

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

UNITED STATES

CRIMINAL ACTION

v.

MARDIN GEOVANY GAMEZ

NO. 19-2

DuBois, J.

March 28, 2019

MEMORANDUM

I. INTRODUCTION

Defendant Mardin Geovany Gamez moves to dismiss the Indictment in which he is charged with one count of reentry after deportation in violation of 8 U.S.C. § 1326(a) and (b)(1). He contends that dismissal is warranted because the government cannot prove an essential element of § 1326—that he was removed from the United States. Specifically, defendant argues that, under the Supreme Court decision in *Pereira v. Sessions*, 138 S. Ct. 2105, 2107 (U.S. 2018), this Court should determine that the removal order upon which the § 1326 charge relies was invalid because the immigration judge did not have jurisdiction to issue the removal order. He also claims that dismissal of the removal order is warranted because its issuance did not comport with due process. For the reasons that follow, defendant’s Motion to Dismiss the Indictment is denied.

II. BACKGROUND

In November 2008, the Department of Homeland Security served by regular mail a Notice to Appear for removal proceedings on defendant, a citizen of Honduras. Def.’s Mot. Dismiss Indictment (“Def.’s Mot.”) Ex. C.; Gov’t’s Resp. Opp. Def.’s Mot. To Dismiss Indictment (“Gov’t’s Resp.”) Ex. 1. The Notice to Appear did not specify the date or time of the hearing. *Id.* On January 8, 2009, a Notice of Hearing was mailed to defendant; it specified that

the removal hearing was scheduled for April 27, 2009, at 12:30 p.m. Def.'s Mot. Ex. E; Govt's Resp. Ex. 2. Defendant did not appear at the April 27, 2009 hearing, and the immigration judge, David Anderson, issued an *in absentia* removal order on that same date ("underlying removal order"). Def.'s Mot. Ex. F; Govt's Resp. Ex. 3.

On October 26, 2009, after retaining an attorney, defendant filed a Motion to Reopen Inabsentia [sic] Orders [sic] and Request for Automatic Stay of Removal ("Motion to Reopen and Request for Automatic Stay"). Def.'s Mot. Ex. G.; Govt's Resp. Ex. 4. In those papers, defendant argued that the removal order should be rescinded because his failure to appear at the hearing resulted from the "exceptional circumstances" of being "under constructive custody because he was ordered to attend [a] drug rehabilitation program the same day and time he was ordered to report to his [April 27, 2009] immigration hearing." *Id.* Defendant attached a declaration to his Motion to Reopen and Request for Automatic Stay in which he stated under penalty of perjury that "[t]he day I had a court hearing in Immigration Court I had a mandated appointment with the drug rehabilitation center," and that "I reported the next day to court in the hopes of seeing the immigration judge[.]" *Id.*

By Order dated December 23, 2009, Judge Anderson denied defendant's Motion to Reopen and Request for Automatic Stay. Def.'s Mot. Ex. I; Govt's Mot. Ex. 6. Defendant was removed from the United States on or about March 25, 2010. Indictment 1. He re-entered the United States several times thereafter and was subsequently removed on the basis of the underlying removal order on or about May 20, 2010, December 16, 2010, and October 17, 2012. *Id.*

On or about November 30, 2018, defendant was found by government officials in Pennsylvania. *Id.* The instant Indictment, charging one count of reentry after deportation in

violation of 8 U.S.C. § 1326(a) and (b)(1), was filed on January 3, 2019. *Id.* On January 31, 2019, defendant filed a Motion To Dismiss the Indictment. The government responded on March 4, 2019. Oral argument on the Motion was held on March 7, 2019. The Motion is ripe for decision.

