No. _____

IN THE

Supreme Court of the United States

ELENILSON J. ORTIZ-FRANCO,

Petitioner,

—v.—

LORETTA E. LYNCH, UNITED STATES ATTORNEY GENERAL,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

Lee Gelernt
Counsel of Record
Steven R. Shapiro
Lindsay Nash
Omar C. Jadwat
Dror Ladin
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
125 Broad Street
New York, NY 10004
(212) 549-2500
lgelernt@aclu.org

Attorneys for Petitioner

QUESTION PRESENTED

Unlike every other type of immigration relief, "deferral of removal" under the Convention Against Torture ("CAT") is available to all noncitizens, including those, like petitioner, who have a criminal conviction. The Second Circuit held, however, that although petitioner's conviction did not render him statutorily ineligible to apply for CAT relief, his conviction did restrict the court's jurisdiction to review the denial of CAT relief. In particular, the court of appeals held that in light of the jurisdictional bar applicable to noncitizens with criminal convictions, it could review only legal claims and could not review petitioner's *factual* claims challenging the denial of his application for CAT deferral relief. The Second Circuit's jurisdictional ruling is consistent with the position taken by seven other circuits, but in direct and acknowledged conflict with the position adopted by the Seventh and Ninth Circuits. In those two circuits, petitioner could have raised his factual challenges to the denial of CAT deferral relief. The question presented is:

Did the Second Circuit err in holding that 8 U.S.C. § 1252(a)(2)(C) divests the courts of appeals of jurisdiction to review factual claims challenging the denial of deferral of removal under the Convention Against Torture?

PARTIES TO THE PROCEEDING

Petitioner is Elenilson J. Ortiz-Franco. Petitioner was also petitioner in the court of appeals, but was respondent before the Immigration Court and Board of Immigration Appeals.

Respondent is the Attorney General of the United States, Loretta E. Lynch.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

TREATIES

RULES

PETITION FOR A WRIT OF CERTIORARI

Petitioner Elenilson J. Ortiz-Franco respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 2a–26a) is reported as *Ortiz-Franco v. Holder*, 782 F.3d 81 (2d Cir. 2015). There were no district court proceedings. The decision of the Board of Immigration Appeals (App. 26a–31a), and the decision and order of the immigration judge (App. 32a–54a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 1, 2015. A petition for rehearing was denied on August 31, 2015. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent portions of 8 U.S.C. § 1252 and the Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105–277, Div. G, Title XXII, § 2242, 112 Stat. 2681, 2681–822 (Oct. 21, 1998) (codified as Note to 8 U.S.C. § 1231) are reprinted in the appendix to this petition (App 56a-60a).

INTRODUCTION

Petitioner Elenilson J. Ortiz-Franco is a national of El Salvador. He was placed into immigration proceedings and applied for "deferral of removal" under the Convention Against Torture, ("CAT"), United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 3, S. Treaty Doc. No. 100–20 (1988), 1465 U.N.T.S. 85. The basis for his CAT claim was that he had provided federal prosecutors in New York with evidence against the notorious MS-13 Salvadoran gang and that he would be killed by the gang if he were returned to El Salvador. Although petitioner was subject to removal based on his criminal convictions, the immigration judge recognized that petitioner remained eligible to apply for CAT deferral relief. The immigration judge concluded, however, that the record did not support a grant of CAT deferral relief, based on her unsubstantiated speculation that gang members in El Salvador were unlikely to hear about petitioner's actions because they occurred in the United States and that the Salvadoran government would in any event protect him. The Board of Immigration Appeals ("BIA") affirmed the immigration judge's decision and petitioner sought review in the court of appeals.

The Second Circuit held that it could not review petitioner's factual claims challenging the denial of CAT relief because of a jurisdictional bar applicable to noncitizens with criminal convictions and that its jurisdiction extended only to remedying legal errors. The Second Circuit acknowledged that its holding conflicted with the position adopted by the Seventh and Ninth Circuits, both of which have

held that CAT deferral claims are not subject to the jurisdictional bar and that noncitizens with criminal convictions may therefore challenge the denial of CAT deferral relief on both legal and factual grounds.

STATEMENT

A. Statutory Background.

1. Congress implemented CAT in 1998 through the Foreign Affairs Reform and Restructuring Act of 1998 ("FARRA"). Pub. L. No. 105–277, Div. G, Title XXII, § 2242, 112 Stat. 2681, 2681–822 (Oct. 21, 1998) (codified as Note to 8 U.S.C. § 1231). CAT was adopted to ensure that no individual is subjected to torture in his own country or returned to a country where he will be subject to torture. Because of the universal condemnation of torture, there are *no* exceptions to this prohibition, not even for individuals with serious criminal convictions. *See, e.g.*, *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1682 n.1 (2013) (noting that "[a] conviction of an aggravated felony has no effect on CAT eligibility"); *Negusie v. Holder*, 555 U.S. 511, 514 (2009) ("Th[e] so-called 'persecutor bar' . . . does not disqualify an alien from receiving a temporary deferral of removal under the [CAT]."). Thus, all noncitizens facing removal from the United States are statutorily eligible to apply for "deferral of removal" under the CAT. 8 C.F.R. §§ 1208.16(c)(1), 1208.17(a).

To establish a claim for CAT deferral relief, the noncitizen must show that it is "more likely than not" that he will be tortured if removed and that the torture will occur with the acquiescence of the government in the country of removal. 8 C.F.R.

§§ 1208.17(a), 1208.18(a)(1); *see Negusie*, 555 U.S. at 536 n.6 (2009). If an individual makes this showing, then relief is mandatory and the individual may not be removed to a country where he faces a likelihood of torture. 8 C.F.R. § 1208.17(a) (noncitizen who satisfies the CAT standard "*shall* be granted deferral of removal") (emphasis added).

An immigration judge may not grant CAT deferral relief until the applicant has first received a final order of removal under the Immigration and Nationality Act ("INA"). 8 C.F.R. § 1208.17(a) (providing for grant of CAT deferral only if the applicant "has been ordered removed"); *see also* 8 C.F.R. § 1208.17(b)(1). Thus, the immigration judge must initially determine that the noncitizen is subject to removal for some reason (such as a criminal offense) and that no other form of immigration relief is available. If the applicant is ordered removed, the immigration judge may *at that point* grant CAT deferral relief, which effectively stays the removal order. But a grant of CAT deferral relief does not negate the final order of removal. The order of removal remains in place. *See* 8 C.F.R. §§ 1208.16(f), 1208.17(b)(1), 1208.17(d). And, as its name suggests, CAT *deferral* relief is not permanent. If conditions change and there is no longer a probability of torture, the government may seek to terminate the CAT grant and remove the individual. 8 C.F.R. § 1208.17(d).[1]

[1] By regulation, the United States has created a second form of CAT relief called CAT "withholding" of removal. 8 C.F.R. § 1208.16(c)(1). Unlike CAT deferral relief, CAT withholding is not available to individuals, like petitioner, with certain criminal convictions. The principal difference between the two

2. The denial of CAT relief is reviewable in the courts of appeals. The INA generally provides that review of a "final order of removal" is available by petition for review in the courts of appeals. 8 U.S.C. § 1252(a)(1). And FARRA § 2242(d) specifically provides for review of CAT claims "as part of the review of a final order of removal pursuant to section 242 of the Immigration and Nationality Act (8 U.S.C. § 1252)." 8 U.S.C. § 1231 note.

The *scope* of review is determined by whether one of the INA's jurisdictional bars applies. In the absence of a jurisdictional bar, the courts of appeals' jurisdiction includes review of all claims, legal, factual, and discretionary. 8 U.S.C. § 1252(b)(4) (setting forth standards of review, including substantial evidence standard for reviewing factual claims). The jurisdictional bar at issue here is 8 U.S.C. § 1252(a)(2)(C). Section 1252(a)(2)(C) – the criminal bar – provides:

> Orders against criminal aliens
>
> Notwithstanding any other provision of law . . . , including section 2241 of Title 28, or any other habeas corpus provision . . . and except as provided in subparagraph (D), no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having

---

forms of relief is that the government must take additional procedural steps to terminate a grant of CAT withholding.

