FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOSE ALFREDO LARA-GARCIA, AKA Jose Alfredo Garcia, AKA Jose Alfredo Lara, *Petitioner*, v. MERRICK B. GARLAND, Attorney General, *Respondent.*	No. 20-71703 Agency No. A079-620-624 OPINION

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

Argued and Submitted July 27, 2022
San Francisco, California

Filed September 26, 2022

Before: Susan P. Graber and John B. Owens, Circuit Judges, and M. Miller Baker,[*] International Trade Judge.

Opinion by Judge Graber

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[*] The Honorable M. Miller Baker, Judge for the United States Court of International Trade, sitting by designation.

SUMMARY[**]

Immigration

Denying in part and granting in part Jose Alfredo Lara-Garcia's petition for review of a decision of the Board of Immigration Appeals, and remanding, the panel held that: (1) the vacatur of a conviction underlying a removal order does not excuse a late motion to reopen, and therefore, Petitioner's motion to reopen was untimely; (2) the BIA acted within its discretion in concluding that Petitioner failed to act with sufficient diligence to warrant equitable tolling of the motion-to-reopen deadline; and (3) the BIA erred as a matter of law in denying sua sponte reopening.

Petitioner was removed to Mexico in 2008, partly because of a California conviction for drug possession. In 2018, a California court expunged that conviction under California's rehabilitative statute, and Petitioner sought to reopen his immigration proceedings. An immigration judge and the BIA denied the motion to reopen, and Petitioner sought review in this court.

Because a motion to reopen must generally be filed within 90 days of a final order of removal, Petitioner's motion was approximately a decade late. Petitioner nevertheless argued that his motion was timely. First, he relied on *Cardoso-Tlaseca v. Gonzales*, 460 F.3d 1102 (9th Cir. 2006), which involved the departure bar (a now-invalidated regulation barring motions to reopen after "departure" from the United States). In *Cardoso-Tlaseca*,

[**] This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

the court held that, if a later-expunged conviction was a key part of removal proceedings, then there had been no "departure" and the departure bar did not apply. Here, Petitioner asked the court to extend that rule to hold that the deadlines for motions to reopen do not apply when a person is removed due to a conviction that is later expunged.

The panel rejected Petitioner's argument, observing that it was bound by *Perez-Camacho v. Garland*, 42 F.4th 1103 (9th Cir. 2022), in which this court recently held that the *Cardoso-Tlaseca* rule applies only to timely motions to reopen; it does not excuse late filing. The panel also concluded that, even if it were not bound, it would reach the same result. The panel explained that the statute and regulation governing motions to reopen contain explicit exceptions to the timeliness requirement, but there is no exception for persons removed pursuant to an unlawfully executed order, and the codified exceptions strongly suggest that Congress and the agency did not intend that exception. Moreover, the panel explained that the rule in *Cardoso-Tlaseca* stems from the court's interpretation of the word "departure," yet neither the statutory nor the regulatory timeliness requirement mentions departures or physical presence.

Second, Petitioner argued that he was entitled to equitable tolling of the filing deadline. The panel concluded the BIA acted within its discretion in holding that Petitioner failed to act with the required diligence, explaining that Petitioner did not seek expungement until nearly a decade after he was convicted, and presented neither argument nor evidence explaining why he could not have done so earlier.

Next, the panel concluded that the BIA legally erred in denying sua sponte reopening. The BIA rejected Petitioner's

request for sua sponte reopening for two independent reasons. First, the BIA concluded that Petitioner's conviction fell outside the scope of the Federal First Offender Act ("FFOA"). Under the FFOA, when a federal court finds a person guilty of a first-time federal offense for simple possession of drugs, and the person meets certain requirements, the court may place the person on probation for "a term of not more than one year." At the end of that period, if the person has not violated probation, the court then dismisses the proceedings without entering a conviction. In *Lujan-Armendariz v. INS*, 222 F.3d 728 (9th Cir. 2000), *overruled, prospectively only, by Nunez-Reyes v. Holder*, 646 F.3d 684 (9th Cir. 2011) (en banc), the court held that a dismissed conviction under the FFOA, or a similar conviction for simple possession, later expunged under a state's rehabilitative statute, was not a "conviction" for purposes of immigration law. Here, the BIA reasoned that, because the FFOA allows expungement only if the court imposes one year or less of probation, Petitioner's expungement did not qualify because the state court imposed three years of probation.

