No. 03-909

In the Supreme Court of the United States

JEAN MARIE LOUIS, PETITIONER

v.

JOHN D. ASHCROFT, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Under 8 U.S.C. 1252(a)(2)(C), "no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense" enumerated in certain provisions of Title 8 of the United States Code. The question presented is whether a court of appeals has jurisdiction to consider a "substantial constitutional challenge" to a removal order when the alien is removable by reason of having committed a criminal offense enumerated in Section 1252(a)(2)(C).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-2a) is unreported. The order of the Board of Immigration Appeals (Pet. App. 6a-7a) is also unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 22, 2003. A petition for rehearing was denied on October 3, 2003 (Pet. App. 3a-4a). The petition for a writ of certiorari was filed on December 23, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546, Congress enacted a number of immigration-reform measures. One is codified in 8 U.S.C. 1252(a)(2)(C), which provides that "no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense" covered in certain sections of Title 8 of the United States Code. An "aggravated felony" is a criminal offense covered in one of the sections mentioned in Section 1252(a)(2)(C)—namely, 8 U.S.C. 1227(a)(2)(A)(iii). The term "aggravated felony" is defined in 8 U.S.C. 1101(a)(43) and includes certain drug crimes. See 8 U.S.C. 1101(a)(43)(B).

This Court interpreted Section 1252(a)(2)(C) in two decisions issued on the same day in 2001. One of those cases, *INS* v. *St. Cyr*, 533 U.S. 289, holds that Section 1252(a)(2)(C) has no effect on a district court's habeas corpus jurisdiction under 28 U.S.C. 2241. The other case, *Calcano-Martinez* v. *INS*, 533 U.S. 348, holds that Section 1252(a)(2)(C) deprives a court of appeals of jurisdiction to review an administrative determination that an alien is ineligible for a discretionary waiver of deportation. In *Calcano-Martinez*, the Court noted, but had no occasion to address, the question whether Section 1252(a)(2)(C) deprives a court of appeals of jurisdiction to review a "substantial constitutional challenge" raised by a covered alien. 533 U.S. at 350 n.2.

2. Petitioner is a Haitian citizen who was paroled into the United States for humanitarian reasons in 1992. On May 25, 1999, petitioner was convicted in a Pennsylvania court of possession with intent to deliver

a controlled substance, an aggravated felony. On May 3, 2000, the Immigration and Naturalization Service (INS) initiated administrative removal proceedings.[1] On June 19, 2000, the District Director of the INS sustained the charge of removability and issued an order of removal. Pet. App. 9a, 16a.

Petitioner requested protection from removal on the ground that he faced persecution and torture if returned to Haiti. On February 6, 2001, an Immigration Judge (IJ) ordered petitioner removed, but withheld removal under the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. GAOR, 39th Sess., Supp. No. 51, U.N. Doc. A/39/51 (1984). Pet. App. 8a, 16a, 22a-23a.

The INS appealed the IJ's decision to the Board of Immigration Appeals (BIA). On October 24, 2001, the BIA dismissed the INS's appeal. It concluded that the evidence established that criminal returnees were being indefinitely detained upon their return to Haiti, which had an established record of mistreating detainees and prisoners. The BIA therefore held that the evidence was sufficient to establish a likelihood that petitioner would face torture if returned to Haiti. Pet. App. 8a-9a, 14a-15a.

3. On November 29, 2002, the INS filed with the BIA a motion to reopen petitioner's removal proceeding. The motion requested that the BIA vacate its decision based on a material change in the law. In particular, the INS argued that the rationale for the

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[1] Certain functions of the INS have since been transferred to the Department of Homeland Security and assigned to United States Immigration and Customs Enforcement. See 6 U.S.C. 251(2).

decision—that a deported criminal alien was likely to suffer torture by being detained in a Haitian jail—had been rejected by the BIA in an intervening en banc decision. That decision, *In re J-E-*, 23 I. & N. Dec. 291 (2002), holds that substandard prison conditions in Haiti do not constitute torture under the relevant INS regulation when there is no evidence that the authorities intentionally created and maintained those conditions in order to inflict torture. Admin. R. 15-18.

