No. 05-1251

In the Supreme Court of the United States

ENRIQUE HERNANDEZ-CASTILLO, PETITIONER

v.

ALBERTO R. GONZALES, ATTORNEY GENERAL, ET AL.

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

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

As a result of 1996 amendments to the Immigration and Nationality Act, a removable alien is ineligible for discretionary relief from removal if the alien was previously convicted of an aggravated felony. In *INS* v. *St. Cyr*, 533 U.S. 289 (2001), this Court held that it would be impermissibly retroactive to apply the 1996 amendments 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. The question presented is whether this Court's holding in *St. Cyr* applies to an alien convicted of an aggravated felony at trial.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-8) is reported at 436 F.3d 516. The order and judgment of the district court granting the motion to dismiss (Pet. App. 9-12) are unreported. The order of the district court denying the motion to dismiss (Pet. App. 13-19) is reported at 402 F. Supp. 2d 749. The decisions of the Board of Immigration Appeals (App., *infra*, 1a) and the immigration judge (App., *infra*, 2a-5a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 13, 2006. The petition for a writ of certiorari was filed on March 28, 2006. 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 Section 212(c) of the Immigration and Nationality Act (INA), 8 U.S.C. 1182(c) (1988) (repealed 1996), authorized a permanent resident alien domiciled in the United States for seven consecutive years to apply for discretionary relief from exclusion.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, Tit. V, § 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, Tit. V, § 440(d), 110 Stat. 1277. Later in 1996, in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Congress repealed Section 212(c), see Pub. L. No. 104-208, Tit. III, § 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).

In *St. Cyr*, *supra*, this Court held, based on principles of non-retroactivity, that IIRIRA's repeal of Section 212(c) should not be construed to apply to an alien convicted of an aggravated felony through a plea agree-

ment at a time when the conviction would not have rendered the alien ineligible for relief under Section 212(c). 533 U.S. at 314-326. The question presented in this case is whether this Court's holding in *St. Cyr* applies to an alien convicted of an aggravated felony at trial.

2. Petitioner is a native and citizen of Mexico. In 1985, he was admitted into the United States as a lawful permanent resident. In 1989, a jury found him guilty of felony indecency with a child. In 2001, the Immigration and Naturalization Service (INS) commenced removal proceedings against him.[*] It alleged that petitioner was deportable because the offense of which he was convicted was both an aggravated felony and a crime involving moral turpitude committed within five years after admission for which a prison term of at least one year may be imposed. Pet. App. 2; see 8 U.S.C. 1101(a)(43)(A), 1227(a)(2)(A)(i) and (iii).

Petitioner conceded that he was deportable but sought discretionary relief from deportation under Section 212(c) of the INA. The immigration judge (IJ) ruled that Section 212(c) relief is unavailable to an alien convicted of an aggravated felony before the 1996 amendments to the INA if the alien was convicted at trial. Because petitioner was convicted at trial, the IJ found that his application for Section 212(c) relief was pretermitted and ordered him removed to Mexico. Pet. App. 2-3; App., *infra*, 2a-5a.

The Board of Immigration Appeals affirmed the IJ's decision without opinion. Pet. App. 3; App., *infra*, 1a.

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[*] 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. III 2003).

3. Petitioner filed a petition for a writ of habeas corpus, arguing that he had been unlawfully denied the right to seek a waiver of deportation. Pet. App. 3. The respondent in the habeas corpus action, an official with United States Immigration and Customs Enforcement, filed a motion to dismiss, which the district court at first denied. *Id.* at 13-19. Finding the Third Circuit's decision in *Ponnapula* v. *Ashcroft*, 373 F.3d 480 (2004), persuasive, the district court determined that an alien convicted of an aggravated felony at trial before the 1996 amendments to the INA is eligible for relief under Section 212(c) if he rejected a plea offer. Pet. App. 17-18. The court then directed the parties to conduct further discovery addressed to whether petitioner was offered a plea agreement. *Id.* at 18. Approximately two months later, after discovery was completed, the district court granted the motion to dismiss, finding that there was still no evidence in the record that petitioner had been offered a plea agreement. *Id.* at 4, 9-12.

