proceedings. *Id.* at 1. Having considered the filings of the parties, the relevant law, and the record in this case, the Court DENIES Defendant's motion to dismiss the indictment.

I. BACKGROUND

A. Factual Background

On February 13, 2014, Defendant was served with a Notice to Appear for removal proceedings under 8 U.S.C. § 1229. *See* Mot, Ex. A (“Notice to Appear”). The Notice to Appear set forth factual allegations against Defendant regarding his unlawful presence in the United States and his 1996 conviction for Trafficking/Selling a controlled substance, but did not state a date, time and place for his removal hearing. *Id.* Instead, the Notice stated that a date, time, and place were “to be set.” *Id.*

Five days later, on February 18, 2014, the Immigration Court sent a document entitled “Notice of Hearing in Removal Proceedings, which stated that Defendant’s hearing would take place on February 27, 2014, at 9:30 a.m., before the Immigration Court in San Francisco. *See* Mot., Ex. B (“Notice of Hearing”). The hearing did in fact take place on that date. *See* Mot. at 1. Defendant was present and assisted by an interpreter. *Id.* The immigration judge ordered Defendant removed to Mexico. *See* Mot., Ex. C (“Order of Removal.”).

B. Procedural History

On February 8, 2018, a grand jury in the Northern District of California returned an indictment, charging Defendant with one count of a violation of 8 U.S.C. § 1326, Illegal Re-Entry Following Deportation. ECF No. 1. Defendant filed the instant motion to dismiss on December 5, 2019. *See* Mot. The United States filed an opposition on January 16, 2019. ECF No. 19. Defendant filed a reply on January 23, 2019. ECF No. 20. The United States filed supplemental authority, specifically the Ninth Circuit’s *Karingithi v. Whitaker* decision, on January 28, 2019. ECF No. 21. The United States filed a statement of recent decision, attaching the order of United States District Judge Beth Labson Freeman denying a motion to dismiss similar to the instant motion, on January 29, 2019. ECF No. 22.

II. LEGAL STANDARD

A. Motion to Dismiss Indictment

Under Federal Rule of Criminal Procedure 12(b)(3)(B)(v), a defendant may move to dismiss an indictment on the ground that the indictment “fail[s] to state an offense.” In considering a motion to dismiss an indictment, a court must accept the allegations in the indictment as true and

1 “analyz[e] whether a cognizable offense has been charged.” *United States v. Boren*, 278 F.3d 911,
 2 914 (9th Cir. 2002). “In ruling on a pre-trial motion to dismiss an indictment for failure to state an
 3 offense, the district court is bound by the four corners of the indictment.” *Id.* A motion to dismiss
 4 an indictment can be determined before trial “if it involves questions of law rather than fact.”
 5 *United States v. Shortt Accountancy Corp.*, 785 F.2d 1448, 1452 (9th Cir.), *cert. denied*, 478 U.S.
 6 1007 (1986).

7 **B. Collateral Attack on a Deportation**

8 “For a defendant to be convicted of illegal reentry under 8 U.S.C. § 1326, the Government
 9 must establish that the defendant left the United States under order of exclusion, deportation, or
 10 removal, and then illegally reentered.” *United States v. Raya–Vaca*, 771 F.3d 1195, 1201 (9th Cir.
 11 2014) (internal quotation marks and citation omitted). “A defendant charged under § 1326 has a
 12 due process right to collaterally attack his removal order because the removal order serves as a
 13 predicate element of his conviction.” *Id.* (internal quotation marks and citation omitted).

14 To demonstrate that a prior deportation cannot serve as the basis of an indictment for
 15 illegal reentry, 8 U.S.C. § 1326(d) requires that a defendant “demonstrate that (1) he exhausted the
 16 administrative remedies available for seeking relief from the predicate removal order; (2) the
 17 deportation proceedings ‘improperly deprived [him] of the opportunity for judicial review’; and
 18 (3) the removal order was ‘fundamentally unfair.’” *Raya–Vaca*, 771 F.3d at 1201 (quoting 8
 19 U.S.C. § 1326(d)) (brackets in original). “To satisfy the third prong—that the order was
 20 fundamentally unfair—the defendant bears the burden of establishing both that the deportation
 21 proceeding violated his due process rights and that the violation caused prejudice.” *Id.* (internal
 22 quotation marks, citation, and brackets omitted).

23 **III. DISCUSSION**

24 Defendant filed his motion on December 5, 2018. *See* Mot. On January 28, 2019, the Ninth
 25 Circuit issued its ruling in *Karingithi v. Whitaker*, No. 16-70885, 2019 WL 333335 (9th Cir. Jan.
 26 28, 2019), in which the Ninth Circuit held that an immigration judge had jurisdiction over removal
 27 proceedings even though the Notice to Appear lacked a date and time for the removal proceedings.

1 Specifically, the Ninth Circuit held as follows.

2 First, the Immigration and Nationality Act (“INA”) regulations and not the INA statute
3 governed the requirements for a Notice of Appear and thus defined when the immigration judge’s
4 jurisdiction vests. *Id.* at *1 (citing 8 C.F.R. § 1003.13, 1003.14(a)). Under the relevant regulations,
5 “[j]urisdiction vests, and proceedings before an Immigration Judge commence, when a charging
6 document is filed with the Immigration Court by the Service.” 8 C.F.R. § 1003.14(a). A
7 “[c]harging document means the written instrument which initiates a proceeding before an
8 Immigration Judge,” and includes a “Notice to Appear.” 8 C.F.R. § 1003.13. Both the INA statute
9 and regulations define a “Notice to Appear.” The statute at 8 U.S.C. § 1229(a)(1)(G)(i) provides
10 that in removal proceedings, written notice referred to as a “Notice to Appear” shall be given to
11 the alien specifying, among other things, the “time and place at which the proceedings will be
12 held.” The regulation at 8 C.F.R. § 1003.15 provides that a Notice to Appear “must also include”
13 much of the same information as required by statute under 8 U.S.C. § 1229(a), except that the
14 requirement of the “time and place” of the removal proceeding is omitted. The Ninth Circuit in
15 *Karingithi* explained that because the regulations define when jurisdiction vests, the regulatory
16 definition for “Notice to Appear” also necessarily governs when a Notice to Appear is sufficient
17 for jurisdictional purposes. *Karingithi*, 2019 WL 333335, at *3. Therefore, the Ninth Circuit
18 explained that pursuant to the regulations, a Notice to Appear need not include time and date
19 information to vest jurisdiction with the immigration judge. *Id.*

20 Second, the Ninth Circuit found *Pereira* inapplicable to the issue regarding an immigration
21 judge’s jurisdiction in removal proceedings. *See id.* The Ninth Circuit explained that *Pereira* was
22 limited to the narrow context of the stop-time rule. *Id.* Moreover, the Ninth Circuit was
23 particularly persuaded by the fact that the stop-time rule at issue in *Pereira* concerned the stop-
24 time statute (8 U.S.C. § 1229b(d)(1)) that specifically cross-referenced 8 U.S.C. § 1229(a), the
25 statute defining a “Notice to Appear.” *See id.* By contrast, the regulation regarding an immigration
26 judge’s jurisdiction in removal proceedings does not cross-reference 8 U.S.C. § 1229(a), the
27 statute defining a “Notice to Appear.” As the Ninth Circuit stated, “[t]here is no ‘glue’ to bind §

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Northern District of California

1229(a) and the jurisdictional regulations [at issue here]: the regulations do not reference § 1229(a), which itself makes no mention of the IJ’s jurisdiction.” *Id.*

Therefore, applying the Ninth Circuit’s reasoning in *Karingithi*, the Court finds that in the instant case, Defendant’s Notice to Appear that lacked date, time, and place information was still sufficient to vest the immigration judge in Defendant’s underlying removal proceeding with jurisdiction. Thus, Defendant’s instant collateral attack fails.

