No. _____

In The
Supreme Court of the United States

FRANCISCO ARREGUIN,

Petitioner,

v.

ERIC HOLDER,
UNITED STATES ATTORNEY GENERAL,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Given that an alien who is ordered deported unlawfully and physically deported more than 90 days prior to the issuance of a precedential decision which clarifies the same error of law that resulted in his erroneous removal order is effectively deprived of his statutory motion to reopen, which this Court has held to be "an important safeguard" and necessary to "ensure a proper and lawful disposition":

1. Whether the Federal Circuit Courts of Appeals maintain jurisdiction based on a due process deprivation to review denials of certain *sua sponte* motions to reopen by the Board of Immigration Appeals under the "gross miscarriage of justice" standard; and

2. If not, whether such an unlawfully removed alien has been presented with an adequate habeas corpus substitute.

PARTIES TO THE PROCEEDING

All parties to the proceeding are named in the caption of the case as recited on the cover page. There are no nongovernmental corporate parties requiring a disclosure statement under Supreme Court Rule 29.6.

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CITATIONS TO THE OPINIONS AND ORDERS BELOW

The decision of the United States Court of Appeals for the Fifth Circuit dismissing Petitioner's motion for reconsideration, *Arreguin v. Holder*, No. 13-60656 (5th Cir. August 19, 2014) is unreported.

The decision of the United States Court of Appeals for the Fifth Circuit dismissing Petitioner's petition for review of the order of the Board of Immigration Appeals, *Arreguin v. Holder*, No. 13-60656 (5th Cir. June 25, 2014) is unreported.

The decision of the Board of Immigration Appeals ("BIA") denying Petitioner's motion to reconsider, Francisco Arreguin, A091-399-686 (BIA, February 21, 2014) is unreported.

The decision of the Board of Immigration Appeals denying Petitioner's motion to reopen, Francisco Arreguin, A091-399-686 (BIA, September 9, 2013) is unreported.

The decision of the Board of Immigration Appeals finding Petitioner ineligible for cancellation of removal and removable as an aggravated felon, Francisco Arreguin, A091-399-686 (BIA, July 27, 2006) is unreported.

The Oral Decision and Order of the Immigration Judge, Francisco Arreguin, A091-399-686 (Immigration Judge, April 4, 2006) finding Petitioner ineligible

for cancellation of removal and removable as an aggravated felon is unreported.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Fifth Circuit denied Petitioner's petition for review on June 25, 2014 and his motion for reconsideration on August 19, 2014. Jurisdiction in this Court is therefore proper by writ of certiorari pursuant to 28 U.S.C. § 1254(1) because Petitioner is a "party to any civil or criminal case, before or after rendition of judgment or decree."

APPLICABLE LAW

8 U.S.C. § 1252(a)(1), which provides:

> Judicial review of a final order of removal (other than an order of removal without a hearing pursuant to section 1225(b)(1) of this title) is governed only by chapter 158 of title 28, except as provided in subsection (b) of this section and except that the court may not order the taking of additional evidence under section 2347(c) of such title.

8 U.S.C. § 1252(a)(2)(D), which provides:

> Nothing in subparagraph (B) or (C), or in any other provision of this chapter (other than this section) which limits or eliminates judicial review, shall be construed as precluding

review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.

8 U.S.C. § 1231(a)(5), which provides:

If the Attorney General finds that an alien has reentered the United States illegally after having been removed or having departed voluntarily, under an order of removal, the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed, the alien is not eligible and may not apply for any relief under this chapter, and the alien shall be removed under the prior order at any time after the reentry.

8 C.F.R. § 1003.2(a), which provides:

The Board may at any time reopen or reconsider on its own motion any case in which it has rendered a decision. A request to reopen or reconsider any case in which a decision has been made by the Board, which request is made by the Service, or by the party affected by the decision, must be in the form of a written motion to the Board. The decision to grant or deny a motion to reopen or reconsider is within the discretion of the Board, subject to the restrictions of this section. The Board has discretion to deny a motion to reopen even if the party moving has made out a prima facie case for relief.

8 C.F.R. § 1003.23(b)(1), which provides:

An Immigration Judge may upon his or her own motion at any time, or upon motion of the Service or the alien, reopen or reconsider any case in which he or she has made a decision, unless jurisdiction is vested with the Board of Immigration Appeals. Subject to the exceptions in this paragraph and paragraph (b)(4), a party may file only one motion to reconsider and one motion to reopen proceedings. A motion to reconsider must be filed within 30 days of the date of entry of a final administrative order of removal, deportation, or exclusion, or on or before July 31, 1996, whichever is later. A motion to reopen must be filed within 90 days of the date of entry of a final administrative order of removal, deportation, or exclusion, or on or before September 30, 1996, whichever is later. A motion to reopen or to reconsider shall not be made by or on behalf of a person who is the subject of removal, deportation, or exclusion proceedings subsequent to his or her departure from the United States. Any departure from the United States, including the deportation or removal of a person who is the subject of exclusion, deportation, or removal proceedings, occurring after the filing of a motion to reopen or a motion to reconsider shall constitute a withdrawal of such motion. The time and numerical limitations set forth in this paragraph do not apply to motions by the Service in removal proceedings pursuant to section 240 of the Act. Nor shall such

limitations apply to motions by the Service in exclusion or deportation proceedings, when the basis of the motion is fraud in the original proceeding or a crime that would support termination of asylum in accordance with § 1208.22(e) of this chapter.

8 C.F.R. § 1003.2(c), which provides:

(1) A motion to reopen proceedings shall state the new facts that will be proven at a hearing to be held if the motion is granted and shall be supported by affidavits or other evidentiary material. A motion to reopen proceedings for the purpose of submitting an application for relief must be accompanied by the appropriate application for relief and all supporting documentation. A motion to reopen proceedings shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing; nor shall any motion to reopen for the purpose of affording the alien an opportunity to apply for any form of discretionary relief be granted if it appears that the alien's right to apply for such relief was fully explained to him or her and an opportunity to apply therefore was afforded at the former hearing, unless the relief is sought on the basis of circumstances that have arisen subsequent to the hearing. Subject to the other requirements and restrictions of this section, and notwithstanding the provisions in 1001.1(p) of this chapter, a motion to reopen proceedings for

consideration or further consideration of an application for relief under section 212(c) of the Act (8 U.S.C. 1182(c)) may be granted if the alien demonstrates that he or she was statutorily eligible for such relief prior to the entry of the administratively final order of deportation.

(2) Except as provided in paragraph (c)(3) of this section, a party may file only one motion to reopen deportation or exclusion proceedings (whether before the Board or the Immigration Judge) and that motion must be filed no later than 90 days after the date on which the final administrative decision was rendered in the proceeding sought to be reopened, or on or before September 30, 1996, whichever is later. Except as provided in paragraph (c)(3) of this section, an alien may file only one motion to reopen removal proceedings (whether before the Board or the Immigration Judge) and that motion must be filed no later than 90 days after the date on which the final administrative decision was rendered in the proceeding sought to be reopened.

