No. 05-849

In the Supreme Court of the United States

JAWDAT ELIA, PETITIONER

v.

ALBERTO R. GONZALES, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record
PETER D. KEISLER
Assistant Attorney General
DONALD E. KEENER
ALISON R. DRUCKER
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

1. Whether petitioner's due process rights were violated because the Immigration and Naturalization Service served him with an order to show cause charging him with deportability in December 1991, soon after he began serving a criminal sentence, but did not schedule his deportation hearing until October 1996, soon after he was released from prison.

2. Whether, despite the fact that petitioner served more than five years in prison, he should be deemed to have served less than five years in prison for purposes of determining his eligibility for discretionary relief from deportation under Section 212(c) of the Immigration and Nationality Act, 8 U.S.C. 1182(c) (1994) (repealed 1996), because, after his release from prison, his sentence was reduced from 5 to 20 years to 2 to 20 years.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Constitution, statutes, regulation and rule:

Statutes, regulation and rule—Continued: Page

Miscellaneous:

In the Supreme Court of the United States

No. 05-849

JAWDAT ELIA, PETITIONER

v.

ALBERTO R. GONZALES, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 431 F.3d 268. The order of the Board of Immigration Appeals (Pet. App. 37a) and the decision of the immigration judge (Pet. App. 38a-45a) are unreported. The superseded opinion of the court of appeals (Pet. App. 20a-34a) is reported at 418 F.3d 667.

JURISDICTION

The judgment of the court of appeals (Pet. App. 35a-36a) was entered on July 22, 2005, and amended on October 24, 2005 (Pet. App. 16a). A petition for rehearing was denied on September 29, 2005 (Pet. App. 18a-19a). The petition for a writ of certiorari was filed on December 23, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 212(c) of the Immigration and Nationality Act (INA), 8 U.S.C. 1182(c) (1994) (repealed 1996), authorized a permanent resident alien domiciled in the United States for seven consecutive years to apply for discretionary relief from exclusion. While, by its terms, Section 212(c) applied only to exclusion proceedings, it was construed to apply to deportation proceedings as well. See *INS* v. *St. Cyr*, 533 U.S. 289, 295 (2001). In the Immigration Act of 1990, Congress amended Section 212(c) to make ineligible for discretionary relief any alien previously convicted of an aggravated felony who had served a prison term of at least five years. See Pub. L. No. 101-649, § 511, 104 Stat. 5052. Subsequently, in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Congress amended Section 212(c) to make ineligible for discretionary relief any alien previously convicted of certain offenses, including an aggravated felony, without regard to the amount of time spent in prison. See Pub. L. No. 104-132, § 440(d), 110 Stat. 1277. Later in 1996, in the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), Congress repealed Section 212(c), see Pub. L. No. 104-208, § 304(b), 110 Stat. 3009-597, and replaced it with Section 240A of the INA, 8 U.S.C. 1229b, which provides for a form of discretionary relief known as cancellation of removal. Like Section 212(c) as amended by AEDPA, Section 240A makes aggravated felons ineligible for discretionary relief. See 8 U.S.C. 1229b(a)(3).

2. Petitioner is a native and citizen of Iraq. Pet. App. 39a. In April 1991, after having become a lawful permanent resident, he pleaded guilty in a Michigan court to delivery of a controlled substance, in violation

of Mich. Comp. Laws Ann. § 333.7401(2)(a)(iii) (West 1991). Pet. App. 1a-2a & n.1. In June 1991, he was sentenced to a prison term of 2 to 20 years. *Id.* at 2a. The State appealed the sentence. *Id.* at 3a.

In December 1991, while petitioner was serving his sentence, and while the State's appeal was pending, the Immigration and Naturalization Service (INS) served petitioner with an order to show cause. Pet. App. 3a.[1] The INS alleged that petitioner was deportable because of his conviction of the drug offense, which is an aggravated felony (see 8 U.S.C. 1101(a)(43)(B), 1227(a)(2)(A)(iii)). Pet. App. 3a.