The panel concluded that the BIA misread *Lujan-Armendariz*, explaining that nothing in that decision, or in any other decision, suggests that the period of probation imposed in state court must match the one-year limit on probation under the FFOA. The panel explained that the key question is whether state-court defendants would have been eligible for relief under the FFOA had their offenses been prosecuted as federal crimes. The panel concluded that, had he been prosecuted under federal law, he would have been eligible for FFOA treatment and, because he later received expungement, his conviction qualified under *Lujan-Armendariz*.

Second, in denying sua sponte reopening, the BIA concluded that Petitioner remained removable on the ground that he had been convicted of misdemeanor offenses that were crimes involving moral turpitude. Petitioner was convicted of: (1) burglary, in violation of California Penal Code section 459; (2) receiving stolen property, in violation of California Penal Code section 496(a); and (3) possession of drug paraphernalia, in violation of California Health and Safety Code section 11364(a). Looking to the relevant federal and California precedent, the panel concluded that these offenses are not crimes involving moral turpitude.

The panel remanded for the BIA to exercise its broad discretionary authority as to sua sponte reopening against the correct legal backdrop.

COUNSEL

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Timothy Bo Stanton (argued), Trial Attorney; Anthony P Nicastro, Assistant Director; Jennifer B. Dickey, Acting Assistant Attorney General; Office of Immigration Litigation, Civil Division, United States Department of Justice, Washington, D.C.; for Respondent.

OPINION

GRABER, Circuit Judge:

Petitioner Jose Alfredo Lara-Garcia, a native and citizen of Mexico, was removed to Mexico in 2008, partly because of a California state-court conviction for drug possession. In 2018, a California court expunged that conviction, and Petitioner sought to reopen his immigration proceedings. An immigration judge ("IJ") and the Board of Immigration Appeals ("BIA") denied the motion to reopen. The BIA held that the motion was untimely and that Petitioner could not excuse the untimeliness. The BIA also declined to reopen proceedings sua sponte, on the grounds that Petitioner's expungement was ineffective for immigration purposes and that Petitioner remains removable due to separate crimes involving moral turpitude.

We agree with the BIA that the motion was untimely. In cases such as *Cardoso-Tlaseca v. Gonzales*, 460 F.3d 1102 (9th Cir. 2006), we have held that a regulatory bar to filing a motion to reopen after the noncitizen's departure from the country does not apply to a person who was removed due to a later-expunged conviction. But the *Cardoso-Tlaseca* rule applies only to timely motions; it does not excuse an untimely motion. Similarly, because Petitioner waited ten years to expunge his conviction, the BIA permissibly concluded that he failed to show sufficient diligence to warrant equitable tolling.

But the BIA erred as a matter of law when deciding whether to reopen proceedings sua sponte. The BIA incorrectly interpreted *Lujan-Armendariz v. INS*, 222 F.3d 728 (9th Cir. 2000), *overruled, prospectively only, by Nunez-Reyes v. Holder*, 646 F.3d 684, 690 (9th Cir. 2011) (en banc), to extend solely to state-court defendants who received a

sentence of no more than one year of probation. And the BIA erroneously held that Petitioner's three misdemeanor convictions involve moral turpitude despite binding precedent to the contrary. Accordingly, we deny the petition in part, grant the petition in part, and remand for the BIA to reconsider, under the proper legal framework, whether to reopen proceedings sua sponte.

FACTUAL AND PROCEDURAL HISTORY

Petitioner entered the United States in 1998 and became a legal permanent resident in 2002. In 2006, Petitioner was convicted in California state court of three misdemeanors:

1. burglary, in violation of California Penal Code section 459;

2. receipt of stolen property, in violation of California Penal Code section 496(a); and

3. possession of drug paraphernalia, in violation of California Health and Safety Code section 11364(a).

In 2008, Petitioner was convicted in California state court of felony possession of methamphetamine, in violation of California Health and Safety Code section 11377(a). The state court sentenced Petitioner to three years of probation for the 2008 drug offense.

