

NOT FOR PUBLICATION

In the
United States Court of Appeals
For the Eleventh Circuit

No. 25-12931
Non-Argument Calendar

MIGUEL ANGEL FERNANDEZ,

Petitioner,

versus

U.S. ATTORNEY GENERAL,

Respondent.

Petition for Review of a Decision of the
Board of Immigration Appeals
Agency No. A028-552-187

Before JILL PRYOR, BRANCH, and LUCK, Circuit Judges.

PER CURIAM:

Miguel Angel Fernandez petitions for review of a Board of Immigration Appeals order denying his second motion to reopen

his removal proceedings. After careful consideration, we dismiss the petition for lack of jurisdiction.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Fernandez is a native and citizen of Cuba who became a lawful permanent resident of the United States in 1992. Fernandez operated a large-scale marijuana growing operation in Palm Beach County, Florida. He got caught, and in 2008, was charged with one count of maintaining a “continuing criminal enterprise,” which imposes criminal liability on a person who commits three or more felonies with five or more persons. *See* Fla. Stat. § 893.20. The predicate offenses included twenty-six incidents of conspiracy to traffic between twenty-five and 2,000 pounds of cannabis, *see* Fla. Stat. § 893.135(1)(a)(1), (5), and one incident of armed delivery of cannabis, *see* Fla. Stat. §§ 775.087(1), 893.13(1)(a)(2). Fernandez pleaded guilty and was sentenced to seventy-two months’ imprisonment.

Based on the conviction, in 2010, the Department of Homeland Security issued Fernandez a notice to appear charging him with three grounds of removability: (1) as an alien convicted of a firearms offense, 8 U.S.C. § 1227(a)(2)(C); (2) as an alien convicted of violating a law relating to a controlled substance, 8 U.S.C. § 1227(a)(2)(B)(i); and (3) as an alien convicted of the “aggravated felony” of illicit trafficking in a controlled substance, 8 U.S.C. §§ 1101(a)(43)(B), 1227(a)(2)(A)(iii). An immigration judge sustained the three charges and ordered Fernandez removed to Cuba.

Fernandez waived appeal, making his removal order final. *See* 8 U.S.C. § 1101(a)(47)(B); 8 C.F.R. § 1003.39.

In June 2022, however, Fernandez filed a pro se motion to reopen and terminate his removal proceedings, citing our decision in *Cintron v. United States Attorney General*, 882 F.3d 1380 (11th Cir. 2018), where we held that a Florida trafficking law, Florida Statutes section 893.13(1)(C)(1), was categorically not an “aggravated felony” under the Immigration and Nationality Act. *See id.* at 1383. The immigration judge denied the motion as untimely because a party generally may file only one motion to reopen no later than ninety days after the final order of removal. *See* 8 U.S.C. § 1229a(c)(7)(A), (C); 8 C.F.R. § 1003.2(c)(2). The immigration judge noted that “[t]he law changed in [Fernandez’s] favor in 2018,” but “[h]e did not file his motion until 2022, and ha[d] not provided a persuasive reason for the delay in seeking reopening.” Fernandez appealed, but the board affirmed the immigration judge.

Fernandez then filed a second motion to reopen through counsel in August 2024, arguing that his Florida conviction could not sustain any of the three grounds of removability under various cases we decided after his final order of removal.¹ Although he

¹ In addition to *Cintron*, Fernandez argued that he was not removable for his controlled-substance offenses under *Donowa v. United States Attorney General*, 735 F.3d 1275 (11th Cir. 2013), and *Said v. United States Attorney General*, 28 F.4th 1328 (11th Cir. 2022), and was not removable for his firearms offense under *Aspilaire v. United States Attorney General*, 992 F.3d 1248 (11th Cir. 2021).

acknowledged that his second motion was time- and number-barred, Fernandez insisted that he was entitled to equitable tolling because of ineffective assistance in filing his first motion and appeal. Those ostensibly pro se submissions, he claimed, were actually prepared by a woman he'd assumed was an attorney—she “never said she wasn't”—but was actually a private investigator, a fact he only discovered in December 2023 when he consulted with new counsel for a second opinion. Fernandez contended that he diligently pursued his rights because he'd filed a Florida Bar complaint against the investigator in February 2024, the investigator responded to the complaint in April 2024, and the Florida Bar referred the matter for further investigation in June 2024. Finally, Fernandez argued that the equities favored reopening because he had lived in the United States for over thirty years, his sole conviction was fifteen years ago, and his mother and children were United States citizens.

The board denied the second motion for three reasons. First, equitable tolling did not apply because Fernandez failed to comply with the board's procedural requirements for a motion to reopen based on ineffective assistance, including (1) an affidavit detailing the movant's agreement with his former counsel; (2) evidence that the counsel was given notice of and an opportunity to respond to the allegations against her; and (3) an indication of whether a complaint had been filed with appropriate disciplinary authorities, and if not, why not. *See Matter of Lozada*, 19 I. & N. Dec. 637 (BIA 1988). Although Fernandez submitted his Florida Bar complaint with the second motion, he did not submit the re-

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quired affidavit. And his December 2021 contract with the investigator, attached to the bar complaint, cast doubt on his story because it specifically warned, “[w]e are not attorneys, we cannot give you legal advise [sic].”

