(“INA”) § 101(a)(43)(N),

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F.3d 719 (8th Cir. 1999), reh'g

Furthermore, the government argued that if the Court determined that Cuate’s crime does constitute an aggravated felony, his petition fo2 a goavated

involving the transp tpation of alienaw.rom Mexico across the border to various locations in Arizona where they were met by other co-conspirators who drove them to Minnesota. App. 163-67.

On November 10, 1999, Cuate pleaded guilty and was convicted of conspiracy to transp tp and harbor illegal aliena, in violation of INA §§ 274(a)(1)(A)(ii) and (iii), 8 U.S.C.
§§ 1324(a)(1)(A)(ii) and (iii). App. 43-52, 168-72, 185-86. In the plea agreement, Cuate admitted that he used his van to transp tp illegal alienaw.rom Phoenix, Arizona to Minneapolis, Minnesotaw. t monetary gain. App. 48-49. The plea agreement further notes that Cuate assisted in this operation on more than one occasion between February 12, 1997 and September 19, 1997. App. 48. However, the plea agreement characterizes Cuate's role in this criminal scheme as min t and soughp a two-point reduction in the offense level. App. 45. After he

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violation of the law. Section 1324(a)(1)(A)(iv) prohibits encouraging or inducing an alien to come to, enter, or reside in the U.S., knowing such is in violation of the law. Section 1324(a)(1)(B) sesaw. tpi324naltieaw. t the above offenses. And Section 1324(a)(2) prohibits bringing an alien to the U.S., knowing the alien has no authorization to enter here.

On April 5, 1999, Cuate completed his sentence and was released into the custody of the INS. App. 174-76.

II. CUATE'S COMMENCEMENT OF REMOVAL PROCEEDINGS, BOARD OF IMMIGRATION APPEALS' DECISION, AND PETITION FOR REVIEW IN THIS COURT.

A. The Commencement Of Removal Proceedings.

On April 5, 1999, the INS served Cuate with a Notice to Appear, charging him with being subject to removal from the United States under INA § 237(a)(2)(A)(iii), 8 U.S.C. § 1227(a)(2)(A)(iii), as an alien convicted of an "aggravated

App.

247, 298.[5] The district court first ruled that it had habeas corpus jurisdiction under § 2241. App. 294-97a. In so concluding, the court followed this Court's decision in Shah, 184 F.3d at 719, which held that the transitionalD /F1hfso

[5] The INS filed objections to the report and recommendation. See App. 274. Cuate then filed a reply to these objections. See App. 287. Since the report and recommendation was adopted in its entirety by the district court, this brief will refer to the report and recommendation and district court order simply as one district court decision.

corpus by implication is disfavored. App. 294-96. In support of its "no repeal by implication" theory, the district court cited to the Supreme Court case of Felker v. Turpin, 518

§ 1101(a)(43)(N), which refers to "an offense described in [8 U.S.C. 1324(a)(1)(A) or (2)] (relating to alien smuggling)," was not intended to reach all offenses defined by § 1324(a)(1)(A) or (2), but only those offenses that might be characterized as "relating to alien smuggling." App. 269. Thus, the district court concluded, the parenthetical phrase "relating to alien smuggling" must be read as a limit on the definitilne deU.S.Cwczed afelonyin [he pINA. App. 69.-70. ATe dourt cas ndeUhe popnitn thet mabsnththeisconctriucilne,the defersenceto "aelating to alien smuggling" mwouldbe

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this particular case suggested that Cuate had engaged in

the courts of appeals by means of a petition for review, and

Shah, 184 F.3d at 719 (decision relied upon by the district court). See App. 260, 294-97. Aliens under this regime were placed in administrative "deportation" or "exclusion" proceedings before April 1, 1997, and had final deportation or exclusion orders en9ue 12 Tf 0.3 Tc T 72 708 30ctob8 330inal 6hisJudic

at 198. The district court refused to apply this analysis, concluding instead that in the immigration context, judicial review for criminal aliens under § 2241 is still available in district court even under the new permanent rules for judicial review. App. 297. The district court thereby marginalized the Supreme Court's decision, and contravened the conclusions of two circuit courts. That result is legally unjustified.

