No. 09-1367

In The Supreme Court of the United States

MR. MARTIN ROSILLO-PUGA,

Petitioner,

v.

ERIC H. HOLDER,

Respondent.

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

PETITIONER'S REPLY BRIEF TO OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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PETITIONER'S REPLY BRIEF TO OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondent attempts to persuade this Court that Petitioner's case is not amenable to review because Mr. Rosillo-Puga ("Rosillo" or "Petitioner") filed his motion to reopen and/or reconsider outside the respective 90 and 30 day time limits, and pursuant to the Board of Immigration Appeals ("BIA") and/or the Immigration Judge's ("IJ") *sua sponte* authority to reopen at any time. Brief in Opposition ("Opp. Br.") at 11-12; 8 C.F.R. § 1003.23(b)(1)(IJ); see also 8 C.F.R. § 1003.2(b)(2) and (c)(2)(BIA). Respondent's position that there is no split among the circuits with respect to *untimely* motions to reopen or reconsider, pursuant to *sua sponte* authority, crumples like a house of cards in the face of the true facts – that the Fourth Circuit's decision in *William v. Gonzalez*, 499 F.3d 329 (4th Cir. 2007) involved precisely an untimely, *sua sponte* motion to reopen. In fact, this case is virtually identical, factually, to *William*, putting the Tenth and Fourth Circuits squarely at odds with each other over the validity of the regulatory departure bar.

Moreover, recent cases cited by Respondent, many of which are based in part on the mistaken belief that the motion at issue in *William* was timely, only add to the current state of confusion among the circuits over the effect and scope of the regulatory departure bar, and further illustrate the need for immediate and discerning judicial review of this case.

Ultimately, the BIA cannot be permitted, even in the context of a request pursuant to its *sua sponte* authority, to refuse to consider a request to reopen or reconsider a removal order on the grounds that it *lacks jurisdiction because the alien has departed the country*. This position leads to unfair and absurd results that are contrary to the purpose of the IIRIRA.

I. *William* Cannot Legitimately Be Read To Apply Solely To Timely Filed Motions To Reopen.

Respondent opens its argument with the assertion that in *William*, "although the Fourth Circuit has reached a contrary conclusion in considering *timely* motions to reopen, there is no disagreement in the circuits regarding whether the Attorney General may validly limit the ability of immigration officials to grant requests for *sua sponte* reconsideration or reopening filed by aliens who have departed the United States." Opp. Br. at 11. This assertion is wholly and inexcusably wrong.

It is difficult to see how the Government could make such a mistake from reviewing the *William* opinion. Nowhere in the *William* opinion does the Fourth Circuit so confine its decision. Moreover, it is abundantly clear, from the facts set forth in the opinion, that William's motion to reopen was indeed untimely. William was removed on July 11, 2005, presumably some time after issuance of the final

order of removal, yet he did not file his motion to reopen until December 21, 2005, more than five months later. *William*, 499 F.3d at 331. Moreover, the *William* opinion indicates that the motion to reopen was filed requesting the BIA to exercise its *sua sponte* authority stating that "William filed a motion to reopen immigration proceedings before the BIA in which he asserted that the *exceptional circumstances* of his case warranted reconsideration of his removal." *Id.* at 331 (emphasis added). This language refers expressly to the standard for *sua sponte* reopening. Opp. Br. pp. 3-4, *quoting In re G-D-*, 22 I&N Dec. 1132, 1133-34 (B.I.A. 1999) ("The Board and the IJs 'invoke [their] *sua sponte* authority sparingly, treating it not as a general remedy for any hardships created by enforcement of the time and number limits in the motions regulations, but as an extraordinary remedy reserved for truly *exceptional circumstances*.'" (Emphasis added.)