Second, even if Fernandez had complied with these procedural requirements, he couldn’t demonstrate the diligence required for equitable tolling because he’d had all the evidence necessary to file the motion since at least April 2024 (when the investigator responded to the bar complaint), but waited four months to file it without explaining the delay. Finally, the board declined to exercise its discretion to reopen Fernandez’s case because “the positive factors presented in the motion” were outweighed by Fernandez’s “significant criminal history, which include[d] a lengthy seventy-two-month prison sentence for engaging in a continuing criminal enterprise that spanned several years and involved trafficking marijuana while armed” and the absence of any “evidence of rehabilitation.”

Fernandez seeks review of the board’s order denying his second motion to reopen.

STANDARD OF REVIEW

We review for abuse of discretion the board’s denial of a motion to reopen removal proceedings. *See Butalova v. U.S. Att’y Gen.*, 768 F.3d 1179, 1182 (11th Cir. 2014) (per curiam) (citing *Jiang v. U.S. Att’y Gen.*, 568 F.3d 1252, 1256 (11th Cir. 2009)). We review our subject matter jurisdiction de novo “even when it is raised for the first time on appeal.” *Dupree v. Owens*, 92 F.4th 999, 1004 (11th Cir.

2024) (quoting *United States v. Iguaran*, 821 F.3d 1335, 1336 (11th Cir. 2016) (per curiam)).

DISCUSSION

Fernandez argues that (1) the board either did not have discretion to deny his second motion or abused its discretion by considering his criminal history, and (2) he was entitled to equitable tolling due to ineffective assistance of counsel in his first motion. Before we examine these arguments, though, we must determine whether we have jurisdiction to review the board's denial of the second motion to reopen. *See Gelin v. U.S. Att'y Gen.*, 837 F.3d 1236, 1240 (11th Cir. 2016). We conclude that we don't, so we must dismiss the petition.

"[W]ith limited exceptions, a congressional grant of jurisdiction is a prerequisite to the exercise of judicial power." *Patchak v. Zinke*, 583 U.S. 244, 254 (2018). We have jurisdiction to review any "final order of removal," *see* 8 U.S.C. § 1252(a)(1), which also gives us "the authority to review orders denying motions to reopen any such final order," *Patel v. U.S. Att'y Gen.*, 334 F.3d 1259, 1261 (11th Cir. 2003).

But what Congress gives, it can take away. We do not have jurisdiction "to review any final order of removal against an alien who is removable by reason of having committed" certain criminal offenses, including Fernandez's controlled-substance offenses under section 1227(a)(2)(A)(iii), (B), and his firearms offense under section 1227(a)(2)(C). *See* 8 U.S.C. § 1252(a)(2)(C). If we find this jurisdictional bar applies, we "must enforce" it "sua sponte, even in

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the face of a litigant’s forfeiture or waiver.” *Santos-Zacaria v. Garland*, 598 U.S. 411, 416, 419 & n.5 (2023); *see also Guzman-Munoz v. U.S. Att’y Gen.*, 733 F.3d 1311, 1314 (11th Cir. 2013) (per curiam) (“[B]ecause our jurisdiction to review denials of motions to reopen derives from our jurisdiction to review final orders of removal, it follows that the jurisdiction-stripping provisions of [the Immigration and Nationality Act] must apply to appellate-court review of final orders of removal and to denials of motions to reopen.” (citation omitted)).

One exception to the jurisdictional bar is section 1252(a)(2)(D), which restores our jurisdiction to “review [] constitutional claims or questions of law raised upon a petition for review.” 8 U.S.C. § 1252(a)(2)(D). But “[t]o invoke jurisdiction under [section] 1252(a)(2)(D), a petitioner must allege at least a colorable constitutional [or legal] violation,” meaning “the claim must have some possible validity.” *Patel v. U.S. Att’y Gen.*, 971 F.3d 1258, 1275 (11th Cir. 2020) (en banc) (citation modified).

Here, Fernandez contends that the board did not have discretion to deny the second motion to reopen and, even if it did, it abused that discretion by taking his criminal conviction into account. But we don’t have jurisdiction to consider these contentions because they do not “allege at least a colorable constitutional [or legal] violation.” *See id.* Here’s why.

Fernandez asserts that the board lacked discretion to deny the second motion to reopen because the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-

208, 110 Stat. 3009–546, codified motions to reopen, but did not adopt existing regulations that made reopening discretionary. But this argument has no “possible validity,” *see id.*, because the Supreme Court has held that, even after the Act, the board retains discretion to deny a motion to reopen under its regulations, *see Kucana v. Holder*, 558 U.S. 233, 250 (2010) (holding that, following the 1996 Act, the Board retains “broad discretion, conferred by the Attorney General, ‘to grant or deny a motion to reopen’”) (quoting 8 C.F.R. § 1003.2(a)); *see also Santos-Zacaria*, 598 U.S. at 425 (“Board reconsideration and reopening are discretionary.”).

Fernandez also argues that the board abused its discretion in weighing his Florida conviction against granting him relief. But this does not restore our jurisdiction either because this “garden-variety abuse of discretion argument” that the board failed properly to weigh the facts “does not amount to a legal question under [section] 1252(a)(2)(D).” *Alvarez-Acosta v. U.S. Att’y Gen.*, 524 F.3d 1191, 1196–97 (11th Cir. 2008).

Because Fernandez’s petition does not raise a possibly valid legal or constitutional argument, we are without jurisdiction to review it.

PETITION DISMISSED.