06-2125-ag

To be Argued By:
DOUGLAS P. MORABITO

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 06-2125-ag

ROBERTO PERALTA-TAVERAS,
Petitioner,

-vs-

Attorney General ALBERTO GONZALES, Department of Homeland Security, TOM RIDGE, Secretary, U.S. Immigration and Customs Enforcement, MICHAEL GARCIA, Assistant Secretary, INS District Director, STEVEN FARQUHARSON, Boston, DHS Detention & Removal Operations, GEORGE SULLIVAN, Interim Officer in Charge,

Respondents.

ON PETITION FOR REVIEW
FROM THE BOARD OF IMMIGRATION APPEALS

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BRIEF FOR RESPONDENTS

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STATEMENT OF JURISDICTION

On July 30, 2004, Petitioner filed a petition for writ of habeas corpus in the U.S. District Court for the District of Connecticut (Hon. Christopher F. Droney, U.S.D.J.) under 28 U.S.C. § 2241. On May 2, 2006, the district court issued a decision transferring the petition to this Court pursuant to the REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231. Because Petitioner's underlying immigration proceedings occurred within this Circuit, in Hartford, Connecticut, this Court should transform this habeas petition into a petition for review. *See id.* § 106.

STATEMENT OF ISSUE PRESENTED FOR REVIEW

Whether Petitioner is eligible for relief under both former section 212(c) and current section 240A(a) of the Immigration and Nationality Act ("INA").

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Docket No. 06-2125-ag

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-vs-

Attorney General ALBERTO GONZALES, Department of Homeland Security, TOM RIDGE, Secretary, U.S. Immigration and Customs Enforcement, MICHAEL GARCIA, Assistant Secretary, INS District Director, STEVEN FARQUHARSON, Boston, DHS Detention & Removal Operations, GEORGE SULLIVAN, Interim Officer in Charge,

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ON PETITION FOR REVIEW
FROM THE BOARD OF IMMIGRATION APPEALS

BRIEF FOR RESPONDENTS

Preliminary Statement

Roberto Peralta-Taveras ("Petitioner" or "Peralta"), a native and citizen of the Dominican Republic, petitions this Court for review of an Immigration Judge's ("IJ") decision ordering Petitioner removed from the United

States. The IJ found Petitioner removable on January 16, 2004. The IJ also concluded that, although Petitioner was eligible for former section 212(c) relief, he was not eligible for cancellation of removal because of his aggravated felony convictions. Petitioner appealed the IJ's order to the Board of Immigration Appeals ("BIA") and on July 8, 2004, the BIA affirmed, without opinion, the IJ's decision.

In this Court, Petitioner seeks a remand to the Immigration Court to obtain simultaneous waivers pursuant to section 212(c) and section 240A(a)(3). This Court should deny Petitioner's claims because Petitioner cannot be granted cancellation of removal under section 240A and a waiver under former section 212(c) simultaneously under the plain meaning of the INA.

Statement of the Case

Petitioner was placed into removal proceedings in September 2000. Joint Appendix ("JA") 470-72. On January 16, 2004, an IJ found Petitioner removable to the Dominican Republic. (JA 155-162). The IJ denied Petitioner's concurrent waivers for relief under section 212(c) and section 240A(a)(3). (JA 155-162). The BIA affirmed the IJ's decision without opinion on July 8, 2004. (JA 2).

On July 30, 2004, Petitioner filed a petition for writ of habeas corpus in the United States District Court for the District of Connecticut (Christopher F. Droney, J.) seeking relief from the IJ's final order of removal. On May 2,

2006, the district court transferred the habeas petition to this Court pursuant to the REAL ID Act.

STATEMENT OF FACTS

A. Petitioner's Entry into the United States and Criminal Convictions

Petitioner is a native and citizen of the Dominican Republic. He was admitted to the United States on or about September 6, 1977 as a lawful permanent resident. JA 470-72. On January 16, 1996, Petitioner was convicted of second-degree attempted criminal possession of a forged instrument and he received a sentence of one year of imprisonment. JA 349, 368. Petitioner was convicted on the same day of the crime of sale of a controlled substance in the fifth degree in violation of section 220.31 of New York Penal Law. JA 362-67, 472. On June 9, 1997, Petitioner was convicted of fourth-degree attempted possession of marijuana and sentenced to sixty days of imprisonment. JA 349, 375.

B. INS Removal Proceedings

Based on Petitioner's initial conviction for sale of a controlled substance, the Immigration and Naturalization Service ("INS")[1] initiated proceedings to remove

[1] The INS was abolished effective March 1, 2003, and its functions transferred to three bureaus within the Department of Homeland Security pursuant to the Homeland Security Act of 2002. *See* Pub. L. No. 107-296, 116 Stat. 2135, 2178. The enforcement functions of the INS were transferred to the (continued...)

Petitioner from the United States. JA 470-72. To that end, Petitioner was served with a Notice to Appear on September 4, 2000, which specifically charged that he was not a citizen or national of the United States but a native and citizen of the Dominican Republic, and that he was subject to removal from the United States as an aggravated felon under 8 U.S.C. § 1227(a)(2)(A)(iii), specifically that his sale of a controlled substance conviction was a narcotics trafficking offense under 8 U.S.C. § 1101(a)(43)(B). JA 472. The INS also asserted that Petitioner's conviction rendered him removable pursuant to 8 U.S.C. § 1227(a)(2)(A)(i). JA 472. On November 16, 2001, the INS lodged two additional factual allegations in addition to those alleged in the original notice to appear as reasons for Petitioner's removal from the United States. JA 349. Specifically, the INS alleged that Petitioner's fourth-degree possession of marijuana conviction rendered him removable. JA 349. The INS also alleged that under 8 U.S.C. § 1227(a)(2)(A)(iii), his second-degree attempted criminal possession of a forged instrument conviction rendered him removable under 8 U.S.C. § 1101(a)(43)(R). JA 349.

On January 16, 2004, after Petitioner conceded the charges of removability, IJ Michael J. Strauss found Petitioner removable to the Dominican Republic. The IJ also concluded that Petitioner was not eligible for cancellation of removal under section 240A(a)(3) because of his aggravated felony convictions. The IJ further found that the plain language of section 240A(a)(6) barred

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[1] (...continued)
Bureau of Immigration and Customs Enforcement ("ICE"). *Id.* For convenience, respondent is referred to herein as the INS.

Petitioner from receiving section 212(c) relief and cancellation of removal. JA 155-62.