The convictions caught the attention of the federal government, and Petitioner received a notice to appear in 2008. The government charged him as removable on two separate grounds. First, the government alleged removability pursuant to 8 U.S.C. § 1227(a)(2)(B)(i), asserting that, because of Petitioner's 2008 drug-possession

conviction, he had been convicted of violating a law relating to a controlled substance. Second, the government alleged removability pursuant to 8 U.S.C. § 1227(a)(2)(A)(i), asserting that, because of his three 2006 misdemeanor convictions, Petitioner had been convicted of a crime involving moral turpitude within five years of admission and a crime for which a sentence of one year or longer may be imposed.

Petitioner agreed to depart voluntarily, and he waived the right to appeal to the BIA. In May 2008, an IJ entered an order of voluntary departure, with an alternative order of removal. Petitioner returned to Mexico.

Petitioner later reentered the United States and, in 2018, a California state court dismissed his 2008 drug-possession conviction under California's rehabilitative statute, California Penal Code section 1203.4. For qualifying defendants, section 1203.4(a)(1) allows a California court to set aside the conviction, dismiss the criminal information, and release the defendant from nearly all penalties and disabilities that resulted from the conviction. If certain other requirements are met, defendants may qualify for relief by, among other avenues, successfully fulfilling the terms of probation. Cal. Penal Code § 1203.4(a)(1).

Petitioner then filed a motion to reopen before an IJ, arguing that he warranted relief from removal following the expungement of his drug-possession conviction. Although his 2018 motion came nearly a decade too late, Petitioner asserted that his motion was timely because of (a) an "unlawfully executed removal order" exception that we have applied in other circumstances in cases such as *Cardoso-Tlaseca* and (b) equitable tolling. The IJ denied Petitioner's motion to reopen, and Petitioner appealed to the BIA.

The BIA dismissed the appeal. The BIA held that the motion to reopen was untimely because it had been filed more than 90 days after the date of the 2008 removal order. The BIA held that the "unlawfully executed removal order" exception provided no help to Petitioner because the exception applies only to *timely* motions to reopen. The BIA next held that Petitioner was not entitled to equitable tolling of the filing deadline because, among other reasons, Petitioner failed to show "sufficient diligence to warrant equitable tolling." The BIA therefore denied Petitioner's motion to reopen as untimely.

The BIA declined to reopen proceedings sua sponte for two reasons. First, Petitioner could not benefit from *Lujan-Armendariz* because his "offense plainly falls outside the scope of the Federal First Offender Act (FFOA), 18 U.S.C. § 3607." Specifically, the California state judge sentenced Petitioner to *three years of probation*, whereas the FFOA allows preferential treatment of federal convictions only if the federal court imposes a sentence of *no more than one year of probation*. For that reason, the BIA ruled, "his state conviction cannot qualify, under *Lujan-Armendariz*, as a state conviction that was dismissed under a provision similar to the FFOA, and his offense falls outside the scope of FFOA." Second, the BIA held that, even if the 2008 drug conviction no longer constituted a conviction for immigration purposes, Petitioner nevertheless "remains removable" under 8 U.S.C. § 1227(a)(2)(A)(i) because his 2006 misdemeanor convictions qualify as crimes involving moral turpitude.

Petitioner timely seeks review.

STANDARDS OF REVIEW

We review for abuse of discretion the BIA's denial of a motion to reopen. *Gutierrez-Zavala v. Garland*, 32 F.4th 806, 809 (9th Cir. 2022). We review de novo questions of law. *Ruiz-Colmenares v. Garland*, 25 F.4th 742, 748 (9th Cir. 2022).

DISCUSSION

We address (A) the timeliness of the motion to reopen and (B) the BIA's decision not to reopen proceedings sua sponte.

A. *The Motion to Reopen Was Untimely.*

Title 8 U.S.C. § 1229a(c)(7)(C)(i) provides that, in general, a "motion to reopen shall be filed within 90 days of the date of entry of a final administrative order of removal." Similarly, 8 C.F.R. § 1003.2(c)(2) generally requires that a motion to reopen "must be filed no later than 90 days after the date on which the final administrative decision was rendered." Petitioner was ordered removed in 2008, and he filed his motion to reopen in 2018—approximately a decade too late.

Petitioner nevertheless argues that his motion is timely because, in 2018, a California court expunged his 2008 drug conviction. He presents his argument under two distinct legal theories: (1) the *Cardoso-Tlaseca* rule and (2) equitable tolling. For the reasons discussed below, we agree with the BIA that Petitioner's motion was untimely.

