Mata v. Lynch: Merry Christmas, Fifth Circuit. We got you something. It's jurisdiction.

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I. Prologue:

Mata applied for cancellation of removal for non-permanent residents. The IJ pretermitted his application because he had a conviction for assault under Texas Penal Code 22.01(a)(1) which the IJ thought was a CIMT.

His attorney filed an appeal but failed to file a brief with the BIA. The BIA denied the appeal.

Mata hired new counsel and filed a Motion to Reopen under *Matter of Lozada* 120 days from the final order of removal, asking for equitable tolling of the 90 day deadline on motions to reopen under 8 U.S.C. 1229a(c)(7) [INA 240(c)(7)].

The BIA denied the motion because it agreed with the IJ that he had a CIMT and therefore held Mata was not prejudiced by the ineffective assistance of counsel.

Mata files a petition for review with the Fifth Circuit.

II. Fifth Circuit: Round 1

Mata argues he does not have a CIMT and the BIA should have equitably tolled the motion to reopen deadline.

Fifth Circuit holds:

"In this circuit, an alien's request for equitable tolling on the basis of ineffective assistance of counsel is construed as an invitation for the BIA to exercise its discretion to reopen the removal proceeding sua sponte. *Ramos-Bonilla v. Mukasey*, 543 F.3d 216, 220 (5th Cir. 2008). As the BIA has complete discretion in determining whether to reopen *sua sponte* under 8 C.F.R § 1003.2(a), and we have no meaningful standard against

which to judge that exercise of discretion, we lack jurisdiction to review such decisions."

Since 2008, the Fifth Circuit has cited *Ramos-Bonilla* at least 16 times to strip itself of jurisdiction to review untimely filed motions to reopen.

III. Fifth Circuit: Round 2 (en banc petition)

Mata argues 10 out of 11 circuits have held they have jurisdiction to review motions to reopen seeking equitable tolling.

Fifth Circuit denies en banc petition.

IV. U.S. Supreme Court

Question presented: Whether the Fifth Circuit erred in holding it has no jurisdiction to review Petitioner's request that the Board equitably toll the 90-day deadline on his motion to reopen as a result of ineffective assistance of counsel.

Court grants certiorari.

Court reverses the Fifth Circuit in an 8-1 decision!

> Court holds:
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> "As we held in *Kucana v. Holder*, circuit courts have jurisdiction when an alien appeals from the Board's denial of a motion to reopen a removal proceeding."
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> "Nothing changes when the Board denies a motion to reopen because it is untimely—nor when, in doing so, the Board rejects a request for equitable tolling. Under the INA, as under our century-old practice, the reason for the BIA's denial makes no difference to the jurisdictional issue. Whether the BIA rejects the alien's motion to reopen because it comes too late or because it falls short in some other respect, the courts have jurisdiction to review that decision."

<u>What did the Court do?</u>

- Implicitly overruled *Ramos-Bonilla v. Mukasey*

- Answered a broader question than was asked
- Held not only do the courts of appeals have jurisdiction to review untimely motions to reopen that seek equitable tolling, they have jurisdiction over all motions to reopen filed by aliens. 135 S.Ct. at 2155 ("Whenever the Board denies an alien's statutory motion to reopen a removal case, courts have jurisdiction to review its decision.")
- Held that the untimeliness of a motion to reopen is a merits question, not a jurisdictional determination. 135 S.Ct. at 2156.
- Suggested (maybe) that the Courts of Appeals have jurisdiction over requests by *aliens* for the Board to reopen in its discretion or in its *sua sponte* authority:

  "Similarly, that jurisdiction remains unchanged if the Board, in addition to denying the alien's statutorily authorized motion, states that it will not exercise its separate sua sponte authority to reopen the case. In *Kucana*, we declined to decide whether courts have jurisdiction to review the BIA's use of that discretionary power. Courts of Appeals, including the Fifth Circuit, have held that they generally lack such authority. Assuming arguendo that is right, it means only that judicial review ends after the court has evaluated the Board's ruling on the alien's motion. That courts lack jurisdiction over one matter (the sua sponte decision) does not affect their jurisdiction over another (the decision on the alien's request)." 135 S.Ct. at 2155.

What did the Court not do?

- The Court did not decide if the motion to reopen deadline at 8 U.S.C. 1229a(c)(7) is actually subject to equitable tolling but returned the case to the Fifth Circuit to state a position on the issue.