> committed a criminal offense [listed in this provision] . . . .[2]

The question in this case is whether the criminal bar applies to a CAT deferral claim. If it does not, then the courts of appeals have jurisdiction to review all claims. If it does, then the courts of appeals lack jurisdiction over all claims challenging the denial of CAT relief, with the exception of legal claims. Legal claims can be reviewed pursuant to 8 U.S.C. § 1252(a)(2)(D), which *restores* jurisdiction over "constitutional claims and questions of law" and does so notwithstanding any of the INA's jurisdictional bars, including the criminal bar.[3]

B. Petitioner's Immigration Proceedings.

1. An immigration judge found that petitioner was subject to removal on the basis of his illegal presence in the country and his criminal convictions. The immigration judge then considered petitioner's application for "deferral of removal" under the CAT.

Petitioner contended that, if returned, he would eventually be killed by MS-13 gang members because he had provided evidence against them in a federal criminal proceeding in New York and the gang members had learned of that fact through *Brady* disclosures by the prosecutor. In support of his CAT claim, petitioner submitted evidence

---

[2] Petitioner does not dispute that he has committed an offense listed in § 1252(a)(2)(C).

[3] Section 1252(a)(2)(D) provides: "Nothing in subparagraph (B) or (C), or in any other provision of this chapter (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section."

showing that MS-13 was an organized and sophisticated gang operating in both the United States and El Salvador that routinely engaged in brutal acts of murder against those who opposed them, including witnesses. *See, e.g.*, Certified Administrative Record ("CAR") 379 (describing MS-13 as a sophisticated network that spans the United States and El Salvador); CAR 379 (reporting that MS-13 members have ordered "retaliatory assassinations" from one country to another); CAR 530–33 (describing an incident in which a man who was deported to El Salvador was killed by a gang member because he had spoken out against the gang while in the United States).

Petitioner also submitted a letter from an Assistant United States Attorney ("AUSA") in the Eastern District of New York explaining that Mr. Ortiz-Franco was a co-defendant in a case involving MS-13 gang members, that the AUSA had provided Mr. Ortiz-Franco's statements to MS-13 gang member defendants, and that the AUSA "d[id] not dispute" that this "may put [Mr. Ortiz-Franco] in some danger, if he is deported to El Salvador . . . . " CAR 857.

Finally, petitioner provided reports showing that the Salvadoran government and police acquiesced in MS-13's retaliatory targeting of individuals who betray the gang. *See, e.g.*, CAR 490 ("PNC [(National Civil Police)] officers are thought to be complicit in the targeted killings and abuses of numerous members of [the former gang member] population."); CAR 466–67, 539–40, 542.

Notwithstanding the record support for petitioner's CAT claim, the immigration judge denied

relief. App. 33a–55a. The immigration judge first held that petitioner had failed to show that it was more likely than not that he would be killed by MS-13 if he were deported, speculating that gang members *in El Salvador* were unlikely to hear about what had occurred *in the United States*. Specifically, she found that Mr. Ortiz-Franco "failed to provide [sic] that there is a link between establishing that he would be identified as a turncoat MS-13 member by anyone." App. 53a; *see also* App. 45a–46a, 50a, 54a. The immigration judge acknowledged the AUSA's letter but treated it as if it were a request for leniency, rather than as evidence that petitioner faced danger if deported. The immigration judge stated that the government

> ha[s] written a letter to the Court, which has no discretion in this matter, and to the Department of Homeland Security that has discretion, and it will be up to the Department of Homeland Security to decide whether they wish to defer the respondent's removal from the United States based upon the non-objection of the Eastern District to that event, but in order for the respondent to gain benefits from this Court he needs to meet a standard of law with regard to harm he would face if removed to El Salvador.

App. 52a.

The immigration judge next concluded that even if petitioner would be in danger if deported, the record did not show that the Salvadoran government would fail to protect him. That conclusion, however,

was expressly contradicted by the record evidence, which showed that the Salvadoran police have acquiesced in the criminal activity of the country's major gangs, including MS-13. *See* p. 7, *supra*.

2. The BIA affirmed the immigration judge's denial of CAT relief. App. 27a–32a. The BIA agreed that petitioner had not established that his cooperation with federal authorities in the United States "will become known in El Salvador." App. 30a. The BIA further agreed that petitioner had not established that the Salvadoran government would acquiesce in his torture by the gangs, quoting an old 2007 U.S. State Department report stating that "it is neither the policy nor the practice of the Salvadoran law enforcement authorities to decline or refuse to protect gang members or to condone abuses by anyone against gang members." App. 31a (internal quotation marks omitted).

C. The Second Circuit's Decision.

1. In the court of appeals, petitioner argued that the immigration judge and BIA erred in concluding that he had failed to show (1) that MS-13 gang members in El Salvador would learn that he had provided evidence against them in the United States, and (2) that the Salvadoran government would turn a blind eye when MS-13 sought retribution. The Second Circuit did not reach the merits of those claims and instead dismissed the petition for review, holding that it lacked jurisdiction to review factual questions in light of the criminal bar in 8 U.S.C. § 1252(a)(2)(C). App. 3a, 11a.

The court reasoned that the criminal bar applied to petitioner's CAT deferral claim because petitioner was subject to removal based on one of the

criminal offenses listed in § 1252(a)(2)(C) and because (in the Second Circuit's view) a CAT deferral claim is simply a type of final order. Accordingly, the court concluded that the bar applied because petitioner was challenging a "final order of removal" and was "removable by reason of" an offense listed in § 1252(a)(2)(C). The Second Circuit noted that the Seventh and Ninth Circuits had held that the criminal bar does not apply to CAT deferral claims and that noncitizens with criminal convictions may therefore challenge the denial of CAT deferral relief on factual grounds in those two circuits. The Second Circuit declined, however, to follow those circuits and instead adopted the "majority" position. App. 11a.

Judge Lohier concurred, but stressed the significance of the case, the circuit conflict, and the need for uniformity in this area. App. 22a–26a.

> Among other things, this case implicates our judicial power to review an important category of petitions—a power of review that the Government claims for itself alone. And the stakes are very high for petitioners, like Ortiz–Franco, who may face torture if the Government's denial of deferral of removal proves to be mistaken.
>
> * * *
>
> [T]he state of play today is that noncitizens with criminal convictions who appeal the Government's denial of deferral of removal under the CAT will have access to federal court in a wide geographic swath of the Nation (the Seventh and Ninth Circuits), while

> similarly situated men and women in other parts of the country (including, now, this Circuit) will not. This is not a sustainable way to administer uniform justice in the area of immigration. Congress, or the Supreme Court, can tell us who has it right and who has it wrong.

App. 24a, 26a.

2. On August 31, 2015, the Second Circuit denied Mr. Ortiz-Franco's petition for rehearing en banc. App. 1a.[4] This petition followed.

REASONS FOR GRANTING THE WRIT

The courts of appeals are divided 8-2 on a recurring jurisdictional issue involving claims of torture. The issue was squarely addressed by the Second Circuit and was dispositive. Review by this Court is warranted to resolve the conflict and correct the Second Circuit's erroneous decision.

---

[4] Petitioner's rehearing petition was filed *pro se* along with a *pro se* request for a stay of removal. Second Circuit Dkt. No. 13-3610, Doc. No. 89. Due to confusion in the Clerk's Office of the Second Circuit about whether petitioner was still represented in the court of appeals by his immigration attorney, the *pro se* rehearing petition and stay request were not initially circulated to the Court and petitioner was deported before the Second Circuit had an opportunity to rule on his stay request. Dkt. No 13-3610, Doc. Nos. 97, 101, 110, 111, 114, 118. *See Nken v. Holder*, 556 U.S. 418, 435 (2009) (stating in case involving CAT claim that "[a]liens who are removed may continue to pursue their petitions for review . . . ."); *see also Lopez v. Gonzales*, 549 U.S. 47, 52 n.2 (2006) (noting that petitioner was deported but "agree[ing] with the parties that the case is not moot" because petitioner "can benefit from relief in this Court by pursuing his application for cancellation of removal").

