UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

DEC 26 2023

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

BRIAN ROSALIO GUZMAN-NUNEZ,

Petitioner,

v.

MERRICK B. GARLAND, Attorney General,

Respondent.

No. 21-1118

Agency No. A099-060-254

ORDER VACATING MEMORANDUM DISPOSITION AND GRANTING REHEARING

Before: BYBEE, BENNETT, and MENDOZA, Circuit Judges.
Dissent by Judge BENNETT.

This matter is before the court on petitioner Brian Rosalio Guzman-Nunez's petition for panel rehearing, filed October 25, 2023. We GRANT the petition for rehearing, VACATE our memorandum disposition dated October 11, 2023 (*Guzman-Nunez v. Garland*, No. 21-1118, 2023 WL 6617941 (9th Cir. Oct. 11, 2023)), and REMAND to the Board of Immigration Appeals ("BIA") for further proceedings.

I.

Guzman's petition for rehearing arises from this court's denial of his petition for review from a BIA decision denying his motion to reopen removal proceedings. In 2008, Guzman pleaded *nolo contendere* to one count of violating California Health and Safety Code § 11351.5. In 2018, an immigration judge denied

Guzman's application for asylum and withholding of removal on account of Guzman's 2008 conviction. The BIA affirmed the immigration judge's order and issued a final order of removal on January 7, 2019.

Guzman timely petitioned for review in this court and we denied his petition. *Guzman-Nunez v. Barr*, 822 F. App'x 563, 565 (9th Cir. 2020). Three days after the mandate issued, on November 18, 2020, Guzman filed a motion in California state court to vacate his 2008 conviction as invalid pursuant to California Penal Code § 1473.7. In a minute order dated February 25, 2021, the California Superior Court vacated Guzman's 2008 conviction and set aside his plea, but did not state its basis for vacating the conviction. On March 16, 2021, Guzman moved to reopen his removal proceedings, arguing before the BIA that he was no longer ineligible for asylum and withholding of removal because his 2008 conviction had been vacated. The BIA determined that Guzman's motion was untimely and not subject to equitable tolling, and therefore denied the motion. The BIA also held that Guzman failed to establish that his 2008 conviction was based on a procedural or substantive defect in the underlying criminal proceeding because the Superior Court's minute order did not reflect the court's rationale for vacating the conviction.

On review in this court, we denied Guzman's petition. We declined to reach the issue of equitable tolling because, even if that doctrine had applied, we held:

"Guzman failed to establish prima facie eligibility for relief because his motion to reopen was unsupported by any evidence bearing on whether his 2008 conviction was 'vacated due to a substantive or procedural defect, and not for equitable or rehabilitative reasons . . . .'" *Guzman-Nunez*, 2023 WL 6617941, at *1 (quoting *Ballinas-Lucero v. Garland*, 44 F.4th 1169, 1178 (9th Cir. 2022)).

On October 25, 2023, Guzman filed the instant petition for rehearing, to which he appended a *nunc pro tunc*-amended minute order (the "*nunc pro tunc* order") from the California Superior Court, dated October 25, 2023. The Superior Court amended the February 2021 minute order because it "d[id] not reflect the court's order," and added the following language *nunc pro tunc*: "The motion pursuant to Penal Code Section 1473.7 is GRANTED. Defendant's plea is set aside this date." Both parties then submitted supplemental briefing regarding the impact of the *nunc pro tunc* order.

II.

Under California law, "the function of a nunc pro tunc order is merely to correct the record of the judgment and not to alter the judgment actually *rendered*." *Gonzalez v. Sherman*, 873 F.3d 763, 772–73 (9th Cir. 2017) (quoting *In re Eckstrom's Est.*, 354 P.2d 652, 655 (Cal. 1960)); *id.* at 773 ("[A] scrivener's error in a minute order or an abstract of judgment is a 'recording error' that must be corrected to make those documents consistent with the oral pronouncement (the

judgment) and may be ordered nunc pro tunc."). Here, the California Superior Court held on October 25, 2023, that its February 2021 vacatur order "does not reflect the court's order," and amended the order to clarify that Guzman's motion to vacate was granted pursuant to California Penal Code § 1473.7. The *nunc pro tunc* order therefore dates back to the date of the original order of vacatur.