4. The court of appeals vacated the district court's finding of habeas corpus jurisdiction, converted petitioner's habeas corpus petition into a petition for review pursuant to the REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, Tit. I, § 106, 119 Stat. 310-311, and denied the petition for review. Pet. App. 1-8. The court held that applying the 1996 amendments to the INA to an alien whose aggravated-felony conviction antedates them does not "yield[] an impermissible retroactive effect" when the conviction "follow[s] a jury trial, rather than [being] pursuant to a guilty plea." *Id.* at 7. Quoting the Second Circuit's decision in *Rankine* v. *Reno*, 319 F.3d 93, cert. denied, 540 U.S. 910 (2003), the court of appeals reasoned that "aliens who chose to go to trial are in a different position with respect to [the 1996 amendments to the

INA] than aliens * * * who chose to plead guilty," because the former did not "detrimentally change[] [their] position in reliance on continued eligibility for § 212(c) relief" and can "point[] to no conduct on their part that reflects an intention to preserve their eligibility for relief under § 212(c) by going to trial." Pet. App. 7 (quoting *Rankine*, 319 F.3d at 99-100). The court therefore "agree[d] with the IJ's order declaring [petitioner] ineligible for § 212(c) relief." *Id.* at 8. In a footnote, the court of appeals rejected petitioner's request for "an opportunity to present evidence that he had been offered a plea agreement before his trial," reasoning that, even if there were such evidence, "the refusal to take a plea agreement" would not amount to "detrimental reliance on § 212(c)." *Id.* at 8 n.3.

ARGUMENT

Petitioner contends (Pet. 8-16) that the holding of *St. Cyr*, which involved aliens convicted of an aggravated felony through a plea agreement, should be extended to aliens convicted at trial. The court of appeals correctly held otherwise, and its decision does not conflict with the decision of any other court of appeals. Further review is therefore unwarranted. Indeed, this Court has already denied petitions raising the claim that petitioner raises in at least three prior cases. See *Thom* v. *Gonzales*, 126 S. Ct. 40 (2005); *Stephens* v. *Ashcroft*, 543 U.S. 1124 (2005); *Reyes* v. *McElroy*, 543 U.S. 1057 (2005).

1. In *St. Cyr*, this Court placed considerable emphasis on the fact that "[p]lea agreements involve a *quid pro quo*," whereby, "[i]n exchange for some perceived benefit, defendants waive several of their constitutional rights (including the right to a trial) and grant the government numerous tangible benefits." 533 U.S. at 321-

322 (citation and internal quotation marks omitted). In light of "the frequency with which § 212(c) relief was granted in the years leading up to AEDPA and IIRIRA," the Court concluded that "preserving the possibility of such relief would have been one of the principal benefits sought by defendants deciding whether to accept a plea offer or instead to proceed to trial." *Id.* at 323. And because, in the Court's view, aliens in St. Cyr's position "almost certainly relied upon th[e] likelihood [of receiving § 212(c) relief] in deciding whether to forgo their right to a trial," the Court held that "the elimination of any possibility of § 212(c) relief by IIRIRA has an obvious and severe retroactive effect." *Id.* at 325. See also *Fernandez-Vargas* v. *Gonzales*, 126 S. Ct. 2422, 2431-2432 & n.10 (2006) (reaffirming the *quid pro quo* basis for the holding in *St. Cyr*).