I. THE CIRCUITS ARE DIVIDED ON A RECURRING JURISDICTIONAL ISSUE INVOLVING CLAIMS OF TORTURE.

The Seventh and Ninth Circuits have both held that the criminal bar in 8 U.S.C. § 1252(a)(2)(C) does not apply to CAT deferral claims and that noncitizens with criminal convictions may therefore challenge the denial of CAT deferral relief on factual grounds. *See Lemus-Galvan v. Mukasey*, 518 F.3d 1081, 1083 (9th Cir. 2008); *Wanjiru v. Holder*, 705 F.3d 258, 264 (7th Cir. 2013).

In *Lemus-Galvan*, 518 F.3d at 1083–84, the Ninth Circuit noted that because all noncitizens are statutorily eligible to apply for CAT deferral relief, a denial of CAT deferral relief will necessarily be "on the merits" of the claim (*i.e.*, because the noncitizen could not meet the standard for CAT relief), rather than because of a criminal offense. The Ninth Circuit thus held that because § 1252(a)(2)(C) applies only where a noncitizen "is removable *by reason of*" a criminal offense, the statute does not apply to CAT deferral claims. *Id.* at 1083–84 (emphasis added); *see also Vinh Tan Nguyen v. Holder*, 763 F.3d 1022, 1029 (9th Cir. 2014) (noting that notwithstanding § 1252(a)(2)(C), the court had "jurisdiction to review denials of deferral of removal under CAT" for factual errors); *Edu v. Holder*, 624 F.3d 1137, 1141–42 (9th Cir. 2010) (same); *Eneh v. Holder*, 601 F.3d 943, 946 (9th Cir. 2010) (same).

The Seventh Circuit has likewise held that the criminal bar in § 1252(a)(2)(C) does not apply to CAT deferral claims, although it has relied on different reasoning than the Ninth Circuit. *See Wanjiru*, 705 F.3d at 264 (noting that "[t]he Ninth Circuit reached

the same conclusion as ours, although on somewhat different grounds"). In *Wanjiru*, the Seventh Circuit noted that the criminal bar applies only to a "final order of removal" and held that it therefore does not apply to a CAT deferral claim, which the court likened to a temporary "injunction" barring the government from executing the intact final order. *Id.* at 264. Accordingly, in the Seventh Circuit, as in the Ninth Circuit, a petitioner with a criminal conviction may raise factual claims challenging the denial of CAT deferral relief. *See also, e.g.*, *Lenjinac v. Holder*, 780 F.3d 852, 855–56 (7th Cir. 2015) (reviewing factual challenge to denial of CAT deferral because "deferral of removal is not a final remedy and therefore [§ 1252(a)(2)(C)] does not bar judicial review"); *Teneng v. Holder*, 602 Fed. App'x 340, 347 (7th Cir. 2015) (same); *Bitsin v. Holder*, 719 F.3d 619, 630–31 (7th Cir. 2013) (same).[5]

In direct contrast, the Second Circuit held in this case that the criminal bar set forth in § 1252(a)(2)(C) *does* apply to CAT deferral claims,

[5] In *Perez-Guerrero v. Holder*, 134 S. Ct. 1000 (2014) (mem.), this Court denied review on the same jurisdictional issue presented here. The Solicitor General opposed review in that case because the petitioner had "belatedly and inadequately asserted the jurisdictional argument" before the Eleventh Circuit and because the government believed the Seventh Circuit's statements on the issue in *Wanjiru* were only "dicta" and that the Ninth Circuit was therefore the only circuit to have ruled against the government. *See* Brief for the Respondent in Opposition at 13–14, 18, *Perez-Guerrero*, 134 S. Ct. 1000 (13-323), 2013 WL 6503528, at *13–14, 18. The Seventh Circuit has since made unmistakably clear that its statements in *Wanjiru* are the law of the Circuit. *See*, *e.g.*, *Lenjinac*, 780 F.3d at 855 ("In *Wanjiru* . . . we conclusively held that deferral of removal is not a final remedy and therefore [§ 1252(a)(2)(C)] does not bar judicial review.").

thereby precluding review of petitioner's factual challenges. App. 11a–12a, 16a–20a (noting contrary position of Seventh and Ninth Circuits); App. 26a (Lohier, J., concurring) (noting conflict with Seventh and Ninth Circuits).

The Second Circuit rejected the Ninth Circuit's position that a noncitizen with a criminal conviction who is denied CAT deferral relief "on the merits" is not "removable by reason of" a criminal conviction. App. 18a–20a. The Second Circuit also rejected the Seventh Circuit's position that the denial of a CAT deferral claim is simply an "injunction" rather than a "final" order of removal. App. 16a–18a. The court additionally rejected petitioner's alternative arguments, *see* Section II.A., *infra*, based on a 2005 amendment to the INA that specifically addresses the review of CAT claims. App. 15a–16a.

The Second Circuit's jurisdictional ruling is consistent with the position taken by the First, Third, Fourth, Fifth, Sixth, Eighth, and Eleventh Circuits, all of which have held that the criminal bar in § 1252(a)(2)(C) applies to CAT deferral claims. *See Cole v. U.S. Att'y Gen.*, 712 F.3d 517, 524, 532 (11th Cir. 2013) (finding that 8 U.S.C. § 1252(a)(2)(C) applies to CAT claims and that its review was therefore limited to "legal and constitutional claims"); *Escudero-Arciniega v. Holder*, 702 F.3d 781, 785 (5th Cir. 2012) ("Because we do not have jurisdiction to review factual determinations made pursuant to removal orders based upon an aggravated felony [under § 1252(a)(2)(C)], we dismiss Escudero's petition for review of the BIA's denial of . . . protection under the CAT."); *Turkson v. Holder*, 667 F.3d 523, 526–27 (4th Cir. 2012) (noting that

§ 1252(a)(2)(C) limited its jurisdiction over CAT claim to "questions of law or constitutional claims") (internal citations omitted); *Pieschacon–Villegas v. Att'y Gen.*, 671 F.3d 303, 309–10 (3d Cir. 2011) (in light of § 1252(a)(2)(C), court lacked "jurisdiction to consider" factual claims challenging the denial of CAT deferral relief); *Lovan v. Holder*, 574 F.3d 990, 998 (8th Cir. 2009) ("agency's factual determinations" regarding CAT deferral relief "are beyond our jurisdiction" in light of § 1252(a)(2)(C)); *Gourdet v. Holder*, 587 F.3d 1, 5 (1st Cir. 2009) (in case where noncitizen has committed criminal offense covered by § 1252(a)(2)(C), court "may not review the administrative fact findings" regarding denial of CAT relief); *Tran v. Gonzales*, 447 F.3d 937, 943 (6th Cir. 2006) (in light of § 1252(a)(2)(C), "our review of Tran's CAT claim is limited to questions of law or constitutional issues").

There is thus a direct and acknowledged conflict among the courts of appeals on an important and recurring jurisdictional issue with potential life and death consequences. If petitioner's immigration proceedings had occurred in the Seventh or Ninth Circuit, he would have had his factual claims reviewed. As Judge Lohier observed in his concurrence, "[t]his is not a sustainable way to administer uniform justice in the area of immigration." App. 26a. That is particularly so where the claims involve torture and the "stakes are very high." App. 24a.