In September 1992, the Michigan Court of Appeals remanded the criminal case for resentencing, on the ground that the statutory minimum was five years and the trial court did not have discretion to impose a sentence below the statutory minimum. Pet. App. 3a. On remand, petitioner was resentenced to a prison term of 5 to 20 years. *Ibid.* In March 1995, in *People* v. *Fields*, 528 N.W.2d 176, the Michigan Supreme Court held that a sentence below the five-year statutory minimum is permissible in some circumstances. In October 1996, after serving more than five years in prison, petitioner was released on parole and taken into INS custody. Pet. App. 3a & n.2.

3. Later in October 1996, petitioner appeared before an immigration judge (IJ) and requested discretionary relief from deportation under Section 212(c) of the INA.

---

[1] The INS's immigration-enforcement functions have since been transferred to United States Immigration and Customs Enforcement in the Department of Homeland Security. See 6 U.S.C. 251 (Supp. II 2002).

Pet. App. 4a.[2] The IJ ruled that petitioner was ineligible for such relief and entered an order of deportation. *Ibid*. The IJ reasoned that AEDPA had eliminated the availability of Section 212(c) relief to any alien convicted of an aggravated felony and that the applicable provision applied to aliens convicted before AEDPA's effective date. *Ibid*.

In the meantime, petitioner had filed a motion in the state trial court to have his criminal sentence modified in light of the Michigan Supreme Court's decision in *Fields*. Pet. App. 4a. In April 1997, the trial court reinstated petitioner's initial sentence of 2 to 20 years. *Ibid.* He was given credit for the time he had already served, which was approximately five years and 93 days. *Id*. at 41a.

In July 1997, the Board of Immigration Appeals (BIA) affirmed the IJ's order of deportation. Pet. App. 4a.

4. Petitioner subsequently moved to reopen the deportation proceedings. Pet. App. 4a. The BIA granted the motion, on the basis of a 1999 Sixth Circuit decision, *Pak* v. *Reno*, 196 F.3d 666, that prohibited the application of AEDPA's amendment of Section 212(c) in cases pending on the statute's effective date. Pet. App. 4a. On remand from the BIA, an IJ ruled that petitioner was ineligible for relief under the pre-AEDPA (*i.e.*, 1990) version of Section 212(c), because he had served at least five years in prison, and again entered an order of de-

---

[2] Petitioner asserts (Pet. 8, 12, 16 n.10, 17) that he orally requested Section 212(c) relief from an INS officer who visited him in the state prison shortly before he was served with the order to show cause in December 1991. The court below found, however, that "nothing in the record supports this claim." Pet. App. 3a.

portation. *Id.* at 38a-45a. The BIA affirmed without opinion. *Id.* at 37a.

5. The court of appeals denied petitioner's petition for review. Pet. App. 1a-15a.

a. The court of appeals rejected petitioner's contention that, because the Michigan trial court ultimately reinstated the sentence of 2 to 20 years, he should be deemed to have served a sentence of only two years. Pet. App. 10a-11a. The court explained that "[d]etermining whether imprisonment has made an alien ineligible for § 212(c) relief 'turns not on the sentence imposed but on the period of actual incarceration.'" *Id.* at 10a (quoting *United States* v. *Ben Zvi*, 242 F.3d 89, 99 (2d Cir. 2001)). The court went on to say that "[p]arole is discretionary" in Michigan, and "[t]here is no reason to assume that [petitioner] would have been paroled after only two years had [his] original two-to-twenty-year term remained in effect throughout his incarceration." *Id.* at 11a. Indeed, since "[t]here is some indication that [he] was not from the outset a model prisoner," the court suggested that it might be more appropriate to assume that petitioner would *not* have served "only the minimum within his sentence range." *Id.* at 11a n.8.

b. The court of appeals also rejected petitioner's contention that his due process rights were violated by the lapse of time between the service of the order to show cause and the scheduling of a deportation hearing. Pet. App. 12a-13a. The court relied on decisions of other courts that "soundly reasoned that the Government's delay in scheduling a deportation hearing after issuing

an [order to show cause] does not violate due process." *Id.* at 12a (citing cases).[3]

ARGUMENT

1. Petitioner contends (Pet. 10-18) that his due process rights were violated because the INS served the order to show cause in December 1991, soon after he began serving his state criminal sentence, but did not schedule his deportation hearing until October 1996, soon after he was released from prison. The court of appeals correctly held otherwise, and its decision does not conflict with any decision of any other court. Further review is therefore unwarranted.

