[DO NOT PUBLISH]

In the

# United States Court of Appeals

## For the Eleventh Circuit

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Nos. 20-14861, 23-14072

Non-Argument Calendar

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DIMITAR PETLECHKOV,

Petitioner,

*versus*

U.S. ATTORNEY GENERAL,

Respondent.

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Petitions for Review of a Decision of the
Board of Immigration Appeals
Agency No. A216-634-377

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Before ROSENBAUM, JILL PRYOR, and GRANT, Circuit Judges.

PER CURIAM:

In these two consolidated cases, Dimitar Petlechkov petitions for review of two final administrative orders of removal—or more accurately, the same removal order issued twice by the Department of Homeland Security. Construing his pro se pleadings liberally, Petlechkov argues that the Department (1) lacked the authority to issue the second order of removal while his petition for review of the first order remained pending, (2) lacked sufficient evidence to support its determination that his conviction for mail fraud qualified as an aggravated felony within the meaning of the Immigration and Nationality Act (INA), and (3) violated his Fifth Amendment due process rights by failing to provide him with notice and an opportunity to contest his removability. For the reasons discussed below, we deny the consolidated petitions for review.

**I.**

We assume the parties' familiarity with the relevant factual and procedural history and proceed directly to the issues Petlechkov raises in his petitions for review. Because Petlechkov was removed based on his conviction for an aggravated felony, our jurisdiction is limited to constitutional claims or questions of law. 8 U.S.C. § 1252(a)(2)(C)–(D).

To begin, we reject the argument that the Department had no authority to reconsider its first administrative order of removal

and issue a new one while the petition for review of the first order remained pending in this Court. The INA makes clear that simultaneous judicial review of a final order of removal and agency reconsideration of the removal order is permissible by instructing courts to consolidate "any review sought of a motion to reopen or reconsider" a final order of removal with any pending review of the underlying removal order. 8 U.S.C. § 1252(b)(6); *see Stone v. I.N.S.*, 514 U.S. 386, 394 (1995). This provision indicates that a petition for review of a final order of removal "remains active and pending before the court" while the agency considers and rules on a motion for reconsideration. *Stone*, 514 U.S. at 394. Logically, if the agency is authorized to reconsider its removal order on the motion of a party while a petition for review of the order is pending, it is authorized to take the same action as part of a limited remand from this Court.

Nor was the Department's reconsideration of its removal order here outside the scope of our limited remand, as Petlechkov argues. It is true that our remand order contemplated a more formal and transparent procedure than the Department employed. We instructed the Department to provide notice "in a written decision" if it determined "that the better course would be to vacate the removal order and conduct additional proceedings under 8 U.S.C. § 1228 or to refer the matter to an immigration judge for proceedings under 8 U.S.C. § 1229a." The administrative record indicates that the Department did not issue a written decision or otherwise provide formal notice to Petlechkov before reconsidering his removability, as we expected it to do. But although the

Department's action may have been procedurally flawed (as discussed further below), its reconsideration of Petlechkov's removability and issuance of a new final order of removal was within the range of activity authorized by our limited remand order.

Petlechkov also argues that the Department should not be allowed to "cancel" its original removal order after he has already been removed from the United States. He contends that permitting the Department to cancel its first order would cut off his right to judicial review and leave him without recourse for the legal and constitutional violations he alleged in his petition for review of that order.[1] We need not decide whether the Department has the authority to cancel a removal order after it has been executed, because that is not what the Department did here.

According to the Department, it was unable to locate additional evidence on remand contradicting Petlechkov's claim that he had not been served with a Notice of Intent before the Department issued its first final order of removal. *See* 8 U.S.C. § 1228(b)(4)(A); 8 C.F.R. §§ 103.8, 238.1(b). It therefore reopened Petlechkov's administrative removal proceedings, expanded the administrative record, and reconsidered his removability. After

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[1] Petlechkov also argues that the second order of removal is invalid because it attempts to extend the reach of the INA outside the territorial jurisdiction of the United States. Not so. The order makes findings regarding Petlechkov's legal status in the United States and orders him to be removed from this country, none of which attempts to reach Petlechkov outside the borders of the United States.

determining again that Petlechkov was removable as an alien who had been convicted of an aggravated felony, it issued a new final administrative order of removal—identical to the first one—to represent its decision on reconsideration.