In *Rankine* v. *Reno*, 319 F.3d 93, cert. denied, 540 U.S. 910 (2003), on which the decision below relied (Pet. App. 7-8 & n.3), the Second Circuit correctly concluded that "aliens who chose to go to trial are in a different position with respect to IIRIRA than aliens like St. Cyr who chose to plead guilty." 319 F.3d at 99. As the court explained in *Rankine*, unlike an alien who pleaded guilty, an alien who went to trial did not "detrimentally change[] his position in reliance on continued eligibility for § 212(c) relief." *Ibid.* An alien who pleaded guilty made a decision "to abandon any rights and admit guilt—thereby immediately rendering [himself] deportable—in reliance on the availability of the relief offered prior to IIRIRA." *Ibid.* An alien who went to trial, by contrast, did so "to challenge the underlying crime that could render [him] deportable and, had [he] succeeded, § 212(c) relief would be irrelevant." *Id.* at 99-100. In short, as *Rankine* correctly recognized, it is

"the lack of detrimental reliance on § 212(c) by those aliens who chose to go to trial" that "puts them on different footing than aliens like St. Cyr." *Id.* at 102.

2. The Second Circuit (in *Rankine*) and the Fifth Circuit (in this case) are not the only courts of appeals that have declined to extend the holding of *St. Cyr* to aliens convicted at trial. Five others have done so as well. See *Dias* v. *INS*, 311 F.3d 456 (1st Cir. 2002) (per curiam), cert. denied, 539 U.S. 926 (2003); *Chambers* v. *Reno*, 307 F.3d 284 (4th Cir. 2002); *Montenegro* v. *Ashcroft*, 355 F.3d 1035, 1036-1037 (7th Cir. 2004) (per curiam); *Armendariz-Montoya* v. *Sonchik*, 291 F.3d 1116, 1121-1122 (9th Cir. 2002), cert. denied, 539 U.S. 902 (2003); *Brooks* v. *Ashcroft*, 283 F.3d 1268, 1273-1274 (11th Cir. 2002). And, contrary to petitioner's contention (Pet. 8, 12-15), those decisions do not conflict with the Third Circuit's decision in *Ponnapula* v. *Ashcroft*, 373 F.3d 480 (2004).

While *Ponnapula* did address the question whether the 1996 amendments to the INA apply to aliens convicted of an aggravated felony at trial before 1996, it did not hold that the amendments do not apply to *any* alien convicted at trial. The Third Circuit framed the question to be decided in *Ponnapula* as "what aliens—if any—who went to trial and were convicted did so in reasonable reliance on the availability of § 212(c) relief." 373 F.3d at 494. The court observed that, "[g]enerally speaking, reliance interests (in the legal sense) arise because some choice is made evincing reliance." *Ibid.* The court thus divided the category of "aliens who went to trial and were convicted prior to the effective date of IIRIRA's repeal of former § 212(c)" into (1) "aliens who went to trial because they declined a plea agreement that was offered to them" and (2) "aliens who went to

trial because they were not offered a plea agreement." *Ibid*. Since aliens in the latter category "had no opportunity to alter their course in the criminal justice system in reliance on the availability of § 212(c) relief," the court "highly doubt[ed]" that aliens who were not offered a plea agreement "have a reliance interest that renders IIRIRA's repeal of former § 212(c) impermissibly retroactive as to them." *Ibid*. The Third Circuit ultimately held that "aliens * * * who affirmatively turned down a plea agreement had a reliance interest in the potential availability of § 212(c) relief." *Ibid*.

Petitioner was convicted of an aggravated felony at trial, but he did not decline a plea agreement. Petitioner asserts that he "was offered the ability to enter into a plea agreement" (Pet. 12) and "rejected" it (Pet. 6). But the district court explicitly found, after giving petitioner the opportunity to conduct discovery, that the "[e]vidence in the record does not show that [he] was offered a plea" (Pet. App. 12); the court of appeals did not disturb that finding (*id.* at 8 n.3); and petitioner does not challenge it in this Court. Petitioner therefore would not be able to prevail even under the Third Circuit's decision in *Ponnapula*. With respect to aliens who were convicted of an aggravated felony at trial before the 1996 amendments to the INA and did not decline a plea agreement, there is no conflict between the decision below and *Ponnapula* on the question whether application of the 1996 amendments would be impermissibly retroactive.