a. At bottom, petitioner is asserting a type of "speedy trial" claim. Pet. 16. It is not clear, however, why the Due Process Clause should be thought to have anything to say about how soon a hearing must be held after an order to show cause is served. In the criminal context, where a defendant is afforded greater protections than an alien in the immigration context, the question of how soon a trial must be held after the filing of charges is governed, not by the Due Process Clause, but by the Speedy Trial Clause of the Sixth Amendment and, in the federal system, by the Speedy Trial Act of 1974, 18 U.S.C. 3161-3174. The fact that there is no analogous constitutional or statutory provision applicable to deportation proceedings suggests that the govern-

[3] The court of appeals also rejected petitioner's contention that the delay in scheduling a deportation hearing violated his equal protection and Eighth Amendment rights, Pet. App. 13a-14a, and his contention that the doctrines of equitable estoppel and laches should prevent the government from benefitting from the delay, *id.* at 14a-15a. Petitioner does not renew those contentions in this Court.

ment does not have an obligation to hold a hearing within any particular period.

While petitioner's claim is one of procedural due process, moreover, see Pet. 8, 10, 17, 18, he fails to identify the liberty or property interest of which he has assertedly been deprived. See *Board of Regents* v. *Roth*, 408 U.S. 564, 569 (1972) ("The requirements of procedural due process apply only to the deprivation of interests encompassed by the [Fifth or] Fourteenth Amendment's protection of liberty and property."). Petitioner was in state, not INS, custody from December 1991, when the order to show cause was served, until he was released on parole in October 1996, shortly before his first deportation hearing was scheduled. The lapse of time between the service of the order to show cause and the hearing thus did not have any effect on petitioner's liberty during that period. Insofar as petitioner's claim is that he had a constitutionally protected interest in discretionary relief from deportation under Section 212(c) during that time, that claim is equally without merit. "[B]ecause discretionary relief is necessarily a matter of grace rather than of right, aliens do not have a due process liberty interest in consideration for such relief." *United States* v. *Torres*, 383 F.3d 92, 104 (3d Cir. 2004). Accord, *e.g.*, *Jamieson* v. *Gonzales*, 424 F.3d 765, 768 (8th Cir. 2005); *Ali* v. *Ashcroft*, 366 F.3d 407, 412 (6th Cir. 2004); *Dave* v. *Ashcroft*, 363 F.3d 649, 653 (7th Cir. 2004); *United States* v. *Wilson*, 316 F.3d 506, 510 (4th Cir.), cert. denied, 538 U.S. 1025 (2003); *United States* v. *Lopez-Ortiz*, 313 F.3d 225, 231 (5th Cir. 2002), cert. denied, 537 U.S. 1135 (2003); *Oguejiofor* v. *Attorney General*, 277 F.3d 1305, 1309 (11th Cir. 2002) (per curiam).

b. Petitioner contends (Pet. 10) that the INS violated his due process rights by failing to comply with the requirement of 8 U.S.C. 1229(d)(1) that, "[i]n the case of an alien who is convicted of an offense which makes the alien deportable, the Attorney General shall begin any removal proceeding as expeditiously as possible after the date of the conviction." But 8 U.S.C. 1229(d)(2) explicitly states that "[n]othing in this subsection shall be construed to create any substantive or procedural right or benefit that is legally enforceable by any party against the United States or its agencies or officers or any other person." The provision was enacted for the benefit of the public, not aliens, to bring about the prompt removal of those who have been convicted of criminal offenses. And petitioner would not have been deported in any event while he was still serving his state sentence.

Petitioner also relies (Pet. 14) on a regulation proposed in 1992, but never adopted, that would have required, in a case in which the alien was deportable by virtue of having been convicted of an aggravated felony, that the hearing be "scheduled and completed within 30 days after the commencement of proceedings." 57 Fed. Reg. 61,587. A regulation that was never adopted, however, provides no basis for a due process claim. In any event, petitioner's hearing *was* scheduled and completed within 30 days after the commencement of proceedings. His deportation proceeding was commenced, not by the *service* of the order to show cause, but "by the filing of [the] order to show cause with the Immigration Court," 8 C.F.R. 242.1(a) (1996), and the order to show cause was filed on October 9, 1996, Admin. R. 500-503. The deportation hearing was completed 16 days later, on October 25, 1996. *Id.* at 342-353.