1. *The* Cardoso-Tlaseca *Rule*

Title 8 C.F.R. § 1003.2(d) bars an applicant from filing a motion to reopen "subsequent to his or her departure from the United States."[1] We have long interpreted the term "departure" narrowly, to mean only a "'legally executed' departure when effected by the government." *Estrada-Rosales v. INS*, 645 F.2d 819, 820–21 (9th Cir. 1981); *see also Mendez v. INS*, 563 F.2d 956, 958 (9th Cir. 1977) (interpreting a statute's use of the term "departure" in the same manner). Accordingly, the regulatory departure bar applied only to persons who were removed under a "legally executed" removal order. We further held that a removal "based upon an invalid conviction" is not "legally executed." *Estrada-Rosales*, 645 F.2d at 821. If an invalid conviction was a "key part" of the original removal proceedings, then the regulatory departure bar did not apply. *Id.*; *Wiedersperg v. INS*, 896 F.2d 1179, 1182 (9th Cir. 1990). Finally, in *Cardoso-Tlaseca*, we held that a conviction that was later expunged by a state court because of a procedural or substantive defect was an "invalid conviction" for purposes of the regulation. 460 F.3d at 1106–07. In sum, if a later-expunged conviction was a key part of the removal proceedings, then there had been no "departure," so the regulatory departure bar did not apply by its own terms.

Petitioner asks us to extend the *Cardoso-Tlaseca* rule. In his view, the statutory and regulatory filing deadlines for motions to reopen do not apply when a person is removed

[1] In *Toor v. Lynch*, 789 F.3d 1055, 1060–64 (9th Cir. 2015), we invalidated the cited regulation as inconsistent with Congress' intent when enacting the Illegal Immigration Reform and Immigrant Responsibility Act of 1996. We nevertheless begin with a discussion of the departure bar because it informs our analysis of the statutory and regulatory timeliness requirements.

due to a conviction that is later expunged. We reject Petitioner's argument both as foreclosed by precedent and as contrary to congressional intent.

We recently held that the *Cardoso-Tlaseca* rule applies only to *timely* motions to reopen; the rule does not excuse a late filing. *Perez-Camacho v. Garland*, 42 F.4th 1103, 1108–09, 1109 n.8, 1111 & n.12 (9th Cir. 2022). We are bound by *Perez-Camacho*. *Miller v. Gammie*, 335 F.3d 889, 899–900 (9th Cir. 2003) (en banc).

Even if we were not bound, we would reach the same conclusion. *Perez-Camacho*'s holding comports with congressional intent. Both the statute and the regulation contain explicit exceptions to the timeliness requirement in certain circumstances, such as changed country conditions, battered spouses, and removals in absentia. 8 U.S.C. § 1229a(c)(7)(C)(ii)–(iv); 8 C.F.R. § 1003.2(c)(3). But there is no freestanding exception for persons who were removed pursuant to an unlawfully executed order, and the codified exceptions strongly suggest that Congress and the agency did not intend that exception. *See, e.g.*, *United States v. Johnson*, 529 U.S. 53, 58 (2000) ("When Congress provides exceptions in a statute, . . . [t]he proper inference . . . is that Congress considered the issue of exceptions and, in the end, limited the statute to the ones set forth."); *see also Toor*, 789 F.3d at 1061 (applying that interpretive rule to hold that Congress did not intend the departure bar).

Moreover, our rule in *Cardoso-Tlaseca* stems from our interpretation of the word "departure," yet neither the statutory timeliness requirement nor the regulatory timeliness requirement mentions departures or physical presence. *Cf. Planes v. Holder*, 652 F.3d 991, 995 (9th Cir. 2011) (holding that certain earlier cases "were decided before the enactment of this statutory definition of

'conviction' which supplants our prior judicially-created standards"). Nothing in the *Cardoso-Tlaseca* line of cases suggests that a person who was removed pursuant to an unlawfully executed order is excused from meeting *other* requirements for filing a motion to reopen; the decisions concerned only the meaning of the word "departure."

In sum, the BIA correctly held that the *Cardoso-Tlaseca* rule does not excuse a late motion to reopen.