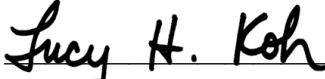
Further, the Court notes that like the petitioner in *Karingithi*, the instant Defendant also ultimately received actual notice of the hearing through the February 18, 2014 Notice of Hearing, and Defendant in fact attended his removal proceeding. *See Karingithi*, 2019 WL 333335, at *1; *see also* Notice of Hearing. Such actual notice defeats Defendant’s arguments regarding due process and prejudice.

IV. CONCLUSION

For the foregoing reasons, the Court DENIES Defendant’s motion to dismiss the indictment.

IT IS SO ORDERED.

Dated: February 4, 2019


LUCY H. KOH
United States District Judge

39 F.4th 1187
United States Court of Appeals, Ninth Circuit.

UNITED STATES of America, Plaintiff-Appellant,
v.
Juan Carlos BASTIDE-HERNANDEZ, aka Jesus
Chavez-Gongoria, aka Domingo Chavez-Lopez, aka
Francisco Soto Hernandez, Defendant-Appellee.

No. 19-30006
|
Argued and Submitted En Banc
March 22, 2022 Pasadena, California
|
Filed July 11, 2022

Synopsis

Background: Defendant, who had been charged with illegal reentry after removal, filed a motion to dismiss the indictment. The United States District Court for the Eastern District of Washington,  360 F.Supp.3d 1127, Stanley A. Bastian, J., dismissed the indictment. The United States appealed.

[Holding:] On rehearing en banc, the Court of Appeals, Owens, Circuit Judge, held that failure to include the date and time of removal hearing in notice to appear (NTA), which initiated immigration removal proceedings against defendant resulting in his eventual removal, did not deprive the immigration court of subject matter jurisdiction to effect the removal.

Reversed and remanded.

Friedland, Circuit Judge, filed an opinion concurring in judgment.

Collins, Circuit Judge, filed an opinion concurring in part and dissenting in part.

Opinion,  360 F.Supp.3d 1127, vacated.

Procedural Posture(s): Appellate Review; Pre-Trial Hearing Motion.

West Headnotes (5)

[1] Criminal Law Review De Novo

Court of Appeals reviews a district court's decision to dismiss a criminal indictment de novo.

2 Cases that cite this headnote

[2] Aliens, Immigration, and Citizenship Notice; order to show cause

Failure to include the date and time of removal hearing in notice to appear (NTA), which initiated immigration removal proceedings against defendant resulting in his eventual removal, did not deprive the immigration court of subject matter jurisdiction to effect the removal, and thus the entire immigration proceeding was not void ab initio, for the purpose of prosecution for defendant for illegal reentry after removal; regulation that purported to condition the "jurisdiction" of immigration courts upon the filing of a charging document, including NTAs, was a nonjurisdictional claim-processing rule that did not implicate the court's adjudicatory authority. Immigration and Nationality Act §§ 239, 276,  8 U.S.C.A. §§ 1229(a)(1)(G)(i),  1326(d); 8 C.F.R. § 1003.14(a).

74 Cases that cite this headnote

[3] Courts Jurisdiction of Cause of Action

Rules of subject matter jurisdiction are sui generis; they define the class of cases a court has the statutory or constitutional power to adjudicate.

1 Case that cites this headnote

[4] Criminal Law Waiver of objections
Criminal Law Jurisdiction

Rules of subject matter jurisdiction can never be waived or forfeited, courts are obligated to raise them sua sponte if the parties fail to do so, and if subject matter jurisdiction is found lacking at

any stage of litigation, the suit must be dismissed, sometimes at considerable cost to the parties and the court.

[5] **Indictments and Charging**

Instruments 🔑 Defects in charging instrument

Sentencing and Punishment 🔑 Factors enhancing sentence

Although a criminal indictment must, as a matter of constitutional law, charge any facts that enhance the defendant's sentence beyond the statutory maximum, omission of those facts, or any other defect in the indictment, will not oust the court's jurisdiction.

***1188** Appeal from the United States District Court for the Eastern District of Washington, [Stanley A. Bastian](#), Chief District Judge, Presiding, D.C. No. 1:18-cr-02050-SAB-1

Attorneys and Law Firms

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[Richard W. Mark](#), [Amer S. Ahmed](#), [Alexandra Perloff-Giles](#), and [Cassarrah M. Chu](#), Gibson Dunn & Crutcher LLP, New York, New York, for Amici Curiae Former Immigration Judges and Members of the Board of Immigration Appeals.

Before: [Mary H. Murguia](#), Chief Judge, and [M. Margaret McKeown](#), [Kim McLane Wardlaw](#), [Consuelo M. Callahan](#), [Morgan Christen](#), [John B. Owens](#), [Michelle T. Friedland](#), [Ryan D. Nelson](#), [Daniel P. Collins](#), [Danielle J. Forrest](#) and [Patrick J. Bumatay](#), Circuit Judges.

Opinion by Judge [Owens](#);

Concurrence by Judge [Friedland](#);

Partial Concurrence and Partial Dissent by Judge [Collins](#)

OPINION

OWENS, Circuit Judge:

The United States appeals from the district court's dismissal of an indictment charging Juan Carlos Bastide-Hernandez with illegal reentry after removal, in violation of [8 U.S.C. § 1326](#). According to the district court, defects in the notice to appear (“NTA”)—which initiated the immigration proceedings against Bastide-Hernandez resulting in his eventual removal from the United States—deprived the immigration court of subject matter jurisdiction to effect the removal in the first place, thereby rendering the entire immigration proceeding “void ab initio.”

Consistent with our own precedent and that of every other circuit to consider this issue, we hold that the failure of an NTA to include time and date information does not deprive the immigration court of subject matter jurisdiction, and thus Bastide-Hernandez's removal was not “void ab initio,” as the district court determined. We reverse the district court's dismissal and remand for further proceedings.

