

**Fifth Circuit Court**

**Case:** *Pierre-Paul v. Barr*, 930 F.3d 684 (5th Cir. 2019) **Date:** July 18, 2019

**Panel:** Smith, Wiener, Elrod **Opinion:** Elrod

**Tags:** Immigration, defective NTA, jurisdiction, claim-processing rule, *Pereira*

**Question(s) Presented:** Did defective NTA (post-*Pereira*) preclude jurisdiction by the Immigration Court?

**Holdings:** *Pereira* was narrowly decided (about the stop-time rule). A defective NTA does not affect jurisdiction. A subsequent hearing notice cures a defective NTA anyway. (This last part gets overruled by *Niz Chavez* in 2021.)

**Rationale:** “Under the regulations, a notice to appear is sufficient to commence proceedings even if it does not include the time, date, or place of the initial hearing.” 693

**Facts:** (686-687) Citizen of Haiti admitted to U.S. in 2001 based on his mother’s asylum. Acquired a lengthy criminal record.

**Procedural History:**

- **May 11, 2010:** NTA personally served while R was in ICE custody; did not have time or date. NOH sent on same day and served both in person and by mail.
- **2011-2015:** Released pending removal proceedings; committed four more criminal offenses.
- **Oct. 6, 2016:** competency hearing. IJ ordered representation.
- **Sept. 22, 2017:** Transferred to new IJ; ordered removed.
- **March 16, 2018:** BIA dismissed appeal.

**Respondent’s Arguments (*inter alia*):**

- IJ lacked jurisdiction because the original NTA was defective.

**Appeals to Statute & Precedent:**

- **8 C.F.R. § 1003.14:** IJ’s “jurisdiction vests, and proceedings before an IJ commence, when a charging document is filed with the Immigration Court.”
- **8 C.F.R. § 1003.14:** Charging document = “the written instrument which initiates a proceeding” before the immigration court.
- ***Pereira v. Sessions*, 585 U.S. \_\_\_, 138 S. Ct. 2105 (2018):** defective NTA does not stop clock for cancellation of removal. “A putative notice to appear that fails to designate the specific time or place . . . is not a ‘notice to appear’ under 1229(a).” 138 S. Ct. at 2113-14.
- ***Matter of Bermudez-Cota*, 27 I&N Dec. 441 (BIA 2018):** defective NTA is cured by subsequent Notice of Hearing. (Overruled by *Niz-Chavez v. Garland*, US 2021)
- ***Mauricio-Benitez v. Sessions*, 908 F.3d 144 (5th Cir. 2018):** *Pereira* decided a narrow question of stop-time rule WRT defective NTA.

**Discussion:**

- “The key to the *Pereira* decision was the stop-time rule’s reference to ‘under,’ which was ‘the glue that bonds the stop-time rule to [8 U.S.C. § 1229(a)’s] substantive time-and-place requirements. 138 S. Ct. at 2117.” 689
- “Pierre-Paul seeks to extend *Pereira*’s narrow holding beyond the stop-time rule context: Because his notice to appear omitted the time and date of his initial hearing, he argues that it was defective and could not constitute a charging document.” 689
- Other circuits agree that *Pereira* does not have a broader application:
  - *Nkomo v. A.G.* (3d Cir. July 12, 2019)
  - *Ali v. Barr*, 924 F.3d 983 (8th Cir. 2019)
  - *Banegas Gomez v. Barr*, 922 F.3d 101 (2d Cir. 2019)
  - *Soriano-Mendoza v. Barr*, 768 F. App’x 796 (10th Cir. 2019)
  - *Santos-Santos v. Barr*, 917 F.3d 486 (6th Cir. 2019)
  - *Karingithi v. Whitaker*, 913 F.3d 1158 (9th Cir. 2019)
  - *Leonard v. Whitaker*, 746 F. App’x 269 (4th Cir. 2018)
  - *Ortiz-Santiago v. Barr*, 924 F.3d 956 (7th Cir. 2019)
- “*Pereira* turned on the intersection of two statutory texts and the word ‘under’ that glued to stop-time rule to the time-and-place requirement. . . . However, the regulations do not carry such glue and are not textually bonded to 8 U.S.C. § 1229(a).” 690
- “To constitute a valid charging document, the regulations require that a notice to appear list the nature of the proceedings, the legal authority for the proceedings, and the warning about the possibility of *in absentia* removal, etc..” 690
  - “Even though his notice to appear did not include the time and date of his initial hearing, the regulations do not require this information.” 690
- “Congress has not ‘clearly state[d]’ that the immigration court’s jurisdiction depends on the content of notices to appear.” 692
- “There is no congressional grant of authority to the A.G. to adopt jurisdictional rules regarding removal proceedings. Title 8 C.F.R. Section 1003.14 is, therefore, a claim-processing rule.” 692-93
- “Because 8 C.F.R. Section 1003.14 is a non-jurisdictional claim-processing rule, any alleged defect with the charging document can be forfeited if the alien waits too long to raise it.” 693

**Commentary:**

- **Cancellation of Removal:**
  - *Matter of Perez*, 22 I&N Dec. 689 (BIA 1999): continuous residence terminates on the date a qualifying offense is committed.
- **Claim-Processing Rule**
  - Must be raised timely
  - Does not affect jurisdiction
  - “A claim-processing rule is a rule that ‘seek[s] to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times.’” 692