On November 19, 2002, INS counsel mailed its motion to reopen both to petitioner and to the attorney who represented him before the BIA at the addresses on file with the INS. On December 11, 2002, the BIA separately sent notice of the INS's motion to petitioner and his counsel at their addresses on file with the BIA. Neither petitioner nor his counsel responded to the motion to reopen. Admin. R. 13-14, 18.

On February 26, 2003, the BIA issued an order in which it concluded that the INS's motion to reopen was untimely but granted the motion *sua sponte*. Finding its decision in *In re J-E-* controlling, the BIA vacated its previous decision and ordered petitioner removed from the United States to Haiti. On the same day, the BIA mailed a copy of the order to petitioner at a new address. Pet. App. 6a-7a; Admin. R. 1.

4. Petitioner did not file a motion to reconsider with the BIA. Instead, he filed a petition for review of its order in the court of appeals. On June 9, 2003, the court issued an order to show cause why the petition should not be dismissed for want of jurisdiction under 8 U.S.C. 1252(a)(2)(C). Pet. App. 5a.

On August 22, 2003, after receiving submissions from the parties, the court dismissed the petition for review in an unpublished order. Jurisdiction in a case falling under Section 1252(a)(2)(C), the court held, is limited to

determining whether the petitioner is an alien and whether he is removable by reason of having been convicted of one of the enumerated offenses, and petitioner conceded that the answer to both questions is yes. The court declined to consider petitioner's claim that he had been denied due process because he was not given notice of the BIA proceeding on the motion to reopen. The court held that it had no jurisdiction over a criminal alien's "substantial constitutional claims," and declined petitioner's invitation to revisit the decision that established that principle, *Liang* v. *INS*, 206 F.3d 308, 322 (3d Cir. 2000), cert. denied, 533 U.S. 949 (2001). Pet. App. 1a-2a.

ARGUMENT

Petitioner contends that 8 U.S.C. 1252(a)(2)(C) does not preclude, on direct review of an order of removal, a court of appeals' exercise of jurisdiction over "substantial constitutional challenges." Pet. 8-21. He contends that the Third Circuit's contrary interpretation of Section 1252(a)(2)(C) is erroneous (Pet. 18-21); that its interpretation conflicts with that of other courts of appeals (Pet. 8-15); and that the interpretive question is one of great importance (Pet. 15-18). While the government agrees with petitioner that Section 1252(a)(2)(C) does not deprive a court of appeals of jurisdiction to review a substantial constitutional claim, and while there does appear to be a circuit conflict on that issue, it is not clear that the issue is sufficiently important to justify this Court's intervention, and even if it were, this case would not be an appropriate vehicle. Further review is therefore unwarranted.

1. By preserving aliens' ability to raise certain legal challenges to an order of removal through a petition for a writ of habeas corpus if they cannot be raised in a

petition for direct review in the court of appeals, this Court's decision in *St. Cyr* has greatly diminished the significance of the issue in this case. In light of *St. Cyr*, the question raised in the petition, as a practical matter, is not *whether* there can be judicial review of substantial constitutional claims, but only *where* there can be judicial review of such claims. In the Seventh, Eighth, and Eleventh Circuits, such claims may be reviewed in the court of appeals, on direct review of an order of removal. See, *e.g.*, *Robledo-Gonzales* v. *Ashcroft*, 342 F.3d 667, 676-681 (7th Cir. 2003); *Balogun* v. *Attorney General*, 304 F.3d 1303, 1305 (11th Cir. 2002); *Vasquez-Velezmoro* v. *INS*, 281 F.3d 693, 696 (8th Cir. 2002). In the Third and Ninth Circuits, such claims must be brought in the district court, in a petition for a writ of habeas corpus. See, *e.g.*, *Cedano-Viera* v. *Ashcroft*, 324 F.3d 1062, 1067-1070 (9th Cir. 2003); *Liang*, 206 F.3d at 322-323. Since there is no circuit in which an alien challenging an order of removal is categorically foreclosed from obtaining judicial review of a substantial constitutional claim, it is not clear that the procedural question in this case—which, in practical terms, is whether such a claim is to be brought in the district court or the court of appeals—is sufficiently important to justify the exercise of this Court's certiorari jurisdiction at this time.