This Court's review is warranted to resolve this entrenched circuit split. The jurisdictional issue was outcome-determinative and the issue was comprehensively addressed in the Second Circuit's opinion, in contrast to the decisions issued by the

other circuits that have ruled for the government. *See Wanjiru*, 705 F.3d at 265 (noting that its decision conflicted with the majority position, but stating that those decisions "did so without any discussion"). And, there is no question that the issue will continue to arise with regularity in the courts of appeals.[6]

II. THE SECOND CIRCUIT'S DECISION WAS INCORRECT.

There are multiple reasons why the Second Circuit erred in finding that the criminal bar in § 1252(a)(2)(C) applies to CAT deferral claims. First, the Second Circuit's ruling does not account for a 2005 amendment to the INA that specifically addresses the review of CAT claims. Second, a CAT deferral claim is not subject to § 1252(a)(2)(C) because it is not a final order of removal (as the Seventh Circuit held), and because a noncitizen denied CAT deferral relief on the merits is not

---

[6] In 2015 alone, there have been numerous cases presenting the issue, including: *Dhami v. Lynch*, No. 14-60836, 2015 WL 4747866, at *1 (5th Cir. Aug. 12, 2015) (unpub.); *Ya Pao Vang v. Lynch*, No. 14-1439, 2015 WL 4385981, at *3 (1st Cir. July 17, 2015) (unpub.); *Mansare v. Lynch*, 609 Fed. App'x 502, 503 (9th Cir. 2015) (unpub.); *Oliviera v. Att'y Gen.,* No. 14-4141, 2015 WL 4081900, at *3 (3d Cir. July 7, 2015) (unpub.); *Torres v. Lynch*, 608 Fed. App'x 493, 494–95 (9th Cir. 2015) (unpub.); *Meza-Barhona v. Lynch*, No. 13-71405, 2015 WL 3825308, at *1 (9th Cir. June 22, 2015) (unpub.); *Ventura-Reyes v. Lynch*, No. 14-3237, – F.3d –, 2015 WL 3485909, at *6-7 (6th Cir. May 26, 2015); *Bastien v. Att'y Gen.*, 620 Fed. App'x 144, 145 (3d Cir. 2015) (unpub.); *Baboolall v. Att'y Gen.*, 606 Fed. App'x 649, 656 (3d Cir. 2015) (unpub.); *Campos v. Holder*, 597 Fed. App'x 198, 199 (4th Cir. 2015) (unpub.); *Lenjinac v. Holder*, 780 F.3d 852, 855–56 (7th Cir. 2015); *Teneng v. Holder*, 602 Fed. App'x 340, 347 (7th Cir. 2015) (unpub.); *De Jesus-Sanchez v. Holder*, 590 Fed. App'x 710, 711 (9th Cir. 2015).

"removable by reason of" a criminal offense (as the Ninth Circuit held). Finally, to the extent there is ambiguity regarding the proper interpretation of the criminal bar, that ambiguity must be resolved in favor of finding jurisdiction under various canons of statutory construction.

A. FARRA And INA Provisions That Specifically Address The Review Of CAT Claims Make Clear That The Criminal Bar Does Not Apply To CAT Deferral Claims.

1. There are two statutory provisions that specifically address the review of CAT claims. Those provisions show that the criminal bar does not apply to CAT deferral claims because Congress did not view CAT claims as orders of removal. *See* 8 U.S.C. § 1252(a)(2)(C) (applicable by its terms only to a "final order of removal").

The first provision is FARRA § 2242(d), which provides in relevant part that no court may review CAT claims "except as part of the review of a final order of removal pursuant to section 242 of the Immigration and Nationality Act (8 U.S.C. § 1252(a)(2)(C))." 8 U.S.C. § 1231 note. The Second Circuit found that this provision supported its view that CAT deferral claims were final orders of removal within the meaning of the criminal bar. But this provision does not state that CAT claims *are* final orders but merely that they should be reviewed "as part of" the review of a final removal order.

In any event, any ambiguity that may have existed after the enactment of FARRA in 1998 was eliminated in 2005 when Congress enacted the REAL ID Act, which amended the judicial review provisions

of the INA. *See* REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, 106(a)(1)(A)(iii), 119 Stat. 310. The impetus for the 2005 INA amendments was this Court's decision in *INS v. St. Cyr*, 533 U.S. 289, 314 (2001), where the Court held that various INA jurisdiction-stripping provisions enacted in 1996 did not eliminate district court habeas review because they did not contain a "clear, unambiguous, and express" statement repealing habeas review. Congress responded in 2005 by expressly eliminating habeas review throughout most of the INA's judicial review provisions. In particular, Congress enacted 8 U.S.C. § 1252(a)(5), which states:

> Exclusive means of review
>
> Notwithstanding any other provision of law . . . including section 2241 of Title 28, or any other habeas corpus provision, . . . 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 chapter, except as provided in subsection (e) of this section. For purposes of this chapter, 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, or any other habeas corpus provision . . . .

The purpose of this provision is straightforward: to eliminate habeas review of an "order of removal" (with one immaterial exception for review of special "expedited" removal orders pursuant to subsection (e) of 8 U.S.C. § 1252). Critically, however, Congress simultaneously enacted a virtually identical provision, 8 U.S.C. § 1252(a)(4), that specifically eliminated habeas review of CAT claims:

> Claims under the United Nations Convention
>
> Notwithstanding any other provision of law . . . including section 2241 of Title 28, or any other habeas corpus provision, . . . 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 any cause or claim under the [CAT], except as provided in subsection (e) of this section.

The two provisions, enacted side-by-side as part of the same 2005 legislation, both eliminate habeas review. The difference is that § 1252(a)(5) applies to an "order of removal" while § 1252(a)(4) applies only to CAT claims. Yet if Congress viewed CAT claims as final orders of removal (as the Second Circuit concluded), there would have been no need to enact § 1252(a)(4); § 1252(a)(5) would have been sufficient to eliminate habeas jurisdiction over CAT claims and all other orders of removal. By treating CAT claims as final orders, however, the Second Circuit rendered § 1252(a)(4) superfluous.

As this Court has repeatedly stated, courts should interpret statutes as a whole and should

strive not to render statutory provisions superfluous if another reading is fairly possible. *Corley v. United States*, 556 U.S. 303, 314 (2009) (noting that "one of the most basic interpretive canons" is "that a statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant") (internal quotation marks and alterations omitted). Here, a construction of the statute that gives meaning to § 1252(a)(4) is not only possible, but is the most plausible reading of the statutory language. Given the unique characteristics of CAT claims, it is entirely reasonable to assume that Congress did not want CAT claims treated like ordinary final orders, with a truncated scope of review. Among other things, noncitizens are not eligible for CAT deferral relief unless they have first been "ordered removed." 8 C.F.R. § 1208.17(a). Moreover, the grant of CAT relief leaves the final order intact, *see* 8 C.F.R. § 1208.17(b)–(e), and CAT deferral is the *only* form of relief available to every noncitizen, regardless of the severity of their criminal offense.

The Second Circuit concluded that treating CAT deferral claims as final orders did not render § 1252(a)(4) superfluous, but the court's analysis focused on the wrong provision (FARRA § 2242(d) rather than § 1252(a)(5)). Specifically, the Second Circuit found that § 1252(a)(4) was not redundant of FARRA § 2242(d), but rather, simply served to "confirm" that habeas review of CAT claims was unavailable. App. 16a (internal quotation marks and citations omitted). But petitioner's argument was not that § 1252(a)(4) was redundant in light of FARRA § 2242(d). FARRA § 2242(d) placed review of CAT claims in the court of appeals but did not *expressly*

eliminate habeas review. In light of *St. Cyr*, it was necessary for Congress to expressly eliminate habeas review of CAT claims if it wished to eliminate such review. Congress accomplished that goal in § 1252(a)(4). The critical question is why Congress would have enacted both § 1252(a)(4) and § 1252(a)(5) if CAT deferral claims were simply final orders of removal, since § 1252(a)(5) expressly repeals habeas over all final removal orders and would therefore have been sufficient.

