

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

OCT 26 2023

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

DAVID CASTILLO-GOMEZ,

Petitioner,

v.

MERRICK B. GARLAND, Attorney
General,

Respondent.

No. 22-1049

Agency No. A213-082-400

MEMORANDUM*

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

Submitted October 17, 2023**
Pasadena, California

Before: PAEZ and H.A. THOMAS, Circuit Judges, and RAKOFF, District
Judge.***

* 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).

*** The Honorable Jed S. Rakoff, United States District Judge for the Southern District of New York, sitting by designation.

David Castillo-Gomez is a native and citizen of Mexico who entered the United States without inspection in 2002. On September 5, 2017, the Department of Homeland Security (DHS) served Castillo-Gomez with a Notice to Appear in immigration court, charging him as removable. The Notice to Appear did not list the location of the immigration court or the date and time of the hearing. Instead, it listed the location as “to be decided” and the time and date as “[t]o be set.” Three days later, however, DHS mailed Castillo-Gomez a Notice of Hearing that supplied the previously missing information. Castillo-Gomez then appeared at the hearing with counsel. He conceded removability but applied for cancellation of removal under 8 U.S.C. § 1229b, arguing that his departure would be a significant hardship for his three children who are U.S. citizens.

An immigration judge (IJ) denied Castillo-Gomez’s application for cancellation of removal for two independent reasons, one of which was that Castillo-Gomez did not show that separation of his family, standing alone, imposed an “exceptional and extremely unusual hardship.” 8 U.S.C. § 1229b(b)(1)(D). The Board of Immigration Appeals (BIA) affirmed the IJ’s reasoning on that ground and dismissed Castillo-Gomez’s appeal. This court dismissed Castillo-Gomez’s petition for review of that order because the court lacked jurisdiction to review the factual issue presented. *See Castillo-Gomez v. Garland*, No. 21-71000, Dkt. No. 16 (9th Cir. Jan. 20, 2022).

At no point in any of the above proceedings did Castillo-Gomez challenge the sufficiency of his initial Notice to Appear. After this court’s dismissal, however, Castillo-Gomez moved the BIA to reopen his removal proceedings because the first Notice to Appear did not inform him of the location, time, and date of his hearing. He argued that because a defective Notice to Appear could not validly begin removal proceedings, the immigration court lacked jurisdiction and his removal proceedings had to be terminated. The BIA denied the motion, explaining based on its own precedent and this court’s precedent that an insufficient Notice to Appear does not deprive an IJ of subject matter jurisdiction over removal proceedings. *See Aguilar Fermin v. Barr*, 958 F.3d 887, 895 (9th Cir. 2020) (holding that a Notice to Appear’s “lack of time, date, and place . . . did not deprive the immigration court of jurisdiction”). The BIA also rejected Castillo-Gomez’s reliance on *Singh v. Garland*, 24 F.4th 1315 (9th Cir. 2022), because that case touched only on *in absentia* removal proceedings, which Castillo-Gomez’s proceedings were not. Castillo-Gomez timely petitioned for review.

We review the denial of a motion to reopen for abuse of discretion, while reviewing “purely legal questions *de novo*.” *Id.* at 1317. Exercising that review, we now deny Castillo-Gomez’s petition.

Although Castillo-Gomez no longer challenges the BIA’s legal conclusion that a defective Notice to Appear does not implicate an immigration court’s subject

matter jurisdiction, he argues that the BIA nevertheless erred by failing to reopen and terminate his removal proceedings under *Singh v. Garland*, 24 F.4th 1315 (9th Cir. 2022). In *Singh*, this Court held that a Notice to Appear must be “a single document that include[s] all the information set forth in 8 U.S.C. § 1229(a)(1), including the time and date of the removal proceedings.” *Id.* at 1320. And in that case, the Court rescinded the petitioner’s *in absentia* removal order “[b]ecause the government did not provide Singh with statutorily compliant notice before his removal hearing.” *Id.*

The problem with Castillo-Gomez’s argument, as the BIA rightly recognized, is that *Singh* only addresses “*in absentia* removal orders.” *Id.* at 1318–20. The decision in *Singh* relied on a statutory provision expressly prohibiting removal *in absentia* when a noncitizen does not receive the time and location information “required under . . . section 1229(a).” *Id.* at 1319 (quoting 8 U.S.C. § 1229a(b)(5)(A)). But that provision does not apply to removals that are not *in absentia*. See 8 U.S.C. § 1229a(b)(5)(A). And *Singh* makes no mention of removal proceedings in which a petitioner appeared and actively participated, as Castillo-Gomez did here with the assistance of counsel. See *id.* at 1317–20. Castillo-Gomez failed to acknowledge that distinction before the BIA or show why *Singh* entitles him to relief. The BIA therefore did not abuse its discretion in denying Castillo-Gomez’s motion to reopen.

Castillo-Gomez also separately asks the Court to remand for the BIA to reconsider his motion to reopen under *Matter of Fernandes*, 28 I. & N. Dec. 605 (B.I.A. 2022), which was decided after this petition for review was filed but before Castillo-Gomez submitted his opening brief.¹ But *Matter of Fernandes* only requires a remedy for petitioners who “made a timely objection to [a] noncompliant notice to appear.” 28 I. & N. Dec. at 611. And, according to *Matter of Fernandes*, such an objection is “timely if it is raised prior to the closing of pleadings before the Immigration Judge.” *Id.* at 610–11. Here, Castillo-Gomez made no objection until after the BIA had entered a final order of removal. He therefore fails to explain how *Matter of Fernandes* could offer him relief.

PETITION DENIED.

¹ The Government argues that the Court lacks jurisdiction to consider this argument under 8 U.S.C. § 1252(d)(1) because Castillo-Gomez failed to exhaust it before the BIA. But the Supreme Court recently clarified that “§ 1252(d)(1)’s exhaustion requirement is not jurisdictional.” *Santos-Zacaria v. Garland*, 598 U.S. 411, 423 (2023). And although the exhaustion requirement is still “mandatory” when not waived or forfeited, *id.* at 421, 423, a petitioner need only exhaust “remedies available . . . as of right,” 8 U.S.C. § 1252(d)(1). “Because [BIA] reconsideration (like reopening) is a discretionary form of review, it is not available to the noncitizen ‘as of right.’” *Santos-Zacaria*, 598 U.S. at 425. “Section 1252(d)(1) therefore does not require a noncitizen to pursue it.” *Id.* Accordingly, neither a jurisdictional prerequisite nor a mandatory claim-processing rule bars this Court from considering Castillo-Gomez’s argument for remand and reconsideration.