Nothing about the Department's second final order of removal indicated that it was intended to "cancel," vacate, or even supersede the first order. As discussed above, the INA contemplates that the Department may issue an order on reconsideration that acts as a second final, reviewable order, all while judicial review of the first final order of removal is ongoing. *See Stone*, 514 U.S. at 394–95. The agency's first order of removal is "final when issued, irrespective of the later filing of a reconsideration motion," and once the agency issues a ruling on the motion for reconsideration, the petitioner can "file a separate petition to review that second final order," as Petlechkov did here.[2] *Id.* at 395. As we have explained before, the finality (and reviewability) of an initial final order of removal is not affected when the agency grants reconsideration and affirms its original decision without changing the substance of the first order. *Jaggernauth v. U.S. Att'y Gen.*, 432 F.3d 1346, 1351 (11th Cir. 2005).

In addition to challenging the validity of the second final order of removal, Petlechkov has renewed his arguments that (1) his conviction for mail fraud was not an aggravated felony under the

[2] Petlechkov's petition for review of the second final order of removal was docketed as case number 23-14072 and consolidated with his pending petition for review in case number 20-14861.

INA, and (2) the Department violated his Fifth Amendment due process rights by failing to provide notice and an opportunity to respond before removing him from the United States. We address each argument in turn.

**II.**

The INA provides that an "alien who is convicted of an aggravated felony at any time after admission is deportable." 8 U.S.C. § 1227(a)(2)(A)(iii). The INA's definition of "aggravated felony" includes any offense that "involves fraud or deceit in which the loss to the victim or victims exceeds $10,000." 8 U.S.C. § 1101(a)(43)(M)(i). We review whether a prior conviction qualifies as an aggravated felony de novo. *Garcia-Simisterra v. U.S. Att'y Gen.*, 984 F.3d 977, 980 (11th Cir. 2020). But we review the agency's factual findings about the amount of loss involved in a prior conviction under "the highly deferential substantial evidence test." *Id.* Under this test, the agency's "findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary." *Id.* at 980–81.

Petlechkov concedes that his mail fraud conviction involves fraud or deceit, but he argues that the evidence in the administrative record is insufficient to support the Department's finding that the amount of loss exceeded $10,000. We disagree.

The administrative record contains, among other things, the indictment charging Petlechkov with 20 counts of mail fraud in violation of 18 U.S.C. § 1341; the district court's judgment (on remand after direct appeal) adjudicating Petlechkov guilty of three of

those counts and imposing a sentence of 37 months' imprisonment, two years of supervised release, and restitution to FedEx Corporation in the amount of $801,219.02; and two Sixth Circuit Court of Appeals opinions affirming Petlechkov's convictions on three counts of mail fraud and affirming his sentence, including the order of restitution. *See United States v. Petlechkov*, 922 F.3d 762 (6th Cir. 2019) (*Petlechkov I*); *United States v. Petlechkov*, No. 21-5174, 2022 WL 168651 (6th Cir. Jan. 19, 2022) (*Petlechkov II*). Collectively, these documents show that Petlechkov's mail fraud convictions arose from a scheme in which he obtained sharply discounted shipping rates from FedEx by posing as a vendor for a high-volume shipper, and then sold FedEx's shipping services to third parties for a profit. *Petlechkov II*, 2022 WL 168651, at *1. Petlechkov used his fraudulently obtained discount to ship more than 63,000 packages in five years. *Id.*

At sentencing, the district court calculated FedEx's financial loss from this scheme by subtracting the amount that Petlechkov paid FedEx for its shipping services from the amount that the third-party shippers would have paid for those same services if they had purchased them directly from FedEx, based on an average of the third parties' own discounted shipping rates. *Id.*, at *3. The district court adopted the resulting figure of $801,219.02 as the amount of actual loss to FedEx and ordered Petlechkov to pay restitution in that amount. *Id.*, at *3–*4. The Sixth Circuit Court of Appeals

affirmed, finding that the district court made a reasonable estimate of loss based on the information available. *Id.*

Petlechkov argues that the Department should not have relied on the sentencing court's method of calculating loss because that method assumed that the third-party shippers would have been willing to pay their usual contract rates for the express shipping that he sold them at a much lower cost. If not for his fraud, he says, his customers likely would have chosen a less expensive shipping method or another shipping company. This argument is specious. Petlechkov's fraud caused FedEx to provide premium shipping services at a much lower rate than it otherwise would have charged. The difference between what FedEx should have been paid and what it was paid for the services it actually provided provides a reasonable measure of its lost profit.

