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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ALFONSO ANDRADE HERNADEZ,
AKA Alfonso Andrade Hernandez,

Petitioner,

v.

MERRICK B. GARLAND, Attorney
General,

Respondent.

No. 20-70052

Agency No. A092-049-270

MEMORANDUM*

On Petition for Review of an Order of the
Board of Immigration Appeals

Submitted January 26, 2023**
San Francisco, California

Before: GOULD, RAWLINSON, and BRESS, Circuit Judges.

Alfonso Andrade Hernandez (Hernandez), a native and citizen of Mexico,
petitions for review of a decision of the Board of Immigration Appeals (BIA)
denying a motion to *sua sponte* reopen his immigration proceedings. We generally

* This disposition is not appropriate for publication and is not precedent
except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision
without oral argument. *See* Fed. R. App. P. 34(a)(2).

have jurisdiction under 8 U.S.C. § 1252(a) to review the BIA’s denial of a motion to reopen. *See Perez-Camacho v. Garland*, 54 F.4th 597, 603 (9th Cir. 2022). But, “we have no jurisdiction to review the BIA’s sua sponte authority,” *Lona v. Barr*, 958 F.3d 1225, 1232 (9th Cir. 2020), except “for the limited purpose of reviewing the reasoning behind the decision[] for legal or constitutional error.” *Bonilla v. Lynch*, 840 F.3d 575, 588 (9th Cir. 2016), *as amended*. We review de novo due process claims. *See Mukulumbutu v. Barr*, 977 F.3d 924, 925 (9th Cir. 2020).

The BIA did not commit legal error when determining that Hernandez’s nolo contendere plea to violating California Health and Safety Code § 11378 (possession of methamphetamine for sale) constituted a removable controlled substance offense. In *United States v. Rodriguez-Gamboa*, 972 F.3d 1148, 1552, 1153–54 (9th Cir. 2020), we concluded that there is a “categorical match” between § 11378 and the Controlled Substances Act. Although the BIA’s decision predates our decision in *Rodriguez-Gamboa*, it correctly reasoned that Hernandez failed to demonstrate “a realistic probability” that a person would be prosecuted under § 11378 for possession of geometric isomers of methamphetamine that are not included in the federal Controlled Substances Act. *See id.* at 1154.

We reject Hernandez’s arguments that his nolo contendere plea is distinguishable from the guilty plea in *Rodriguez-Gamboa*, and therefore his

conviction for a violation of § 11378 was not a removable offense. In Hernandez's prior appeal, we determined that these contentions are foreclosed by our precedent. *See Hernandez v. Sessions*, 715 F. App'x. 708, 709 (9th Cir. 2018).

Hernandez also argues that the BIA violated his right to due process by declining to exercise its discretion to reopen his case *sua sponte*. Hernandez does not assert that the BIA committed legal or constitutional error, *see Bonilla*, 840 F.3d at 588, but instead, contends that our decision in *Lorenzo v. Sessions*, 902 F.3d 930 (9th Cir. 2018), was a significant change in law establishing exceptional circumstances for the BIA to reopen his case *sua sponte*. But we have repeatedly held that we do not have jurisdiction to review BIA decisions not to *sua sponte* reopen a case. *See Bonilla*, 840 F.3d at 585–86. Because the BIA committed no legal or constitutional errors in declining to exercise its *sua sponte* authority, we lack jurisdiction to review the decision on this basis. *See id.* at 588.

Finally, we lack jurisdiction to consider Hernandez's argument that initiating removal proceedings for a conviction that happened seven years earlier violated due process and the Double Jeopardy clause because he did not raise that argument before the BIA. *See Barron v. Ashcroft*, 358 F.3d 674, 677–78 (9th Cir. 2004) (noting that the court lacks jurisdiction to review claims not presented to the agency).

PETITION DENIED in part and DISMISSED in part.