The parties dispute whether this court may consider the *nunc pro tunc* order at this juncture. "[O]ur review of BIA decisions is generally limited to the record and [] it is unusual for this court to take judicial notice of events outside of the administrative record." *Gafoor v. INS*, 231 F.3d 645, 655 (9th Cir. 2000), *superseded by statute on other grounds* 8 U.S.C. § 1158. And "we generally will not consider 'evidentiary material that either party could have presented to the BIA but that the petitioner simply failed to introduce at the hearing[.]'" *Marinelarena v. Garland*, 6 F.4th 975, 978 (9th Cir. 2021) (quoting *Lising v. INS*, 124 F.3d 996, 998 (9th Cir. 1997)).

We conclude that we may consider the *nunc pro tunc* order in deciding whether to grant the petition for review given the unique posture of this case. "We may take judicial notice of undisputed matters of public record, including documents on file in federal or state courts," *Harris v. Cnty. of Orange*, 682 F.3d 1126, 1132 (2012) (citation omitted); *see* Fed. R. Evid. 201, and we may choose to "exercise [our] inherent authority to supplement the record in extraordinary cases"

such as this, *Lowry v. Barnhart*, 392 F.3d 1019, 1024 (9th Cir. 2003). Under the circumstances of this case, where the BIA considered the original order of vacatur, the California Superior Court's *nunc pro tunc* amendment to that order did nothing more than correct a clerical error that was material to Guzman's reopening claim, and Guzman was not responsible for that error, we will consider the *nunc pro tunc* order for the limited purpose of determining whether remand to the BIA is warranted. We have considered state court orders in the past under similar circumstances, and find it appropriate to do so here. *See Aleman v. Holder*, 472 F. App'x 814, 815 (9th Cir. 2012) (granting Attorney General's request to take judicial notice of *nunc pro tunc*-amended order that was "not part of the administrative record" and "remand[ing] to the BIA to consider, in the first instance, that order's effect on [p]etitioner's arguments"); *Fernandez-Ruiz v. Gonzales*, 468 F.3d 1159, 1170 (9th Cir. 2006) (considering Arizona court minute order that was not in the administrative record where the order could not "have been raised during the earlier BIA proceedings because the [] Arizona court entered the minute entry over six months after the BIA rendered its decision" and "conclud[ing] that the proper disposition is to remand the case to the BIA for it to consider [the order] in the first instance").

The *nunc pro tunc* order upends the BIA's conclusion that "the record does not reflect the state court's rationale for granting [the vacatur]." The *nunc pro tunc*

order reflects that in February 2021, the California Superior Court vacated Guzman's 2008 conviction pursuant to California Penal Code § 1473.7. Section 1473.7 provides for vacatur of a "conviction or sentence [that] is legally invalid due to prejudicial error damaging the moving party's ability to meaningfully understand, defend against, or knowingly accept the actual or potential adverse immigration consequences of a conviction or sentence." Cal. Penal Code § 1473.7(a)(1).

We therefore remand so that the BIA may consider, in the first instance, whether the vacatur of Guzman's 2008 conviction pursuant to California Penal Code § 1473.7(a)(1) demonstrates that Guzman faced "extraordinary circumstances" for purposes of equitable tolling. *Hernandez-Ortiz v. Garland*, 32 F.4th 794, 801 (9th Cir. 2022) (explaining that equitable tolling applies "when some extraordinary circumstance stood in the petitioner's way and prevented timely filing, and he acted with due diligence in pursuing his rights" (internal quotation marks and brackets omitted)); *see Covarrubias-Delgado v. Garland*, 2023 WL 4928509, at *1 (9th Cir. Aug. 2, 2023) (reversing BIA's holding with respect to due diligence and remanding because "the BIA failed to consider whether vacatur of a conviction underlying a removal order on constitutional grounds qualifies as an exceptional circumstance for the purpose of equitable tolling" (citing *INS v. Ventura*, 537 U.S. 12, 16–18 (2002)).