(3) In removal proceedings pursuant to section 240 of the Act, the time limitation set forth in paragraph (c)(2) of this section shall not apply to a motion to reopen filed pursuant to the provisions of 1003.23(b)(4)(ii). The time and numerical limitations set forth in paragraph (c)(2) of this section shall not apply to a motion to reopen proceedings:

(i) Filed pursuant to the provisions of 1003.23(b)(4)(iii)(A)(1) or 1003.23(b)(4)(iii)(A)(2);

(ii) To apply or reapply for asylum or withholding of deportation based on changed circumstances arising in the country of nationality or in the country to which deportation has been ordered, if such evidence is material and was not available and could not have been discovered or presented at the previous hearing;

(iii) Agreed upon by all parties and jointly filed. Notwithstanding such agreement, the parties may contest the issues in a reopened proceeding; or

(iv) Filed by the Service in exclusion or deportation proceedings when the basis of the motion is fraud in the original proceeding or a crime that would support termination of asylum in accordance with 1208.22(f) of this chapter.

8 C.F.R. § 1003.2(d), which provides:

A motion to reopen or a motion to reconsider shall not be made by or on behalf of a person who is the subject of exclusion, deportation, or removal proceedings subsequent to his or her departure from the United States. Any departure from the United States, including the deportation or removal of a person who is the subject of exclusion, deportation, or removal proceedings, occurring after the filing

of a motion to reopen or a motion to reconsider, shall constitute a withdrawal of such motion.

8 C.F.R. § 241.8(a), which provides:

An alien who illegally reenters the United States after having been removed, or having departed voluntarily, while under an order of exclusion, deportation, or removal shall be removed from the United States by reinstating the prior order. The alien has no right to a hearing before an immigration judge in such circumstances. In establishing whether an alien is subject to this section, the immigration officer shall determine the following: (1) whether the alien has been subject to a prior order of removal. The immigration officer must obtain the prior order of exclusion, deportation, or removal relating to the alien; (2) the identity of the alien, *i.e.*, whether the alien is in fact an alien who was previously removed, or who departed voluntarily while under an order of exclusion, deportation, or removal. In disputed cases, verification of identity shall be accomplished by a comparison of fingerprints between those of the previously excluded, deported, or removed alien contained in Service records and those of the subject alien. In the absence of fingerprints in a disputed case the alien shall not be removed pursuant to this paragraph; (3) whether the alien unlawfully reentered the United States. In making this determination, the officer shall consider all relevant evidence, including statements made by the

alien and any evidence in the alien's possession. The immigration officer shall attempt to verify an alien's claim, if any, that he or she was lawfully admitted, which shall include a check of Service data systems available to the officer.

STATEMENT OF THE CASE AND RELEVANT FACTS

In Petitioner's case, a gross miscarriage of justice occurred when Petitioner was ordered removed as an aggravated felon for possession of less than one gram of cocaine, which was plainly not an aggravated felony as a matter of law. *See* BIA Opinion of July 27, 2006, App. 10; *Lopez v. Gonzales*, 127 S. Ct. 625, 549 U.S. 47 (2006). He was physically removed just five months before this Court's decision in *Lopez*, making him ineligible to reopen his case under the "departure bar" regulations, which state that a motion to reopen or reconsider cannot be made by a person who has been subject to removal. *See* 8 C.F.R. § 1003.23(b)(1); 8 C.F.R. § 1003.2(d). Petitioner later discovered that the departure bar regulations had been invalidated by recent Fifth Circuit precedent. *See Garcia-Carias v. Holder*, 697 F.3d 257 (5th Cir. 2012) (finding the departure bar to be invalid as applied to statutory motions to reopen); *see also Lari v. Holder*, 697 F.3d 273 (5th Cir. 2012) (finding the departure bar to be invalid as applied to statutory motions to reconsider). Immediately upon discovering that new case law

enabled him to file to reopen his removal proceedings, the Petitioner sought reopening in the hopes of overturning his unlawful removal order and having his lawful permanent resident status restored. *See* Declaration of Petitioner, Certified Administrative Record, 98.

The BIA denied the Petitioner's motion to reopen. *See* BIA Opinion of September 9, 2013, App. 8; BIA Opinion of February 21, 2014, App. 2. On appeal, the Fifth Circuit dismissed the Petitioner's petition for review of the BIA's dismissal without opinion. *See* Order of the Fifth Circuit, June 25, 2014, App. 1. Therefore, we must assume that the Fifth Circuit adopted the reasoning of the BIA. The BIA denied the Petitioner's request for reopening on the grounds that the prior order was "open to reinstatement" and therefore the Board lacked jurisdiction. *See* BIA Opinion of February 21, 2014, App. 2. The BIA further stated that it would not reopen Petitioner's case, even if it was not precluded by the reinstatement bar under 8 U.S.C. § 1231(a)(5) (codified at INA § 241(a)(5)) because it lacked jurisdiction under 8 C.F.R. § 1003.23(b)(1) and § 1003.2(d) since the Petitioner had been removed. *Id.*

The Immigration and Nationality Act provides for the reinstatement of prior removal orders in order to expedite the deportation of aliens who reenter the United States in violation of their removal orders, but there are procedures that must be followed for a reinstatement to be valid. 8 U.S.C. § 1231(a)(5); *see* 8 C.F.R. § 241.8. To reinstate a removal order, the

government must show "the alien has been subject to a prior order of removal," "[t]he identity of the alien [by fingerprint comparison]," and that the alien did, in fact, unlawfully reenter the United States. 8 C.F.R. § 241.8. If these three requirements are met, the alien is subject to removal immediately.

Although the Department of Homeland Security has not actually reinstated the Petitioner's removal order, the BIA seeks to remove him automatically because he is "subject to reinstatement," which allegedly has the same effect. *See* BIA Opinion of February 21, 2014, App. 2. The BIA seeks to skip a step in the process by reinstating the Petitioner's removal order because it is "open to reinstatement" but without following the actual regulatory process for doing so. Because of this, the Petitioner was barred jurisdictionally from reopening his prior proceedings due to untimeliness, but he was also unable to seek review of the reinstatement through a timely petition for review of the reinstatement order. Such a deprivation of due process violates this Court's precedent.

In *Dada* and *Kucana*, this Court determined that some degree of due process is necessary to ensure a "proper and lawful disposition of the case," and the Petitioner was denied that degree of due process in his case. *See Dada v. Mukasey*, 128 S. Ct. 2307, 2318 (2008); *Kucana v. Holder*, 130 S. Ct. 827, 834 (2010). "Federal-court review of administrative decisions denying motions to reopen removal proceedings dates back to at least 1916." *Kucana*, 130 S. Ct. at 834 (*citing Dada*, 128 S. Ct. at 2314).

The BIA unlawfully ordered Petitioner deported, and then paradoxically determined that Petitioner could not reopen his case several years later because he had been deported. *See* BIA Opinion of February 21, 2014, App. 2. The Petitioner's only recourse is to seek review of his claim under the "gross miscarriage of justice" standard as it has been articulated by various appellate courts and to find the Fifth Circuit had independent jurisdiction on that ground to avoid an infringement of his due process rights.

A. Jurisdiction of the Court of Appeals

The Court of Appeals had jurisdiction over Petitioner's petition for review pursuant to INA § 242(a)(1), 8 U.S.C. § 1252(a)(1), which provides for judicial review of a final order of removal. None of the jurisdiction-stripping sections of this chapter of the Act, however, are to "be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals." INA § 242(a)(2)(D) (emphasis added).