I. BACKGROUND AND PROCEDURAL HISTORY

Bastide-Hernandez, a citizen and native of Mexico, first entered the United States ***1189** in 1996 without inspection. In the years that followed, he was convicted of narcotics and firearms offenses, as well as assault with a deadly weapon.

Bastide-Hernandez has also had extensive contact with the immigration system. In April 2006, he was placed in removal proceedings by U.S. Immigration and Customs Enforcement (“ICE”). ICE sent NTAs to his residence and his immigration detention facility, but neither specified the date or time of the hearing. While ICE later sent a curative notice of hearing for June 14, 2006, via fax to an unidentified custodial officer at the detention facility, Bastide-Hernandez denies receiving the notice of hearing, and the record remains unclear if he did. Though we lack a transcript or recording of the June 14, 2006, hearing, on appeal, Bastide-Hernandez concedes he attended

the hearing via videoconference, and the immigration judge subsequently ordered his removal from the United States.

Despite his removal, Bastide-Hernandez returned to the United States. In 2018, a grand jury in the Eastern District of Washington returned an indictment for illegal re-entry after removal in violation of 8 U.S.C. § 1326(a).¹ Bastide-Hernandez moved to dismiss the indictment and argued that the NTA's omission of the date and time of his removal hearing meant that the immigration court lacked subject matter jurisdiction over his case. Because the immigration court lacked subject matter jurisdiction, the argument went, the removal order underlying the indictment was "void and without legal effect." And without the underlying removal, Bastide-Hernandez contended, the § 1326 indictment was necessarily defective.

The district court agreed with Bastide-Hernandez and dismissed the indictment. It treated the defective NTA as depriving the immigration court of subject matter jurisdiction and concluded that "[a]bsent jurisdiction, the removal order is void on its face and it is 'the duty of this and every other court to disregard it.'" The court explained that in addition to 8 U.S.C. § 1326(d), which is the statutory vehicle to collaterally attack the underlying deportation order,² "there remains a free-standing due process right to challenge a deportation order issued from a court that lacked subject-matter jurisdiction in a subsequent criminal case in which that order is used as an element, as the immigration court proceeding, its orders, and any protections it may have purported to offer were void ab initio."³

*1190 The United States appealed, and a three-judge panel held that the defective NTA did not deprive the immigration court of subject matter jurisdiction and remanded the case for further proceedings. *United States v. Bastide-Hernandez*, 3 F.4th 1193, 1196–98 (9th Cir.), vacated, 20 F.4th 1230 (9th Cir. 2021). Judge Milan Smith concurred in the judgment because Bastide-Hernandez failed to satisfy the § 1326(d) requirements, but read our decisions in *Karingithi v. Whitaker*, 913 F.3d 1158 (9th Cir. 2019), and *Aguilar Fermin v. Barr*, 958 F.3d 887 (9th Cir. 2020), to "compel the conclusion that the Immigration Court lacked jurisdiction to issue a removal order because the court never cured the omission of the date and time of the hearing" from the

NTA. *Bastide-Hernandez*, 3 F.4th at 1198 (M. Smith, J., concurring).

Our court voted to take this case en banc to examine what effect, if any, a defective NTA has on an immigration court's subject matter jurisdiction.

II. DISCUSSION

A. Standard of Review

[1] We review a district court's decision to dismiss a criminal indictment de novo, *United States v. W.R. Grace*, 504 F.3d 745, 751 (9th Cir. 2007), as we do its conclusion that a defect in removal proceedings precludes reliance upon the resulting order of removal in a subsequent prosecution under 8 U.S.C. § 1326, *United States v. Reyes-Bonilla*, 671 F.3d 1036, 1042 (9th Cir. 2012).

B. A Defective NTA Does Not Affect the Immigration Court's "Subject Matter Jurisdiction"

[2] [3] [4] "Jurisdiction," the Supreme Court has cautioned, "is a word of many, too many, meanings." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 90, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998). It has been invoked, often imprecisely, in reference to forms of relief a court is empowered to grant, see *id.*, duties a judge is authorized to perform, see, e.g., 8 C.F.R. § 1003.14(c), and even the territorial boundaries of a court's authority, see, e.g., 8 C.F.R. § 1003.19(c)(1). But rules of *subject matter* jurisdiction are sui generis. They define the class of cases a court has the "statutory or constitutional power to adjudicate." *Steel Co.*, 523 U.S. at 89, 118 S.Ct. 1003 (emphasis in original). Such rules can never be waived or forfeited, courts are obligated to raise them *sua sponte* if the parties fail to do so, and if subject matter jurisdiction is found lacking at any stage of litigation, the suit must be dismissed (sometimes at considerable cost to the parties and the court).⁴ See *Gonzalez v. Thaler*, 565 U.S. 134, 141, 132 S.Ct. 641, 181 L.Ed.2d 619 (2012). In short, the consequences of denominating any rule subject matter jurisdictional are "drastic." *Id.*

Thus, the Supreme Court has sought to impose "discipline" on the use of the term by distinguishing between rules properly

implicating a court's adjudicatory authority and mere claim-processing rules. *1191 *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 435, 131 S.Ct. 1197, 179 L.Ed.2d 159 (2011). Unlike rules of subject matter jurisdiction, claim-processing rules “seek to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times,” *id.*, and “may be forfeited if the party asserting the rule waits too long to raise the point,” *Manrique v. United States*, — U.S. —, 137 S.Ct. 1266, 1272, 197 L.Ed.2d 599 (2017) (internal quotation marks omitted). This is not to say the rules are optional. A timely objection to a claim-processing defect can in some cases warrant dismissal of the case. *See, e.g., id.* at 1274. But the Supreme Court “has long rejected the notion that all mandatory prescriptions, however emphatic, are properly typed jurisdictional.” *Gonzalez*, 565 U.S. at 146, 132 S.Ct. 641 (internal quotation marks and ellipsis omitted).

As relevant here, the Attorney General has promulgated a regulation purporting to condition the “jurisdiction” of immigration courts upon the filing of a charging document, including NTAs. 8 C.F.R. §§ 1003.13, 1003.14(a).⁵ And the question is whether this regulation goes to the subject matter jurisdiction of immigration courts, with all the procedural consequences attending the use of that label. We join the emerging consensus of our sister circuits in holding that it does not.⁶ Section 1003.14(a) is a claim-processing rule not implicating the court's adjudicatory authority, and we read its reference to “jurisdiction” in a purely colloquial sense.