C. District Court Proceedings

On July 30, 2004, Petitioner filed a petition for writ of habeas corpus in the United States District Court for the District of Connecticut (Christopher F. Droney, J.) seeking relief from the order of removal. Petitioner argued that he was entitled to apply for simultaneous waivers under former section 212(c) and section 240A(a)(3). After the matter was fully briefed, the district court transferred the habeas petition to this Court pursuant to the REAL ID Act.

SUMMARY OF ARGUMENT

Because Petitioner is not eligible for relief under both former section 212(c) and current section 240A(a), this Court should deny his petition for review. That is, although Petitioner is technically eligible for section 212(c) relief, he cannot obtain cancellation of removal for his June 1997 drug conviction because his 1996 aggravated felony convictions render him ineligible for cancellation of removal under section 240A(a). Section 240A(a)(3) unambiguously bars cancellation of removal for aliens, like Petitioner, who have been convicted of an aggravated felony, and *St. Cyr* does not render that statute ambiguous. Moreover, the plain language of the statute bars Petitioner from simultaneously receiving cancellation of removal under section 240A and a waiver under former section 212(c). Finally, because section 240A is clear and unambiguous, Petitioner's international treaty claims are without merit.

ARGUMENT

I. Petitioner Is Not Eligible For Relief Under Both Former Section 212(c) And Current Section 240A(a) Of The INA

A. Relevant Facts

The relevant facts are set forth in the Statement of Facts above.

B. Governing Law and Standard of Review

1. The REAL ID Act of 2005

On May 11, 2005, as part of a larger Act, the President signed into law the "REAL ID Act of 2005," Pub. L. No. 109-13, Div. B., 119 Stat. 231. Section 106 of the REAL ID Act clarifies the scope of judicial review of removal orders. As relevant here, under § 106, a petition for review to the court of appeals is the *exclusive* means of review of an administrative order of removal. *Id.* § 106(a). Section 106(c) provides that if an alien seeks habeas review of a final order of removal in a "case . . . [that] is pending in a district court on the date" of the Act's enactment (May 11, 2005), "the district court shall transfer the case . . . to the court of appeals" in which a petition for review could have been filed under 8 U.S.C. § 1252, and that court shall adjudicate the case as a petition for review (without regard to § 1252(b)(1)'s 30-day filing deadline).[2]

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[2] This Court would be the proper transferee court under (continued...)

See § 106(c). Congress enacted this mandatory, non-discretionary transfer provision to ensure that every alien would have the opportunity for "one day in the court of appeals" and that "[n]o alien, not even criminal aliens, [would] be deprived of judicial review of [constitutional and purely legal] claims." *See* H.R. Conf. Rep. No. 109-72, at 174-75 (2005). These amendments apply to all cases in which a final order of removal has been entered *before, on, or after* the date of enactment. REAL ID Act § 106(b). The REAL ID Act provides for the transfer of habeas cases pending in the district court to the court of appeals.

2. Sections 212(c) and 240A of the INA

Prior to 1990, the Attorney General was authorized to grant discretionary relief from exclusion or deportation under former Section 212(c) of the INA to certain lawful permanent resident aliens who had previously lawfully resided for seven consecutive years in the United States. *See* 8 U.S.C. § 1182(c) (repealed 1996); *INS v. St. Cyr*, 533 U.S. 289, 294-96 (2001) (explaining statutory history); *Lovell v. INS*, 52 F.3d 458, 461 (2d Cir. 1995) (discussing Section 212(c) discretionary factors).[3]

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[2] (...continued)
§ 106(c) because it is the "circuit in which the immigration judge completed the proceedings," 8 U.S.C. § 1252(b)(2). *See* JA 5 (proceedings completed in Hartford, Connecticut).

[3] This is commonly referred to as a "Section 212(c) waiver," *i.e.*, the Attorney General had discretion to "waive" the grounds for exclusion or deportation.

However, in 1990, Congress amended the INA to substantially limit the availability of section 212(c) relief. Through Section 511 of the Immigration Act of 1990 ("IMMACT"), Congress eliminated the grant of Section 212(c) relief for any "alien who has been convicted of an aggravated felony and has served a term of imprisonment of at least 5 years." IMMACT, Pub. L. No. 101-649, § 511(a), 104 Stat 4978 (Nov. 29, 1990).[4] In 1996, in the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Congress further amended Section 212(c) to bar relief to any lawful permanent resident convicted of an aggravated felony, regardless of the length of time served in prison for the conviction. *See* Pub. L. No. 104-132, 110 Stat. 1214, 1277 (Apr. 24, 1996). Later that same year, in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Congress repealed Section 212(c) altogether. *See* Pub. Law. No. 104-208, 110 Stat. 3009-546 (Sept. 30, 1996). In IIRIRA, Congress enacted "cancellation of removal," a form of discretionary relief not available to any alien who has been convicted of

[4] In 1991, Congress further amended the statute to make clear that the five year term could be served for multiple convictions. *See* Miscellaneous Technical Immigration and Naturalization Amendments of 1991, Pub. L. No. 102-232, § 306(a)(10) & § 310, 105 Stat. 1733, 1751.

an aggravated felony. *See* 8 U.S.C. § 1229b(a)(3).[5] *See St. Cyr*, 533 U.S. at 294-96.

C. Discussion

Here, there is no dispute that Petitioner's 1996 convictions are aggravated felonies and that Petitioner is eligible for a waiver of this ground of deportation under former § 212(c), despite Congress' subsequent repeal of that statute. The question presented is whether Petitioner is also eligible for cancellation of removal under INA § 240A(a) for his June 1997 drug possession *despite* his 1996 aggravated felony convictions. Petitioner's argument that he is entitled to such relief rests on two assumptions: (1) that the decision in *INS v. St. Cyr*, 533 U.S. 289 (2001), may be read to mean that Congress' intent in applying the aggravated felony bar of INA § 240A(a) to aliens, like Petitioner, who seek cancellation of removal for post-IIRIRA offenses, is ambiguous; and (2) that simultaneous consideration of former § 212(c) and current § 240A(a)

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[5] Section 240A(a) of the INA provides:

> The Attorney General may cancel removal in the case of an alien who is inadmissible or deportable from the United States if the alien ----
>
> > (1) has been an alien lawfully admitted for permanent residence for not less than 5 years,
> >
> > (2) has resided in the United States continuously for 7 years after having been admitted in any status, and,
> >
> > (3) has not been convicted of any aggravated felony.

8 U.S.C. § 1229b(a).

relief will resolve Petitioner's ineligibility for cancellation of removal. Neither assumption is supported by the plain language of the INA or applicable case law.