B. Background

The Petitioner, Mr. Francisco Arreguin is a native and citizen of Mexico. *See* Decision of the Immigration Judge, App. 14. He became a lawful permanent resident on December 1, 1990. *Id.* at 2. After 16 years of lawful permanent residency in the United States, the Petitioner was convicted of possession of less than one gram of cocaine on January 6, 2006. *Id.* He was

subsequently placed in removal proceedings, and admitted that he had been convicted but denied that he was convicted of an aggravated felony. *Id.* He sought cancellation of removal, but the Immigration Judge determined that the Petitioner was ineligible because his cocaine possession conviction constituted an aggravated felony. *Id.*

The Petitioner appealed the decision of the IJ to the Board of Immigration Appeals, which issued its decision on July 27, 2006. *See* BIA Opinion of July 27, 2006, App. 10. The Petitioner explained that his crime of possession of cocaine did not constitute an aggravated felony because his conviction was for less than one year and was only a misdemeanor. *Id.* at 2. The BIA disagreed, and incorrectly held that the Petitioner's crime constituted an aggravated felony, so he was statutorily ineligible for cancellation of removal. *Id.* The Petitioner was then ordered removed as an aggravated felon. *Id.* The BIA did not discuss the controlled substance charge, so the Petitioner was ordered removed solely on the grounds of his alleged aggravated felony. The Petitioner obeyed the removal order and subsequently left the country. *See* Declaration of Petitioner, Certified Administrative Record, 98. In 2013, the Petitioner's wife consulted with an attorney and discovered that his deportation had been unlawful and *ultra vires*. *Id.* This request for reopening followed.

C. Administrative Appeal

Petitioner filed a motion to reopen his case with the BIA on July 19, 2013 after discovering that he was potentially eligible to file a motion to reopen under *Garcia-Carias, Lari*, and *Lopez*. *See discussion infra*; BIA Opinion of September 9, 2013, App. 8. However, the BIA held on September 9, 2013 that it lacked jurisdiction to reopen his proceedings under INA § 241(a)(5), 8 U.S.C. § 1231(a)(5), because the Petitioner's removal proceedings were "open to reinstatement." *Id.* The BIA also mentioned in a footnote that the Petitioner's "untimely motion requesting sua sponte reopening does not qualify as a motion to reopen authorized by statute." *Id.* at 1, n.1.

Petitioner filed a petition for review with the Fifth Circuit Court of Appeals and then filed a motion to reconsider with the BIA, which was again denied on February 21, 2014. *See* BIA Opinion of February 21, 2014, App. 2. The BIA maintained its prior reasoning that it was unable to reopen his proceedings under § 241(a)(5) and under the departure bar at 8 C.F.R. § 1003.2(d). *Id.* At no point before or during this process was the Petitioner's removal order actually reinstated under 8 C.F.R. § 241.8(a). *Id.* As a result, the Petitioner sought appeal before the Fifth Circuit Court of Appeals.

D. Judicial Review

On August 19, 2014, the Fifth Circuit Court of Appeals issued as mandate its denial of Petitioner's

appeal in part and dismissal in part. *See* Order of the Fifth Circuit, June 25, 2014, App. 1; Denial of Motion for Reconsideration, July 15, 2014, App. 18. The Fifth Circuit denied the appeal with respect to the Petitioner's motion to reopen and dismissed the appeal for want of jurisdiction with respect to the Petitioner's appeal of the underlying removal order. *Id.* The Fifth Circuit offered no explanation of its decision, so we must assume that it adopted the reasoning of the BIA. *See id.* The Fifth Circuit also refused to reach the merits of Petitioner's claim that a fundamental change in the law had rendered his prior removal order *void ab initio*. *See id.* The Fifth Circuit erred in stating that it did not have jurisdiction to entertain the Petitioner's claim, so this Petition for Certiorari follows.

ARGUMENT FOR ALLOWING THE WRIT

The issue in this case is whether a gross miscarriage of justice in the underlying removal proceedings creates independent jurisdiction such that a Federal Circuit Court of Appeals may review the denial of a motion to reopen immigration proceedings to the Board of Immigration Appeals, even if the Board allegedly denied the motion in its discretion. If a gross miscarriage of justice cannot create independent jurisdiction for a case to be heard, then the court will be faced with a due process issue, as the Petitioner will have been left with no means to seek

recourse for an unjust deprivation of his permanent resident status.

In Petitioner's case, he was ordered removed as an aggravated felon for possession of less than one gram of cocaine, which was plainly not an aggravated felony as a matter of law. *See* BIA Opinion of February 21, 2014, App. 2; *Lopez v. Gonzales*, 127 S. Ct. 625, 549 U.S. 47 (2006). He was ordered removed just five months before this Court's decision in *Lopez*, making him ineligible to reopen his case because of the now-invalid departure bar regulations, which state:

> A motion to reopen or to reconsider shall not be made by or on behalf of a person who is the subject of removal, deportation, or exclusion proceedings subsequent to his or her departure from the United States. Any departure from the United States, including the deportation or removal of a person who is the subject of exclusion, deportation, or removal proceedings, occurring after the filing of a motion to reopen or a motion to reconsider shall constitute a withdrawal of such motion.

8 C.F.R. § 1003.23(b)(1).

> A motion to reopen or a motion to reconsider shall not be made by or on behalf of a person who is the subject of exclusion, deportation, or removal proceedings subsequent to his or her departure from the United States. Any departure from the United States, including

> the deportation or removal of a person who is the subject of exclusion, deportation, or removal proceedings, occurring after the filing of a motion to reopen or a motion to reconsider, shall constitute a withdrawal of such motion.

8 C.F.R. § 1003.2(d). Petitioner later discovered that the departure bar regulations had been invalidated by recent Fifth Circuit precedent. *See Garcia-Carias v. Holder*, 697 F.3d 257 (5th Cir. 2012) (finding the departure bar to be invalid as applied to statutory motions to reopen); *see also Lari v. Holder*, 697 F.3d 273 (5th Cir. 2012) (finding the departure bar to be invalid as applied to statutory motions to reconsider). Immediately upon discovering that new case law enabled him to file to reopen his removal proceedings, the Petitioner sought reopening in the hopes of overturning his unlawful removal order and having his lawful permanent resident status restored. *See* Declaration of Petitioner, Certified Administrative Record, 98.

The BIA denied Petitioner's motion to reopen. *See* BIA Opinion of September 9, 2013, App. 8; BIA Opinion of February 21, 2014, App. 2. The Fifth Circuit dismissed the Petitioner's petition for review without discussion. *See* Order of the Fifth Circuit, June 25, 2014, App. 1. Therefore, we must assume that the Fifth Circuit adopted the reasoning of the BIA. The BIA denied the Petitioner's request for reopening on the grounds that the prior order was "open to reinstatement," which the BIA held deprived

it of jurisdiction to review his motion. *See* BIA Opinion of February 21, 2014, App. 2. The BIA further stated that it would not reopen Petitioner's case, even if it was not precluded by the reinstatement bar under 8 U.S.C. § 1231(a)(5) (codified at INA § 241(a)(5)) because it lacked jurisdiction under 8 C.F.R. § 1003.23(b)(1) and § 1003.2(d) since the Petitioner had been removed. *Id.* The BIA unlawfully deported the Petitioner and then paradoxically determined that he could not reopen the proceedings several years later because the BIA unlawfully deported him. *Id.*

This Court in *Dada* and *Kucana* determined that some degree of due process is necessary to ensure a "proper and lawful disposition of the case," and the Petitioner was denied that degree of due process in his case. *See Dada v. Mukasey*, 128 S. Ct. 2307, 2318 (2008); *Kucana v. Holder*, 130 S. Ct. 827, 834 (2010). "Federal-court review of administrative decisions denying motions to reopen removal proceedings dates back to at least 1916." *Kucana*, 130 S. Ct. at 834 (*citing Dada*, 128 S. Ct. at 2314). Where an alien is unable to reach a forum where he can seek judicial review of a question of law, "serious constitutional questions" arise. *INS v. St. Cyr*, 533 U.S. 289, 314 (2001).