The Fourth Circuit's reasoning in *United States v. Cortez* is especially persuasive. 930 F.3d 350 (4th Cir. 2019). Like Bastide-Hernandez, the defendant in that case was deported following immigration proceedings commenced with an undated NTA. *Id.* at 353–54. He was orally notified of the date and time of his removal hearing and attended it via videoconference, but he never challenged the immigration court's jurisdiction or appealed the order of removal. *Id.* In a subsequent prosecution for illegal reentry, he argued, for the first time, that the NTA was insufficient to vest subject matter jurisdiction in the immigration court under 8 C.F.R. § 1003.14(a) because it lacked date and time information, and thus the resulting order of removal was void. *Id.* at 354–55. After disputing (without conclusively overruling) the parties' assumption that subject matter jurisdiction can be

collaterally attacked in general or attacked without satisfying the 8 U.S.C. § 1326(d) requirements, *id.* at 356–58, the Fourth Circuit held that 8 C.F.R. § 1003.14(a) “is an internal docketing rule, not a limit on an immigration court's ‘jurisdiction’ or authority to act,” *id.* at 358.

As the Fourth Circuit explained, “the immigration courts' adjudicatory authority over removal proceedings comes not from the agency regulation codified at 8 C.F.R. § 1003.14(a), but from Congress: It is the [Immigration and Nationality Act (“INA”)] that explicitly and directly grants that authority.” *Id.* at 360 (internal quotation marks omitted); *see also* 8 U.S.C. § 1229a(a)(1) (“An immigration judge shall conduct proceedings for deciding the inadmissibility or deportability of [a noncitizen].”). Nothing in the INA, the Fourth *1192 Circuit observed, conditions an immigration court's adjudicatory authority “on compliance with rules governing notices to appear, whether statutory, *see* 8 U.S.C. § 1229(a) (statutory definition of notice to appear), or regulatory, *see* 8 C.F.R. § 1003.18(b).” *Cortez*, 930 F.3d at 360. Nor could that condition spring from 8 C.F.R. § 1003.14(a) because jurisdiction ordinarily operates as an external constraint on a court's authority to act. “To deem such a regulation jurisdictional would be to say that the Attorney General is in effect, ... *telling himself* what he may or may not do.” *Id.* (internal quotation marks omitted) (emphasis in original); *see also Garcia v. Lynch*, 786 F.3d 789, 797 n.2 (9th Cir. 2015) (Berzon, J., concurring); *accord Perez-Sanchez v. U.S. Att'y Gen.*, 935 F.3d 1148, 1155 (11th Cir. 2019); *Ortiz-Santiago v. Barr*, 924 F.3d 956, 963 (7th Cir. 2019).

We agree. Although the statutory definition of an NTA requires that it contain the date and time of the removal hearing, 8 U.S.C. § 1229(a)(1)(G)(i), this provision chiefly concerns the notice the government must provide noncitizens regarding their removal proceedings, not the authority of immigration courts to conduct those proceedings. *See Pereira v. Sessions*, — U.S. —, 138 S.Ct. 2105, 2115, 201 L.Ed.2d 433 (2018). Nowhere does the statute imply, much less “clearly state,” that its requirements are jurisdictional. *See Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 153, 133 S.Ct. 817, 184 L.Ed.2d 627 (2013) (“We inquire whether Congress has clearly stated

that the rule is jurisdictional; absent such a clear statement, we have cautioned, courts should treat the restriction as nonjurisdictional in character.” (internal quotation marks and alteration omitted)). And Department of Justice (“DOJ”) regulations cannot define the subject matter jurisdiction of immigration courts, because Congress gave the Attorney General “no authority to adopt rules of jurisdictional dimension.” *Union Pac. R.R. Co. v. Bhd. of Locomotive Eng'rs & Trainmen Gen. Comm. of Adjustment, Cent. Region*, 558 U.S. 67, 84, 130 S.Ct. 584, 175 L.Ed.2d 428 (2009). The only sensible way to read 8 C.F.R. § 1003.14(a), then, is as a docketing rule whose function extends no further than providing for “the orderly administration of proceedings, including deportation proceedings, before the immigration judges.” *Cortez*, 930 F.3d at 362.

This reading is consistent with the purpose and history of § 1003.14. Cf. *Gundy v. United States*, — U.S. —, 139 S. Ct. 2116, 2126, 204 L.Ed.2d 522 (2019) (plurality) (explaining “competing views” of statutory interpretation). The 1985 Notice of Proposed Rulemaking for § 1003.14's predecessor regulation, 8 C.F.R. § 3.14, notes that then-existing DOJ regulations permitted the Immigration and Naturalization Service (the predecessor of the Department of Homeland Security) to terminate removal proceedings at any time prior to the commencement of the hearing. *Aliens and Nationality; Rules of Procedure for Proceedings Before Immigration Judges*, 50 Fed. Reg. 51,693, 51,693 (Dec. 19, 1985). Thus, by fixing the point at which proceedings commence (and the immigration court's authority is invoked), the regulation “limit[ed] the Service's ability to cancel an Order to Show Cause,” and provided the Executive Office for Immigration Review “with the ability to utilize its resources efficiently by ensuring optimal scheduling of matters on its hearing calendars.” *Id.* Although the regulation and notice of proposed rulemaking speak of “jurisdiction,” clearly their focus was the internal, operational efficiency of the immigration review process, see *Cortez*, 930 F.3d at 361–62, a hallmark of a claim-processing rule unrelated to subject matter jurisdiction.

[5] This reading is also consistent with how we treat charging documents in other contexts. *Federal Rule of Civil Procedure* 3, for example, provides that “[a] civil action *1193 is commenced by filing a complaint with the court.” But the failure to comply with this rule is not a defect of jurisdictional proportion. See *Schlesinger v. Councilman*, 420 U.S. 738,

742 n.5, 95 S.Ct. 1300, 43 L.Ed.2d 591 (1975) (“[S]o long as the court's subject-matter jurisdiction actually existed and adequately appeared to exist from the papers filed, ... any defect in the manner in which the action was instituted and processed is not itself jurisdictional and does not prevent entry of a valid judgment.”). And although a criminal indictment must, as a matter of constitutional law, charge any facts that enhance the defendant's sentence beyond the statutory maximum, *Apprendi v. New Jersey*, 530 U.S. 466, 476, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), omission of those facts (or any other defect in the indictment) will not oust the court's jurisdiction. *United States v. Cotton*, 535 U.S. 625, 630–31, 122 S.Ct. 1781, 152 L.Ed.2d 860 (2002). If an indictment defect of constitutional magnitude does not affect an Article III court's subject matter jurisdiction, defects in an NTA likewise have no bearing on an immigration court's adjudicatory authority.

Our conclusion here is consistent with *Karingithi*, 913 F.3d 1158. At issue in *Karingithi* was whether the filing of an undated NTA, subsequently supplemented with a notice of hearing that specified the date and time of the removal hearing, was sufficient to vest jurisdiction in the immigration court. *Id.* at 1158. We answered in the affirmative. *Id.* at 1159–60. We acknowledged the Supreme Court's decision in *Pereira* that an undated NTA does not qualify as a notice to appear under 8 U.S.C. § 1229(a) for the purposes of the stop-time rule. *Id.* at 1161; see also *Pereira*, 138 S. Ct. at 2110; 8 U.S.C. § 1229b(d)(1). But we held that DOJ “regulations, not § 1229(a), define when [immigration court] jurisdiction vests,” and “[a] notice to appear need not include time and date information to satisfy this standard.” *Karingithi*, 913 F.3d at 1160.