1. Section 240A(a)(3) Unambiguously Bars Cancellation of Removal for Aliens Who Have Been Convicted of an Aggravated Felony, and *St. Cyr* Does Not Render that Statute Ambiguous

Petitioner argues that the Supreme Court's decision in *St. Cyr* stands for the proposition that the cancellation of removal provision, INA § 240A(a), is ambiguous in its bar of relief for aggravated felons. Pet. Br. at 23-24. Specifically, he argues that Congress clearly intended to repeal § 212(c) in its entirety and replace it with § 240A relief; could not have foreseen that the Supreme Court would keep § 212(c) relief available for certain classes of aliens; and that Congress therefore could not possibly have any intent – one way or the other – with respect to whether an alien seeking § 240A relief could also simultaneously seek § 212(c) relief.

As superficially attractive as that argument may seem, it contains at least two flaws. First, and most importantly, it wrongly assumes that ambiguity in the legislative history can inject uncertainty into unambiguous text. Section 240A(a)(3) is quite straightforward: It permits cancellation of removal only for an alien who "has not been convicted of any aggravated felony." 8 U.S.C. § 1229b(a)(3). As the Supreme Court has repeatedly instructed, statutory

construction begins with the language of the statute, and "where the statutory language provides a clear answer, it ends there as well." *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999). The "first canon" of statutory construction is that "courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1993). Indeed, "[w]hen the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'" *Id.; see also United States v. Menasche*, 348 U.S. 528, 538-39 (1955) ("It is our duty 'to give effect, if possible, to every clause and word of [the] statute . . . .'") (quoting *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883)); *In re Mazzeo*, 131 F.3d 295, 302 (2d Cir. 1997). Application of § 240A(a)(3) is simple in this case: Petitioner has been convicted of aggravated felonies, and he therefore cannot satisfy the third criterion for seeking cancellation of removal. (And, as argued in Part I.C.2 *infra*, the continued availability of § 212(c) waivers cannot budge that immovable fact.)

Petitioner's argument to the contrary rests on the notion that when Congress does not foresee all the possible consequences of the text that it enacts, that text must be found ambiguous. This, of course, stands accepted canons of statutory interpretation on their head. Regardless of whether Congress' anticipated repeal of § 212(c) might turn out to be fully effective, partially effective, or completely nullified by subsequent court action, the fact remains that § 240A(a)(3) itself has remained unchanged, and that it bars relief to all those who have been convicted of an aggravated felony. Interpretive rules – such as reference to legislative history, or the rule of lenity – are

designed only as "aid[s] for resolving an ambiguity; [they are] not to be used to beget one." *Callanan v. United States*, 364 U.S. 587, 596 (1961) (discussing rule of lenity).

Moreover, the premise of Petitioner's argument (that *St. Cyr* frustrated congressional intent by preserving § 212(c) for at least some aliens) is in significant tension with the principle on which *St. Cyr* itself was decided – that, absent a clear statement to the contrary, Congress would be presumed *not to have intended* to repeal § 212(c) with respect to those aliens. 530 U.S. at 316 (holding that statute may not be applied retroactively "absent a clear indication from Congress that it intended such a result"); *id.* at 326 (finding "nothing in IIRIRA unmistakably indicating that Congress considered the question of whether to apply its repeal of § 212(c) retroactively to such aliens"). It would be most peculiar for this Court to accept Petitioner's invitation to interpret § 240A on the assumption that Congress intended to wholly abolish § 212(c), in the face of the Supreme Court's decision to interpret § 212(c) itself based on the diametrically opposite conclusion.

Quite apart from the inverted precedence that Petitioner accords to legislative history and statutory text, it is worth pointing out that the statute does not limit when an alien's disqualifying conviction must occur, but rather states that "any aggravated felony" conviction prohibits cancellation of removal. *See also* INA § 101(a)(43); 8 U.S.C. § 1101(a)(43) ("the term [aggravated felony] applies regardless of whether the conviction was entered before,

on, or after September 30, 1996."); *cf. Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997) (concluding that term "employee" in antiretaliation provision of Title VII covered former as well as current employees, in part because term contained no "temporal qualifier"). To the extent Petitioner argues or implies that retroactive application of the aggravated felony bar of § 240A(a)(3) offends his due process rights, the claim is without merit. This Court has held that retroactive application of changes to the definition of "aggravated felony" in INA § 101(a)(43), 8 U.S.C. § 1101(a)(43), does not violate due process. *See Kuhali v. Reno*, 266 F.3d 93, 111-12 (2d Cir. 2001). If Congress may retroactively constrict the availability of relief from removability by expanding the definition of "aggravated felony" to sweep in more offenses, then it must logically be permitted to do so by redefining the scope or types of relief available to aggravated felons as well.

Moreover, application of the aggravated felony bar in § 240A(a)(3) would not raise the same retroactivity concerns at issue in *St. Cyr*. In this case, on January 16, 1996, Petitioner could not have been aware when he pled guilty to two aggravated felony offenses that Congress would later that year eliminate the possibility of § 212(c) relief for those offenses. However, by June 9, 1997 (the date of his guilty plea to another drug offense), after AEDPA and IIRIRA were enacted and became effective, Petitioner was on notice that his prior conduct would preclude him from seeking § 240A relief if he committed another removable offense.

One district court has rejected the same due process claim based on retroactive application of the aggravated

felony bar of § 240A(a)(3) in a case analogous to the instant case. *See Campbell v. Ashcroft*, 2004 WL 1563022 * 4 (E.D. Pa. July 12, 2004) ("we need not examine the burden that retroactivity imposes . . . because Congress has expressly stated that the aggravated felony bar applies retroactively."); *see also Almeida v. Ashcroft*, 2003 WL 22533686 * 3 (D.R.I. Nov. 4, 2003) (rejecting petitioner's due process and equal protection claims based on denial of § 212(c) relief for pre-IIRIRA convictions and cancellation of removal for post-IIRIRA conviction).

In *Campbell*, the district court denied the claims of the petitioner who, like Peralta herein, argued that he was eligible for former § 212(c) relief for his pre-IIRIRA aggravated felony convictions as well as Section 240A(a) cancellation of removal for his post-IIRIRA conviction. In rejecting the petitioner's due process claim, the district court in *Campbell* explained:

> Most important of all, aliens facing removal as a result of a post-IIRIRA offense cannot complain that retroactivity contravenes "elementary considerations of fairness [that] dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly." *Landgraf* [*v. USI Film Products, Inc.*, 511 U.S. 244, 265 (1994)]. Campbell certainly would not have known in 1983 that Congress would later define attempted burglary as an aggravated felony. However, the 1996 amendments to the INA put him on notice that his prior conduct would preclude him from seeking

> § 240A relief if he committed another removable offense. Campbell thus had ample opportunity to understand the consequences of future criminal conduct, and he has only himself to blame for the fact that he committed an offense in 2002 that led to his present predicament.