The Petitioner is caught in a peculiar circumstance where there is no question that he was not removable as an aggravated felon and that he should have his permanent resident status restored since he

was not deportable as charged, yet due to incorrect interpretations by the BIA and Fifth Circuit, he has virtually no avenue through which he may pursue relief. The question is not "was the Petitioner removable?" but instead "can we talk about how the Petitioner was not removable?" The standard that should reach that question is the "gross miscarriage of justice" standard which is typically used to determine when a collateral attack of a prior removal order will be valid. Although the Petitioner's removal order was never actually reinstated, he faces the consequences of its reinstatement nonetheless. The gross miscarriage of justice standard must allow Circuit Courts to have independent jurisdiction to review constitutional questions and interpretations of the law; otherwise aliens will continue to be deprived of an adequate habeas corpus substitute, which itself raises serious constitutional concerns.

A. An alien must have access to habeas corpus relief or an adequate habeas substitute when an agency's constitutional or legal interpretation is at question, but the Fifth Circuit's precedent precludes such relief and creates a constitutional problem where one need not exist.

Review of agency decisions by the Circuit Courts of Appeals is essential for the regulatory motion to reopen to serve as a valid habeas corpus substitute. "In the immigration context, 'judicial review' and

'habeas corpus' have historically distinct meanings." *INS v. St. Cyr*, 533 U.S. 289, 311 (2001) (*citing Heikkila v. Barber*, 345 U.S. 229 (1953)). In *Heikkila*, this Court determined that even provisions that stripped the judiciary of the power to review administrative decisions did not preclude the right to habeas corpus. *Heikkila*, 345 U.S. at 235-36. A statute that gave "no right of review to be exercised by any court or judicial officer" was not enough to revoke the right to habeas corpus relief. *See Terlinden v. Ames*, 184 U.S. 270, 278 (1902).

Where an alien is unable to reach a forum where he can seek judicial review of a question of law, "serious constitutional questions" arise. *INS v. St. Cyr*, 533 U.S. 289, 314 (2001). Habeas review traditionally "encompassed detentions based on errors of law, including the erroneous application or interpretation of statutes." *Id.* at 307. It also included determinations of an alien's "statutory eligibility for discretionary relief." *Id.* at 314 n.38. Habeas review even considered "questions of law that arose in the context of discretionary relief." *Id.* at 307. Further, the Supreme Court has considered a case that involved the application and interpretation of a regulation, not a statute. *Id*. at 307 (*citing United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 265-68 (1954)).

The Suspension Clause of the U.S. Constitution provides that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require

it." U.S. Const. art. I, § 9, cl. 2. This Court stated that "some judicial intervention in deportation cases is unquestionably required by the Constitution" because of that clause. *St. Cyr*, 533 U.S. at 300. "[T]he question becomes whether the statute stripping jurisdiction to issue the writ avoids the Suspension Clause mandate because Congress has provided adequate substitute procedures for habeas corpus." *Boumediene v. Bush*, 553 U.S. 723, 771 (2008). Pure questions of law are generally within the scope of habeas review. *See St. Cyr*, 533 U.S. at 304-05.

Importantly, the court's ability to review administrative decisions does not impinge on the discretion of the agency. *See Kucana v. Holder*, 558 U.S. 233, 248, 130 S. Ct. 827, 175 L. Ed. 2d 694 (2010) ("[a] court decision reversing the denial of a motion to reopen does not direct the Executive to afford the alien substantive relief; ordinarily, it touches and concerns only the question whether the alien's claims have been accorded a reasonable hearing"). Additionally, the motion to reopen serves as "an important safeguard" and is necessary to "ensure a proper and lawful disposition." *Dada v. Mukasey*, 554 U.S. 1 (2008); *reaffirmed in Kucana v. Holder*, 558 U.S. 233 (2010).

Some Courts of Appeals have suggested that the § 1003.2(c) motion to reopen serves as an adequate substitute for habeas corpus. *See Luna v. Holder*, 637 F.3d 85, 95 (2d Cir. 2011) ("Petitioners lack a forum in which to raise [habeas] claims, then we are confronted squarely with the 'serious constitutional questions' raised by the Supreme Court") (*citing St. Cyr*, 533

U.S. at 314); *Espinal v. AG*, 653 F.3d 213, 218 (3d Cir. 2011); *Mohamed v. Gonzalez*, 477 F.3d 522, 526 (8th Cir. 2007); *Alexandre v. AG*, 452 F.3d 1204, 1206 (11th Cir. 2006); *Muka v. Baker*, 559 F.3d 480, 483-85 (6th Cir. 2009).

However, the Fifth Circuit's precedent regarding its jurisdiction to review BIA decisions effectively denies aliens the right to have administrative interpretations of questions of law reviewed by the judiciary where the alien was unable to timely file for review. *See Enriqeuz-Alvarado v. Ashcroft*, 371 F.3d 246, 250 (5th Cir. 2004) (holding that there is no jurisdiction to review an IJ's decision not to invoke its *sua sponte* authority); s*ee also Ramos-Bonilla v. Mukasey*, 543 F.3d 216, 220 (5th Cir. 2008) (finding that requests for equitable tolling are, in effect, requests for *sua sponte* discretion, which therefore strips the court of jurisdiction to review the agency's decision). The Fifth Circuit has also determined that the departure bar is valid as applied to *sua sponte* motions to reopen. *See Navarro-Miranda v. Ashcroft*, 330 F.3d 672 (5th Cir. 2003) (holding that the departure bar regulations strip the BIA of the authority to reopen proceedings *sua sponte*); *see also Ovalles v. Holder*, 577 F.3d 288 (5th Cir. 2009) (same).

Under this line of precedent, an alien such as the Petitioner whose removal was unlawful will never have an adequate forum through which to challenge the BIA's interpretation of a question of law, because either *sua sponte* reopening or equitable tolling would be required. It would be functionally impossible for

an alien in the Petitioner's circumstances to seek review of a removal order in light of new precedent implying that a prior deportation order was contrary to law. The Fifth Circuit will be required to dismiss any case that is filed untimely, even where it would have been impossible for the alien to file a timely motion because of an incorrect interpretation of the law. The present case is a perfect example: Petitioner was ordered deported based on a faulty interpretation of the law. According to statute, he only had 90 days to file a motion to reopen. However, this Court's decision in *Lopez,* which established that his deportation order was unlawful, was issued more than 90 days after his final administrative order of deportation. Therefore, his only recourse is the BIA's *sua sponte* power. But the Fifth Circuit holds it has no review over the BIA's use of *sua sponte* power. Therefore, the Fifth Circuit denies aliens habeas corpus relief in this situation. A failure to allow habeas review or an adequate habeas substitute leads to "serious constitutional questions." *INS v. St. Cyr*, 533 U.S. 289, 314 (2001).