And, insofar as the Second Circuit did briefly address the interaction between § 1252(a)(4) and § 1252(a)(5), the court suggested only that § 1252(a)(4) may have been enacted "to clarify" that CAT claims were reviewable in the courts of appeals. App. 16a. Thus, the Second Circuit itself acknowledged that § 1252(a)(4) added nothing to § 1252(a)(5) if CAT deferral claims did in fact constitute final orders of removal (as the court believed). In the Second Circuit's view, § 1252(a)(4) was simply explanatory and served no independent purpose.

The Second Circuit also attempted to buttress its decision by noting that the overall purpose of the 2005 amendments was to streamline the judicial review process and channel all review directly into the courts of appeals, bypassing the district courts. App. 16a. But that point is unresponsive to petitioner's argument. Congress was indeed trying to channel all review to the courts of appeals. The question is why Congress would have needed to enact § 1252(a)(4) in addition to § 1252(a)(5) to further that goal if Congress believed that CAT deferral claims were simply final orders of removal.

Section § 1252(a)(4) thus makes clear that Congress did not view CAT deferral claims as final orders of removal. Otherwise, it would have been unnecessary to enact § 1252(a)(4).

2. Alternatively, even if CAT deferral claims *are* considered final orders, § 1252(a)(4) would still provide review of factual claims because § 1252(a)(4) trumps the criminal bar. Section 1252(a)(4) provides for review of "any cause or claim" regarding CAT and does so "notwithstanding *any other* provision of law" (emphasis added). The expansive phrase "any cause or claim" plainly encompasses both legal and factual claims. And the "notwithstanding" phrase ensures that § 1252(a)(4) overrides the criminal bar in § 1252(a)(2)(C). Thus, factual claims would be reviewable even if CAT deferral claims were considered final orders under § 1252(a)(2)(C).

The Second Circuit concluded that § 1252(a)(4)'s reference to "any cause or claim" did not "widen[] [its] appellate jurisdiction." App. 15a (citing *Lovan*, 574 F.3d at 998). But the Second Circuit offered no basis for that conclusion other than its citation to the Eighth Circuit's *Lovan* decision, which in turn supplied no analysis. App. 15a.

In sum, § 1252(a)(4) makes clear that petitioner's factual claims are reviewable. Section 1252(a)(4) shows that Congress did not view CAT deferral claims as final orders of removal. Alternatively, even if CAT deferral claims are considered final orders of removal and thus fall under the criminal bar in § 1252(a)(2)(C), § 1252(a)(4) overrides the criminal bar and ensures review of "any" claim, including factual claims.

B. The Seventh And Ninth Circuits Correctly Construed The Criminal Bar.

1. The Seventh Circuit has held that CAT deferral claims are not "final" removal orders within the meaning of the criminal bar in § 1252(a)(2)(C). As that court explained, CAT deferral claims do not fall under § 1252(a)(2)(C) because the grant or denial of such claims in no way disturbs a final order. *Wanjiru*, 705 F.3d at 263–65.

Under the regulations, CAT deferral is a temporary form of relief that may only be granted once there is an order of removal. *See* 8 C.F.R. § 1208.17(a) (limiting CAT deferral to a noncitizen who "has been ordered removed"). If CAT deferral is granted, it does not negate the final order of removal. The order of removal remains in place. *See* 8 C.F.R. § 1208.17(b)(1) (specifying that notice of a CAT grant is provided "[a]fter an immigration judge orders an alien described in paragraph (a) of this section removed"). If conditions in the home country change, and the noncitizen would no longer face a likelihood of torture, CAT deferral protection may be terminated and the noncitizen removed based on the *existing* final order of removal. *See* 8 C.F.R. §§ 1208.17(b)(1), 1208.17(d)(4) (specifying that if deferral is terminated, an "alien may be removed to that country" without the need for another removal order). Indeed, even while CAT protection remains in effect, the government remains free to remove the noncitizen to a third country based on the existing final order of removal. *See* 8 C.F.R. § 1208.17(b)(2).

Thus, review of a CAT deferral claim does not affect, nor question the validity of, a final order of

removal. A final order of removal remains in place and is not disturbed by the outcome of the court's review of the merits of a deferral claim. Regardless of whether or not the denial of CAT deferral is upheld, an individual seeking deferral remains subject to a final order and has neither the right to stay in the United States nor any pathway to lawful permanent resident status. In the Seventh Circuit's words, deferral is simply a temporary "injunction" barring the government from executing the *intact* final order. *Wanjiru*, 705 F.3d at 264.

The Second Circuit rejected the Seventh Circuit's analysis, reasoning that CAT deferral relief must be a final order of review because it is reviewable in the courts of appeals and only final orders of removal are reviewable under the INA. App. 16a–18a. But that ignores the Seventh Circuit's observation that an order may be final for one purpose but not another. *Wanjiru*, 705 F.3d at 264. Moreover, CAT claims are made reviewable by § 1252(a)(4), which does not refer to review of final orders of removal, but to "any cause or claim" regarding CAT.

2. The Ninth Circuit's alternative reading of the statutory language is also more persuasive than the Second Circuit's. It focuses on the fact that the criminal bar, by its terms, applies only where the alien is "removable *by reason of*" one of the listed criminal offenses. 8 U.S.C. § 1252(a)(2)(C) (emphasis added).

Unlike other forms of relief, CAT deferral claims are not subject to a criminal bar. Consequently, any noncitizen, regardless of his criminal offense, is eligible to apply for CAT deferral

and to obtain a ruling on the merits of that claim. Thus, as the Ninth Circuit has explained, a CAT deferral claim does not fall within the criminal bar because the noncitizen is not ultimately removable on the basis of a criminal offense, but rather on the merits of whether he qualifies for CAT deferral relief. *See Lemus-Galvan*, 518 F.3d at 1084 ("The jurisdictional wrinkle here is that although the IJ ordered removal on the basis of Lemus–Galvan's felony conviction, he denied Lemus–Galvan's request for deferral of removal under the CAT because Lemus–Galvan failed to establish that internal relocation within Mexico was impossible.").

Moreover, CAT deferral is mandatory. Where the noncitizen satisfies the objective standard for CAT deferral relief, the government lacks any discretionary authority to remove him to a country in which he faces a likelihood of torture. Thus, whether a noncitizen with a claim to CAT deferral is removable turns entirely on whether the alien is likely to be tortured if removed to a particular country; a noncitizen whose CAT claim is denied is removable on *this* basis, and is not "removable by reason of" a criminal offense, which is the trigger for § 1252(a)(2)(C).

The Second Circuit rejected the Ninth Circuit's position, reasoning that removability does not concern *relief* from deportation, but rather the threshold determination that the noncitizen is subject to removal in the first place. App. 18a–20a ("Deferral under the CAT is simply an impediment to removal that is removed by denial of that relief.") (internal quotation marks and citation omitted). Even if that point were generally correct, it ignores the unique nature of CAT, which is available to all

noncitizens and divests the government of discretion to remove a qualifying individual.

C. Any Ambiguity Must Be Resolved In Favor Of Finding Jurisdiction.

To the extent there is any ambiguity in the statute, that ambiguity must be construed in favor of finding jurisdiction. It is a basic tenet of statutory construction that interpretations that provide for judicial review of administrative action are favored over competing readings. This strong presumption in favor of review has been consistently applied to "legislation regarding immigration, and particularly to questions concerning the preservation of federal-court jurisdiction." *Kucana v. Holder*, 558 U.S. 233, 251 (2010). And because the "presumption favoring interpretations of statutes [to] allow judicial review of administrative action is well-settled," courts "assume[] that Congress legislates with knowledge of the presumption." *Id.* at 251–52 (first alteration in original) (quotation marks omitted). "It therefore takes 'clear and convincing evidence' to dislodge the presumption." *Id.* at 252 (quoting *Reno v. Catholic Social Services, Inc.*, 509 U.S. 43, 64 (1993)).