Campbell, 2004 WL 1563022, at *5. The 1996 amendments to the INA put Petitioner on notice that subsequent criminal conduct would preclude him from seeking relief from deportation. Petitioner has only himself to blame for his current predicament. And, as in *Campbell*, this Court should reject Petitioner's apparent challenge to retroactive application of the Section 240A(a) aggravated felony bar.

The second principal error in Petitioner's argument is that it construes certain observations by the Supreme Court in *St. Cyr* far too broadly to suggest that § 240A is ambiguous with respect to its applicability to aggravated felons or its interaction with § 212(c). The Supreme Court decided two issues in *St. Cyr*. First, the Court invoked the clear statement rule to avoid construction of certain jurisdiction-stripping provisions of AEDPA and IIRIRA in a manner that would raise a significant constitutional question, specifically, preclusion of review. 533 U.S. 298-300. Due to the lack of another forum for judicial review for aggravated felons like St. Cyr, and "lack of a clear, unambiguous and express statement of congressional intent to preclude" habeas review for important legal questions such as those raised by St. Cyr, the Court concluded that "habeas jurisdiction under [28 U.S.C.]

§ 2241 was not repealed by AEDPA and IIRIRA." 533 U.S. 314. This unrelated jurisdictional issue did not even remotely call into question the clarity of § 240A, or even of § 212(c) itself.

Second, the Supreme Court found "nothing in IIRIRA" clearly indicating that Congress intended to apply the repeal of § 212(c) retroactively to pre-enactment convictions. 533 U.S. at 326. More specifically, the Court held "that § 212(c) relief remains available for aliens, [like petitioner herein], whose convictions were obtained through plea agreements and who, notwithstanding those convictions, would have been eligible for § 212(c) relief at the time of their plea under the law then in effect." *Id*. While *St. Cyr* discussed the ambiguity of the cancellation of removal provision with respect to retroactive application to those who were eligible for § 212(c) to relief at the time of their guilty plea, 533 U.S. at 314-16, the Court did not discuss, nor did it imply, that Congress' intent in barring aggravated felons from obtaining cancellation of removal under INA § 240A(a) was ambiguous. Indeed, despite Petitioner's repeated assertion that *St. Cyr* demonstrates the ambiguity of § 240A, petitioner has cited no case in which a court has held that Congress' intent with respect to § 240A was somehow ambiguous.

As the Court explained in *St. Cyr*, the determination of whether a particular statute is impermissibly retroactive "should be informed and guided by 'familiar considerations of fair notice, reasonable reliance, and settled expectations.'" 533 U.S. at 321 (quoting *Martin v. Hadix*, 527 US. 343, 358 (1999) (quoting *Landgraf v. USI*

Film Products, 511 U.S. 244, 270 (1994) (internal quotations omitted)). Thus, in *St. Cyr*, the Supreme Court found that IIRIRA's elimination of any possibility of § 212(c) relief for those aliens who plead guilty prior to IIRIRA's enactment with the expectation that they would be eligible for consideration for such relief, "'attaches a new disability, in respect to transactions or considerations already past.'" *St. Cyr*, 533 U.S. at 321 (citations omitted). Because aliens who entered guilty pleas prior to IIRIRA's repeal of § 212(c) relief "almost certainly relied upon [the likelihood of receiving such relief] in deciding whether to forgo their right to a trial," the Court found that the elimination of any possibility of § 212(c) relief" for those who pleaded guilty in reliance on that possibility was impermissible. 533 U.S. at 325-26.

2. Peralta Cannot Be "Simultaneously" Granted Cancellation of Removal Under Section 240A and a Waiver Under Former Section 212(c)

In this case, to obtain relief from removal, Petitioner would have to be eligible for both cancellation of removal and § 212(c) relief. He is not eligible for both because in his case one necessarily precludes the other. By Petitioner's own admission, Congress thought it was *repealing* § 212(c) and therefore an alien in need of the new form of relief could not simultaneously apply for the old form of relief at the same time. The Supreme Court's ruling that § 212(c) relief is still available for certain classes of individuals who pled guilty prior to AEDPA and IIRIRA in no way changes the plain language of

§ 240A(a)(3) that the Attorney General may not grant cancellation of removal to an alien convicted of an aggravated felony. *See* 8 U.S.C. § 1229b(a)(3).

In an effort to circumvent the plain meaning of the statute, Peralta argues that he can seek a waiver under former section 212(c) for his 1996 aggravated felony convictions and cancellation of removal under section 240A(a) for his June 1997 possession of marijuana conviction. Although he calls it "simultaneous" relief, what he really seeks is to have the Immigration Judge grant section 212(c) relief, then grant section 240A(a) relief.[6] Indeed, his flawed argument that a waiver under 212(c) for his 1996 crimes "will eliminate the status of those crimes as aggravated felonies" for purposes of relief from removal under Section 240A hinges on successive, not simultaneous, relief. In any event, his claim that he can be granted dual relief under sections 212(c) and 240A in one proceeding is wrong for several reasons.

First, a waiver under INA §212(c) grants *exemption* from removal or deportation, but does not eliminate or expunge the underlying convictions for other purposes of

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[6] In the alternative, Petitioner requests that this Court grant the discretionary relief he seeks under both Section 212(c) and Section 240A. Cancellation of removal under Section 240A, like Section 212(c) relief, is a discretionary decision properly left to the Attorney General and his delegates. Thus, should the Court accept petitioner's claims - though respondents submit they are legally untenable - the Respondent respectfully submits that a remand to the BIA would be necessary.

immigration law. That is, an aggravated felony that is the subject of a waiver under § 212(c) remains an aggravated felony when considered under other immigration statutes. Hence, cancellation of removal under § 240A(a) for Petitioner's post-IIRIRA offense is barred by the plain language of the statute because Petitioner's prior offenses would not be eliminated even with a Section 212(c) waiver. *See Rodriguez-Munoz v. Gonzales*, 419 F.3d 245, 248 (3d Cir. 2005) (holding that the granting of section 212(c) relief merely waives finding of deportability but conviction remains an aggravated felony for purposes of precluding application for cancellation of removal); *Munoz-Yepez v. Gonzales*, 465 F.3d 347 (8th Cir. 2006) (same); *Amouzadeh v. Winfrey*, 467 F.3d 451(5th Cir. 2006) (same).