First, in INA § 242, Congress created a specific and comprehensive review scheme for removal orders that renders inapplicable all other review provisions. See AADC, 525 U.S. at 482-83; Max-George, 205 F.3d at 198; Richardson, 180 F.3d at 1315. Section 242 states that challenges to removal orders are goves375o orp2.56e,o2orc1ire gov7 aeare goves375oTD g challengentG,g distermaneongress crea(e)(2), is legal85 -27C7 TD egaless c125a(e)(2)de

review.’” Id. (emphasis supplied). Applying the Supreme Court's analysis, the Eleventh and Fifth Circuits subsequently ruled that the section 242(b)(9) “zipper clause,” along with the overall revisions to the judicial review scheme enacted by

[8] Section 242(a)(2)(C) provides:

ORDERS AGAINST CRIMINAL ALIENS — Notwithstanding any other provision of law, no court shall have jurisdiction to

[9] Because Cuate's case is governed by the permanent rules, the district court also improperly applied Shah which is a case specifically limited by this Court to the transitional rule context. See Shah, 184 F.3d at 725 ("As to whether the new provisions of that Act, as added by IIRIRA, exclude all judicial review, including habeas corpus, in other cases, we express no view."). Other circuits considering cases under the transitional rules have limited their holdings as well and went even further, suggesting that they may reach a different result under INA § 242's permanent provisions. See Jurado-Gutierrez v. Greene, 190 F.3d 1135, 1147 n.8 (10th Cir. 1999); Requena-Rodriguez v. Pasquarell, 190 F.3d 299, 309 (5th Cir. 1999) ("we note that congressional intent to limit jurisdiction is expressed more forcefully in the permanent than in the transitional rules"). Moreover, by following Shaw and allowing § 2241 habeas review in permanent rule cases (as opposed to the transitional rule case), the district court's decision directly conflicts with § 242's requirement that "no court" shall review removal orders entered against certain criminal aliens, see INA § 242(a)(2)(C), and that judicial review shall take place "only" in the context of petitions for review under Hobbs Act procedures, see INA §§ 242(a)(1) & (b)(9). Finally, in stark contrast to Shah's transitional rules, the permanent rules are far more explicit and contain much stronger language precluding judicial review than those Sha

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Nothing in <u>Felker</u> supports that conclusion. <u>Felker</u> addressed whether a circumscribed jurisdiction-limiting provision revoked the Supreme Court’s independent, original habeas jurisdiction. <u>Felker</u>

where statutory language is a veritable signpost directing the

[10] Cuate does not raise an issue of constitutional error. If he did, Appellant asserts that review of constitutional concerns is still available in the courts of appeals for criminal aliens pursuant to the Supreme Court's canon of statutory construction that courts should not presume that Congress intended to preclude review of constitutional claims unless Congress is expliciterts t regard. ( ) T33j 7.6 0 T(See) TET

When a court is determining the presence of these jurisdictional facts, the BIA's conclusions on these issues are to be given appropriate deference. See Hall v. INS, 167 F.3d 852, 856 (4th Cir. 1999) (court may consider jurisdictional facts but will not probe the facts underlying the conviction if the criminal statute on its face fits one of the crimes described in IIRIRA); Yang v. INS, 109 F.3d 1185, 1192 (7th Cir. 1997)
(deference to the BIA's findings); but see Lopez-Elias v. Reno, 209 F.3d 788, 791 (5th Cir. 2000) (no deference owed BIA's legal determinations when court deciding its own jurisdiction). Therefore, since the BIA in Ruiz-Romero, supra, already determined that crimes such as Cuate's are aggravated felonies, this decision should be accorded deference especially since its conclusion is eminently reasonable.