3. There are three additional reasons why certiorari should be denied. First, the question presented in the petition has diminishing prospective significance, because it affects only removal proceedings for aliens convicted of an aggravated felony at trial before the 1996

amendments to the INA. That is an ever-diminishing class.

Second, it would in any event be premature for the Court to decide whether *St. Cyr*'s holding applies to aliens convicted of an aggravated felony at trial. A final rule adopted by the Department of Justice to implement *St. Cyr* by amending certain provisions of Title 8 of the Code of Federal Regulations, see *Section 212(c) Relief for Aliens With Certain Criminal Convictions Before April 1, 1997*, 69 Fed. Reg. 57,826 (2004), provides that the 1996 amendments to the INA apply to aliens convicted at trial. In its response to comments received on its proposed rule, the Department noted cases holding that "an alien who is convicted after trial is not eligible for section 212(c) relief under *St. Cyr*," and then stated that it "has determined to retain the distinction between ineligible aliens who were convicted after criminal trials[] and those convicted through plea agreements." *Id* at 57,828. That determination is reflected in the amended regulations, which took effect on October 28, 2004. See *id*. at 57,833 (8 C.F.R. 1003.44(a)) ("This section is not applicable with respect to any conviction entered after trial."); *id*. at 57,835 (8 C.F.R. 1212.3(h)) ("Aliens are not eligible to apply for section 212(c) relief under the provisions of this paragraph with respect to convictions entered after trial."). Only a few courts have considered these regulations in deciding whether *St. Cyr*'s holding applies to aliens convicted at trial, see, *e.g.*, *Alexandre* v. *U.S. Attorney General*, No. 05-15421, 2006 WL 1678202, at *3 (11th Cir. Apr. 12, 2006) (per curiam), and this Court should not be one of the first to do so.

Finally, there is a factual distinction between this case and *St. Cyr* that makes it an unsuitable vehicle for

deciding the question presented. In *St. Cyr*, the Court addressed the situation of aliens who pleaded guilty after Section 212(c) was amended in 1990 to render ineligible any alien convicted of an aggravated felony who had served a prison term of at least five years. A plea agreement providing for a sentence of less than five years thus would have assured the alien's eligibility for relief under the amended provision. See *St. Cyr*, 533 U.S. at 293, 321-324. In those circumstances, in which the prosecutor received the benefit of a plea agreement that was likely facilitated by the alien's belief that he would be eligible for Section 212(c) relief, the Court concluded that considerations of fair notice, reasonable reliance, and settled expectations indicated that the repeal of Section 212(c) had a retroactive effect. *Id.* at 323-324. Here, by contrast, petitioner was convicted in 1989, before Section 212(c) was amended to render a convicted aggravated felon ineligible if he served more than five years in prison. There accordingly was no distinct benefit in terms of eligibility for Section 212(c) relief in either going to trial *or* pleading guilty to the aggravated felony charge.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

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Assistant Attorney General

DONALD E. KEENER
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Attorneys

JULY 2006

APPENDIX A

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

Date: Mar. 08, 2004

File: A39-285-860 – SAN ANTONIO

In re: HERNANDEZ-CASTILLO, ENRIQUE

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Esparza Jr., Thomas Esq.

ON BEHALF OF DHS: Juan Carlos Rodriguez, Assistant District Counsel

ORDER:

PER CURIAM. The Board affirms, without opinion, the results of the decision below. The decision below is, therefore, the final agency determination. *See* 8 C.F.R. § 1003.1(e)(4).

[ILLEGIBLE]
FOR THE BOARD

APPENDIX B

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES DISTRICT COURT

File No. : A 39 285 860 November 19, 2002

In the Matter of
Enrique Hernandez-Castillo, Respondent

IN REMOVAL PROCEEDINGS

CHARGE: Section 237(a)(2)(A)(iii) of the Immigration and Nationality Act: alien convicted of an aggravated felony as defined in Section 101(a)(43)(A) of the Act.