In any event, the question for our purposes is not whether the district court in Petlechkov's criminal case precisely calculated the amount of loss caused by his mail fraud scheme. Rather, we must decide whether substantial evidence in the administrative record—including the Sixth Circuit's opinion explaining the evidence and affirming the district court's calculation that FedEx suffered more than $800,000 in actual loss—supported the Department's finding that Petlechkov's conviction involved loss to the victim in excess of $10,000. We conclude that it did.

**III.**

We turn next to Petlechkov's argument that the Department violated his due process rights by denying him notice and an

opportunity to respond to the charge of removability. Noncitizens in removal proceedings have the right to due process under the Fifth Amendment. *Lapaix v. U.S. Att'y Gen.*, 605 F.3d 1138, 1143 (11th Cir. 2010). Due process requires that they be given notice and an opportunity to be heard. *Id.* To establish a due process violation in a deportation proceeding, a petitioner must show that he was deprived of his liberty without due process and that the alleged error caused him substantial prejudice. *Id.* And to establish substantial prejudice, the petitioner must show that the alleged deprivation of due process affected the outcome of the proceeding. *Id.*

Here, Petlechkov claims that he was not served with notice or given an opportunity to respond and contest his removability during either the original expedited removal proceeding or during the limited remand from this Court. Our review of this issue is complicated by the fact that the Department failed to make any findings on remand about whether Petlechkov was served with a Notice of Intent before it issued its first removal order, and it is not clear from the record whether he was given the opportunity to present evidence on the issue of removability before the Department issued its second order of removal. But ultimately it is unnecessary for us to determine whether Petlechkov was given the opportunity to be heard by the Department on the issue of his removability

because he has not shown that he suffered substantial prejudice as a result. *See id.*

In an effort to make that showing, Petlechkov has proffered hundreds of pages of transcripts and filings from his criminal case in support of his argument that the amount of loss to FedEx from his mail fraud did not exceed $10,000.[3] He again challenges the district court's method of calculating loss, pointing to shipping invoices and testimony by one of the third-party shippers as proof that his customers would not have used FedEx express shipping if they had been charged the usual rates for that service. Petlechkov was not prejudiced by the lack of opportunity to present this evidence in his removal proceedings because it does not undermine the Department's conclusion that his fraud caused more than $10,000 in loss to FedEx.

At sentencing, Petlechkov made the same arguments regarding what shipping rates his customers would have been willing to pay in the absence of his fraud—arguments that were rejected by the district court and the Sixth Circuit Court of Appeals, and that the Department was not likely to find any more persuasive. And even if the Department had adopted Petlechkov's argument

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[3] Petlechkov has also asked us to take judicial notice of the proceedings in his criminal case, *United States v. Petlechkov*, case no. 2:17-cr-20344-1 (W.D. Tenn.). We grant his motion to take judicial notice, as previously amended. We construe his third motion to amend his motion to take judicial notice (Doc. 113) as a motion to supplement the record on appeal with the documents he filed on November 9, 2022, labeled as a corrected appendix, and we grant the motion.

at sentencing that the amount of FedEx's loss should be limited to Petlechkov's own profit (the difference between what Petlechkov's customers paid him for shipping and what he paid FedEx), the outcome of his removal proceeding would not have been different. That is because Petlechkov stipulated at sentencing that his profit from the mail fraud scheme was more than $300,000—far more than necessary to support the Department's finding that his mail fraud conviction involved loss exceeding $10,000.

**IV.**

For the reasons discussed above, we DENY Petlechkov's petitions for review in these consolidated cases. We also DENY his motion to vacate the Department's second final order of removal and his motion for oral argument, and we DENY AS MOOT his motions to expedite oral argument and to appear for oral argument. We GRANT Petlechkov's motion to take judicial notice of his criminal proceedings in *United States v. Petlechkov*, case no. 2:17-cr-20344-1 (W.D. Tenn.), and we GRANT his third motion to amend his motion to take judicial notice, construed as a motion to supplement the record on appeal with the documents he filed on November 9, 2022, as a corrected appendix.

**PETITIONS DENIED.**