Citing *Zadvydas* v. *Davis*, 533 U.S. 678 (2001), petitioner contends that the Due Process Clause requires that a deportation hearing be held within a "reasonable time" of the service of an order to show cause, and that the nearly five years that separated those events in this case is not a "reasonable time." Pet. 13. Petitioner's reliance on *Zadvydas* is misplaced. In that case, this Court applied the canon of constitutional avoidance and construed a statute authorizing the detention of aliens in certain circumstances to contain an implicit "reasonable time" limitation. 533 U.S. at 688-701. In construing the statute in that manner, the Court recognized that "[f]reedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty [the Due Process] Clause protects." *Id.* at 690. This case does not involve the right to be free from imprisonment—during the period at issue, petitioner was serving a lawfully imposed criminal sentence—but rather an asserted right to a hearing shortly after service of an order to show cause, even though the mere service of the order did not actually commence the proceedings against petitioner (see p. 8, *supra*), and even though he could not have been deported at that time.[4]

Petitioner also relies (Pet. 16-17) on *INS* v. *St. Cyr*, 533 U.S. 289 (2001), but that case, too, has no applicability here. *St. Cyr* involved AEDPA's amendment of Section 212(c) to make ineligible for discretionary relief from deportation any alien previously convicted of an aggravated felony, without regard to the amount of time spent in prison. The Court held that it would be

---

[4] Petitioner also cites (Pet. 13) *Reno* v. *Flores*, 507 U.S. 292, 314-315 (1993), but that case, too, involved detention.

impermissibly retroactive to apply the amendment to an alien convicted of an aggravated felony through a plea agreement at a time when the conviction would not have rendered the alien ineligible for discretionary relief. As petitioner acknowledges, there is no "retroactive statute at issue here." Pet. 16. Petitioner pleaded guilty to an aggravated felony in 1991, Pet. App. 2a, and it was the 1990 version of Section 212(c)—not the 1996 version—that was applied at his deportation hearing. Petitioner was ineligible for discretionary relief from removal, not because of a statute enacted after his plea, but because of a failure to satisfy the eligibility criteria of the statute in effect when his plea was entered.

c. Petitioner contends (Pet. 10-13) that the court of appeals' decision on the due process issue conflicts with the Seventh Circuit's decision in *Singh* v. *Reno*, 182 F.3d 504 (1999). That is not correct.

In *Singh*, the INS issued an order to show cause in October 1992 and did not schedule a deportation hearing until late 1996, by which time the alien (Singh) no longer had a right to apply for discretionary relief from deportation. 182 F.3d at 510. The Seventh Circuit did not take issue with the "abstract" proposition that "an alien has no substantive right to have a claim heard at a particular time," but held that Singh had stated a due process claim in "the very unusual circumstance" of that case—in particular, the circumstance that it was "Singh rather than the INS pressing for the resolution of Singh's status." *Ibid*. Indeed, the court found the fact that "it was Singh who pressed to have the matter resolved" to be "of crucial significance." *Id*. at 511.

The "very unusual" and "crucial[ly] significan[t]" fact that was present in *Singh* is not present here, because, unlike Singh, petitioner did not ask that his deportation

hearing be scheduled or otherwise "press[] for the resolution of [his] status." 182 F.3d at 510-511. Petitioner repeatedly asserts (Pet. 8, 12, 16 n.10, 17) that he orally requested Section 212(c) relief from an INS officer shortly before he was served with the order to show cause, but the court below correctly found that "nothing in the record supports this claim" (Pet. App. 3a).