There must be an adequate habeas substitute to prevent a constitutional deprivation under the Suspension Clause. The Petitioner attempted to avoid this question by making what was, in essence, a collateral attack on his prior order of removal preemptively before it was reinstated. *See* BIA Opinion of February 21, 2014, App. 2. The Petitioner contends that he was ordered removed unlawfully, which constituted a gross miscarriage of justice. A

gross miscarriage of justice in prior removal proceedings can be the basis for vacating the removal order and restoring the alien to his previous status.

B. The "gross miscarriage of justice" standard has traditionally been employed to create independent jurisdiction for Courts of Appeals to review underlying removal orders in the context of reinstatement proceedings.

The Fifth Circuit requires that the alien show a gross miscarriage of justice occurred in the underlying removal proceedings as a jurisdictional matter in order to collaterally attack an order that is reinstated. *See Ramirez-Molina v. Ziglar*, 436 F.3d 508, 515 (5th Cir. 2006) (requiring that the alien demonstrate a gross miscarriage of justice as a jurisdictional barrier to a collateral attack). In that case, the Fifth Circuit denied the alien's request because he could not show that he exhausted all possible remedies. *Id.* Importantly, however, the Fifth Circuit seemed to find that it would have jurisdiction to review the underlying removal order if the alien had exhausted all remedies and if a gross miscarriage of justice had occurred. *Id.*

The Second Circuit does not use the gross miscarriage of justice standard, but instead finds that there is no need to review a prior order of deportation during reinstatement proceedings. *Garcia-Villeda v. Mukasey*, 531 F.3d 141, 150 (2d Cir. 2008). The Second Circuit held that "[p]etitioner had the right to

challenge the validity of the original deportation proceeding in a direct appeal to the BIA, but he did not exercise it." *Id.* The Second Circuit argues that "[t]his outcome does not offend due process because, 'regardless of the process afforded in the underlying order,' reinstatement of the prior deportation order does not alter petitioner's legal condition." *Id.* (*citing Morales-Izquierdo v. Gonzales*, 486 F.3d 484, 497 (9th Cir. 2007)). The Second Circuit did not consider, however, what would occur had the petitioner exhausted all remedies prior to reaching the Court of Appeals and suffered reinstatement of an unlawful and erroneous removal order. *See Garcia-Villeda*, 531 F.3d at 150.

The Third Circuit sees the gross miscarriage of justice standard as merely a prerequisite to relief, rather than as a jurisdictional hurdle. *Debeato v. AG*, 505 F.3d 231, 234-35 (3d Cir. 2007) (permitting review of legal and constitutional challenges to prior BIA orders). Therefore, the Third Circuit has determined that it has the jurisdiction to review collateral challenges to orders of deportation, but requires that a gross miscarriage of justice has occurred to grant substantive relief. *Id.*

The Sixth Circuit considers a collateral attack on a prior order of removal only where there is a constitutional claim or a question of law, such as a habeas corpus petition or due process challenge. *Villegas de la Paz v. Holder*, 640 F.3d 650 (6th Cir. 2010) ("[w]e now agree with the *Lorenzo*, *Debeato*, and *Ramirez-Molina* courts, and conclude that § 1252(a)(2)(D)

re-vests the circuit courts with jurisdiction over constitutional claims or questions of law raised in the context of reinstatement proceedings").

The Seventh Circuit refuses to "look behind the reinstatement to entertain challenges to the earlier, underlying removal order." *Torres-Tristan v. Holder*, 656 F.3d 653, 656 (7th Cir. 2011) (citing pre-REAL ID Act case law and without discussing INA § 242(a)(2)(D)). It is worth noting, however, that the petitioner in that case did not raise any legal or constitutional questions relating to his prior removal order, but merely wished to reopen proceedings in order to apply for U-visa relief. *Id.*

The Ninth Circuit follows a similar precedent to the Fifth Circuit. *See Rincon v. Mukasey*, 539 F.3d 1133 (9th Cir. 2008) (permitting a collateral attack on a prior removal order when the alien can demonstrate that a gross miscarriage of justice occurred in the prior proceedings).

The Tenth Circuit also permits review of legal and constitutional challenges to the prior order in reinstatement proceedings, subject to jurisdictional limitations on the filing of the petition itself. *Lorenzo v. Mukasey*, 508 F.3d 1278, 1281 (10th Cir. 2007) (finding that the 30-day filing period for the petition of review after the reinstatement order is entered is binding and jurisdictional).

The Eleventh Circuit has found that it lacks jurisdiction to review an underlying removal order

where the alien has failed to exhaust administrative remedies or has failed to timely file a petition for review. *Avila v. United States AG*, 560 F.3d 1281, 1284 (11th Cir. 2009) (allowing, however, review of the underlying removal order during reinstatement proceedings where the jurisdictional burdens have been satisfied).

Each of these circuits seeks a solution to the problem where the current reopening procedures in the immigration context are simply not sufficient to satisfy due process. Indeed, every circuit has agreed that it has jurisdiction to review the reinstatement of a prior removal order under § 241(a)(5),[1] they only disagree as to the standards that must be met for the alien to contest the underlying removal order. Given that, it is abundantly clear that the Fifth Circuit would have had jurisdiction to review the reinstatement of the Petitioner's removal order had it actually been reinstated, but the BIA determined it had no jurisdiction even though his removal order had not

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[1] *Arevalo v. Ashcroft*, 344 F.3d 1, 9 (1st Cir. 2003); *Garcia-Villeda v. Mukasey*, 531 F.3d 141, 144 (2d Cir. 2008); *Avila-Macias v. Ashcroft*, 328 F.3d 108, 110 (3d Cir. 2003); *Velasquez-Gabriel v. Crocetti*, 263 F.3d 102, 105 (4th Cir. 2001); *Ojeda-Terrazas v. Ashcroft*, 290 F.3d 292, 295 (5th Cir. 2002); *Warner v. Ashcroft*, 381 F.3d 534, 536 (6th Cir. 2004); *Gomez-Chavez v. INS*, 308 F.3d 796, 800 (7th Cir. 2002); *Briseno-Sanchez v. Heinauer*, 319 F.3d 324, 326 (8th Cir. 2003); *Chay Ixcot v. Holder*, 646 F.3d 1202, 1206 (9th Cir. 2011); *Duran-Hernandez v. Ashcroft*, 348 F.3d 1158, 1162 n.3 (10th Cir. 2003); *Sarmiento-Cisneros v. Ashcroft*, 381 F.3d 1277, 1278 (11th Cir. 2004).

been reinstated, thus cutting off all recourse to seek review. It is ironic that had Petitioner's removal order been reinstated, he could have sought a collateral attack from a federal appellate court. But because it was not reinstated, he was deprived of judicial review, and, according to the BIA's erroneous interpretation of 8 U.S.C. § 1231(a)(5), he was deprived of BIA review as well.

Considering the complex jurisdictional challenges and confusions that often arise in the context of reopening immigration proceedings, the Petitioner contends that the best course of action is to extend the gross miscarriage of justice standard to include the review of *ultra vires* and unconstitutional removal orders prior to their actual reinstatement. The BIA's practice of effectively denying aliens judicial review flies in the face of common conceptions of justice and equity. As such, the gross miscarriage of justice standard employed by the Fifth Circuit and others to review underlying removal orders in the context of reinstatements should be extended to allow aliens to petition for review of an underlying removal order when the BIA claims a lack of jurisdiction because the case is "open to reinstatement."