2. *Equitable Tolling*

The timeliness requirement for motions to reopen is subject to equitable tolling. *Perez-Camacho*, 42 F.4th at 1110. "A petitioner may receive equitable tolling when some extraordinary circumstance stood in the petitioner's way and prevented timely filing, and he acted with due diligence in pursuing his rights." *Hernandez-Ortiz v. Garland*, 32 F.4th 794, 801 (9th Cir. 2022) (internal quotation marks and brackets omitted).

Here, the BIA acted within its discretion in holding that Petitioner failed to act with sufficient diligence. Petitioner did not seek to have his conviction expunged until nearly a decade after he was convicted in 2008, and he has presented neither argument nor evidence explaining why he could not have done so earlier than 2018.[2] *See, e.g.*, *Perez-Camacho*,

[2] The record does not disclose the precise reason why the California court expunged Petitioner's conviction. But Petitioner's three-year term of probation was scheduled to expire in 2011. If the ground for relief was his successful fulfillment of the conditions of probation, then he became eligible for expungement in 2011, leaving a gap of seven years between eligibility and his motion for expungement in state court. Petitioner has not argued or presented evidence—to the BIA or to us—

42 F.4th at 1111–1112 (holding that the BIA properly held that the petitioner failed to show diligence because he "waited 21 years . . . to seek modification of his conviction in state court" and had not "provided any explanation for such an exceedingly long delay" (internal quotation marks omitted)); *Bonilla v. Lynch*, 840 F.3d 575, 583 (9th Cir. 2016) (holding that, given a six-year gap during which the petitioner did not seek relief, the BIA properly held that the petitioner did not make "reasonable efforts to pursue relief" and therefore failed to show sufficient diligence); *id.* ("In the end, Bonilla waited *six* years to take any further action to negate the 1995 deportation order. He provides no explanation for waiting that long.").

B. *The BIA Legally Erred When It Denied Sua Sponte Reopening.*

We generally lack jurisdiction to review the BIA's denial of sua sponte reopening. *Bonilla*, 840 F.3d at 585–86. But we retain jurisdiction to review any underlying legal or constitutional errors. *Id.* at 587. We "may review denials of *sua sponte* reopening where . . . there is 'law to apply' in doing so." *Id.* If the BIA's decision "was based on a legally erroneous premise," we have jurisdiction to grant the petition and "remand to the Board to exercise its broad discretionary authority as to *sua sponte* reopening against the correct legal backdrop." *Id.* at 579. "The scope of our review under *Bonilla* is limited to those situations where it is obvious that the agency has denied sua sponte relief not as a matter of discretion, but because it erroneously believed that the law forbade it from exercising its discretion or that exercising its discretion would be futile." *Lona v. Barr*,

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that he qualified for relief for some other reason that would justify the ten-year delay between his conviction and his motion for expungement.

958 F.3d 1225, 1234 (9th Cir. 2020) (internal citations omitted).

Here, the BIA rejected Petitioner's request for sua sponte reopening for two independent, alternative reasons grounded in the BIA's understanding of the applicable law: (1) Petitioner's conviction "plainly falls outside the scope of the [FFOA]," and (2) Petitioner "remains removable" due to his crimes involving moral turpitude. We therefore have jurisdiction to review the BIA's legal conclusions. *Bonilla*, 840 F.3d at 585.

1. *Scope of the FFOA*

The BIA held that, in order to qualify for relief under *Lujan-Armendariz*, a state conviction must have resulted in a sentence of no more than one year of probation. The proper interpretation of the FFOA and *Lujan-Armendariz* presents a question of law over which we have jurisdiction. *See, e.g.*, *Lyon v. Chase Bank USA, N.A.*, 656 F.3d 877, 883 (9th Cir. 2011) (noting that rulings "based on statutory interpretation and Ninth Circuit precedent" are "questions of law" that we review "de novo").

The FFOA provides:

> If a person found guilty of an offense described in section 404 of the Controlled Substances Act [simple possession]—
>
> (1) has not, prior to the commission of such offense, been convicted of violating a Federal or State law relating to controlled substances; and

> (2) has not previously been the subject of a disposition under this subsection;
>
> the court may, with the consent of such person, *place him on probation for a term of not more than one year* without entering a judgment of conviction. At any time before the expiration of the term of probation, if the person has not violated a condition of his probation, the court may, without entering a judgment of conviction, dismiss the proceedings against the person and discharge him from probation. At the expiration of the term of probation, if the person has not violated a condition of his probation, the court shall, without entering a judgment of conviction, dismiss the proceedings against the person and discharge him from probation.