Petitioner's assertion that if he were granted relief under Section 212(c), his 1996 convictions would cease to retain the status of aggravated felony convictions that bar him from relief from removal is erroneous. Petitioner assumes that the fact of simultaneous consideration will necessarily remove his aggravated felony convictions from consideration under the cancellation of removal procedure but he provides no legal basis for this assumption. In fact, the law is well-settled that relief under § 212(c) does not remove the conviction from the alien's record. *See Matter of Balderas*, 20 I. & N. Dec. 389, 390 (BIA 1991) ("a grant of section 212(c) relief 'waives' the finding of . . . deportability rather than the basis of the excludability itself, the crimes alleged to be grounds for . . . deportability do not disappear from the alien's record for immigration purposes."); *Matter of Gordon*, 20 I.&N. Dec. 52, 55-56 (BIA 1989) (A waiver granted under § 212(c)

returns the alien to the status of lawful permanent resident but convictions waived "do not completely disappear from the record" and may be considered in subsequent removal proceedings). Thus, even if the immigration judge were to consider the two forms of relief simultaneously, Petitioner's aggravated felony conviction would still bar cancellation of removal. Similarly, this line of cases does not support petitioner's claim that utilizing two portions of the INA in one proceeding results in one waiver. *See Rodriguez-Munoz*, 419 F.3d at 248; *Munoz-Yepez*, 465 F.3d at 348; *Amouzadeh*, 467 F.3d at 458-59.

Petitioner's reliance on *Matter of Sosa-Hernandez*, 20 I. & N. Dec. 758 (BIA 1993) is similarly misplaced. *Sosa-Hernandez* involved an interpretation of former Section 241(f), 8 U.S.C. §1251(f) (1988), and not Section 212(c). This difference is critical, because former section 241(f) provided that relief thereunder waived not only the ground for deportation, but also the underlying misrepresentation or fraud in connection with the alien's illegal entry into the country, *Sosa-Hernandez*, 20 I&N Dec. at 760-61. By contrast, Section 212(c) contained no such "expungement" relief. *See Matter of Balderas*, 20 I. & N. Dec. at 390 (grant of waiver under Section 212[c] not akin to pardon or expungement); *Matter of Gordon*, 20 I. & N. Dec. 55-56. *Accord Campbell*, 2004 WL 1563022, at * 2; *Almeida*, 2003 WL 22533686, *2.

Because relief under § 212(c) does not excuse the nature of the underlying offense or remove the offense from the alien's record, simultaneous relief would not help petitioner. The plain language of § 240A indicates

Congress' intent to bar relief to aliens, like Peralta, who have been convicted of aggravated felonies. 8 U.S.C. § 1229b(a)(3).

Second, section 240A expressly precludes relief for an alien who received a waiver under its predecessor, former Section 212(c). *See* Section 240A(c)(6), 8 U.S.C. §1229b(c)(6). In this regard, section 240A(c)(6) of the INA states:

> (c) The provisions of subsections (a) and (b)(1) shall not apply to any of the following aliens:
>
> * * *
>
> (6) An alien whose removal has previously been cancelled under this section or whose deportation was suspended under section 244(a) or who has been granted relief under section 212(c), as such sections were in effect before September 30, 1996.

8 U.S.C. §1229b(c)(6). Thus, by the plain language of the statute, the discretionary relief available under the cancellation of removal provision was intended as a one-time waiver and is not available to those who have received section 212(c) relief.

Petitioner's reliance on *Matter of Gabryelsky*, 20 I. & N. Dec. 750 (BIA 1993), does not spare his claim for simultaneous relief under section 212(c) and section 240A. In *Gabryelsky*, the BIA held that an alien in deportation proceedings can simultaneously seek a waiver under

section 212(c) and adjustment of status under section 245 to waive a drug conviction and a firearm conviction, respectively. Such a simultaneous form of relief was allowed because a section 212(c) waiver only waived grounds of inadmissibility and a firearms conviction did not result in a ground of inadmissibility. The BIA specifically explained that the respondent could seek both forms of relief because the alien was "statutorily eligible" for both forms of relief. *Id*. at 752, 753. Importantly, the BIA also noted that allowing the alien to seek both forms of relief simultaneously was in conformance with the regulations which explicitly provided that an alien could seek to adjust status and to waive grounds of inadmissibility at the same time. *Id*. at 754.

Neither of these conditions is present here. As discussed above, section 240A of the INA, 8 U.S.C. § 1229b, specifically and unambiguously provides that an alien may only apply for cancellation of removal if the alien "has not been convicted of any aggravated felony." INA § 240A(a)(3). The statute further expressly and unambiguously provides that "an alien … who has been granted relief under section 1182(c)" is ineligible for relief under section 240A. INA § 240A(c)(6), 8 U.S.C. § 1229b(c)(6). And, in fact, Congress made quite plain its intent that only one bite at the apple is possible. *See* Section 240A(c)(6), 8 U.S.C. §1229b(c)(6) (expressly precluding relief for an alien who has received a waiver under former Section 212(c)). Thus, unlike in *Gabryelsky*, where the federal regulations expressly allowed for the dual relief sought, here the statute plainly provides that dual relief is not permitted.

Moreover, current federal case law does not support Petitioner's claim. While this Court has sanctioned simultaneous relief under *Gabryelsky*, it has done so only because federal regulations specifically provided for concurrent applications for dual waivers. *See Drax v. Reno*, 338 F.3d 98, 111 n.18 (2d. Cir. 2003) (discussing the legal foundation for *Gabryelsky* relief). This Court has not considered the type of relief requested in the case at bar. However, at least four courts of appeals and three district courts have soundly rejected analogous claims for dual relief under former section 212(c) and section 240A(a). *See Rodriguez-Munoz*, 419 F.3d at 248; *Munoz-Yepez*, 465 F.3d at 348; *Amouzadeh*, 467 F.3d at 458-59; *Maldonado-Galindo v. Gonzales*, 456 F.3d 1064, 1067-68 (9th Cir. 2006); *Campbell*, 2004 WL 1563022, at * 5 (holding that aggravated felony bar to cancellation of removal precluded alien from seeking relief under section 240A even if he received a waiver under section 212(c)); *Almeida*, 2003 WL 22533686 at * 3 (rejecting claim for dual relief on basis of both aggravated felony bar of 240A(a)(3) and because of the preclusion of 240A(c)(6); *Fetamia v. Ridge*, 2004 WL 1194458 at * 7 (N.D. Tex. May 27, 2004) (rejecting claim for dual relief under sections 212(c) and 240A because "the clear intent of [section 240A(c)(6)] is to afford an alien only one opportunity for a discretionary waiver").