C. Petitioner suffered a gross miscarriage of justice when he was unlawfully ordered removed, and the gross miscarriage of justice compounded when he was subsequently barred from reopening his proceedings because of the unlawful removal order itself.

Petitioner was ordered removed for possession of less than one gram of cocaine, which was incorrectly considered an aggravated felony at the time of his removal proceedings. *See* BIA Opinion of February 21, 2014, App. 2; *Lopez v. Gonzales*, 127 S. Ct. 625, 549 U.S. 47 (2006). It is incontrovertible that the Petitioner was ordered removed as an aggravated felon for a crime that did not constitute an aggravated felony. Because the BIA determined that the Petitioner's prior removal order was "open to reinstatement," he is now left without the ability to appeal the reinstatement order, as one does not exist, yet his motion to reopen was denied because of the potential for reinstatement.

In the Petitioner's case, it is clear that a gross miscarriage of justice occurred when he was ordered removed unlawfully. His removal was predicated on the basis of his conviction for less than one gram of cocaine, which was held incorrectly to constitute an aggravated felony under the federal guidelines, despite it clearly not rising to such a level. *See* Decision of the Immigration Judge, App. 14. The Petitioner was ordered removed after the BIA rejected his appeal of the IJ's decision, and only a few months

later *Lopez* was decided, making Petitioner's deportation ground no longer valid. *See* BIA Opinion of July 27, 2006, App. 10. In his appeal before the BIA, the Petitioner made the same arguments as the petitioner in *Lopez*, yet because his case was just a few months earlier, he was denied. *See id.*

Thus, the injustice compounded upon itself as the Petitioner's original removal grounds are invalid, so he should be able to seek reopening, yet he remains unable to reopen because he has been removed; a perfect example of circular reasoning at work. Because of this reasoning, the Petitioner has been denied adequate due process and habeas corpus relief, causing a gross miscarriage of justice to occur a second time. The gross miscarriage of justice standard should be extended to grant Circuit Courts the ability to review an underlying removal order for constitutional and legal questions where the BIA has relied upon that removal order in denying an alien's motion to reopen, particularly where the prior order was not actually reinstated.

CONCLUSION

The Petitioner's requests for reopening and to review his underlying removal order were dismissed on the basis of jurisdiction alone. The actual merits of his complaint were never considered because the BIA avoided them through a convoluted circus of jurisdictional barriers. The Fifth Circuit, not desiring

to disturb the Board's *sua sponte* authority, refused to consider the Petitioner's case on the merits as well, citing a lack of jurisdiction over the underlying removal order and agreeing with the BIA's "open to reinstatement" reasoning. The reality is that the Petitioner, formerly a lawful permanent resident for 16 years, was deported unlawfully and is now barred from seeking review of his unlawful deportation because he was unlawfully deported. The Petitioner's situation epitomizes the type of injustice with which habeas review of agency decisions was initially concerned.

Every circuit agrees that it cannot review the BIA's *sua sponte* decisions, yet also agrees that it may review reinstatements of prior removal orders, so the BIA has carefully sandwiched itself between these two areas of precedent to hide in a veil of unreviewability. No review of the BIA's *sua sponte* decision can be had, and the untimely statutory request to reopen the underlying removal proceedings would have required the BIA's *sua sponte* authority to be granted through equitable tolling. The Petitioner's prior order was never actually reinstated, so he has no opportunity to file a current, timely petition to review such a reinstatement. The Petitioner's situation carries with it great constitutional concerns, because he has been thoroughly denied the opportunity for habeas review of his plainly erroneous removal order.

For the reasons explained above, Petitioner asks that his Petition for Certiorari be granted, and that

he be given the opportunity to present his arguments before the Court.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 13-60656

FRANCISCO ARREGUIN,

Petitioner

v.

ERIC H. HOLDER, JR.,
U. S. ATTORNEY GENERAL,

Respondent

Petitions for Review of an Order of the
Board of Immigration Appeals

(Filed Jun. 25, 2014)

Before OWEN, ELROD, and HAYNES, Circuit Judges.

PER CURIAM:

IT IS ORDERED that respondent's opposed motion for summary disposition is GRANTED. Arreguin's petition is DENIED with respect to the appeal of the motion to reopen and DISMISSED for want of jurisdiction, to the extent he seeks to appeal the underlying removal order.

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 20530

Decision of the Board of Immigration Appeals

Date: FEB 21 2014

File: A091 399 686 – Houston, TX

In re: FRANCISCO ARREGUIN

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT:
Raed Gonzalez, Esquire

APPLICATION: Reconsideration

The respondent has filed a motion to reconsider the Board's decision of September 9, 2013, in which the Board denied the respondent's untimely motion to reopen.[1] The Department of Homeland Security (DHS) has not responded to the motion to reconsider. The motion will be denied.

A motion to reconsider must identify a material error of fact or law in the decision for which reconsideration is being requested. 8 C.F.R. § 1003.2(b)(2); *Matter of O-S-G-,* 24 I&N Dec. 56 (BIA 2006). The

[1] Ordinarily motions to reconsider must be filed within 30 days of the decision for which reconsideration is being requested. 8 C.F.R. § 1003.2(b)(2). However, as the Board's mailing address changed during the relevant period, this motion will be addressed on the merits.

respondent acknowledges that after departing the United States in accordance with his removal order, he reentered the United States unlawfully prior to the filing of his untimely motion. The respondent argues the Board erred in stating that we lacked jurisdiction to address his untimely motion under section 241(a)(5) of the Immigration and Nationality Act, 8 U.S.C. § 1231(a)(5), because DHS has not reinstated the prior removal order.

The text of section 241(a)(5) of the Act provides that if "the Attorney General finds that an alien has reentered the United States illegally after having been removed or having departed voluntarily, under an order of removal, the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed, the alien is not eligible and may not apply for any relief under this chapter, and the alien shall be removed under the prior order at any time after the reentry." The DHS regulation setting forth a procedure for whether proceedings should be subject to reinstatement, 8 C.F.R. § 241.8, addresses only the physical removal of the alien.

The respondent correctly notes that the Board lacks jurisdiction to reinstate a prior removal order (Motion at 10-11). *See Matter of W-C-B-,* 24 I&N Dec. 118 (BIA 2007); 8 C.F.R. § 241.8. However, the respondent cites no authority for the proposition that section 241(a)(5) of the Act "requires the prior order of removal to actually be reinstated" before the bar on reopening is in effect (Motion at 9). While the DHS is the sole authority competent to determine whether an

alien should be removed under a prior removal order, Immigration Judges and the Board are the sole administrative body competent to analyze the statutory scheme with respect to reopening of removal proceedings. Similarly, the Board has previously determined that an Immigration Judge has authority to terminate removal proceedings as improvidently begun where an alien "could have been removed by reinstatement of his prior deportation order," even where DHS had not initiated reinstatement proceedings.[2] *See Matter of W-C-B-, supra,* at 122.

The respondent argues that the Board's denial of his motion to reopen was an abuse of discretion, alleging that the Board has reopened proceedings in similar circumstances (Motion at 14-15).[3] The Board renders decisions based on the particular factual circumstances in each individual case, and we do not find the results in other, unrelated cases to be binding. Additionally, the short, unpublished orders referenced by the respondent include no legal interpretation and are not demonstrative of any legal error in this case.