18 U.S.C. § 3607(a) (emphasis added). In *Lujan-Armendariz*, we held that a dismissed conviction under the FFOA, or a similar conviction for simple possession of drugs, later expunged under a state's rehabilitative statute, was not a "conviction" for purposes of immigration law. 222 F.3d at 749. Specifically: "no alien may be deported based on an offense that could have been tried under the [FFOA], but is instead prosecuted under state law, where the findings are expunged pursuant to a state rehabilitative statute." *Id.* The legal basis for *Lujan-Armendariz*'s rule was the constitutional guarantee of equal protection. *Id.* at 743 n.24. In 2011, we sat en banc and overruled *Lujan-Armendariz*, but we did so prospectively only: convictions entered before 2011 continue to receive treatment under *Lujan-Armendariz*. *Nunez-Reyes*, 646 F.3d at 690–95.

Petitioner was convicted in 2008 so, as the BIA held and as the government does not dispute, *Lujan-Armendariz* applies.

The BIA reasoned as follows. The FFOA allows federal expungement only if the federal sentencing court imposes a sentence of probation of one year or less. The state court imposed three years of probation on Petitioner. Three is more than one. Accordingly, his expungement does not qualify under *Lujan-Armendariz*.

The BIA misread *Lujan-Armendariz*. Nothing in *Lujan-Armendariz*, or in any other decision, suggests that the period of probation imposed in *state* court must match the one-year limit on probation under *federal* law. Instead, we repeatedly explained in *Lujan-Armendariz* that the rule applies to anyone who was convicted, for the first time, of simple possession and whose conviction was later expunged under state law. The key question is whether the state-court defendants "would have been eligible for relief under the Act had their offenses been *prosecuted* as federal crimes." *Lujan-Armendariz*, 222 F.3d at 749 (emphasis added). We repeated that formulation throughout our opinion. *See id.* at 738 ("if the offense could have been expunged under the Act had the crime been prosecuted under federal law"); *id.* ("as long as they *could* have received the benefit of the federal Act if they had been prosecuted under federal law"); *id.* ("if he establishes that he would have been eligible for federal first offender treatment under the provisions of [the FFOA] had he been prosecuted under federal law"). That inquiry focuses only on the time of *prosecution*. At that time, had Petitioner been prosecuted under federal law, he would have been eligible for FFOA treatment. Because he later received expungement, his conviction qualifies under *Lujan-Armendariz*.

Lujan-Armendariz does not turn on the artificial inquiry whether the state judge happened to impose a sentence of one year or less of probation. Many states, including Arizona, California, and Idaho, have an expungement statute that allows the sentencing judge to conclude that the defendant should be eligible for expungement and also allows the imposition of a term of probation longer than one year. *See, e.g.*, Cal. Penal Code § 1203.4; *see also Lujan-Armendariz*, 222 F.3d at 732–33 (discussing similar laws in Arizona and Idaho). The only relevant inquiry under our cases is whether the sentencing judge found the defendant eligible for expungement and imposed a sentence that would allow expungement under the applicable state law. It makes little sense to inquire into whether the sentencing judge happened to impose a sentence below the maximum sentence permitted under federal law. *Lujan-Armendariz* focused clearly on whether the petitioner met the federal eligibility requirements *at the time of prosecution* and asked only whether the state court also later found the petitioner worthy of expungement under whatever state expungement scheme applied.

Two aspects of *Lujan-Armendariz* confirm our interpretation. First, both petitioners in *Lujan-Armendariz* received probationary sentences of longer than one year. *See* 222 F.3d at 733 (five years and three years). Yet we held several times that "both Lujan and Roldan would have been eligible for relief had they been prosecuted under the [FFOA]" and therefore could not be deported for those convictions.[3] *Id.* at 743 n.25; *see id.* at 748 ("Here, both

[3] Considered in isolation, this reason is not dispositive. It is theoretically possible that, in *Lujan-Armendariz*, we overlooked the disparity in sentencing or we silently concluded that the government had forfeited the argument by failing to raise it. But our reasoning in *Lujan-*

petitioners could have been prosecuted under the [FFOA] and their offenses have already been expunged under state law. Thus, . . . they cannot be deported for those offenses."); *id.* at 749–50 ("Both Lujan's and Roldan's petitions involve first-time drug offenses for simple possession, and both offenses were expunged under state law. Therefore, the petitioners may not be deported on account of those offenses.").