III. LEGAL STANDARD

Under Federal Rule of Criminal Procedure 12(b)(1), a defendant “may raise by pretrial motion any defense . . . that the court can determine without a trial on the merits.” “Dismissal of a criminal indictment is authorized if its allegations are not sufficient to charge an offense.” *United States v. Sullivan*, No. 00-695, 2002 WL 31819611, at *2 (E.D. Pa. Dec. 12, 2002). In evaluating a motion to dismiss an indictment, a district court “accepts as true the factual allegations set forth in the indictment.” *United States v. Besmajian*, 910 F.2d 1153, 1154 (3d Cir. 1990). “A district court may consider a pretrial motion to dismiss an indictment where the government does not dispute the ability of the court to reach the motion and proffers, stipulates, or otherwise does not dispute the pertinent facts.” *United States v. Gomez-Ramirez*, No. 18-10122, 2019 WL 1260517, at *2 (D. Mass. Mar. 19, 2019) (quoting *United States v. Musso*, 914 F.3d 26, 29–30 (1st Cir. 2019)).

IV. DISCUSSION

a. Jurisdiction over 2009 Removal Proceedings

Defendant contends that Judge Anderson was never vested with statutory jurisdiction over defendant’s 2009 removal proceedings and consequently, the underlying removal order was invalid. Def.’s Mot. 6. Defendant relies heavily on the recent Supreme Court decision in *Pereira v. Sessions*, 138 S. Ct. 2105 (U.S. 2018), for the proposition that when a Notice to Appear does not specify the time and place of proceedings, it is statutorily defective. Def.’s Mot.

8. Because defendant's Notice to Appear did not specify the date and time, defendant argues, Judge Anderson lacked jurisdiction over the removal proceedings. *Id.* 8–9. For the reasons that follow, the Court concludes that Judge Anderson had jurisdiction to issue the underlying removal order.

In *Pereira*, the Supreme Court addressed a narrow question: “[d]oes a ‘notice to appear’ that does not specify the ‘time and place at which the proceedings will be held,’ as required by § 1229(a)(1)(G)(i), trigger the stop-time rule?”¹ 138 S. Ct. at 2113. In that context, the Supreme Court ruled that “a notice that does not specify when and where to appear for a removal proceeding is not a ‘notice to appear’ that triggers the stop-time rule.” *Id.* at 2115.

The Supreme Court decision in *Pereira* has led to a proliferation of many motions to dismiss similar to defendant's. District courts across the country are divided over how to apply *Pereira* to the issue of jurisdiction over removal proceedings. See *United States of Am. v. Antonio De Jesus Valdez Rojas*, No. 18-700, 2019 WL 1244186, at *1 n.1 (S.D. Tex. Mar. 18, 2019) (collecting cases). This Court is aware of only one decision in this district. In that case, Judge Robreno held that *Pereira* “was inapposite to” the Motion to Dismiss the Indictment brought under § 1326 because *Pereira* “was limited to a narrow question of whether a [Notice to Appear] that did not provide the time and place of the removal hearing triggered the so-called ‘stop-time rule[.]’” *United States v. Jimenez-Diaz*, No. 18-486, (E.D. Pa. Feb. 13, 2019) (order denying Motion to Dismiss Indictment).

In a recent opinion, the Third Circuit rejected a challenge to an immigration judge's jurisdiction based on a notice that failed to specify the date and time of a removal hearing. See *Cuellar Manzano v. Attorney Gen. United States*, No. 18-1939, 2019 WL 1313401, at *4 (3d Cir.

¹ The “stop-time” rule provides that the period of continuous physical presence necessary to qualify for cancellation of removal is “deemed to end . . . when the alien is served a notice to appear under section 1229(a).” 8 U.S.C. § 1229b(d)(1).