Cuate already filed a petition for review seeking review of his BIA decision and a determination whether his crime constituted an aggravated felony. App. 245. In response, the government filed a motion to dismiss for lack of jurisdiction which explicitly stated to this Court that courts of appeals

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availability of judicial review of these issues helped insulate the IIRIRA jurisdictional bars from constitutional attack.

have jurisdiction to determine their own jurisdiction and thus, the threshold question whether Cuate's crime is an aggravated felony. App. 298-311. After considering the petition for review and the motion to dismiss, this Court dismissed Cuate's petition for review for lack of jurisdiction. App. 312-13. Although the judgement dismissing the case was only one-sentence without explanation or rationale, it must be concluded that this Court conducted a proper jurisdictional review of Cuate's claim. Thus, the issue whether conspiracy to transport and harbor illegal aliens within the United States is an aggravated felony has already been before this Court.

> the purpose of assisting, abetting, or aiding only the alien's spouse, child, or parent (and no other individual) to violate a provision of this act[.]

At issue in this case is the parenthetical phrase "relating to

Cuate argued, and the district court agreed, that the parenthetical phrase should be read as restrictive and not as having been intended to reach all the offenses defined by §§ 1324(a)(1)(A) or (2). App. 22-33, 229-30, 265-73, 297. The district court believed that this restrictive reading "accomplishes a unique purpose in further defining which offenses, among the many contained in [§ 1324], are an aggravated felony." App. 268. The district court then

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position and reverse the district court’s decision.

§ 101(a)(43)(C), 8 U.S.C. § 1101(a)(43)(C). Where Congress chose to describe the nature of the crime, as in subparagraphs (A), (B), and (C), it omitted the necessarily duplicative descriptive parenthetical ("relating to"). See also §§ 101(a)(43)(F),(G), (K)(i),(M)(i),(O), (Q),(R),(S),(T),(U), 8 U.S.C. §§ 1101(a)(43)(F),(G),(K)(i),(M)(i),(O),(Q),(R), (S),(T),(U).

In subparagraphs in which Congress cited specific statutory sections without describing the nature of the crime, however, it included a descriptive parenthetical to obviate the need to resort to the statute. Thus, subparagraph (D), rather than describing the nature of the offense, cites the

[13] Like subparagraph (E)(i), subparagraph (E)(ii) can be

2381 and 2382 in the definition of aggravated felony and added the descriptive parenthetical "relating to treason" after the citation. See 8 U.S.C. § 1101(a)(43)(L)(i). But both section 2381 and section 2381 describe a single offense. Thus, if the "relating to" phrase after the citation in subparagraph (L) is interpreted as limiting the aggravated felony definition to only the "treason" crimes within those sections, its use is redundant9e aa use both itautmescontahinbye a single offens,s

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Section 922(n) provides:

> It shall be unlawful for any person who is under indictment for a crime punishable by imprisonment for a term exceeding one year to ship or transport in interstate or foreign commerce any firearm or ammunition or receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

Section 922(n) is undoubtedly a "firearms offense," and, because it is specifically cited in subparagraph (E)(ii), it is undoubtedly an aggravated felony under 8 U.S.C. § 1101(a)(43).

Congress's clear intent to the contrary.

Where Congress has employed a precise method of identifying the specific crimes it wished to include within the aggravated felony definition, it is illogical to find that it resorted to a less precise method that, at least in the circumstance before this Court, uses generic language that does not appear in the statute in question, and that leaves to speculation what offense it intended to include. The only logical conclusion is that Congress knew how to specify the precise federal crimes it wished to include in the aggravated

CONCLUSION

For the foregoing reasons, the Court should reverse the distriToUaese the2s decision and remand the case with

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(B)(i) and (C) and Eighth Circuit Rule 28A, I hereby

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CERTIFICATE OF SERVICE

I certify that on August 28, 2000, one copy of Respondent's Brief and Disk were served upon petitioner by placing it in the Department of Justice mail room for same day mailing, first-class, postage prepaid, addressed as follows:

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