Finally, in addition to the explicit statutory preclusions in paragraphs (a)(3) and (c)(6) of INA § 240A explained above, there is no articulable public policy consideration that would justify permitting an alien with convictions before and after the repeal of section 212(c) relief to obtain such simultaneous relief in a solitary removal hearing

when the same alien, had he been subjected to deportation or exclusion proceedings on the pre-AEDPA/IIRIRA convictions and granted section 212(c) relief and thereafter placed in removal proceedings for a post-IIRIRA conviction, would be precluded from obtaining cancellation of removal because of the award of relief in the earlier proceedings. For these reasons, Petitioner's claim that he is entitled to both section 212(c) relief and cancellation of removal under section 240A should be soundly rejected by this Court.

3. Petitioner's International Treaty Claims Are Without Merit

Petitioner claims that § 240A is ambiguous and is therefore subject to interpretation such that it comports with provisions of the International Covenant on Civil and Political Rights ("ICCPR"). Such interpretation, Petitioner asserts, would support his claim for simultaneous relief in this case. Additionally, Petitioner asserts that deportation without consideration of the effect on family violates provisions of the Universal Declaration of Human Rights ("UDHR") and the Convention on the Rights of the Child ("CRC"). These claims are without merit.

A. INA § 240A Is Clear and Unambiguous

Petitioner's international law and treaty claims are premised on his assertion that section 240A is ambiguous regarding application of the bar against relief to aggravated felons and that principles of statutory interpretation should be invoked. As the Supreme Court recognized in *INS v. St. Cyr*, however, Congress' intent to retroactively apply the definition of aggravated felony is clear. 533 U.S. at 319-20 ("IIRIRA's amendment of the definition of 'aggravated felony,' for example, clearly states that it applies with respect to 'conviction[s] . . . entered before, on, or after' the statute's enactment date."). As explained, *supra*, the Supreme Court has held that statutory construction begins with the language of the statute, and "where the statutory language provides a clear answer, it ends there as well." *Hughes Aircraft Co. v.*

Jacobson, 525 U.S. 432, 438 (1999). The "first canon" of statutory construction is that "courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1993). Indeed, "[w]hen the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'" *Id.* Because Congress' intent in barring cancellation of removal for aliens, like Petitioner, who have been convicted of an aggravated felony is clear from the face of the statute, there is no need for further inquiry or interpretation.

B. The Court Lacks Jurisdiction Over Petitioner's International Treaty Claims

Because the ICCPR is not a self-executing treaty, this Court does not have jurisdiction to consider claims arising out of alleged violations of the ICCPR. The ICCPR was adopted by the United Nations General Assembly on December 16, 1966, and entered into force on March 23, 1976. Statement of Senator Claiborne Pell, Chairman, Senate Foreign Relations Committee, 138 Cong. Rec. S4781-01, 1992 WL 65154. The treaty was entered into force by the United States on September 8, 1992, *Taveras-Lopez v. Reno*, 127 F. Supp. 2d 598, 608 (M.D. Pa. 2000), but with a number of reservations, understandings and declarations. 138 Cong. Rec. S4781, S4783. The most important declaration in this case is "[t]hat the United States declares that the provisions of

Articles 1 through 27 of the [ICCPR] are not self-executing." 138 Cong. Rec. S4781, S4783.

For a treaty to confer rights enforceable by private parties it must be self-executing - i.e., a treaty which requires no legislation to make it operative. *Frolova v. Union of Soviet Socialist Republics*, 761 F.2d 370 (7th Cir. 1985). If a treaty is not self-executing, "it must be implemented by legislation before it can give rise to a private right of action enforceable in a court of the United States." *Jama v. INS*, 22 F. Supp. 2d 353, 362 (D.N.J. 1998) (citing *Dreyfus v. Von Finck*, 534 F.2d 24 (2d Cir. 1976), *cert. denied*, 429 U.S. 835 (1976), *disavowed on other grounds, Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980)).[7]

"Federal courts have subject matter jurisdiction over all civil actions arising under . . . treaties of the United States. 28 U.S.C. § 1331. An action arises under a treaty only when the treaty expressly or by implication provides for a

[7] "A United States treaty is a contract with another nation which under art. VI, cl. 2 of the Constitution becomes a law of the United States. It may also contain provisions which confer rights upon the citizens of one of the contracting parties which are capable of enforcement as are any other private rights under the law. In general, however, this is not so. Rarely is the relationship between a private claim and a general treaty sufficiently direct so that it may be said to 'arise under' the treaty as required by art. III, s 2, cl. 1 of the Constitution. It is only when a treaty is self-executing, when it prescribes rules by which private rights may be determined, that it may be relied upon for the enforcement of such rights." *Dreyfus*, 534 F.2d at 29-30.

private right of action. The treaty must be self-executing; i.e., it must prescribe[ ] rules by which private rights may be determined." *Columbia Marine Serv., Inc. v. Reffet Ltd.*, 861 F.2d 18, 21 (2d Cir. 1988) (citing *Dreyfus*, 534 F.2d at 30; *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 808 (D.C. Cir. 1984)); *see also Igartua De La Rosa v. United States*, 32 F.3d 8, 10 n.1 (1st Cir. 1994). *Cf. Wang v. Ashcroft*, 320 F.3d 130 (2d Cir. 2003) (holding that habeas review of Torture Convention claims is permitted even though treaty is not self-executing because Congress enacted legislation implementing Article 3 of the treaty).[8]

It is clear that Congress specifically dictated that the ICCPR is not self-executing and, as such, no private right of action was created, or exists, for Petitioner. In addition, because the UDHR is "not a treaty," it creates no legal

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[8] The United States is a signatory and ratified party to the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("Convention Against Torture" or "CAT"), 1465 U.N.T.S. 85, G.A. Res. 39/46, 39th Sess., U.N. GAOR Supp. No. 51, at 197, U.N. Doc. A/39/51 (1984). Article 3 of the Convention provides, in relevant part, that "[n]o State Party shall expel, return ('refouler') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture." Torture Convention, Art. 3, S. Treaty Doc. 100-20, 100th Cong., 2d Sess. 20 (May 23, 1988). Congress implemented Article 3 of the Torture Convention in the Foreign Affairs Reform and Restructuring Act of 1988 ("FARRA"). Pub. L. No. 105-277, div. G, Title XXII, § 2242, 112 Stat. 2681-822 (Oct. 21, 1998) (codified as Note to 8 U.S.C. § 1231).

obligations that are enforceable in United States courts.[9] *Beharry v. Reno,* 183 F. Supp. 2d 584, 596 (E.D.N.Y. 2002), *rev'd on other grounds*, *Beharry v. Ashcroft*, 329 F.3d 56, 59 (2d Cir. 2003). And finally, contrary to the *Beharry* court's statement, the United States is not a party to the CRC, and the CRC in any event "does not have the force of domestic law" in the United States. *See Beharry*, 183 F. Supp.2d at 596. Accordingly, this Court has no jurisdiction to review Petitioner's claims asserted under the ICCPR, UDHR and CRC.