In so holding, we borrowed the “jurisdiction vests” phraseology of 8 C.F.R. § 1003.14(a). But, like the regulation itself, this reference to “jurisdiction” was colloquial—that is to say, not denoting “subject matter jurisdiction” or the court's fundamental power to act.⁷ Thus, the import of our holding in this case, in concert with that in *Karingithi*, is that § 1003.14(a) is a nonjurisdictional claim-processing rule, and the filing of an undated NTA that is subsequently supplemented with a notice of hearing fully complies with the requirements of that regulation.⁸ See *id.* at 1162;

 *Aguilar Fermin*, 958 F.3d at 895 (extending  *Karingithi* to NTAs that fail to specify the location of the removal hearing).⁹

*1194 Because the district court erroneously concluded that the undated NTA precipitating Bastide-Hernandez's removal in 2006 was insufficient to vest subject matter jurisdiction in the immigration court and thus rendered its removal order “void ab initio,” we reverse and remand for further proceedings consistent with this opinion.¹⁰

REVERSED AND REMANDED.

FRIEDLAND, Circuit Judge, concurring in the judgment: I agree that we should reverse and remand for the district court to decide whether Bastide-Hernandez has satisfied all three requirements of  8 U.S.C. § 1326(d). See *United States v. Palomar-Santiago*, — U.S. —, 141 S. Ct. 1615, 1620–21, 209 L.Ed.2d 703 (2021).¹ I write separately, however, to urge the Government to adhere to the statutory requirements

for the notice to appear (“NTA”). See  8 U.S.C. § 1229(a)(1). Although our court today holds that service of an NTA is not required to confer jurisdiction on the immigration court, there are strong arguments for the contrary position. The Supreme Court may therefore hold that jurisdiction *1195 vests over removal proceedings only upon service of a single, statutorily compliant NTA. To minimize disruption to immigration proceedings if the Supreme Court so holds, and because providing the required information at the outset is a better practice in any event, I urge the Government not to interpret the majority opinion as a license for complacency.

In 1996, Congress made sweeping changes to the Immigration and Nationality Act (“INA”) in a law called the Illegal Immigration Reform and Immigrant Responsibility Act (“IIRIRA”). See *Pub. L. 104-208*, div. C, 110 Stat. 3009-546 (1996). Bastide-Hernandez makes a strong argument that a transitional provision in IIRIRA shows that Congress intended service of the NTA, as defined in IIRIRA, to be a jurisdictional requirement.

Among IIRIRA's many changes was a modification to how notice of charges of removability must be given to noncitizens. Prior to IIRIRA, the charging document used to begin removal proceedings was called an “order to show cause.”  8 U.S.C. § 1252b(a)(1) (1994); see  *Niz-Chavez*

v. Garland, — U.S. —, 141 S. Ct. 1474, 1484, 209 L.Ed.2d 433 (2021). IIRIRA dispensed with the order to show cause and defined a new charging document, called a “notice to appear,” in a newly enacted section 239 of the INA entitled “Initiation of removal proceedings.” IIRIRA sec. 304, § 239, 110 Stat. at 3009-587 to-589. As codified, that section provides in relevant part:

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: ... The time and place at which the proceedings will be held.

 8 U.S.C. § 1229(a)(1),  (a)(1)(G)(i).²

To guide the transition to IIRIRA, Congress included a provision explaining how the law would affect noncitizens already in exclusion or deportation proceedings. See IIRIRA sec. 309, 110 Stat. at 3009-625 to-627. In general, Congress instructed that IIRIRA's new provisions would not apply to cases already in progress, either at the agency level or on judicial review. *Id.* sec. 309(c)(1), 110 Stat. at 3009-625. But for certain in-progress proceedings in which an evidentiary hearing had not yet been held by the time IIRIRA went into effect, Congress gave the Attorney General discretion to proceed under the post-IIRIRA framework. *Id.* sec. 309(c)(2), 110 Stat. at 3009-626. If the Attorney General chose to invoke the new framework, Congress specified that “the notice of hearing provided to the alien under section 235 or 242(a) of [the INA] shall be valid as if provided under section 239 of [the INA] (as amended by this subtitle) to confer jurisdiction on the immigration judge.” IIRIRA sec. 309(c)(2), 110 Stat. at 3009-626 (emphasis added). As discussed, section 239 of the INA is the provision that defines the NTA, codified at  8 U.S.C. § 1229. Although  § 1229 does not itself use the word “jurisdiction,” the transition statute's use of the word in reference to the notice requirements of

§ 1229 suggests that Congress understood the NTA to have jurisdictional significance.

As Bastide-Hernandez also argues, Congress's reference to “jurisdiction” is consistent with the Executive Branch's apparent understanding, both before and after IIRIRA, that a charging document is a prerequisite to the vesting of jurisdiction in the immigration court. After IIRIRA, the Attorney General announced plans to replace the “Order to Show Cause, Form I-221” with the “Notice to Appear, Form I-862” as the charging document used to initiate removal proceedings. *Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures*, 62 Fed. Reg. 444, 449 (proposed January 3, 1997). In the same proposed rulemaking, the Attorney General reaffirmed a longstanding rule that “[j]urisdiction vests, and proceedings before an Immigration Judge commence, when a charging document is filed with the Immigration Court by the Service.” 62 Fed. Reg. at 456 (to be codified at 8 C.F.R. § 3.14).³ That language has since remained unchanged in a regulation entitled “Jurisdiction and commencement of proceedings,” now codified at 8 C.F.R. § 1003.14. The use of “and” in both the text and title of the regulation suggests that the Attorney General has understood the word “jurisdiction” to do work beyond indicating when proceedings commence—that is, beyond the work of a claim-processing rule that “promote[s] the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times,” *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 435, 131 S.Ct. 1197, 179 L.Ed.2d 159 (2011). That understanding of the regulation would be consistent with Congress's suggestion in IIRIRA that an NTA is what confers jurisdiction on the immigration court. *See* IIRIRA sec. 309(c) (2), 110 Stat. at 3009-626.