2. Even if the question were deserving of the Court's attention, this case would not be an appropriate vehicle for deciding it, because the court of appeals would lack jurisdiction regardless of whether the Court adopted the rule that petitioner advocates. As explained in more detail below, that is true for two independent reasons. First, because petitioner never presented his constitutional claim to the BIA, he has failed to exhaust administrative remedies. Second,

even if it is true that petitioner did not receive notice of the INS's motion to reopen, the BIA did not violate due process by *sua sponte* vacating its initial decision without notice, and petitioner thus has no substantial constitutional challenge to bring, both because he could have filed a motion to reconsider with the BIA and because any lack of notice had no effect on the outcome.

a. According to petitioner, subsection (a) of 8 U.S.C. 1252 does not deprive a court of appeals of jurisdiction to review a substantial constitutional challenge to an order of removal. Section 1252, however, also has a subsection (d), which provides, in part, that "[a] court may review a final order of removal only if * * * the alien has exhausted all administrative remedies available to the alien as of right." 8 U.S.C. 1252(d)(1). This provision has uniformly been interpreted to mean that a claim of procedural error, even one of constitutional dimension, has not been exhausted if the asserted error could have been corrected by the BIA but the claim was not raised there. See *Silva-Calderon* v. *Ashcroft*, 358 F.3d 1175, 1178-1179 (9th Cir. 2004) (citing cases from other circuits). Section 1252(d) has also been uniformly interpreted to mean that a failure to exhaust administrative remedies deprives a court of appeals of subject matter jurisdiction to consider the claim in question. See *Barron* v. *Ashcroft*, 358 F.3d 674, 678 (9th Cir. 2004) (citing cases from other circuits).

The asserted error in this case—an alleged lack of notice to petitioner before the BIA vacated its prior decision[2]—could have been raised in the BIA, and cor-

[2] There has never been any finding that petitioner did not receive notice of the INS's motion to reopen. And the only concrete evidence of lack of notice is the fact that the copy of the motion to reopen that was served on petitioner's counsel by the INS was

rected by it, through the mechanism of a motion to reconsider. See 8 C.F.R. 1003.2(b) (authorizing such a motion within 30 days of BIA decision when the decision is based on an "error[] of fact or law"). Since petitioner did not file such a motion, he failed to exhaust his administrative remedies. See, *e.g.*, *Gonzalez-Torres* v. *INS*, 213 F.3d 899, 903-904 (5th Cir. 2000) (no exhaustion where claim was not raised on appeal to BIA and alien did not file motion to reconsider). Cf. *Bernal-Vallejo* v. *INS*, 195 F.3d 56, 63-64 (1st Cir. 1999) (no exhaustion where due process claim based on ineffective assistance of counsel was not raised on appeal to BIA and alien did not file motion to reopen); *Liu* v. *Waters*, 55 F.3d 421, 424-426 (9th Cir. 1995) (same). The court of appeals would therefore be without jurisdiction to consider petitioner's claim even if this Court concluded that Section 1252(a)(2)(C) is not a bar to consideration of substantial constitutional claims.

b. The court of appeals would also lack jurisdiction even if petitioner had not failed to exhaust administrative remedies, because he has no substantial constitutional challenge to bring. That is true for two separate reasons.