While the *William* opinion's lack of express reference to *sua sponte* authority and timeliness might reasonably confuse perhaps even a circuit court, it is unfathomable that the Government would misunderstand. But, any confusion on the issue could easily have been resolved by review of either the BIA's opinion on remand, *In re Tunbosun Olawale William*, 2008 WL 5537807, or on subsequent appeal to the circuit court, *William v. Holder*, 359 Fed. Appx. 370, 2009 WL 5175986 (C.A. 4). Both opinions make it clear that, in fact, William's motion was not filed until "more than 26 months after the date when his

removal order became final, and more than 5 months after his physical removal from the United States." *See*, respectively, pp. 3 and p. 372 (setting out the specific dates).[1] Moreover, both opinions specify that William's request was made pursuant to the BIA's *sua sponte* authority to reopen a case "at any time." *Id.*, respectively, at 3 and 373.

There is simply no credible basis for assuming or representing that the *William* court intended to confine its ruling to timely filed, non-*sua sponte* motions to reopen or reconsider. The Fourth Circuit concluded broadly:

> [W]e believe it is evident that 8 C.F.R. § 1003.2(d), containing the post-departure bar on motions to reopen, conflicts with the statute by restricting the availability of motions to reopen to those aliens who remain in the United States. Therefore, we conclude the regulation lacks authority and is invalid. Id. at 334.

The lack of reference to timeliness or *sua sponte* remedies can be explained by the fact that both the IJ, and then the BIA, denied William's motion to reopen, in the first instance, exclusively on the basis that it could not hear William's request once he was removed from the United States. The Fourth Circuit

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[1] Respondent begrudgingly acknowledges that the motion in *William* "may well have been untimely" in a footnote on page 18 of its brief. See Opp. Br., at 18, n.3.

states as much in its opinion when describing the disposition below: "The BIA refused to consider William's motion to reopen – thereby effectively denying it on procedural grounds – reasoning that William had already been removed from the United States, and in those circumstances, 8 C.F.R. § 1003.2(d) bars the filing of a motion to reopen." *William*, 499 F.3d at 331. Again, review of the subsequent proceedings confirms this fact as well. *See In re Tunbosun Olawale William*, 2008 WL 5537807 at 1 ("we denied [William's] motion pursuant to 8 C.F.R. § 1003.2(d)(2006), which provides in relevant part that a motion to reopen shall not be made by or on behalf of a person who is the subject of removal proceedings after his departure from the United States.") and *see*, *similarly, William v. Holder*, 359 Fed. Appx. at 371-72.

Additionally, there was no need to reference *sua sponte* authority in the *William* opinion, because despite the fact that William's motion was untimely, and therefore requested that the BIA reopen pursuant to its *sua sponte* authority, Respondent did not argue in *William* that there was no statutory authority for its *sua sponte* powers. Rather the Respondent took the position that the statutory language was silent as to whether it intended to apply to aliens who have departed the country. *William*, 499 F.3d at 332.

Thus, this case cannot be distinguished from *William* on either of the grounds asserted by Respondent. The Fourth Circuit remanded *William* to the BIA knowing both that the motion to reopen at issue was untimely, and that it was brought pursuant

to the BIA's *sua sponte* authority. Similarly, the Tenth Circuit's opinion below does not limit itself to untimely or *sua sponte* motions as the Government would like the Court to believe. Rather, the Tenth Circuit held: "We agree with the dissent's position [in *William*] and conclude that 8 C.F.R. 1003.23(b)(1) (like 8 C.F.R. 1003.2(d)) is a valid exercise of the Attorney General's Congressionally-delegated rulemaking authority, and does not contravene 8 U.S.C. 1229a(c)(6)(A) or (7)(A)." *Rosillo-Puga v. Holder*, 580 F.3d 1147, 1156 (10th Cir. 2009). Like the Fourth Circuit's holding in *William*, the Tenth Circuit put no qualifications on the scope of its decision. It held simply that the regulatory departure bar was a valid exercise of discretion, regardless of the nature of the motion to which it was applied.