If service of an NTA under 8 U.S.C. § 1229 is a jurisdictional requirement, then the Supreme Court's decisions in *Pereira v. Sessions*, — U.S. —, 138 S. Ct. 2105, 201 L.Ed.2d 433 (2018), and *Niz-Chavez v. Garland*, — U.S. —, 141 S. Ct. 1474, 209 L.Ed.2d 433 (2021), would seem to compel the conclusion that a notice lacking the time or place of proceedings is inadequate to vest jurisdiction. The Supreme Court held in *Pereira* that “[a] notice that does not inform a noncitizen when and where to appear for removal proceedings is not a ‘notice to

appear under section 1229(a),’ ” 138 S. Ct. at 2110 (quoting 8 U.S.C. § 1229b(d)(1)), and clarified in *Niz-Chavez* that an NTA must be a single document containing all statutorily required information to trigger the stop-time rule for cancellation of removal, 141 S. Ct. at 1486. Given that the Supreme Court has on two occasions strictly enforced the statutory NTA requirements, and given that there is evidence that Congress intended an NTA to be necessary for jurisdiction over removal proceedings, the Supreme Court may eventually disagree with our court's holding today. To minimize the disruption that would follow from a holding that jurisdiction is lacking in proceedings that did not begin with a statutorily compliant NTA, I urge the Government to ensure that, going forward, all NTAs contain the information required by statute.

Even aside from minimizing potential disruption, there are good reasons for the Government to ensure that all putative NTAs contain the time and place of removal proceedings. The Supreme Court has observed that “[c]onveying such time-and-place information to a noncitizen is an essential function of a notice to appear, for without it, the Government cannot reasonably expect the noncitizen to appear for his removal proceedings.” *Pereira*, 138 S. Ct. at 2115. If the Government does not provide this information at the outset, noncitizens may be deprived of a meaningful opportunity to prepare for their hearings. For instance, the Government “could serve a document labeled ‘notice to appear’ without listing the time and location of the hearing and then, years down the line, provide that information a day before the removal hearing.” *Id.*

An amicus brief filed by former immigration judges elaborates on why it better serves clarity, efficiency, and due process to include the time and location of the hearing in an NTA in the first instance. As amici explain, incomplete initial notice documents create uncertainty both for noncitizens, who are left in the dark as to when and where a potentially life-changing proceeding will be held, and for immigration judges, who cannot be sure if a case can proceed. Amici also note that the Government's notice-by-installment practice creates additional fact-finding obligations for immigration judges, who may need to look to multiple documents to determine whether informational gaps in the initial notice have been filled. And amici caution that, because immigration judges are already overburdened and face pressure to complete cases, ambiguities about notice may

lead immigration judges to order noncitizens removed when they fail to show up at their hearings, even if the noncitizens never received notice of those hearings at all.

In recent years, the Government has failed to comply with the time-and-place requirements of 8 U.S.C. § 1229(a)(1)(G)(i). See *Pereira*, 138 S. Ct. at 2111 (quoting the Government's statement during oral argument in 2018 that "almost 100 percent" of "notices to appear omit the time and date of the proceeding over the last three years"). At oral argument before our court, the Government admitted that, despite progress in this area, some NTAs will continue to have a placeholder reading "to be determined" or "to be set" instead of the time and date of the hearing. This admission shows that, more than a year after the Supreme Court's warning in *Niz-Chavez*, the Government still is not "turn[ing] square corners" when it issues NTAs. 141 S. Ct. at 1486. I urge the Government to redouble its efforts to comply with the statute—and to take seriously the possibility that statutory noncompliance might have jurisdictional consequences.

COLLINS, Circuit Judge, concurring in part and dissenting in part:

I concur in the majority opinion in all respects except for footnote 10, which remands "for the district court to reconsider its § 1326(d) analysis" in light of *United States v. Palomar-Santiago*, — U.S. —, 141 S. Ct. 1615, 209 L.Ed.2d 703 (2021). For three reasons, I see no basis for us to order the district court to undertake the further § 1326(d) analysis that is sketched in that footnote.

First, having properly reversed the district court's dismissal of the indictment, which did not rest on an application of § 1326(d), there is no need for us to specify what particular issues should or should not be considered as the case proceeds on remand. With the indictment thus reinstated, the case will proceed in the ordinary course, and the parties on remand may raise whatever issues they think are appropriate. There simply is no need for us to instruct the district court to consider any particular issue.

*1198 Second, in addition to being unnecessary, the majority's instructions to reconsider the § 1326(d) issue violate the party presentation principle, under which "courts

normally decide only questions presented by the parties." See

United States v. Sineneng-Smith, — U.S. —, 140 S. Ct. 1575, 1579, 206 L.Ed.2d 866 (2020) (simplified); see

also *id.* ("[A]s a general rule, our system is designed around the premise that parties represented by competent counsel know what is best for them, and are responsible for advancing the facts and argument entitling them to relief.") (simplified). The majority contravenes this principle by instructing the district court on remand to consider contentions that Bastide-Hernandez has never made and, indeed, has explicitly disavowed.

As reflected in his answering brief, Bastide-Hernandez's position throughout this appeal has been that, if the immigration court *lacked* subject matter jurisdiction when his initial removal order was issued in 2006, then he "*did not need to satisfy* § 1326(d)'s requirements because the underlying removal order supporting the charge was issued *ultra vires*" (emphasis added). Similarly, when asked to file a supplemental brief in this court specifically addressing the impact of *Palomar-Santiago*, Bastide-Hernandez reiterated that the decision did not affect his jurisdictional objections, "which can never be waived or forfeited," and that the decision therefore "has no bearing or impact on this appeal whatsoever." Notably, in that brief, Bastide-Hernandez alluded to a *different* potential ground for challenging his 2006 removal order under § 1326(d)—*viz.*, whether his appeal waiver at his 2006 hearing was knowingly and intelligently made—but he noted that the "question of the validity of his appeal waiver was not raised in the district court" and therefore was not at issue in this appeal.

In short, Bastide-Hernandez has never contended in this court that, if the immigration court *had* subject matter jurisdiction, he nonetheless could satisfy the requirements for asserting a collateral challenge under § 1326(d) based on non-jurisdictional defects in the underlying Notice to Appear ("NTA"). Nonetheless, the majority inexplicably remands with instructions to consider whether those non-jurisdictional defects in the NTA could give rise to a challenge under § 1326(d) or whether Bastide-Hernandez "forfeited his claim-processing rights" concerning such defects. See Op. at 1194 n.10.

The majority's remand instructions are all the more puzzling given the explicit position that Bastide-Hernandez's counsel

took when asked about § 1326(d) at oral argument. Counsel affirmatively stated that no § 1326(d) inquiry on remand was warranted if we were to reject his argument that the NTA's defects deprived the immigration court of subject matter jurisdiction. Specifically, when asked whether, if Bastide-Hernandez were to lose on the jurisdictional issue, "there's no remand for § 1326(d)," counsel responded as follows:

Counsel: "That's correct. That is my position. If you say that I do not win on the jurisdiction issue, remand for § 1326(d) is not necessary. Again, because you have already held that I lose on my substantive argument."

Oral Argument at 56:39, *United States v. Bastide-Hernandez*, available at <<https://www.ca9.uscourts.gov/media/video/20220322/19-30006/>>. Instead, as counsel explained, a remand to consider the § 1326(d) factors was necessary only if he *prevailed* on his jurisdictional argument:

Counsel: "[I]f we lose on the merits it doesn't matter whether we exhausted our remedies.^[1] It doesn't matter if we *1199 satisfied § 1326(d) if we can't satisfy the substance of the argument."