Moreover, construing § 1252(a)(2)(C) to bar the judiciary from providing *any* check on factually erroneous deferral decisions threatens the United States' compliance with its treaty obligations. As this Court stated more than two centuries ago, "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804); *see also Wanjiru*, 705 F.3d at 265 (finding review over factual issues regarding CAT deferral and noting that "[w]e should

not lightly presume that Congress has shut off avenues of judicial review that ensure this country's compliance with its obligations under an international treaty").

There is also a "'longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien.'" *St. Cyr,* 533 U.S. at 320 (quoting *INS v. Cardoza-Fonseca,* 480 U.S. 421, 449 (1987)). This rule is required because "the stakes are considerable for the individual." *INS v. Errico,* 385 U.S. 214, 225 (1966). The stakes for the individual facing deportation are never higher than when the result of an erroneous agency decision means subjecting the individual to torture or death, in violation of the United States' treaty obligations.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Lee Gelernt
Counsel of Record
Steven R. Shapiro
Lindsay Nash
Omar C. Jadwat
Dror Ladin
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street,
New York, NY 10004
(212) 549-2500
lgelernt@aclu.org

Dated: September 18, 2015

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 31st day of August, two thousand fifteen.

Elenilson J. Ortiz-Franco,

Petitioner,

v. **ORDER**
Docket No: 13-360

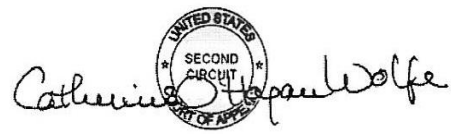
Eric H. Holder, Jr., United States Attorney General,

Respondent.

Petitioner Elenilson J. Ortiz-Franco filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk



UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2014

(Argued: October 9, 2014 Decided: April 1, 2015)

Docket No. 13-3610

ELENILSON J. ORTIZ-FRANCO,

Petitioner,

- v.-

ERIC H. HOLDER, JR.,
UNITED STATES ATTORNEY GENERAL,

Respondent.

Before: JACOBS, LOHIER, and DRONEY,
Circuit Judges.

Elenilson J. Ortiz-Franco petitions for review of an order of the Bureau of Immigration Appeals, entered August 30, 2013, which affirmed the decision of Immigration Judge Noel A. Ferris denying Ortiz-Franco deferral of removal under the Convention Against Torture ("CAT"). We lack jurisdiction to consider the petition for review because the jurisdictional limitations set forth in 8 U.S.C. §1252(a)(2)(C) and (D) apply when an otherwise removable alien is denied deferral of removal under the CAT, and Ortiz-Franco raises no colorable constitutional claims or questions of law.

Accordingly, the petition for review is DISMISSED. Judge Lohier concurs in a separate opinion.

Lee P. Gelernt, American Civil Liberties Foundation, Immigrants' Rights Project (with Dror Ladin, American Civil Liberties Foundation, Immigrants' Rights Project and Genet Getachew, Law Office of Genet Getachew), New York, N.Y., for Petitioner.

Jesse M. Bless, Trial Attorney, United States Department of Justice, Civil Division, Office of Immigration Litigation (with David B. Bernal, Director, Stuart F. Delery, Acting Associate Attorney General and Anthony C. Payne, Senior Litigation Counsel), Washington, D.C., for Respondent.

DENNIS JACOBS, Circuit Judge:

Elenilson J. Ortiz-Franco petitions for review of an order of the Bureau of Immigration Appeals ("BIA"), entered August 30, 2013, which affirmed the decision of Immigration Judge Noel A. Ferris ("IJ"), denying all relief, including relief on the sole basis that is the subject of this appeal: deferral of removal under the Convention Against Torture ("CAT"). We conclude that we lack jurisdiction to consider this petition for review because, when an otherwise removable alien is denied deferral of removal under the CAT, our jurisdiction is limited by 8 U.S.C. §

1252(a)(2)(C) and (D) to review of colorable constitutional claims and questions of law—and Ortiz-Franco raises none.[1]

Ortiz-Franco, a native and citizen of El Salvador, conceded before the IJ that he was removable as an alien present in the United States without being admitted or paroled, i.e., illegally, and as an alien convicted of a controlled substance violation and a crime of moral turpitude. His contention is that, if he is returned to El Salvador, members of La Mara Salvatrucha street gang ("MS–13") would torture and kill him because of information he provided to federal prosecutors in a proffer session.

Ortiz-Franco applied for asylum, withholding of removal, and deferral of removal under the CAT. The IJ ruled that his witness tampering conviction rendered Ortiz-Franco ineligible for asylum and withholding of removal, and that he did not sustain his burden of demonstrating entitlement to CAT relief because he did not establish that it was more likely than not that he would be subject to torture in which the Salvadoran government would acquiesce. The BIA affirmed and dismissed the appeal. The petition presented to this Court challenges only the denial of deferral under the CAT.

---

[1] Section 1252(a)(2)(C) provides: "Notwithstanding any other provision of law[,] ... no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a [covered] criminal offense." 8 U.S.C. § 1252(a)(2)(C). Section 1252(a)(2)(D) provides a limited exception to this jurisdictional restriction for a petition for review that raises "constitutional claims or questions of law." Id. § 1252(a)(2)(D).

BACKGROUND

Ortiz-Franco entered the United States illegally in 1987. Between 1992 and 1996, he was convicted of: criminal possession of a weapon in the third degree, a class D Armed Violent Felony under New York law; attempted petit larceny; and possession of a controlled substance. See N.Y. Penal Law §§ 265.02, 110, 155.25, 220.03.

In July 2005, the Department of Homeland Security ("DHS") served Ortiz-Franco with a Notice to Appear in removal proceedings, alleging that he was removable as an alien present in the United States without being admitted or paroled. See 8 U.S.C. § 1182(a)(6)(A)(i). At an initial hearing, Ortiz-Franco conceded removability on the charged ground. In October 2005, DHS additionally alleged that Ortiz-Franco was subject to removal as an alien convicted of violating a law related to a federally controlled substance. See id. § 1182(a)(2)(A)(i)(II). A superseding charging document, filed in April 2006, charged that Ortiz-Franco was subject to removal as an "alien convicted of . . . a crime involving moral turpitude." See id. § 1182(a)(2)(A)(i)(I). Ortiz-Franco conceded removability on these additional grounds.

This petition arises from an order issued years later, following intervening events recounted below.

Ortiz-Franco joined MS–13 in 2008. He and other members were later indicted on federal charges in connection with a fight with a rival gang. Ortiz-Franco attended a proffer session in which he stated that: his co-conspirators were members of MS–13; they started the fight "and were displaying MS–13 hand signs and saying 'La Mara, La Mara,' "; one of the people they were fighting was a former MS–13

member; Ortiz-Franco and his co-conspirators had snorted cocaine before the fight; and certain of his co-conspirators provided "muscle" for a drug dealer. The government did not credit Ortiz-Franco's account as "completely truthful and accurate," declined to hold further proffer sessions, and offered him no cooperation agreement.

Since Ortiz-Franco's proffer statements might have been admissible at trial, the government gave copies to his co-defendants. Thereafter, defense counsel told the government that Ortiz-Franco had "concerns about being deported to El Salvador, because of the MS–13's perception, albeit inaccurate, that he cooperated with the government."

The case against Ortiz-Franco expanded into a prosecution in which defendants were charged with (inter alia) murder, racketeering, conspiracy to distribute cocaine, and witness tampering. Ortiz-Franco ultimately pleaded guilty to witness tampering and was sentenced principally to 24 months' imprisonment.