V. So what does this mean for my client?

Although the Fifth Circuit still has to decide whether the 90 day deadline on motions to reopen can be equitably tolled, it seems highly likely they will say yes because even the United States now agrees that there is

equitable tolling, and the Supreme Court hinted strongly that they would take the case back if the Fifth Circuit says no (because that would create a 10-1 split).

Additionally, the Courts of Appeals say they have no jurisdiction to review the Board's *sua sponte* motions. And although the Supreme Court (once again) did not state a position on this issue, the majority opinion might have narrowed what is actually considered a "sua sponte" motion. If an alien files a motion asking for the Board to utilize its discretion, and the Board says no, that was the *alien's* motion, not the Board's motion. Under Mata, a strong argument could be made that the courts of appeals have jurisdiction to review the denial of this motion for abuse of discretion.

VI. Other potential consequences of *Mata*: The Departure Bar.

Remember that *Mata* implicitly overruled *Ramos-Bonilla*, the case that held a motion to reopen seeking equitable tolling is interpreted as a motion requesting that the BIA reopen in its *sua sponte* authority. However, *Ramos-Bonilla* was not the only Fifth Circuit precedent that turned on assuming the statutory right to file a motion to reopen was somehow jurisdictionally tied to the 90 day deadline.

Mata potentially affects the departure bar in the Fifth Circuit. The departure bar is, of course, the BIA's regulation at 8 C.F.R. 1003.2(d) which presumes to cut off (as a matter of jurisdiction) any right to file a motion to reopen proceedings once the alien has physically left the country. To understand why *Mata* could very well affect (what is left of) the departure bar, it is necessary to remember how the Fifth Circuit has ruled in its three departure bar precedents: *Navarro-Miranda v. Ashcroft*, *Ovalles v. Holder*, and *Garcia-Carias v. Holder*.

Navarro-Miranda v. Ashcroft, 330 F.3d 672 (5th Cir. 2003) merely determined it was reasonable for the BIA to interpret 8 C.F.R. 1003.2(d) as a limitation on its ability to reopen *sua sponte* under 8 C.F.R. 1003.2(a). Mata does not affect this holding, which is merely a question of deference to an agency's interpretation of its own regulations.

In Ovalles v. Holder, 577 F.3d 288 (5th Cir. 2009), the alien made two arguments. His first, original, argument was that 8 C.F.R. 1003.2(d) impermissibly conflicted with the statutory right to reopen at 8 U.S.C. 1229a(c)(7). His second argument was exactly the same as what had been argued in *Navarro-Miranda*.

The Fifth Circuit's response to Ovalles' first argument (statute/regulation conflict) was that the motion to reopen and reconsider provisions "offer him no relief" because Ovalles' motion was untimely filed. *Id.* at 295-296. Because the Court held there was no statute-regulation conflict in Ovalles' particular circumstances, the departure bar remained effective. The Court stated:

> Thus, **because sections 1229a(c)(6) and 1229a(c)(7) of IIRIRA do not grant *Ovalles* the right to have his facially and concededly untimely motion heard by the BIA**, he cannot rely on those statutory provisions as a basis for contending that the BIA was required to give *sua sponte* consideration to the merits of his July 27, 2007 motion to reconsider or reopen its march 2004 decision.

In other words, an alien has no statutory right to have his motion heard by the Board if it's filed beyond the 90 day deadline.

Finally, *Garcia-Carias v. Holder*, 697 F.3d 257 (5th Cir. 2012) is the same legal holding as *Ovalles* with a different result. The Fifth Circuit says the departure bar is invalid to the extent it conflicts with the statutory right to reopen, but it only conflicts if the Board treats the motion to reopen as timely filed. 697 F.3d at 265 ("[W]e concluded that Ovalles could not avail himself of his statutory right to file a motion to reopen or for reconsideration because his motion before the Board was untimely.").

Translation: A timely motion to reopen is statutory (so the Board has statutory jurisdiction to hear it and the Court has statutory jurisdiction to review the denial) and *untimely* motions are regulatory (i.e., the Board doesn't have to hear it, and if it does hear it, the Court can't review it because the Board's decision was entirely discretionary).

This is the logic that I will refer to as "the theory."

The theory: the alien's statutory right to reopen is interconnected with the timeliness of the motion the alien filed.