In the end, even if Respondent's characterization that this case "only presents a question about whether the departure bar regulation is valid as applied to *sua sponte* reopening or reconsideration" is accepted as true, a fact not supported by the broad holding in the case below, it still represents a clear split between, at least, the Fourth and Tenth Circuits as to the effect of the unambiguous language of 8 U.S.C. § 1229a(c)(7)(A) on the Agency's application of the departure bar, in the context of *sua sponte* motions.

II. Recent Circuit Court Cases Illustrate The Need For Review.

There can be no dispute that there is a conflict between the Fourth and Tenth Circuits on whether the regulatory departure bar is valid. This split has been expressly recognized by, at least, the Seventh Circuit in *Marin-Rodriguez*, 612 F.3d at 592, and the Ninth Circuit in *Coyt v. Holder*, 593 F.3d 902, 907 n.3 (9th Cir. 2010). The issue has been thoroughly reviewed and the subject of both majority and dissenting opinions in the Fourth and Tenth Circuits. There is no reason to delay review of this motion as Respondent suggests, for more Courts of Appeals to address it. Opp. Br. at 21. Rather, more Courts of Appeals have addressed the issue since this Petition was filed, and the confusion over the validity of the departure bar only grows.

Since Rosillo filed this Petition in May 2010, both the Second and Seventh Circuits have ruled on the validity of the regulatory departure bar, taking the opposite positions from each other, with the Seventh Circuit following *William* and the Second Circuit declining to follow *William*. *See Marin-Rodriguez v. Holder*, 612 F.3d 591 (7th Cir. July 14, 2010) and *Zhang v. Holder*, 2010 WL 3169292 (C.A. 2, Aug. 12, 2010). The different approaches taken in these cases, both from each other, and from the Fourth and Tenth Circuit's analysis on the validity of the departure bar, presents an increasingly compelling reason to review this case now.

In *Marin-Rodriguez* the Seventh Circuit expressly acknowledged that it reached the same result as the Fourth Circuit in *William*, but for different reasons relying on this Court's recent and post-*William* opinion in *Union Pacific R.R. v. Brotherhood of Locomotive Engineers*, ___ U.S. ___, 130 S.Ct. 584, 175 L.Ed.2d 428 (2009). *Id.* at 594. The Seventh Circuit framed the issue as whether the BIA "lacks jurisdiction to reconsider or reopen any of its decisions after the alien has left the United States." *Id.* at 592. The court held:

> As a rule about subject-matter jurisdiction, §1003.2(d) is untenable. The Immigration and Nationality Act authorizes the Board to reconsider or reopen its own decisions. It does not make that step depend on the alien's presence in the United States. * * * The fact remains that since 1996 nothing in the statute undergirds a conclusion that the Board lacks "jurisdiction" – which is to say, adjudicatory competence, see *Reed Elsevier, Inc. v. Muchnick*, ___ U.S. ___, 130 S.Ct. 1237, 1243, 176 L.Ed.2d 17 (2010) (collecting cases) – to issue decisions that affect the legal rights of departed aliens.

Marin-Rodriguez v. Holder, 612 F.3d 591, 593-94 (7th Cir. 2010). The court of appeals took the position that *Union Pacific*, in which this Court determined that "agencies directed by Congress to adjudicate particular matters" may not "decline to exercise [that jurisdiction]," was controlling. *Union Pacific*, 130 S.Ct. at 590; *Marin-Rodriguez*, 612 F.3d at 594 ("We think

that *Union Pacific* is dispositive in favor of the holding in *William* – though on a rationale distinct from the fourth circuit's.") Notably, as in *Marin-Rodriguez*, the sole reason for denying Rosillo-Puga's claim expressed by the BIA was its interpretation that it lacked jurisdiction to hear the case because the alien had departed the United States.[2]

Conversely, in *Zhang v. Holder*, 2010 WL 3169292 (C.A. 2), the Ninth Circuit held that the BIA's determination that the departure bar deprived it of jurisdiction to hear a *sua sponte* motion to reopen once the alien had departed was entitled to deference. However, in denying the petitioner's request for review, the Ninth Circuit recognized some "superficial tension" between its ruling, and the Seventh Circuit's decision in *Marin-Rodriguez*, and further distinguished itself from *Marin-Rodriguez* and *William* on