Ortiz-Franco's removal hearing resumed in 2012 and continued in 2013. He faced limited options, given his criminal record and previously-conceded removability. Accordingly, he applied for deferral of removal under the CAT. In support of his application, he submitted: an affidavit and an additional written statement; background information on gang violence and country conditions in El Salvador; and a letter from the United States Attorney's Office for the Eastern District of New York. The letter did "not dispute that the statements made by [Ortiz-Franco] regarding the MS–13 and members of that street gang may put him in some

danger, if he is deported to El Salvador" because of "MS–13's perception, albeit inaccurate, that he cooperated with the government;" the government did not object to a stay of deportation.

Ortiz-Franco offered inconsistent testimony. At one point, he said he joined MS–13 by invitation after he met members of the gang at a bar he frequented; later, he said that the members forced him to join. He first denied being involved in the gang fight that led to the 2009 prosecution; subsequently he testified that he punched his rival after being insulted and seeing his rival "coming toward [him]." As to the witness tampering to which he pleaded guilty, Ortiz-Franco disclaimed wrongdoing and stated that he pleaded guilty because he was pressured to do so by federal agents who "scared [his] children" and told them that he would lose them if he went to trial and would not see them for many years.

As to his CAT claim, Ortiz-Franco testified that: his co-defendants told him he was "in trouble" for "ratting on them," which he understood to mean that "they could kill [him]"; his co-defendants "had the information [he] had given to the federal agents" and had "made copies of that paper [and] ... give[n] [it] to other [MS–13] members who were in the prison"; and, although he could not name those who had threatened him, they made the MS–13 hand sign.

Asked how he knew that his perceived cooperation would be disclosed to MS–13 members in El Salvador, Ortiz-Franco "imagine[d]" his co-defendants had "contacts" there "because [MS–13] is a big gang." Although Ortiz-Franco testified that

gang members "must have sent copies" of the proffer documents to contacts in El Salvador, he had no proof of it.

Ortiz-Franco asserted that the police in El Salvador would not protect him because he was a gang member. The IJ explained that "CAT deferral does not stretch under Board precedent . . . [to] a situation where the police cannot protect someone," but rather requires proof that the government would acquiesce in the torture, and urged Ortiz-Franco's counsel to "deal[ ] with that issue." Counsel inquired of Ortiz-Franco whether, "[b]esides the gangs[,] . . . any other agency or organization will cause you problems"; Ortiz-Franco replied, "no." Specifically, though Ortiz-Franco was afraid of MS–13, he was "not afraid of the government" or the police in El Salvador, and did not know of any connections between or among MS–13, the Salvadoran government, and his co-defendants.

The IJ doubted Ortiz-Franco's truthfulness during the proceedings and ruled that Ortiz-Franco failed to establish that "he would be identified as a turncoat MS–13 member by anyone," that the Salvadoran government would punish or harm him or that "MS–13 has the ability to influence government authorities in El Salvador." To the contrary, the IJ found that "according to background evidence, there has actually been an attempt to broker peace . . . in El Salvador between the gangs"; that the government was seeking to "protect the people of El Salvador"; and that no evidence "suggest[s] that [the Salvadoran government] would acquiesce in harm perpetuated against [Ortiz-Franco] if he were to return to that country." The IJ denied the application for deferral of removal under

the CAT, which permitted Ortiz-Franco to be removed.

The BIA affirmed. Specifically, the BIA upheld the IJ's key determinations: Ortiz-Franco "did not establish [that] he will be identified by anyone in El Salvador as an MS–13 member who cooperated with law enforcement officials in the United States," that it is "more likely than not that he will experience harm meeting the definition of torture" in El Salvador, or "that the government of El Salvador will acquiesce to any harm caused to [Ortiz-Franco] by criminal gangs unaffiliated with the government."

The petition for review argues that, as to denial of deferral, the agency erred in concluding that he did not show the requisite likelihood of torture or that any torture by gang members would occur with the acquiescence of El Salvador. The government counters that this Court lacks jurisdiction to consider the petition for review because our jurisdiction is limited to consideration of questions of law and constitutional claims, of which Ortiz-Franco raises none.

DISCUSSION

Although we have never expressly decided the question, we have sometimes "assumed" that our review is limited to questions of law and constitutional claims when an alien otherwise removable for having committed a covered criminal offense claims entitlement to deferral of removal under the CAT. De La Rosa v. Holder, 598 F.3d 103, 107 (2d Cir. 2010); cf. Pierre v. Gonzales, 502 F.3d 109, 113 (2d Cir. 2007) (reviewing application for withholding of removal and observing that "[b]ecause Pierre is a criminal alien, this Court's review is

limited to constitutional claims and questions of law").

Given the uncertain scope of our jurisdiction to decide petitions challenging the denial of deferral under the CAT, we have at times avoided the jurisdictional question by assuming "hypothetical" jurisdiction. See Roig v. Holder, 580 F. App'x 4, 6 (2d Cir. 2014) (summary order) ("To the extent our jurisdiction to review the denial of deferral of removal under the CAT is unresolved, we may assume jurisdiction and deny a petition on the merits where, as here, the agency denied petitioner's claim and his underlying challenges to that decision are without merit." (internal citation omitted)); Keita v. Holder, 486 F. App'x 951, 952 (2d Cir. 2012) (summary order) ("We assume, without deciding, that we have jurisdiction in this case of denial of deferral of removal."). However, such an assumption is prohibited in all but the narrowest of circumstances. See Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 94 (1998) (criticizing exercise of "hypothetical" jurisdiction as "carr[ying] the courts beyond the bounds of authorized judicial action and . . . offend[ing] fundamental principles of separation of powers" and explaining that "[w]ithout jurisdiction the court cannot proceed at all in any cause" (internal quotation marks omitted)); Ctr. for Reprod. Law & Policy v. Bush, 304 F.3d 183, 193–94 (2d Cir. 2002) (recognizing that "ordinarily we are not to assume the existence of jurisdiction in favor of reaching an 'easier' merits issue" but acknowledging "an exception to the rule" for limited and "peculiar circumstances" (internal quotation marks omitted)).

Accordingly, we now consider the issue, and join the majority of courts that have done so, holding that when an alien who is otherwise removable due to the commission of a covered criminal offense seeks deferral of removal under the CAT, appellate jurisdiction is limited to review of constitutional claims and questions of law. See Escudero–Arciniega v. Holder, 702 F.3d 781, 785 (5th Cir. 2012) ("Escudero asserts only factual issues on appeal. . . . Because we do not have jurisdiction to review factual determinations made pursuant to removal orders based upon an aggravated felony, we dismiss Escudero's petition for review of the BIA's denial of . . . protection under the CAT."); Pieschacon–Villegas v. Att'y Gen., 671 F.3d 303, 309–10 (3d Cir. 2011) ("This Court would lack jurisdiction to consider" petitioner's "disagreement with the BIA's determination that he failed to sufficiently demonstrate that public officials in Colombia would likely acquiesce in his torture. . . . This Court does, however, have jurisdiction over constitutional claims or questions of law [including] . . . whether the Board adjudicated [petitioner's] application for deferral of removal under an incorrect legal standard." (internal quotation marks and citations omitted)); Constanza v. Holder, 647 F.3d 749, 754 (8th Cir. 2011) (same); Saintha v. Mukasey, 516 F.3d 243, 249–51 (4th Cir. 2008) (finding that because alien was removable by reason of an aggravated felony conviction, § 1252(a)(2)(C) prohibited evaluation of the factual merits of his CAT claim and alien could not "repackage[ ] his ... argument . . . in an attempt to create a reviewable legal question where there is none"); Jean–Pierre v. U.S. Att'y Gen., 500 F.3d 1315, 1320 (11th Cir. 2007) (same); Tran v. Gonzales, 447 F.3d 937, 943 (6th Cir. 2006) ("Pursuant to § 1252(a)(2)(C) and (D), our

review of Tran's CAT claim is limited to questions of law or constitutional issues."). But see Issaq v. Holder, 617 F.3d 962, 970 (7th Cir. 2010) (holding "a decision under the CAT to deny even deferral of removal [does not] fall[ ] within the jurisdiction-stripping provisions of either § 1252(a)(2)(B) or § 1252(a)(2)(C)"); Lemus–Galvan v. Mukasey, 518 F.3d 1081, 1083–84 (9th Cir. 2008) (same).