The Theory underlay *Ramos-Bonilla*, it underlies the Fifth Circuit's departure bar jurisprudence, and it was the basis for the Fifth Circuit's (amicus curiae in defense of the judgment) argument before the U.S. Supreme Court in *Mata*. This was amicus' opening statement:

> "We agree with the government that orders of the Board denying invitations for the Board to reopen sua sponte are not reviewable in the courts of appeals because they're committed to agency discretion by law. Where we part ways with the government is on how you distinguish the two of them. And we offer what we think is the easiest test, which is the timeliness. **If an alien asks the board to reopen within the statutory deadline, within the 90 days, he has a right to reopening that is reviewable under Kucana if the Board denies it. On the other hand, if the alien requests reopening after the expiration of the 90-day statutory period, the board is not obligated to grant reopening in that circumstance.**" Transcript of Oral Argument at 23-24, *Mata v. Lynch*, 135 S.Ct. 2150 (2015) (No. 14-185).

But *Mata* rejected The Theory:

> "Under the INA, as under our century-old practice, the reason for the BIA's denial makes no difference to the jurisdictional issue. Whether the BIA rejects the alien's motion to reopen because it comes too late or because it falls short in some other respect, the courts have jurisdiction to review that decision."

Under *Mata*, the Board has statutory jurisdiction over any motion to reopen made by an alien, and whether it is timely is just one of many possible merits determinations.

So the Fifth Circuit's theory is debunked. Timeliness is always a merits determination. An alien's statutory right to file a motion to reopen is not limited by the 90 day deadline. Therefore, (think *Garcia-Carias* and *Ovalles*) the statutory right to reopen at 8 U.S.C. 1229a(c)(7) *always conflicts* with the departure bar regulation. Therefore the departure bar regulation is *entirely* invalid, not just for motions to reopen filed within the 90 day deadline.

To underscore the point:

The *Mata* decision consistently refers to Mr. Mata's motion to reopen as a *statutory* motion, not a regulatory motion, even though it was untimely filed.

Since *Mata* was issued, some courts, and the U.S. Department of Justice, have gone into damage control mode arguing incorrectly that *Mata* only provides judicial jurisdiction over untimely motions to reopen that specifically sought equitable tolling. *See Shoyombo v. Lynch*, 799 F.3d 1215, 1215 (8th Cir. 2015). *See also* Attorney General's Supplemental Brief (on remand to the Fifth Circuit) in *Mata v. Lynch* (on file with author) (characterizing the Supreme Court's decision as holding that "jurisdiction exists where the motion to reopen was untimely and denied for failure to establish that equitable tolling is warranted.").

But this is not at all what the Supreme Court said. *See Mata,* 135 S.Ct. at 2155 ("*Whenever* the Board denies an alien's statutory motion to reopen a removal case, courts have jurisdiction to review its decision."). (emphasis added). Regardless of the relief sought, if the motion to reopen is the alien's, there is jurisdiction to review it.

Furthermore, if it were true that *Mata* was only about motions that sought equitable tolling, the Court would have had to decide whether equitable tolling was actually available before they decided the jurisdictional issue, which they did not do (the logic being that equitable tolling, if it were available, could make an untimely motion timely and hence, pursuant to the theory, statutory). Mata did not need to make a winning argument on the merits to receive the benefit of the statutory right to file a motion to reopen which is that the BIA and appellate courts have jurisdiction to hear and review it.

Finally, the Court said there would still be jurisdiction even if the motion to reopen statute forbids equitable tolling:

> "Amicus's defense of that approach centrally relies on a merits-based premise: that the INA forbids equitable tolling of the 90-day filing period in any case, no matter how exceptional the circumstances.
>
> …

> But that conclusion is wrong even on the assumption—and it is only an assumption—that its core premise about equitable tolling is true. If the INA precludes Mata from getting the relief he seeks, then the right course on appeal is to take jurisdiction over the case, explain why that is so, and affirm the BIA's decision not to reopen."
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> *Id.* at 2155-2156.

VII. Conclusion

Mata is not a case about equitable tolling (although we expect the Fifth Circuit to come to its senses regarding this issue on remand). It is a case about jurisdiction. It is the furthest installment in a recent series of positive decisions about motions to reopen removal proceedings including *Dada v. Mukasey*, 128 S.Ct. 2307 (2008) and *Kucana v. Holder*, 130 S.Ct. 827 (2010). Specifically, it affirms that *Kucana* applies equally to untimely and timely filed motions to reopen. And it emphasizes that there is no connection between timeliness and jurisdiction which may have important consequences for the validity of other negative Fifth Circuit precedents restricting an alien's ability to file a motion to reopen.