[2] The court noted that the motion to reopen at issue in *Marin-Rodriguez* was timely, referring to another 2010 case, *Munoz De Real v. Holder*, 595 F.3d 747 (7th Cir. 2010), in which the Seventh Circuit denied the immigrant's appeal on the basis that his motion to reopen was untimely. In deciding *Munoz*, however, the Seventh Circuit found that the BIA had actually considered the request to exercise its *sua sponte* authority to reopen, but expressly declined to do so. *Id.* at 750. Additionally, the Court was under the mistaken impression that the motion to reopen in *William* was timely, when it was not. *Id.* at 749. ("Munoz de Real urges us to join the Fourth and Ninth Circuits, which have ruled that immigration courts may hear motions to reopen filed on behalf of departed aliens . . . This court need not determine the effect of the departure bar in this case. The reason is that Munoz de Real's motion to reopen was time-barred.")

the basis of timeliness. *Id.* at *11 ("Because the petitioner's only motion for reconsideration was timely under the INA, the facts of *Marin-Rodriguez* resemble those considered by the Fourth Circuit in *William*.") This incorrect assumption – that the *William* court dealt with a timely filed, *i.e.*, non-*sua sponte* motion, rather than an untimely *sua sponte* motion, was undoubtedly advocated by the Government's attorneys, as they have attempted to advocate here.[3]

These recent decisions rendered after the Tenth Circuit's opinion in the case below, clearly illustrate the importance of this recurring issue. Furthermore, the divergent approaches taken by the courts to address the validity of the regulatory departure bar weighs compellingly in favor of review.

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[3] The opinions in the Fifth Circuit cases cited by Respondent in support of its attempt to stymie judicial review in this case, *Ovalles v. Holder*, 577 F.3d 288 (2009) and *Al-Mousa v. Holder*, No. 07-61003, 2010 WL 2802454 (5th Cir. July 9, 2010), were similarly founded, at least in part, on the Court's mistaken belief that *William* involved a timely, and thus, non-*sua sponte* motion to reopen or reconsider. Respondent expressly acknowledges this fact. See Opp. Br. at 18 ("And, like the court below, the Fifth Circuit determined that the untimeliness of the alien's motion was a 'key fact [that] distinguishes the present case from William.' ") *Ovalles*, 577 F.3d at 295; *Al-Mousa*, at *1.

III. Review Is Necessary To Avoid An Unfair And Absurd Result.

This case illustrates an extremely important, and recurring issue warranting this Court's immediate attention because of the absurd and unfair result to which the Government's position leads. The IJ and BIA avoided considering the merits of Petitioner's case, in which he alleges exceptional circumstances and a gross miscarriage of justice warranting *sua sponte* reopening, solely because he followed the law and allowed himself to be removed from this Country.[4] Had he stayed or returned illegally, Petitioner could have filed his motion, and under the current state of the BIA's interpretation of the law, the IJ would have been forced to make a determination of whether to exercise its discretion to reopen or reconsider the case. The Government's stance on this issue is absurd, unfair, and inconsistent with the recognized overriding purpose of the IIRIRA – "expedit[ing] physical removal of those aliens not entitled to admission to the United States, while at the same time increasing the accuracy of such determinations." *Coyt v. Holder*, 593 F.3d 902, 907 (9th Cir. 2010). The Government should not be permitted to bypass its

[4] Petitioner did not argue the exceptional circumstances that warrant reopening of his removal proceedings below. That issue was not presented to the circuit court by the BIA opinion on appeal which denied Petitioner's motion solely for lack of jurisdiction pursuant to the regulatory departure bar. See Cert. Pet. at 35-36.

responsibilities based upon a self-imposed arbitrary rule at odds with statute, common sense and fairness.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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