The Seventh Circuit itself has decided that the holding of *Singh* does not apply when, as in this case, the alien did not "press[] for the resolution of [his] status." 182 F.3d at 510. See *Patel* v. *Gonzales*, No. 04-3401, 2006 WL 799187, at *6 (7th Cir. Mar. 30, 2006) ("[Patel's] case is not the same as *Singh v. Reno*, 182 F.3d 504 (7th Cir. 1999) * * *. There, the applicable law had changed during the period of delay and we found 'crucial significance' in the petitioner's diligent pursuit of relief."); *Morales-Ramirez* v. *Reno*, 209 F.3d 977, 983 (7th Cir. 2000) ("during the period of his incarceration, Morales-Ramirez made no effort, unlike the petitioner in *Singh*, to apply for discretionary waiver under § 212(c)"); see also *Clavis* v. *Ashcroft*, 281 F. Supp. 2d 490, 497 (E.D.N.Y. 2003) ("petitioner makes no allegation that he sought to have his case decided swiftly, a fact the Seventh Circuit held to be 'of crucial significance' in *Singh*"); cf. *Barker* v. *Wingo*, 407 U.S. 514, 531-532 (1972) (failure to assert right to speedy trial important factor in finding no violation of right). Those decisions make clear that, on facts like those present here, an alien in the Seventh Circuit would be treated no differently than an alien in the Sixth Circuit.

2. Petitioner also contends (Pet. 18-25) that, despite the fact that he served more than five years in prison, he should be deemed to have served less than five years in prison for purposes of determining his eligibility for Sec-

tion 212(c) relief, because, after his release from prison, his sentence was reduced from 5 to 20 years to 2 to 20 years. As with the first issue, the court of appeals correctly held otherwise, and its decision does not conflict with any decision of any other court. Further review is therefore unwarranted.

a. The court of appeals applied the principle that "[d]etermining whether imprisonment has made an alien ineligible for § 212(c) relief 'turns not on the sentence imposed but on the period of actual incarceration.'" Pet. App. 10a (quoting *United States* v. *Ben Zvi*, 242 F.3d 89, 99 (2d Cir. 2001)). Petitioner does not appear to challenge that principle as a general matter. Instead, he contends that it does not apply when a sentence is later reduced to a term shorter than the time actually served. Even if that contention is correct, it does not benefit petitioner.

Contrary to his contention, petitioner was not "ultimately * * * sentenced to a term of imprisonment of less than five (5) years." Pet. 18. Petitioner's ultimate sentence was 2 to 20 years of imprisonment. Pet. App. 4a. Because, as the court of appeals recognized, "[p]arole is discretionary in Michigan," an indeterminate sentence of 2 to 20 years is not a sentence of less than five years. *Id.* at 11a (citing Mich. Comp. Laws Ann. § 791.234(9) (West 2004)). Indeed, petitioner "acknowledges that it is uncertain how long he would have served in prison" if his sentence had never been increased from 2 to 20 years to 5 to 20 years. Pet. 20 n.11.

b. Petitioner contends (Pet. 19-20, 22-24) that the court of appeals' decision on this point conflicts with decisions of a number of district courts. That contention would be irrelevant even if it were correct. See Sup. Ct. R. 10(a). And it is not correct.

In the case on which petitioner principally relies, *Mandarino* v. *Ashcroft*, 318 F. Supp. 2d 13 (D. Conn. 2003), the alien was sentenced to nine years of imprisonment, he served more than five years, and his sentence was later reduced to four years and 360 days. *Id.* at 16. The court held that the later sentence was "the relevant sentence for purposes of determining eligibility for waiver." *Id.* at 18. Unlike the four-year-and-360-day sentence in *Mandarino*, the 2-to-20-year sentence ultimately imposed here was not less than five years.

In the other cases on which petitioner relies, the district court concluded that the period of incarceration is to be measured at the time the alien initially seeks Section 212(c) relief, see *Greenidge* v. *INS*, 204 F. Supp. 2d 594, 597-600 (S.D.N.Y. 2001), or at the time the BIA enters a final order of deportation, see *Archibald* v. *INS*, No. CIV.A. 02-0722, 2002 WL 1434391, at *6 (E.D. Pa. July 1, 2002). In this case, petitioner had served more than five years at the time he initially sought Section 212(c) relief—and, *a fortiori*, at the time the final order of deportation was entered. Pet. App. 4a-5a, 11a n.7.[5]

[5] *Edwards* v. *INS*, 393 F.3d 299 (2d Cir. 2004), which petitioner also cites (Pet. 19), is distinguishable on the same ground. See Pet. App. 11a n.7.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General
PETER D. KEISLER
Assistant Attorney General
DONALD E. KEENER
ALISON R. DRUCKER
Attorneys

APRIL 2006