Citing *Ramirez-Molina v. Ziglar,* 436 F.3d 508 (5th Cir. 2008), the respondent argues that under the

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[2] Similar to the circumstances in *Matter of W-C-B-,* DHS in this case opposed reopening on the grounds that the Board lacked jurisdiction.

[3] The respondent's descriptions of the underlying fact patterns in these cases do not suggest that the aliens' proceedings implicated section 241(a)(5) of the Act (Motion at 14-15).

law for the United States Court of Appeals for the Fifth Circuit his removal proceedings should be considered "void ab initio" (Motion at 7). However, the holding in *Ramirez-Molina* was that, because the alien had not established there was a "gross miscarriage of justice" in his initial removal proceedings, the Court of Appeals lacked jurisdiction to entertain any collateral attack on those proceedings within the context of reinstatement. *Ramirez-Molina v. Ziglar, supra.* Nothing in *Ramirez-Molina* addresses the Board's jurisdiction to reopen proceedings when an alien admits to having unlawfully reentered the United States subsequent to departing under an order of removal. Indeed, if the respondent's argument were correct and *Ramirez-Molina* applied to the Board's consideration of motions to reopen, the Board would retain jurisdiction over any motion to reopen proceedings upon a showing of "gross miscarriage of justice," even if proceedings had been reinstated by DHS. However, the respondent acknowledges that the Board has no jurisdiction to reopen proceedings in that event.

The respondent also argues that later reinstatement of the respondent's prior removal order would not bar him from reopening or relief, citing *Lopez-Flores v. Dept. of Homeland Security,* 376 F.3d 793 (8th Cir. 2004). We decline to apply that decision to this case, which arises out of the United States Court of Appeals for the Fifth Circuit. Regardless, we note the holding in *Lopez-Flores* was not the general holding given by the respondent – that "an alien's

application for relief [. . .] was not barred by a reinstatement order because the order was issued after the application for relief had been made" (Motion at 12). Rather, the Eighth Circuit held that the bar to relief in 241(a)(5) of the Act could not be applied retroactively to someone who had unlawfully entered prior to the time the law came into effect. *Lopez-Flores, supra,* at 795-96. That is not at issue in the respondent's case, as section 241(a)(5) of the Act was in effect prior to the initiation of his removal proceedings and his subsequent departure from the United States.

Finally, the respondent argues that "the reinstatement provision conflicts with [the] right of an alien to file a motion to reopen," citing various opinions regarding the regulatory "departure bar" at 8 C.F.R. § 1003.2(d) (Motion at 5). Unlike the regulatory departure bar, section 241(a)(5) of the Act is a statutory provision limiting the right to file a motion to reopen. To the extent that the respondent argues section 241(a)(5) of the Act violates his constitutional rights, we note that "neither the Immigration Judge nor this Board may rule on the constitutionality of the statutes that we administer." *Matter of Rodriguez-Carrillo,* 22 I&N Dec. 1031, 1035 (BIA 1999).

Moreover, as noted in the Board's prior decision, the respondent's motion to reopen is not authorized by statute because it was untimely filed. *See* section 240(c)(7)(C)(i) of the Act, 8 U.S.C. § 1229a(c)(7)(C)(i). The respondent acknowledges that he sought reopening under the Board's discretionary authority to

reopen proceedings sua sponte.[4] *See* 8 C.F.R. § 1003.2(a); *Matter of J-J-,* 21 I&N Dec. 976 (BIA 1997). The departure bar at 8 C.F.R. § 1003.2(d) routinely has been held to be a valid restriction on the Board's power to reopen sua sponte, including in cases factually similar to the respondent's claims. *Ovalles v. Holder,* 577 F.3d 288 (5th Cir. 2009); *Garcia-Carias v. Holder,* 697 F.3d 257, 265 (5th Cir. 2012) (addressing and affirming the decision in *Ovalles*); *see also Desai v. Att'y Gen.,* 695 F.3d 267, 270-71 (3d Cir. 2012); *Ortega-Marroquin v. Holder,* 640 F.3d 814 (8th Cir. 2011); *Zhang v. Holder,* 617 F.3d 650, 665 (2nd Cir. 2010). Accordingly, even if the Board did not lack jurisdiction under section 241(a)(5) of the Act, the respondent's motion would nonetheless have been denied.

As we are not persuaded of any material error in the Board's prior decision, this motion to reconsider will be denied.

ORDER: The motion to reconsider is denied.

/s/ [Illegible]
FOR THE BOARD

[4] In addition to seeking discretionary reopening, the respondent indicated that on remand he would seek to proceed with an application for cancellation of removal for lawful permanent residents, which is a discretionary form of relief. The Immigration Judge and the Board can consider unlawfully reentering the United States as an adverse factor for purposes of relief.

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

Date: SEP – 9 2013

File: A091 399 686 – Houston, TX

In re: FRANCISCO ARREGUIN

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT:
Raed Gonzalez, Esquire

ON BEHALF OF DHS: John McPhail
Assistant Chief Counsel

APPLICATION: Reopening

This matter was last before the Board on July 27, 2006, when the Board dismissed the respondent's appeal. The respondent submitted this motion on July 19, 2013. *See* section 240(c)(7)(C)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(c)(7)(C)(i). The Department of Homeland Security opposes the motion, alleging the Board lacks jurisdiction to reopen these proceedings.

We lack jurisdiction to reopen the respondent's removal proceedings under section 241(a)(5) of the Act, 8 U.S.C. § 1231(a)(5). The parties do not dispute that respondent was physically removed from the United States. The respondent, who currently resides in Houston, Texas, subsequently reentered the United

States unlawfully. We lack jurisdiction to consider this motion under section 241(a)(5) of the Act, as the respondent's removal proceedings are open to reinstatement.[1] Accordingly, we enter the following order.

ORDER: The record is returned to the Immigration Court without further action.

/s/ [Illegible]
FOR THE BOARD

[1] The jurisdictional bar in section 241(a)(5) of the Act is separate from the "departure bar" regulation addressed in the respondent's motion. *See Lari v. Holder,* 697 F.3 [sic] 273 (5th Cir. 2012) (holding the regulation at 8 C.F.R. § 1003.2(d) does not remove the Board's jurisdiction over a statutorily authorized motion to reopen). Regardless, the respondent's untimely motion requesting sua sponte reopening does not qualify as a motion to reopen authorized by statute.

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

Date: JUL 27 2006

File: A091 399 686 – Houston

In re: FRANCISCO ARREGUIN

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:
Mayda Gil De Lamadrid, Esquire

ON BEHALF OF DHS: John McPhail
Assistant Chief Counsel

CHARGE:

Notice: Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)] – Convicted of aggravated felony

Lodged: Sec. 237(a)(2)(B)(i), I&N Act [8 U.S.C. § 1227(a)(2)(B)(i)] – Convicted of controlled substance violation

APPLICATION: Cancellation of Removal

ORDER:

PER CURIAM. We affirm the Immigration Judge's April 4, 2006, decision finding the respondent removable and ineligible for cancellation of removal under section 240A(a) of the Immigration and Nationality

Act, 8 U.S.C. § 1229b(a), as an alien convicted of an aggravated felony.