Section 237(a)(2)(i) of the Immigration and Nationality Act: alien convicted of a crime involving moral turpitude committed within five years after admission for which a sentence of one year or longer may be imposed.

APPLICATIONS: Section 212(c) of the Act prior to its amendment: waiver of excludability.

ON BEHALF OF RESPONDENT:

Thomas Esparza, Esquire
1811 South First Street
Austin, Texas 78704

ON BEHALF OF SERVICE:

Juan Carlos Rodriguez, Esquire
Immigration and Nationalization Service
P.O. Box 1939
San Antonio, Texas 78297

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent is a male, native and citizen of Mexico who was admitted to the United States as an immigrant on or about April 15, 1985. On September 6, 2001, a Notice to Appear was issued charging the respondent with deportability as shown above, based upon the alleged conviction for the offense of indecency with a child, on or about September 13, 1989. At a hearing before the undersigned, the respondent, through counsel, admitted the allegations in the Notice to Appear and conceded deportability as charged.

The respondent requested an opportunity to seek relief from removal pursuant to Section 212(c) of the Immigration and Nationality Act as it existed prior to its amendment by the Antiterrorism and Effective Death Penalty Act of 1996 and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996. The respondent also sought to apply for Section 212(c) relief pursuant to the decision of the United States Supreme Court in *INS v. St. Cyr*, 121 S. Ct. 2271 (2001). The respondent's application for that relief is in the record as Exhibit 3, and he has also provided supporting documentation. *See* Group Exhibits 4 and 5.

The Service takes the position that the respondent is not eligible for a waiver of excludability because unlike the alien in *St. Cyr*, this respondent was convicted following a plea of not guilty and he did not plead guilty

or nolo contendere. That is, the respondent did not plead to the charge that rendered him removable with an expectation that he would be eligible to file for Section 212(c) relief. The respondent argues that he should be allowed to pursue Section 212(c) relief because the respondent interprets the *St. Cyr* case to mean that retroactive elimination of Section 212(c) relief is prohibited.

The Court had a chance to review the case law in this matter prior to the hearing on the merits, and found several cases where the Federal Courts on this very issue, have determined that *St. Cyr* does not apply to aliens like this respondent who contested the criminal charge and did not plead guilty or nolo contendere. *See Lara-Ruiz v. INS*, 241 F.3d 934 (7th Cir. 2001); *United States v. Herrera-Blanco*, 232 F.3d 715 (9th Cir. 2000); *Bensusan v. Reno*, 225 F.3d 653 (4th Cir. 2000).

I also note that the Supreme Court case held that it was possible reliance upon the availability of Section 212(c) relief that resulted in its ruling that aliens that pled to the criminal charge against them should not be deprived of their eligibility to apply for Section 212(c) relief because they may have made that plea in reliance upon the availability of relief. This respondent can make no such argument because he, in fact, pled not guilty and exercised his right to a trial.

I've also reviewed the proposed regulations to see if they might provide some benefit to this respondent if they were to become final in the form in which they are proposed. However, having reviewed those proposed regulations which would amend some parts of 8 C.F.R. Section 3, Section 212, and Section 240, it does not appear that they would provide any benefit to this respondent in the form in which they are proposed. They

do provide that, under some circumstances, an alien who is convicted prior to April 1, 1997, retains eligibility for Section 212(c) relief. Nonetheless, that eligibility is limited to respondents who were convicted pursuant to plea agreements.

Accordingly, I find that the respondent is unable to establish eligibility for Section 212(c) relief for the reasons stated herein. The respondent has not applied for any other form of relief from removal, nor does it appear that he would be eligible for any such relief.

The following orders are hereby entered.

ORDERS

IT IS ORDERED that the respondent's application for a waiver of excludability pursuant to Section 212(c) of the Act prior to its amendment, be pretermitted and denied for statutory ineligibility

IT IS FURTHER ORDERED that the respondent be removed from the United States to Mexico on the charges contained in the Notice to Appear.

_____

GLENN P. MCPHAUL
Immigration Judge