C. Where They Conflict, Statutes Enacted By Congress Trump Provisions Of International Treaties

Congress' enactment of § 240A, cancellation of removal, trumps provisions of the ICCPR, UDHR and CRC to the extent that they conflict. "The Supremacy Clause declares the Constitution, federal law, and treaties to be 'the supreme Law of the Land.' U.S. Const. art. VI, cl. 2. It is well established that under the Supremacy Clause a self-executing treaty – one that operates of itself without the aid of legislation – is to be regarded in the courts as equivalent to an act of the legislature." *Cheung v. United States*, 213 F.3d 82, 94-95 (2d Cir. 2000) (citing *Whitney v. Robertson*, 124 U.S. 190, 194 (1888) ("to the

[9] The UDHR is not a treaty; rather, it is a nonbinding resolution of the General Assembly of the United Nations. *See generally Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 719 (9th Cir. 1992).

extent that treaties are self-executing, they 'have the force and effect of a legislative enactment.')."

Nonetheless, as the Supreme Court held in *Breard v. Greene*, 523 U.S. 371 (1998), "although treaties are recognized by our Constitution as the supreme law of the land, that status is no less true of provisions of the Constitution itself . . . . We have held 'that an Act of Congress . . . is on a full parity with a treaty, and that when a statute which is subsequent in time is inconsistent with a treaty, the statute to the extent of conflict renders the treaty null.'" 523 U.S. 371, 376 (1998) (quoting *Reid v. Covert*, 354 U.S. 1, 18 (1957)). This rule of law has roots going back two centuries, to the *Head Money Cases*, 112 U.S. 580, 598-99 (1884). There the Supreme Court held that a subsequent statute that conflicted with a prior treaty displaced the conflicting treaty provisions for the purposes of domestic law. It held that

> A treaty . . . is a law of the land as an act of congress is, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined. . . . But even in this aspect of the case there is nothing in this law which makes it irrepealable or unchangeable. The constitution gives it no superiority over an act of congress in this respect, which may be repealed or modified by an act of a later date. . . . In short, we are of opinion that, so far as a treaty made by the United States with any foreign nation can become the subject of judicial cognizance in the courts of this country, it is subject

> to such acts as congress may pass for its enforcement, modification, or repeal.

Edye v. Robertson, 112 U.S. at 598-99 (*Head Money Cases*); *see also Whitney*, 124 U.S. at 194. In *Committee of United States Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 936 (D.C. Cir. 1988), the court noted that "[n]o American court has wavered from this view in the subsequent century."

Well established law makes clear that subsequent Congressional enactments override any international treaties the United States signs to the extent that the treaty and the subsequent enactment conflict. *See Taveras-Lopez v. Reno*, 127 F. Supp. 2d 598, 608-10 (M.D. Pa. 2000) ("the disqualification of aggravated felons from eligibility for a discretionary cancellation of removal effected by the [IIRIRA] displaces any obligation assumed by the United States as a 1992 signatory to the ICCPR.") (citing *Breard*, 523 U.S. at 376)); *see also United States v. Pinto-Mejia*, 720 F.2d 248, 259 (2d Cir. 1983) (holding that "in enacting statutes, Congress is not bound by an international law . . . [i]f it chooses to do so, it may legislate [contrary to] the limits posed by international law."). Thus, to the extent that Petitioner claims that application of § 240A as written would conflict with the ICCPR, UDHR and CRC, his argument must fail.

D. Petitioner's Reliance on *Beharry*'s Reasoning Is Misplaced

Petitioner cites the district court's decision in *Beharry v. Reno*, wherein the court discussed similar international law and treaty claims made by the petitioner, an aggravated felon and long-time legal permanent resident. *See* 183 F. Supp. 2d 584, 596 (E.D.N.Y. 2002), *rev'd on other grounds*, *Beharry v. Ashcroft*, 329 F.3d 56, 59 (2d Cir. 2003). In that case, the district court (Weinstein, J.) granted Beharry's petition and invoked principles of international law to interpret INA Section 212(h) to require the INS to provide a hardship waiver hearing under § 212(h) for Beharry. 183 F. Supp. 2d at 603-05. The *Beharry* court determined that the statutes mandating the deportation of aggravated felons "would violate treaty obligations and customary international law" if they were administered according to their literal terms, and it held, accordingly, that it should "interpret" the statute by making "the minimal changes necessary to bring the statute into compliance" with what it perceived to be the requirements of international law. *Id*. The court limited its ruling to petitioners like Beharry who had committed his crime before Congress amended the definition of "aggravated felony" in 1996, but was convicted after the amendment. *Id*. at 605.

The *Beharry* court erred in invoking principles of international law to hold Beharry eligible for § 212(h) relief. The principle purportedly applied by the *Beharry* court – that statutory interpretation should be informed by international law, *id*. at 604, has no application to that or

this case because the plain language of the INA unambiguously precludes section 212(h) and section 240A relief for aggravated felons like Beharry and the petitioner herein.

Indeed, the *Beharry* court recognized, correctly, that no source of international law supplies direct legal authority for compelling the INS (or the Attorney General) to afford an alien relief from deportation. As explained above, and noted in *Beharry*, the ICCPR is a non-self-executing treaty that lacks the force of law in United States courts. *Id*. at 595; *see Beazley v. Johnson*, 242 F.3d 248, 267 (5th Cir. 2001) (explaining that "'the courts may not enforce'" the provisions of the ICCPR because the treaty is not self-executing, and collecting cases). As the *Beharry* court also acknowledged, the UDHR is "not a treaty" and it creates no legal obligations that are enforceable in United States courts.[10] *Beharry*, 183 F. Supp. 2d at 596. And finally, contrary to the *Beharry* court's statement, the United States is not a party to the CRC, and the CRC in any event "does not have the force of domestic law" in the United States. *See id*. The *Beharry* court determined, however, that international law was relevant to that case as a tool of statutory construction. *Id*. at 593, 603-05. In accordance with this view, the court characterized its decision as one based upon statutory interpretation; it stated that in making a § 212(h) hearing available to Beharry it was merely "interpret[ing] the statute in a way which does not violate international law," *id*. at 604, or,

[10] As noted above, the UDHR is not a treaty; rather, it is a nonbinding resolution of the General Assembly of the United Nations.

put another way, construing the statute "into compliance with international law." *Id*. at 605.