...

Counsel: "I think if you say I lose on [the] substance, we go back to the district court. *If I win on [the] substance*, but *Palomar-Santiago* applies we still should go back to the district court to address § 1326(d)."

Id. at 55:38, 57:42 (emphasis added).

In nonetheless claiming that Bastide-Hernandez's counsel was unclear on this score, the majority relies on a quotation that it improperly takes out of context, thereby distorting the meaning of what counsel said. *See* Op. at 1194 n.10. Counsel's full statement was:

Counsel: "*Palomar-Santiago* and [§] 1326(d) do not provide a barrier to relief *when you're challenging subject matter jurisdiction* and authority of an immigration court, but at worst, this panel must remand to the district court because Mr. Bastide-Hernandez was not given an opportunity to present evidence regarding [§] 1326(d) because that was not at issue before the district court *because the district court excused him from proving that.*"

Oral Argument at 30:07 (emphasis added). In context, it is clear that counsel was addressing the impact of *Palomar-Santiago* on the district court's holding that a jurisdictional challenge was excused from satisfying the requirements of § 1326(d). Counsel's argument was that if we *agree* with his contention that the defects in the NTA deprived the immigration court of jurisdiction, then either (1) *Palomar-Santiago* and § 1326(d) would "not provide a barrier to relief" because the district court *properly* excused compliance with § 1326(d); or (2) "at worst," *Palomar-Santiago* would require remand for application of § 1326(d). Counsel's point is exactly the same as what he later stated at argument, as quoted above: "*If I win on [the] substance*, but *Palomar-Santiago* applies we still should go back to the district court to address § 1326(d)." Oral Argument at 57:42 (emphasis added). At no point did Bastide-Hernandez or his counsel claim—either in his briefs or at oral argument—that remand for application of § 1326(d) would be warranted if he *lost* his jurisdictional argument.

Thus, Bastide-Hernandez himself has expressly disclaimed the need for any further § 1326(d) analysis *if* we rule against him on the jurisdictional issue. We have now ruled against him on that jurisdictional issue—correctly, in my view. Although Bastide-Hernandez has not asked us in that circumstance to require a reconsideration of the § 1326(d) factors on remand, and has instead affirmatively stated that such an analysis is unwarranted, the majority nonetheless instructs the district court to go ahead and reconsider the very issue that Bastide-Hernandez has consciously and affirmatively waived. That is improper. *See* *Sineneng-Smith*, 140 S. Ct. at 1579.²

Third, the particular issues that the majority conjures up for remand are both irrelevant and meritless.

Having correctly recast the NTA's defects as violations of claim-processing rules, the majority *sua sponte* instructs the district court to conduct a new § 1326(d) analysis that addresses two specific issues: (1) whether Bastide-Hernandez "forfeited his claim-processing rights"; *1200 and (2) whether any such forfeiture "is affected by whether he received a notice of hearing." *See* Op. at 1194 n.10. But as applied to this case, the majority's two issues

concerning forfeiture of claims-processing objections are simply irrelevant, because those non-jurisdictional objections (even if preserved) could not possibly contribute to making the three-prong showing that § 1326(d) requires, as construed in *Palomar-Santiago*. Given that Bastide-Hernandez *did* appear at his immigration court hearing (despite the NTA's failure to include date and time information), there is no plausible sense in which those NTA's *date-and-time defects* could be said to have: (1) rendered an appeal to the BIA unavailable, *see* 8 U.S.C. § 1326(d) (1) (requiring exhaustion only of "available" administrative remedies); *cf.* *Palomar-Santiago*, 141 S. Ct. at 1621; (2) "deprived" him "of the opportunity of judicial review," *id.* § 1326(d)(2); and (3) prejudiced him, much less rendered his proceedings "fundamentally unfair," *id.* § 1326(d)(3); *see also* *United States v. Barajas-Alvarado*, 655 F.3d 1077, 1085 (9th Cir. 2011) (explaining that § 1326(d)(3) can be satisfied by showing that "the deportation proceeding violated the alien's due process rights and the alien suffered prejudice as a result").

Moreover, the majority's two forfeiture issues both lack any plausible merit. Bastide-Hernandez plainly forfeited any objection to the NTA's non-jurisdictional defects by failing

to show that he raised any such objection either during his 2006 immigration proceedings or in the multiple subsequent removal proceedings that were based on the 2006 removal order (including at least one in which he was represented by counsel). *See, e.g.,* *Manrique v. United States*, — U.S. —, 137 S. Ct. 1266, 1272, 197 L.Ed.2d 599 (2017) ("Unlike jurisdictional rules, mandatory claim-processing rules may be forfeited if the party asserting the rule waits too long to raise the point."). And whether Bastide-Hernandez received a written notice of hearing announcing the date and time of his 2006 removal hearing has no bearing on whether he did or did not forfeit his non-jurisdictional objections to the NTA at that hearing.

I am at a loss to understand why the majority, after correctly resolving the main issue on appeal, sees fit to remand with instructions to consider irrelevant and meritless questions concerning an issue that Bastide-Hernandez not only has declined to raise, but has affirmatively forsworn. Accordingly, I respectfully dissent from footnote 10, but I otherwise concur in the majority opinion.

All Citations

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Footnotes

1 § 1326(a) requires the government to prove: (1) the defendant was removed from the United States; (2) "thereafter the defendant knowingly and voluntarily reentered 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 (3) "the defendant was [a noncitizen] at the time of reentry." Ninth Circuit Model Criminal Jury Instructions § 7.6 (2022).

2 § 1326(d) provides:

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

- (1) the [noncitizen] exhausted any administrative remedies that may have been available to seek relief against the order;
- (2) the deportation proceedings at which the order was issued improperly deprived the [noncitizen] of the opportunity for judicial review; and

(3) the entry of the order was fundamentally unfair.