We narrow the period that the BIA may properly consider for the purposes of equitable tolling on remand. Here, citing our decision in *Lona v. Barr*, 958 F.3d 1225, 1231–32 (9th Cir. 2020), the BIA rejected Guzman's equitable tolling argument for lack of due diligence because "[Guzman] has not explained why he did not seek post-conviction relief in the eight years prior to him being detained in 2016." But California Penal Code § 1473.7—the vehicle that allowed Guzman to move for vacatur—was not enacted until 2017, and it makes little sense to fault Guzman for a lack of diligence during the period before section 1473.7 relief became available. The period prior to 2017 is therefore not appropriate for consideration on remand because the relevant vacatur statute was not available during that time. The BIA may, however, investigate whether Guzman-Nunez was diligent in pursuing his rights after discovering that the original Superior Court vacatur order was deficient for failing to list the basis on which vacatur was granted.

Accordingly, we **GRANT** Guzman's petition for rehearing; **VACATE** our memorandum disposition in *Guzman-Nunez v. Garland*, No. 21-1118, 2023 WL 6617941 (9th Cir. Oct. 11, 2023); and **REMAND** the case to the BIA for proceedings consistent with this order.

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BENNETT, Circuit Judge, dissenting:

I respectfully dissent from the majority's decision to grant the petition for panel rehearing based on the out-of-record *nunc pro tunc* order. Because the order was not presented to the Board of Immigration Appeals (BIA) but could have been, our precedent bars us from considering it.

The Immigration and Nationality Act directs that "the court of appeals shall decide the petition *only* on the administrative record on which the order of removal is based." 8 U.S.C. § 1252(b)(4)(A) (emphasis added). In *Fisher v. INS*, we held en banc that the predecessor statute, which was materially similar, barred us from considering out-of-record evidence that could have been but was not presented to the BIA. 79 F.3d 955, 963–65 (9th Cir. 1996) (en banc). In *Lising v. INS*, we confirmed *Fisher*'s holding:

> *Fisher* relates to evidentiary material that either party could have presented to the BIA but that the petitioner simply failed to introduce at the hearing. The *Fisher* rule was intended to ensure that petitioners present all outside documents, reports, or information during the course of the administrative proceedings and not offer them for the first time before this court.

124 F.3d 996, 998 (9th Cir. 1997).

The California Superior Court entered the original minute order vacating Guzman's 2008 conviction on February 25, 2021. The next month, Guzman, represented by counsel, moved the BIA to reopen his removal proceedings. Guzman

could have sought clarification of the minute order at any time after it was issued on February 25, 2021, and could have presented such clarification to the BIA before it ruled on his motion to reopen on November 2, 2021. Instead, Guzman waited until October 2023—nearly two years after the BIA denied his motion to reopen, and after we affirmed the BIA's denial—to obtain the *nunc pro tunc* order. Guzman does not explain the delay. Nor does he claim that anything prevented him from obtaining the *nunc pro tunc* order earlier or presenting it to the BIA in his motion to reopen proceedings. Indeed, that Guzman's counsel sought and obtained the *nunc pro tunc* order supports that Guzman could have obtained it and presented it to the BIA.

As in *Fisher*, the out-of-record *nunc pro tunc* order could have been but was not presented to the BIA. Thus, as in *Fisher*, we were required to refuse to consider such evidence.[1] I therefore respectfully dissent.

[1] Contrary to the majority's assertion, *Fernandez-Ruiz v. Gonzales*, 468 F.3d 1159 (9th Cir. 2006), did not involve similar circumstances. In that case, there was no indication that the new evidence could have been obtained sooner and presented to the BIA. *See id.* at 1170.