Mar. 22, 2019) (non-precedential).² That Court “decline[d] the invitation to assess the impact of *Pereira*, other than to note the Supreme Court’s decision was a ‘narrow’ one, addressing what information must be contained in a notice to appear in order to trigger the “stop-time” rule applicable when a petitioner seeks cancellation of removal pursuant to 8 U.S.C. § 1229b[.]” *Id.* The *Cuellar Manzano* Court distinguished *Pereira* because *Pereira* addressed “an issue far afield” from those raised by the jurisdictional challenge. *Id.*

The other Circuit Courts to have considered this question have all determined that *Pereira* does not apply to the regulations governing an immigration judge’s jurisdiction. *See Karingithi v. Whitaker*, 913 F.3d 1158, 1161 (9th Cir. 2019); *Santos-Santos v. Barr*, 917 F.3d 486, 491 (6th Cir. 2019); *United States v. Perez-Arellano*, No. 18-4301, 2018 WL 6617703, at *2 (4th Cir. Dec. 17, 2018); *Hernandez-Perez v. Whitaker*, 911 F.3d 305, 310 (6th Cir. 2018).

As defendant acknowledged during oral argument, “the *Pereira* Court did not reach the issue of jurisdiction.” Hr’g Tr. 49:6–7, March 7, 2019; *see also Karingithi v. Whitaker*, 913 F.3d 1158, 1161 (9th Cir. 2019) (“*Pereira* simply has no application here. The Court never references 8 C.F.R. §§ 1003.13, 1003.14, or 1003.15, nor does the word “jurisdiction” appear in the majority opinion.”). *Pereira* involved the same purportedly jurisdiction-stripping defect—a Notice to Appear that “failed to specify the date and time of *Pereira*’s removal proceedings.” *Pereira*, 138 S. Ct. at 2113. Had the Supreme Court determined that the immigration judge did not have jurisdiction over *Pereira*’s removal proceedings, it was obligated to consider the issue *sua sponte*, and it did not do so. *See Gonzalez v. Thaler*, 565 U.S. 134, 141 (2012) (“[C]ourts are obligated to consider *sua sponte* issues [regarding subject-matter jurisdiction] that the parties have disclaimed or have not presented.”). Significantly, “the [*Pereira*] Court took up, decided,

² Although not binding, the Court finds this opinion instructive.

and remanded *Pereira* without even hinting at the possibility of a jurisdictional flaw.”

Hernandez-Perez v. Whitaker, 911 F.3d 305, 314 (6th Cir. 2018).

Nevertheless, defendant urges the Court to extend *Pereira*’s “logic and rationale” to this case. Hr’g Tr. 31:12–13, 20–22, March 7, 2019. He argues that § 1229(a)—which lists requirements for the contents of a notice to appear—“doesn’t only apply in a stop time context; 1229(a) applies in any context when immigration proceedings are commenced against an immigrant.” *Id.*; *see also* Def.’s Mot. 7.

The problem with defendant’s argument is that § 1229(a) does not address jurisdiction of the immigration court. Section 1229a(a) directs that “[a]n immigration judge shall conduct proceedings for deciding the inadmissibility or deportability of an alien[.]” but does not address jurisdictional prerequisites. *Santos-Santos v. Barr*, 917 F.3d 486, 490 (6th Cir. 2019); *see also Karingithi*, 913 F.3d at 1160 (“[T]he regulations, not § 1229(a), define when jurisdiction vests. Section 1229 says nothing about the Immigration Court’s jurisdiction.”). “Rather, the [Immigration and Nationality Act (“INA”)] allows the Attorney General to promulgate regulations to govern removal hearings, which include provisions for when and how jurisdiction vests with the [immigration judge].” *Santos-Santos*, 917 F.3d at 486. Because the INA does not address this issue, the agency has discretion in fashioning jurisdictional requirements. *Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 543 (1978). Such discretion “has even more force in the immigration context where our deference is especially great.” *Dia v. Ashcroft*, 353 F.3d 228, 238 (3d Cir. 2003).

The immigration court’s jurisdictional requirements are set forth in regulations promulgated by the Attorney General, pursuant to the statutory authority provided in 8 U.S.C. § 1103(g)(2). These regulations state that “[j]urisdiction vests, and proceedings before an

Immigration Judge commence, when a charging document is filed with the Immigration Court.” 8 C.F.R. § 1003.14(a). One of the enumerated examples in the regulations of a “charging document” is a “Notice to Appear.” *Id.* at § 1003.13.