- 3 In a footnote, the district court explained that if it “were to apply the 8 U.S.C. § 1326(d) factors, it would likely find them met” in part because the 2006 removal order was “fundamentally unfair.”
- 4 Less clear, however, is whether subject matter jurisdiction can be attacked collaterally. See *Kontrick v. Ryan*, 540 U.S. 443, 455 n.9, 124 S.Ct. 906, 157 L.Ed.2d 867 (2004) (noting, as dictum, that subject matter jurisdiction “may not be attacked collaterally”); *United States v. Cortez*, 930 F.3d 350, 357 (4th Cir. 2019) (explaining that “the interest in the finality of judgments is sufficiently strong” that a collateral attack on subject matter jurisdiction will be permitted “only in exceptional circumstances”). For the purposes of this opinion, we assume that it can, though we do not decide this issue.
- 5 8 C.F.R. § 1003.14(a) provides, in part, “Jurisdiction vests, and proceedings before an Immigration Judge commence, when a charging document is filed with the Immigration Court by the Service.”
- 6 See *Lopez-Munoz v. Barr*, 941 F.3d 1013, 1016 (10th Cir. 2019); *Perez-Sanchez v. U.S. Att’y Gen.*, 935 F.3d 1148, 1150 (11th Cir. 2019); *Pierre-Paul v. Barr*, 930 F.3d 684, 691–93 (5th Cir. 2019), *abrogated in part on other grounds by* *Niz-Chavez v. Garland*, — U.S. —, 141 S. Ct. 1474, 209 L.Ed.2d 433 (2021); *United States v. Cortez*, 930 F.3d 350, 358–62 (4th Cir. 2019); *Ortiz-Santiago v. Barr*, 924 F.3d 956, 962–64 (7th Cir. 2019).
- 7 In the wake of *Karingithi*, some practitioners interpreted its references to “jurisdiction” as applying to the immigration court’s subject matter jurisdiction, and some case law can be read to suggest that this is the correct reading. See, e.g., *Cortes-Maldonado v. Barr*, 978 F.3d 643, 646 n.2 (9th Cir. 2020); *Aguilar Fermin v. Barr*, 958 F.3d 887, 891–95 (9th Cir. 2020); *United States v. Gomez*, 499 F. Supp. 3d 680, 685–88 (N.D. Cal. 2020); *United States v. Martinez-Gonzalez*, 417 F. Supp. 3d 1349, 1351–53 (E.D. Wash. 2019), *appeal voluntarily dismissed*, No. 19-30252 (9th Cir. Feb. 10, 2020). To the extent that courts or practitioners have read *Karingithi* as holding that the Attorney General’s regulations govern the immigration court’s subject matter jurisdiction, today we clarify that this is not the law in the Ninth Circuit.
- 8 To be clear, *Karingithi* did not address whether a timely notice of hearing supplying time and date information missing from the NTA was *required* to comply with § 1003.14(a) and neither do we. 913 F.3d at 1162.
- 9 After *Niz-Chavez*, the information required in an NTA under § 1229(a) must appear in a single document to trigger the stop-time rule. 141 S. Ct. at 1480. But that decision did not concern the docketing procedure set forth in 8 C.F.R. § 1003.14(a). Thus, while the supplement of a notice of hearing would not cure any NTA deficiencies under § 1229(a), we continue to hold that it suffices for purposes of § 1003.14(a). See *Karingithi*, 913 F.3d at 1161 (noting that the definition of “‘notice to appear under section 1229(a)’ does not govern the meaning of ‘notice to appear’ under an unrelated regulatory provision”).
- 10 The district court assumed that “a challenge to the immigration court’s jurisdiction need not comply with § 1326(d)’s limitations on collateral attacks.” But the court did not have the benefit of the Supreme Court’s recent decision in *United States v. Palomar-Santiago*, — U.S. —, 141 S. Ct. 1615, 209 L.Ed.2d 703 (2021). We

remand for the district court to reconsider its § 1326(d) analysis in light of that decision. And at that time, counsel for Bastide-Hernandez can unequivocally state whether he believes § 1326(d) relief is available. We do not interpret counsel's statements at oral argument as definitively as the partial dissent does. *Compare* Oral Argument at 56:47–56:52 (“If you say I do not win on the jurisdiction issue, remand for 1326(d) is not necessary.”), *with* Oral Argument at 30:18–30:27 (“[A]t worst, this panel must remand to the district court because Mr. Bastide-Hernandez was not given an opportunity to present evidence regarding 1326(d)”).

We also leave it to the district court to determine on remand whether Bastide-Hernandez forfeited his claim-processing rights by failing to raise them during his 2006 immigration proceedings, and if forfeiture is affected by whether he received a notice of hearing.

1 I read § 1326(d) to apply to *any* collateral attack on an underlying removal order that is raised during a prosecution for illegal reentry—regardless of whether that collateral attack raises a jurisdictional flaw. See *Palomar-Santiago*, 141 S. Ct. at 1620 (holding that the statute “provides that defendants charged with unlawful reentry ‘may not’ challenge their underlying removal orders ‘unless’ they ‘demonstrat[e]’ that three conditions are met” (alteration in original) (quoting 8 U.S.C. § 1326(d))). Accordingly, I believe a remand for consideration of the § 1326(d) factors would be necessary even if the majority were holding that defects in the notice to appear deprived the immigration court of jurisdiction over Bastide-Hernandez’s original removal proceeding. An absence of jurisdiction in the underlying removal proceeding would, at most, satisfy the § 1326(d)(3) requirement of fundamental unfairness—the requirements of § 1326(d)(1) (exhaustion of available administrative remedies) and § 1326(d)(2) (lack of opportunity for judicial review) would still need to be satisfied for a collateral attack to succeed. And although the majority rejects Bastide-Hernandez’s theory that defects in the notice to appear deprived the immigration court of jurisdiction, Bastide-Hernandez is not precluded from prevailing on remand by arguing that those defects are claim-processing violations (or, for that matter, by raising other challenges to his original removal proceeding, provided those challenges are not waived)—as long as he can meet the requirements of § 1326(d). Because the district court made no factual findings as to when Bastide-Hernandez learned of his hearing, whether and how he participated in the hearing, what transpired during the hearing, or whether he knowingly waived his right to appeal, we cannot conduct the § 1326(d) analysis on the record before us.

2 § 1229a provides that “[a]n immigration judge shall conduct proceedings for deciding the inadmissibility or deportability of an alien.” 8 U.S.C. § 1229a(1).

3 The regulations first used a version of this language in 1985. *Aliens and Nationality; Rules of Procedure for Proceedings Before Immigration Judges*, 50 Fed. Reg. 51,693, 51,697 (Dec. 19, 1985) (proposed rule) (“Jurisdiction vests and proceedings before an Immigration Judge commence when a charging document is filed with the Office of the Immigration Judge.”). In 1987, in response to criticism that the wording was “not detailed enough to cover all situations,” the Attorney General expressed that the rule was “a simple, direct statement of jurisdiction” but added an exception to exclude bond proceedings. *Aliens and Nationality; Rules of Procedure for Proceedings Before Immigration Judges*, 52 Fed. Reg. 2931, 2932, 2937 (Jan. 29, 1987) (final rule). In these regulations, “the Service” refers to the Immigration and Naturalization Service, the predecessor of the Department of Homeland Security.

1 As the majority notes, see Op. at 1189 n.2, exhaustion of administrative remedies is one of the three factors enumerated in § 1326(d).

- 2 In defending its remand, the majority ignores every point made in this dissent other than this review of counsel's comments at oral argument. See Op. at 1194 n.10. But even if the majority were correct about counsel's comments, it does not address the multiple other reasons why we should not give specific instructions to reconsider the  § 1326(d) issue on remand.