

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 25-2113

WASCAR GARIVALDY REYES,
Petitioner
v.

ATTORNEY GENERAL OF THE UNITED STATES OF AMERICA

On Petition for Review of an Order of the Board of Immigration Appeals
Appellate Immigration Judge Deborah K. Goodwin, No. A044-129-525

Before: HARDIMAN, BIBAS, and RENDELL, *Circuit Judges*
Submitted: Sept. 16, 2026; Filed: Sept. 17, 2026

NONPRECEDENTIAL OPINION*

BIBAS, *Circuit Judge*. Wascar Garivaldy Reyes, a citizen of the Dominican Republic, came to this country and became a lawful permanent resident. But in 1996, he was arrested for distributing marijuana. His defense lawyer allegedly misadvised him that a conviction would not affect his immigration status because he had less than an ounce of marijuana and thus would get only probation. Relying on that misadvice, he pleaded guilty in New Jersey state court. In 1999, based on that criminal conviction, he was ordered removed to the Dominican Republic. Soon after, he re-entered this country illegally, married, and fathered children. He has lived and worked here illegally for decades.

After he returned, the Supreme Court extended the Sixth Amendment right to effective counsel to crimmigration. In 2010, the Court first held that a defense lawyer who fails to warn his client that a guilty plea will automatically make him deportable is ineffective.

*This is not an opinion of the full Court and, under 3d Cir. IOP 5.7, is not binding precedent.

Padilla v. Kentucky, 559 U.S. 356, 366–69 (2010). But the Court declined to make that new rule retroactive. *Chaidez v. United States*, 568 U.S. 342, 347 (2013).

Twelve years after *Padilla*, Reyes took advantage of its rule. In 2022, he successfully moved to reopen his state criminal case, withdraw his guilty plea, vacate his conviction, and have the charges dismissed. Eight months later, he moved to reopen his removal proceedings and vacate his removal order because it had rested on the now-vacated conviction. The Board denied his motion as untimely, well beyond the ninety-day deadline. 8 U.S.C. § 1229a(c)(7)(C)(i). It also declined to exercise its discretion to reopen the case sua sponte.

Reyes petitions for review of the Board’s rulings. But we lack jurisdiction to review removal orders against criminal aliens convicted of drug crimes. 8 U.S.C. § 1252(a)(2)(C); *Cruz v. Att’y Gen. U.S.*, 452 F.3d 240, 246–47 (3d Cir. 2006) (same, for motions to reopen such orders). Even so, we still have jurisdiction to review constitutional claims and questions of law. 8 U.S.C. § 1252(a)(2)(C)–(D). We review those claims and questions de novo. *Bhargava v. Att’y Gen. U.S.*, 611 F.3d 168, 170 (3d Cir. 2010).

Reyes’s motion to reopen comes almost twenty-three years too late. As the Board noted, he made no argument for equitable tolling and never showed that he had pursued his rights diligently. Reyes does not dispute that his motion was untimely. Instead, he argues that the Board was obligated to reopen his case sua sponte. But with two exceptions, the Board’s refusal to reopen proceedings sua sponte is “functionally unreviewable.” *Darby v. Att’y Gen. U.S.*, 1 F.4th 151, 164 (3d Cir. 2021) (cleaned up). Neither exception to that rule

applies here. The Board did not rely on a mistaken premise of law. *Id.* Nor did it flout a settled practice of reopening in such situations when petitioners sleep on their rights. *Id.*

Resisting that conclusion, Reyes relies on a single case, but it is inapt. In that case, right after the alien was ordered removed, he started working to vacate his predicate conviction. *Cruz*, 452 F.3d at 243–44. After the state court vacated it, he then moved to reopen his immigration proceedings, but the Board denied his motion as untimely. *Id.* at 244–45. We granted the petition for review and remanded only because the Board had failed to explain its denial. *Id.* at 247–50. We did not hold that the Board had a settled practice of reopening sua sponte whenever an alien’s conviction supporting removability is vacated. *Id.* at 250. And Reyes has not shown that there is such a practice now. *See Sang Goo Park v. Att’y Gen. U.S.*, 846 F.3d 645, 653 (3d Cir. 2017). We will thus DENY IN PART and DISMISS IN PART the petition for review.