It is undisputed that on January 6, 2006, the respondent was convicted in the 178th District Court of Harris County, Texas, of the offense of possession of less than one gram of cocaine in violation of Texas Health and Safety Code § 481.115(b) (Exh. 4, Tab X). The record of conviction reflects that the district court judge reduced the respondent's sentence to 60 days in jail under Texas Penal Code § 12.44(a) (Exh. 4, Tab X). This provision states that "[a] court may punish a defendant who is convicted of a state jail felony by imposing the confinement permissible as punishment for a Class A misdemeanor if, after considering the gravity and circumstances of the felony committed and the history, character, and rehabilitative needs of the defendant, the court finds that such punishment would best serve the ends of justice." *See* Texas Penal Code § 12.44(a).

According to the United States Court of Appeals for the Fifth Circuit, in whose jurisdiction this proceeding arises, the respondent's offense qualifies as an aggravated felony if it is (1) punishable under the Federal Controlled Substances Act (CSA); and (2) a "felony" under either state or federal law. *United States v. Sanchez-Villalobos,* 412 F.3d 572, 574 (5th Cir. 2005). Possession of cocaine is punishable under the CSA. *See* 21 U.S.C. § 844(a). Hence, if the respondent's offense qualifies as a "felony" he stands convicted of an aggravated felony. Under applicable Fifth Circuit law, a state drug offense is a "felony" in

the present context if it is punishable under the law of the convicting state by a term of imprisonment of more than 1 year. *Sanchez-Villalobos, supra,* at 575; *United States v. Caicedo-Cuero,* 312 F.3d 697, 702-03 (5th Cir. 2002). Under Texas law, the offense of possession of less than 1 gram of cocaine is classified as a "state jail felony." Texas Health and Safety Code § 481.115(b). As such, it is punishable by a term of imprisonment of up to 2 years. Texas Penal Code § 12.35(a); *Caicedo-Cuero, supra,* at 703-06. Accordingly, the respondent's offense is an aggravated felony.

On appeal, the respondent maintains that the district judge's reduction of his sentence converted his offense from a state jail felony to a class A misdemeanor (Respondent's Brief at 5-8). This argument is not supported by Texas law. In considering the effects of Texas Penal Code § 12.44(a) for sentence enhancement purposes, Texas courts have ruled that defendants whose sentences were reduced under the provision were still convicted of state jail felonies and their offenses could properly be used to enhance later sentences. *See Arriola v. State,* 49 S.W.3d 374 (Texas App. 2001); *see also Fite v. State,* 60 S.W.3d 314 (Texas App. 2001). The Fifth Circuit has also adopted this approach. *See United States v. Rivera-Perez,* 322 F.3d 350, 352 (5th Cir. 2003); *United States v. Caicedo-Cuero, supra.* Based on the foregoing, we must conclude that the respondent's offense is classified as a felony under Texas law even though he

received the sentence accorded to a class A misdemeanor.

Because the respondent has been convicted of an aggravated felony, he is removable as charged and statutorily ineligible for cancellation of removal. Accordingly, the appeal is dismissed.

/s/ [Illegible]
FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
Houston, Texas

File No.: A 91 399 686 April 4, 2006

In the Matter of	)	
	)	
FRANCISCO ARREGUIN	)	IN REMOVAL
	)	PROCEEDINGS
Respondent	)	

CHARGE: Section 237(a)(2)(A)(iii) of the Act – convicted of an aggravated felony; Section 237(a)(2)(B)(i) of the Act – convicted of a controlled substance violation.

APPLICATIONS: Cancellation of removal for certain permanent residents.

ON BEHALF OF RESPONDENT:	ON BEHALF OF DHS:
	John McPhail
Mida Gil De La Madrid	ACC, Houston

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent is a 36-year-old male, native and citizen of Mexico. He was placed in removal proceedings when the Department of Homeland Security filed with the Court and served upon the respondent the Notice to Appear at Exhibit Number 1. On that document, respondent is charged with being a subject for removal based on an aggravated felony conviction. The Department of Homeland Security lodged an additional charge on the Form I-261, which is found

at Exhibit 1A. Together, the charges are found on both the Notice to Appear and the Form I-261.

In support of the charges, the Government alleges that the respondent is not a citizen of the United States, that he was born in Mexico and is a citizen of Mexico and became a lawful permanent resident of the United States on December 1, 1990, and then on January 6, 2006, he was convicted in Harris County, Texas, for possession of cocaine. Respondent, with the assistance of counsel, admitted that the allegations were true. The respondent denied that he had been convicted of an aggravated felony and the Court, based upon the absence of evidence at the time, determined that the evidence did not establish in a clear and convincing fashion that he had been convicted of an aggravated felony. The Court did find that the respondent had been convicted of a controlled substance violation based upon his admission to the allegation that he had been convicted of possession of cocaine.

The respondent sought to avoid removal from the United States by filing with the Court an application for cancellation of removal found at Exhibit Number 3 with supporting documents. He also provided to the Court the supporting documents at Exhibit Number 4. The respondent had the burden to establish that he was eligible for the relief that he was seeking and the Court ~~labored~~ [placed] upon him the obligation and responsibility of presenting to the Court evidence of his criminal record, which he did. At Exhibit 4, Tab X, the Court has for consideration the respondent's

conviction record relating to a January 6, 2006, conviction for possession of cocaine wherein respondent was convicted as a State Jail Felon. The conviction record reads in part that ["]in accordance with Section 12.44(a), ~~Penalty~~ [Penalty] Laws of Texas, the Court finds that the ends of justice would best be served by punishment as a Class A Misdemeanor.["] The defendant is adjudged to be guilty of a State jail felony and assessed the punishment indicated above. In *U.S. v. Caicedo Cureo,* 312 F.3d 697 (5th Cir. 2002) the Fifth Circuit Court of Appeals, United States, held a Texas State Jail Felony for simple possession of marijuana constitutes a felony and such felony qualifies as a drug trafficking crime and, therefore, an aggravated felony. Extrapolating the reasoning in that case to the facts of this case, this Court at this time finds that a State Jail Felony for possession of cocaine constitutes a felony and qualifies as an aggravated felony.

Because respondent has been convicted of an aggravated felony, he cannot establish eligibility for cancellation of removal for certain permanent residents because one threshold requirement says that he has not been convicted of any aggravated felony. Despite the fact that the Court did not initially find that the respondent had been convicted of an aggravated felony, that does not preclude the Court from determining that he is in ineligible for cancellation of removal because of an aggravated felony conviction and the evidence is clear and convincing that he has

been convicted of an aggravated felony as relates to his possession of cocaine conviction.

Respondent does not identify any other form of relief from removal and the Court does not believe that he is eligible for any other form of relief from removal and the Court enters the following order.

ORDERS

IT IS HEREBY ORDERED respondent's application for cancellation of removal be and is pretermitted.

IT IS FURTHER ORDERED that the respondent be removed from the United States to Mexico on the charge sustained on the Form I-261.

/s/ J. L. Benton
JIMMIE LEE BENTON
Immigration Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 13-60656

FRANCISCO ARREGUIN,

Petitioner

v.

ERIC H. HOLDER, JR.,
U. S. ATTORNEY GENERAL,

Respondent

Petitions for Review of an Order of the
Board of Immigration Appeals

(Filed Jul. 15, 2014)

Before OWEN, ELROD, and HAYNES, Circuit Judges.

PER CURIAM:

This panel previously granted respondent's opposed motion for summary disposition, denied Arreguin's petition with respect to the appeal of the motion to reopen, and dismissed for want of prosecution, to the extent he seeks to appeal the underlying removal order. The panel has considered petitioner's opposed motion for reconsideration. IT IS ORDERED that the motion is DENIED.