Second, we explained at length that procedural disparities in expungement schemes among states and between state law and federal law were irrelevant: "Equally important, the rule applies regardless of the procedural differences associated with the various state statutes." *Id.* at 735; *see id.* at 735–36 & 738 n.18. "We stressed [in a previous decision] that the critical question is not the nature of the state's expungement statute but rather 'what the petitioner did.'" *Id.* at 738 n.18 (brackets omitted) (quoting *Garberding v. INS*, 30 F.3d 1187, 1191 (9th Cir. 1994)). We summarized: "In short, if the person's crime was a first-time drug offense, involved only simple possession or its equivalent, and the offense has been expunged under a state statute, the expunged offense may not be used as a basis for deportation."[4] *Id.*

Armendariz conflicts with that possibility: we did not consider the length of the petitioners' state-court sentences compared to the FFOA's one-year maximum for the simple reason that the length of the sentences was irrelevant to our analysis.

[4] We noted "one qualification": the rule may not apply if the petitioner was *imprisoned*. *Id.* Because Petitioner was not imprisoned, we need not, and do not, determine the applicability of *Lujan-Armendariz* in that circumstance. *See also Ramirez-Altamirano v. Holder*, 563 F.3d 800, 807 n.6 (9th Cir. 2009) (noting that the issue

Later cases applying *Lujan-Armendariz* also confirm our interpretation. Perhaps most illustrative, in *Ramirez-Altamirano*, we emphasized the same principles discussed above, and we held that the petitioner qualified for relief notwithstanding the intricacies of the effect of the state's expungement law. 563 F.3d at 806–11. For example, "our analysis consistently has focused on whether aliens 'would have been eligible for relief under the FFOA had their offenses been prosecuted as federal crimes,' rather than on the intricacies of the state rehabilitative statutes in question." *Id.* at 810 (brackets omitted) (quoting *Lujan-Armendariz*, 222 F.3d at 749); *see also id.* at 807 (using the "had their offenses been prosecuted as federal crimes" formulation). "We have held that there is no rational basis for denying immigration relief based on the mere happenstance that the individual was prosecuted by the state rather than by the federal government. We also have found no rational basis for denying immigration relief merely because a state rehabilitative statute's procedural and structural details differed from those of the FFOA." *Id.* at 806 (internal citation omitted); *see also id.* at 810 ("In our subsequent cases, we reiterated that 'the relevant question is whether the person involved could have received relief under the FFOA and does receive relief under a state rehabilitative statute.'" (brackets omitted)). Perhaps most importantly, we summarized the requirements as follows:

> Accordingly, an alien cannot be deemed "convicted" for immigration purposes if he can demonstrate that (1) the conviction was his first offense; (2) he had not previously

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remains undecided in this circuit and declining to reach the issue because the BIA did not reach it), *overruled, prospectively only, by Nunez-Reyes*, 646 F.3d at 690.

> been accorded first offender treatment; (3) his conviction was for possession of drugs, . . . ; and (4) he received relief under a state rehabilitative statute.

Id. at 812. Each of those elements is clearly met for Petitioner; none of the elements depends on the length of the probationary term.

In sum, the BIA legally erred by holding that, because he received a sentence of three years of probation, Petitioner's expungement did not qualify under *Lujan-Armendariz*.

2. *Crimes Involving Moral Turpitude*

The BIA's alternative reason for denying sua sponte reopening was that Petitioner "remains removable" under 8 U.S.C. § 1227(a)(2)(A)(i) because his 2006 misdemeanor convictions are crimes involving moral turpitude. We have jurisdiction to decide whether the BIA committed legal error in determining that Petitioner remains removable. *Bonilla*, 840 F.3d at 587. Whether Petitioner's 2006 convictions constitute crimes involving moral turpitude is a legal question over which we have jurisdiction. *See, e.g.*, *Diaz-Flores v. Garland*, 993 F.3d 766, 769 (9th Cir. 2021) ("We have jurisdiction to decide the question of law that Diaz-Flores raises: whether his conviction of first-degree burglary under Oregon law qualifies as a crime involving moral turpitude."); *Orellano v. Barr*, 967 F.3d 927, 932 (9th Cir. 2020) ("Whether a crime involves moral turpitude is a question of law that we review de novo."). In *Lona*, we held that we have jurisdiction only where it is "obvious" that the BIA erroneously believed "that exercising its discretion would be futile." 958 F.3d at 1234. Here, the BIA's reasoning is "obvious": the BIA concluded that reopening would be futile even if the drug offense were no longer valid

because Petitioner presently "remains removable" due to the 2006 convictions.[5]

Turning to the merits, Petitioner is correct that his convictions do not qualify as crimes involving moral turpitude. The government's assertion to the contrary cites no legal authority, and we are aware of none.