The definition of a “Notice to Appear” in the regulations differs from that of a “Notice to Appear” in 8 U.S.C. § 1229(a)(1). Unlike the statutory definition in § 1229(a)(1), the regulatory definition of a Notice to Appear does not require the Notice to Appear to include the date and time at which the proceedings will be held. 8 C.F.R. § 1003.15(b)&(c); *see Santos-Santos*, 917 F.3d at 486 (“No references to the time and place of the hearing are required to vest jurisdiction under the regulation.”); *Karingithi*, 913 F.3d at 1160 (“The regulatory definition, not the one set forth in § 1229(a), governs the Immigration Court’s jurisdiction. A notice to appear need not include time and date information to satisfy this standard.”). Instead, the regulations provide that when the date and time “is not contained in the Notice to Appear,” the immigration court must “schedul[e] the initial removal hearing and provid[e] notice to the government and the alien of the time, place, and date of hearing.” 8 C.F.R. § 1003.18(b).

In a recent precedential opinion, the Board of Immigration Appeals (“BIA”) considered a similar jurisdictional challenge to a removal proceeding where a Notice to Appear did not specify a date and time. *Matter of Bermudez-Cota*, 27 I. & N. Dec. 441 (BIA 2018). The BIA interpreted the regulations governing jurisdiction to provide that “a Notice to Appear that does not specify the time and place of an alien’s initial removal hearing vests an Immigration Judge with jurisdiction over the removal proceedings . . . so long as a notice of hearing specifying this information is later sent to the alien.” *Id.* at 447.

“Congress has charged the Attorney General with administering the INA, who has chosen to delegate that authority to the BIA.” *S.E.R.L. v. Attorney Gen. United States of Am.*, 894 F.3d

535, 549 (3d Cir. 2018). Accordingly, the Court “must afford substantial deference” to the BIA’s interpretation of its own regulations. *Albert Einstein Med. Ctr. v. Sebelius*, 566 F.3d 368, 373 (3d Cir. 2009); *see also Auer v. Robbins*, 519 U.S. 452, 461 (1997) (holding that agency interpretations of their own regulations are “controlling unless ‘plainly erroneous or inconsistent with the regulation’”). The Court determines that the BIA’s conclusion that “a two-step notice process is sufficient to meet the statutory notice requirements” of § 1229(a) is not plainly erroneous or inconsistent with the regulations. *Matter of Bermudez-Cota*, 27 I. & N. Dec. at 447. Thus, the issue of whether Judge Anderson was vested with jurisdiction over the 2009 removal proceedings is predicated upon defendant having subsequently received a Notice of Hearing.

In this case, defendant was mailed a Notice of Hearing specifying the date, time and location of the April 27, 2009 removal hearing. That Notice is presumed to be received. *Santana Gonzalez v. Att’y Gen.*, 506 F.3d 274, 278 (3d Cir. 2007). Defendant offers no evidence to rebut the presumption of receipt of the Notice. To the contrary, by defendant’s own admission in his declaration in support of the Motion to Reopen and Request for Automatic Stay, he was aware of the time and place of the April 27, 2009 hearing. Thus, the Court concludes that the two-step notice process was consistent with agency regulations and properly vested Judge Anderson with jurisdiction over the removal proceedings. Accordingly, the underlying removal order was not invalid for lack of jurisdiction.

b. Collateral Challenge to the Underlying Removal Order

Defendant contends that the Indictment must be dismissed because the issuance of the underlying removal order did not comport with due process. Def.’s Mot. 6.