i. In his response to the court of appeals' order to show cause, petitioner contended that his principal claim of unconstitutionality was that he "received no notice of the proceeding [on the motion to reopen] and no opportunity to be heard in it, as due process requires." Response to Ord. to Show Cause 15. To support that claim, petitioner quoted (*ibid.*) the Third Circuit's observation in another case that, "[i]n the

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returned to sender. Response to Ord. to Show Cause Exh. B. Petitioner simply asserts that he did not receive the copies that were served on him. Pet. 5.

context of an immigration hearing, due process requires that 'aliens threatened with deportation are provided the right to a full and fair hearing' that allows them 'a reasonable opportunity to present evidence' on their behalf." *Abdulrahman* v. *Ashcroft*, 330 F.3d 587, 596 (2003) (quoting *Sanchez-Cruz* v. *INS*, 255 F.3d 775, 779 (9th Cir. 2001)). The proceeding in question in this case, however, was not an immigration hearing, much less one at which an IJ heard evidence, and then found facts, without giving petitioner the opportunity to cross-examine witnesses and present evidence of his own. It was, instead, a proceeding on a motion to reopen an appeal, in which the BIA addressed a single issue of law: whether, in light of the BIA's intervening en banc decision in *In re J-E-*, the facts found by the IJ constitute torture under the applicable regulation. Since the BIA is "an appellate body" that "will not engage in factfinding," 8 C.F.R. 1003.1(d)(1) and (d)(3)(iv), the constitutional principle on which petitioner relied is inapposite.

While petitioner would have been able to raise a substantial constitutional claim if the IJ had adjudicated his rights without giving him an opportunity to challenge the government's evidence and present his own, the BIA's *sua sponte* decision to vacate its prior decision on a pure question of law without providing notice (if that is what happened) does not present a substantial constitutional question. In the latter circumstance, unlike the former, an alien can simply file a motion to reconsider in which he argues that the BIA's conclusion of law was erroneous. See 8 C.F.R. 1003.2(b)(1). For a proceeding of the kind at issue here, that procedure provides a full and fair opportunity to present one's views. See *In re Weinstein*, 164 F.3d 677, 686-687 (1st Cir.) (*sua sponte* reversal of original decision without

notice does not violate due process, because, among other things, argument could have been raised in motion for reconsideration), cert. denied, 527 U.S. 1036 (1999). And since any lack of notice does not present a substantial constitutional question, the court of appeals would have lacked jurisdiction even if it had interpreted Section 1252(a)(2)(C) as petitioner urges.

ii. An alien who challenges an administrative procedure "cannot prove a due process violation in the absence of substantial prejudice." *Patel* v. *Attorney General*, 334 F.3d 1259, 1263 (11th Cir. 2003). Accord, *e.g.*, *Anwar* v. *INS*, 116 F.3d 140, 144-145 (5th Cir. 1997). That is the case here. Even if petitioner had a right to notice before the BIA vacated its initial decision, and even if that right was violated, petitioner was not prejudiced by the violation, because there is no reason to believe that the BIA would have reached a different conclusion if it had had the benefit of petitioner's views.

In its initial decision, the BIA held that substandard prison conditions in Haiti constituted torture under the applicable regulation. Pet. App. 14a-15a. Approximately five months later, the en banc BIA held in *In re J-E-* that such conditions do *not* constitute torture unless the authorities have intentionally created and maintained the conditions in order to inflict torture. 23 I. & N. Dec. at 294-304. Since there is no evidence in the record that Haitian authorities have done so, the holding of *In re J-E-* plainly covers this case. And since the BIA "may at any time reopen or reconsider on its own motion any case in which it has rendered a decision," 8 C.F.R. 1003.2(a), the BIA had the authority to reopen the case *sua sponte* when it did (approximately 16 months after its initial decision). Under these circumstances, there is every reason to believe that the

result "would have been the same in the absence of the alleged procedural deficiencies." *Patel*, 334 F.3d at 1263. Accordingly, petitioner cannot show substantial prejudice, he cannot show a violation of due process, and he cannot show that he has a substantial constitutional claim.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 2004