First, Petitioner was convicted of misdemeanor burglary, in violation of California Penal Code section 459. That crime is not a categorical match for a crime involving moral turpitude. *Hernandez-Cruz v. Holder*, 651 F.3d 1094, 1097, 1109 (9th Cir. 2011). And the statute is not divisible, so the modified categorical approach cannot apply. *See Descamps v. United States*, 570 U.S. 254, 260 (2013) (holding that California Penal Code section 459 is not divisible).

Second, he was convicted of misdemeanor receiving stolen property, in violation of California Penal Code section 496(a). "[A] conviction for receipt of stolen property under § 496 is not categorically a crime of moral turpitude because it does not require an intent to permanently deprive the owner of property." *Castillo-Cruz v. Holder*, 581 F.3d 1154, 1161 (9th Cir. 2009). Because the statutory text nowhere mentions a mens rea with respect to deprivation of property,

[5] We reject the government's argument that Petitioner insufficiently raised the issue to the BIA and to us. The BIA addressed the issue on the merits, so the issue was exhausted, regardless of Petitioner's arguments to the BIA. *See Rodriguez-Castellon v. Holder*, 733 F.3d 847, 852 (9th Cir. 2013) ("While we generally do not have jurisdiction to review unexhausted claims, we may review any issue addressed on the merits by the BIA, regardless whether it was raised to the BIA by the petitioner."). Before us, Petitioner did not forfeit the issue; he raised the issue distinctly and sufficiently, with appropriate citations to the record and to pertinent case law.

the statute almost certainly is not divisible. *Mathis v. United States*, 579 U.S. 500, 504–05 (2016); *see Descamps*, 570 U.S. at 264 (explaining that the modified categorical approach applies "when a statute lists multiple, alternative elements, and so effectively creates several different crimes . . . [and] *at least one, but not all of those crimes matches the generic version*" (emphasis added) (citation and internal quotation marks omitted)). But even assuming that the statute were divisible, the conviction documents in the record nowhere mention any factual basis for the crime and nowhere mention the mens rea for deprivation of property, intentional or otherwise. So Petitioner's conviction also does not involve moral turpitude under the modified categorical approach.

Finally, Petitioner was convicted of misdemeanor possession of drug paraphernalia, in violation of California Health and Safety Code section 11364(a). Misdemeanor possession of drug paraphernalia, "an offense less grave than drug possession," *Mellouli v. Lynch*, 575 U.S. 798, 810 (2015), does not involve moral turpitude, *see Barma v. Holder*, 640 F.3d 749, 750 (7th Cir. 2011) (noting that the IJ found that possession of drug paraphernalia did not involve moral turpitude); *People v. Cloyd*, 64 Cal. Rptr. 2d 104, 107 (Ct. App. 1997) ("Since possession of a controlled substance does not involve moral turpitude [under California law], certainly mere possession of narcotic paraphernalia does not." (internal citation omitted)).

In short, the BIA legally erred by concluding that Petitioner "remains removable" under 8 U.S.C. § 1227(a)(2)(A)(i).

C. *Conclusion*

We deny the petition in part and grant the petition in part. Petitioner's motion was untimely, so we deny the petition to the extent that Petitioner challenges the BIA's timeliness holding. But we grant the petition to the extent that Petitioner challenges the BIA's decision not to reopen proceedings sua sponte. We hold only that, in denying sua sponte reopening, the BIA legally erred. We remand for the BIA "to exercise its broad discretionary authority as to *sua sponte* reopening against the correct legal backdrop." *Bonilla*, 840 F.3d at 579.

PETITION DENIED IN PART AND GRANTED IN PART; REMANDED. The parties shall bear their own costs of appeal.