The *Beharry* court's view that it was engaged in statutory construction was mistaken. As explained above, statutory construction begins with the language of the statute, and "where the statutory language provides a clear answer, it ends there as well." *Hughes Aircraft*, 525 U.S. at 438; *Germain*, 503 U.S. at 253-54. The district court in *Beharry* apparently understood that statutory ambiguity is a precondition for using tools of statutory interpretation. Contrary to the *Beharry* court's conclusion, however, the Supreme Court has held that section 212(h) is clear and unambiguous – its plain terms provide "for automatic denial of discretionary waiver from exclusion" in aggravated felony cases. *St. Cyr*, 533 U.S. at 319 n.43 (explaining Section 212(h)).[11] *See also Jankowski v. Burczyk*, 291 F.3d 172 (2d Cir. 2002). Under these circumstances, there is no room for statutory interpretation, whether by reference to international law or

[11] Nothing in the language of section 212(h) itself provides any conceivable basis for creating an exception for felons who committed their crimes before Congress amended the INA in 1996, but who pled guilty after the amendments had been enacted. As this Court has pointed out in a similar context, although non-citizens may well consider the immigration consequences of deciding to enter a guilty plea in a criminal case, it would "'border on the absurd to argue'" that an alien "would have decided not to commit a crime if he had known that he not only could be imprisoned, but also could face deportation without the availability of a discretionary waiver of deportation." *Domond v. INS,* 244 F.3d 81, 86 (2d Cir. 2001).

to any other canon of statutory construction. Indeed, the *Beharry* court was mistaken when it held that it was "interpreting" or "construing" section 212(h) by applying the statute inconsistently with its plain terms. When the *Beharry* court created an exception to the automatic denial of relief to aggravated felons, it did not 'interpret' section 212(h). Instead, the court rewrote the statute. The *Beharry* court itself tacitly acknowledged that it was altering the terms of the law as it undertook to "make the minimal changes necessary to bring the statute into compliance" with its view of international mandates. Making "changes" to a statute goes beyond the judicial task of statutory interpretation. *See United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 497 (2001) (explaining that a court "cannot 'ignore the judgment of Congress, deliberately expressed in legislation'"). The *Beharry* court accordingly erred when it invoked international law principles to justify its grant of a hearing for Beharry under Section 212(h) and the court's analysis does not assist Petitioner in his efforts to obtain a similar interpretation of § 240A.

In sum, Congress' intent with respect to the bar of relief to aggravated felons as well as the application of that bar to convictions obtained prior to the 1996 amendments to the INA is unambiguous. Further, the procedure for cancellation of removal instituted by Congress trumps provisions of international treaties to the extent that they conflict and, in any case, Petitioner's claims with respect to those provisions are without merit, as no private right of action exists under the ICCPR and no enforceable legal obligations exist under either the UDHR or the CRC.

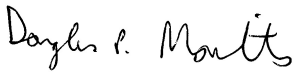
CONCLUSION

For the foregoing reasons, this Court should treat this case as a petition for review, and deny Petitioner's petition for review of the IJ's final order of removal.

Dated: November 27, 2006

Respectfully submitted,

KEVIN J. O'CONNOR
UNITED STATES ATTORNEY
DISTRICT OF CONNECTICUT



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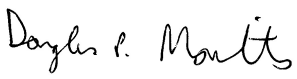
CERTIFICATION PER FED. R. APP. P. 32(A)(7)(C)

This is to certify that the foregoing brief complies with the 14,000 word limitation requirement of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 8,790 words, exclusive of the Table of Contents, Table of Authorities and Addendum of Statutes and Rules.



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Addendum

8 U.S.C.A. § 1252. Judicial review of order of removal

(d) Review of final orders

A court may review a final order of removal only if--

(1) the alien has exhausted all administrative remedies available to the alien as of right, and

(2) another court has not decided the validity of the order, unless the reviewing court finds that the petition presents grounds that could not have been presented in the prior judicial proceeding or that the remedy provided by the prior proceeding was inadequate or ineffective to test the validity of the order.

REAL ID Act of 2005, PL 109-13 (HR 1268)
May 11, 2005

SEC. 106. JUDICIAL REVIEW OF ORDERS OF REMOVAL.

(a) IN GENERAL.--Section 242 of the Immigration and Nationality Act (8 U.S.C. 1252) is amended--

(1) in subsection (a)--

(B) by adding at the end the following:

"(5) EXCLUSIVE MEANS OF REVIEW.--

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, United States Code, or any other habeas corpus provision, and sections 1361 and 1651 of such title, a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of an order of removal entered or issued under any provision of this Act, except as provided in subsection (e). For purposes of this Act, in every provision that limits or eliminates judicial review or jurisdiction to review, the terms 'judicial review' and 'jurisdiction to review' include habeas corpus review pursuant to section 2241 of title 28, United States Code, or any other habeas corpus provision, sections 1361 and 1651 of such title, and review pursuant to any other provision of law (statutory or nonstatutory).";

(2) in subsection (b)(9), by adding at the end the following: "Except as otherwise provided in this section, no court shall have jurisdiction, by habeas corpus under section 2241 of title 28, United States Code, or any other habeas corpus provision, by section 1361 or 1651 of such title, or by any other provision of law (statutory or nonstatutory), to review such an order or such questions of law or fact.";

(b) EFFECTIVE DATE.--The amendments made by subsection (a) shall take effect upon the date of the enactment of this division and shall apply to cases in which the final administrative order of removal, deportation, or exclusion was issued before, on, or after the date of the enactment of this division.

(c) TRANSFER OF CASES.--If an alien's case, brought under section 2241 of title 28, United States Code, and challenging a final administrative order of removal, deportation, or exclusion, is pending in a district court on the date of the enactment of this division, then the district court shall transfer the case (or the part of the case that challenges the order of removal, deportation, or exclusion) to the court of appeals for the circuit in which a petition for review could have been properly filed under section 242(b)(2) of the Immigration and Nationality Act (8 U.S.C. 1252), as amended by this section, or under section 309(c)(4)(D) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (8 U.S.C. 1101 note). The court of appeals shall treat the transferred case as if it had been filed pursuant to a petition for review under such section 242, except that subsection (b)(1) of such section shall not apply.