“Fundamental precepts of due process provide an alien subject to illegal re-entry prosecution under 8 U.S.C. § 1326 with the opportunity to challenge the underlying removal

order under certain circumstances.” *Richardson v. United States*, 558 F.3d 216, 223 (3d Cir. 2009). “To mount a collateral challenge to his deportation, an alien must prove that, first, he ‘exhausted any administrative remedies that may have been available to seek relief against the [deportation] order;’ second, ‘the deportation proceedings at which the order was issued improperly deprived the alien of the opportunity for judicial review;’ and, third, ‘the entry of the order was fundamentally unfair.’” *Id.* (citing 8 U.S.C. § 1326(d)). A defendant bears the burden of proof as to each element of that tripartite test. *Id.*

Defendant first argues that he “need not establish that he exhausted administrative remedies or was denied the opportunity for judicial review, as he was functionally deprived of judicial review by the immigration court’s lack of jurisdiction.” Def.’s Mot. 12. The Court rejects this argument, as it concludes that Judge Anderson was vested with jurisdiction over the 2009 removal proceedings.

Defendant also contends that “exhaustion was impossible in this case because Mr. Gamez was not made aware of his removal proceeding or the removal order. He was also deprived of an opportunity for judicial review for the same reason since he did not have actual notice of the hearing or removal order.” Def.’s Mot. 15. Defendant’s argument is unavailing.

Defendant’s assertion that exhaustion was impossible because he was not aware of the 2009 removal proceedings or the underlying removal order is belied by one of the exhibits defendant attached to his Motion to Dismiss—defendant’s sworn declaration in which he admits that he was aware of the removal proceeding. *See* Def.’s Mot. Ex. G. Moreover, defendant’s claim that he had no actual notice of the underlying removal order is contradicted by the fact that he filed a counseled Motion to Reopen and Request for Automatic Stay, both of which were rejected by Judge Anderson. *Id.* at Ex. I. Significantly, the counseled Motion was based on the

exceptional circumstance that defendant was under “constructive custody” at the time of the hearing; defendant did not contest the adequacy of the Notice to Appear. *Id.*

Finally, defendant failed to appeal Judge Anderson’s decision to the BIA. *See United States v. Mohammed*, No. 02-748, 2003 WL 245630, at *3 (E.D. Pa. Feb. 4, 2003) (“To exhaust administrative remedies, an alien is generally required to appeal from an Immigration Judge’s order to the Board of Immigration Appeals.”). By failing to appeal, defendant did not exhaust his administrative remedies.

Because defendant failed to satisfy even the first prong of § 1326(d), the Court need not consider whether defendant was denied judicial review or whether the removal proceeding was fundamentally unfair. *See United States v. Brown*, No. 17-3239, 2018 WL 6305835, at *2 (3d Cir. Dec. 3, 2018); *see also United States v. Outram*, 445 F. App’x 509, 514 (3d Cir. 2011) (“[A]ll three requirements must be met before an alien will be permitted to mount a collateral challenge to the underlying removal order.”). Defendant’s collateral due process challenge to the underlying removal order is therefore denied.

V. CONCLUSION

The Court concludes that Judge Anderson was vested with jurisdiction to issue the underlying removal order. The Court further determines that defendant cannot collaterally attack the underlying removal order because he failed to exhaust administrative remedies as required by § 1326(d). The Supreme Court decision in *Pereira v. Sessions* does not lead to a different result as it is distinguishable. Defendant’s Motion to Dismiss the Indictment is denied.

An appropriate order follows.

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ORDER

AND NOW, this 28th day of March, 2019, upon consideration of Defendant's Motion to Dismiss the Indictment (Document No. 8, filed January 31, 2019), Government's Response in Opposition to Defendant's Motion to Dismiss the Indictment (Document No. 17, filed March 4, 2019), and following oral argument in open court on March 7, 2019, for the reasons stated in the accompanying Memorandum dated March 28, 2019, **IT IS ORDERED** that Defendant's Motion to Dismiss the Indictment is **DENIED**.

BY THE COURT:

/s/ Hon. Jan E. DuBois

DuBOIS, JAN E., J.