I

The CAT provides 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." U.N. Convention Against Torture and Other Cruel and Inhuman or Degrading Treatment or Punishment pt. I art. 3, opened for signature Dec. 10, 1984, (S. Treaty Doc. No.) 100–20 (1988), 1465 U.N.T.S. 85. The CAT, however, "is not self-executing; by its own force, it confers no judicially enforceable right on individuals." Pierre, 502 F.3d at 114; cf. Medellin v. Texas, 552 U.S. 491, 505 (2008) ("[W]hile treaties may comprise international commitments they are not domestic law unless Congress has either enacted implementing statutes or the treaty itself conveys an intention that it be self-executing and is ratified on these terms." (internal quotation marks and alteration omitted)); id. at n. 2 ("[A] 'non-self-executing' treaty does not by itself give rise to domestically enforceable federal law."). Congress implemented the Convention by passing the Foreign Affairs Reform and Restructuring Act of 1998 ("FARRA"), 8 U.S.C. § 1231, and directing the executive to promulgate regulations.

FARRA and its implementing regulations provide generally that withholding of removal "shall be granted" if an alien demonstrates that it is more likely than not that he will be tortured if removed. 8 C.F.R. § 1208.16(d)(1); see also id. § 1208.16(b); 8 U.S.C. § 1231(b)(3). Denial of this relief is, however, mandatory under certain circumstances. 8 C.F.R. § 1208.16(d)(2). Specifically, an alien is ineligible for withholding of removal (or asylum) "if the Attorney General decides that . . . the alien, having been convicted by a final judgment of a particularly serious crime is a danger to the community of the United States." 8 U.S.C. § 1231(b)(3)(B)(ii); see also 8 C.F.R. § 1208.16(d)(2).

To give effect to the CAT even when an alien has been ordered removed and is "subject to the provisions for mandatory denial of withholding of removal," the implementing regulations provide that the alien "shall be granted deferral of removal" if the alien establishes that "he or she is more likely than not to be tortured" if removed. 8 C.F.R. § 1208.17(a). Torture, for purposes of the CAT's implementing regulations, is "severe pain or suffering, whether physical or mental," that is "inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." Id. § 1208.18(a)(1). Deferral of removal may be terminated on the government's motion if, after a hearing, an alien cannot demonstrate the continuing probability of torture if removed. Id. § 1208.17(d); see Ali v. Mukasey, 529 F.3d 478, 481–82 (2d Cir. 2008) (considering petition for review of order of BIA terminating grant of deferral of removal under the CAT).

II

Because the CAT does not itself confer any "judicially enforceable right," Pierre, 502 F.3d at 114, it of course also has nothing to say about the scope of judicial review of a right defined by statute or the implementing regulations. Congress has, however, specified that "[n]otwithstanding any other provision of law, and except as provided in the [implementing] regulations[,]" nothing in the FARRA shall be construed as providing any court jurisdiction to consider or review claims raised under the CAT "except as part of the review of a final order of removal pursuant to section 242 of the Immigration and Nationality Act (8 U.S.C. § 1252)." 8 U.S.C. § 1231 note (United States Policy with Respect to the Involuntary Return of Persons in Danger of Subjection to Torture). Accordingly, this Court has jurisdiction to consider a claim under the CAT only as part of its review of a final order of removal.

Our jurisdiction over a petition for review of a final order of removal is limited, however, when the petitioner is "removable by reason of having committed a [covered] criminal offense." Id. § 1252(a)(2)(C). Review then extends no further than to "constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section." Id. § 1252(a)(2)(D). Because judicial review of deferral claims is only provided "as part of the review of a final order of removal," the scope of such review must likewise be so limited. 8 C.F.R. § 208.18(e)(1); see also id. § 208.18(e)(2) ("Except as otherwise expressly provided, nothing in this paragraph shall be construed to create a private right of action or to authorize the consideration of issuance of

administrative or judicial relief.").

III

Ortiz-Franco argues for an exception to the jurisdictional limitation that would otherwise apply when a CAT claim is raised by an alien who is removable by reason of having committed a covered criminal offense. He contends that statutory language opens an exclusive avenue of review that contains no express limitation to constitutional claims or questions of law: "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 any cause or claim under the [CAT]." 8 U.S.C. § 1252(a)(4).

We are unpersuaded by Ortiz-Franco's argument that the language "any cause or claim" widens appellate jurisdiction to review a final order of removal entered against a criminal alien. As the Eighth Circuit has concluded, the contention that "we have jurisdiction 'without limit' over CAT claims because § 1252(a)(4) super[s]edes § 1252(a)(2)(C) . . . is without merit." Lovan v. Holder, 574 F.3d 990, 998 (8th Cir. 2009). As that court explained: "Section 1252(a)(4) provides that CAT claims may only be raised in petitions for review under § 1252. It does not grant reviewing courts greater jurisdiction over CAT claims than over other claims." Id.

Ortiz-Franco argues that unless § 1252(a)(4) is read as an exception to the jurisdictional limitation, it would be surplusage because FARRA already makes clear that no court has jurisdiction to consider or review claims raised under the CAT "except as part of the review of a final order of removal." 8 U.S.C. § 1231 note (United States Policy with

Respect to the Involuntary Return of Persons in Danger of Subjection to Torture). But § 1252(a)(4) simply serves to "confirm[ ]" that the statutory right to judicial review exists only as part of a review of a final order of removal. Omar v. McHugh, 646 F.3d 13, 18 (D.C. Cir. 2011).

Congressional intent to limit review to a petition filed with this Court is further supported by the statutory purpose—"to limit all aliens to one bite of the apple and thereby streamline what the Congress saw as uncertain and piecemeal review of orders of removal." Xiao Ji Chen v. U.S. Dep't of Justice, 471 F.3d 315, 324 n. 3 (2d Cir. 2006) (internal quotation marks and alterations omitted). Thus § 1252(a)(4) serves to clarify that, even after the elimination of separate habeas corpus review in this context, see 8 U.S.C. § 1252(a)(5), review of a claim under the CAT is nevertheless available, as part of a petition for review of a final order of removal. See Savchuck v. Mukasey, 518 F.3d 119, 123–24 (2d Cir. 2008) (per curiam) (applying jurisdictional limitation to claims for asylum, withholding, and deferral of removal under the CAT); see also Pierre, 502 F.3d at 113 (noting Pierre's habeas petition raising a claim under the CAT was converted to a petition for review).

IV

Ortiz-Franco contends that because deferral is a temporary remedy, it is not a final order of removal to which the jurisdictional limitation in § 1252(a)(2)(C) applies. The Seventh Circuit has adopted this view—"A deferral of removal is like an injunction: for the time being, it prevents the government from removing the person in question,

but it can be revisited if circumstances change." Wanjiru v. Holder, 705 F.3d 258, 264 (7th Cir. 2013). But this reading would not widen our review, as Ortiz-Franco contends. If we were to treat the adjudication of the deferral claim as some non-final determination rather than (as instructed by the implementing regulations) "as part of the review of a final order of removal," 8 C.F.R. § 208.18(e)(1), this Court would lack jurisdiction to review *any* denial of deferral, even one that did raise a constitutional claim or a question of law. See Chupina v. Holder, 570 F.3d 99, 100 (2d Cir.2009) (per curiam) (dismissing petition for review because there was "no final order of removal over which we may assert jurisdiction").

Treating the denial of a deferral as a final, reviewable order therefore accords with the "presumption favoring judicial review of administrative action." Kucana v. Holder, 558 U.S. 233, 251 (2010); accord Sepulveda v. Gonzales, 407 F.3d 59, 62 (2d Cir. 2005). Moreover, denial of deferral means that a removal order may be carried out at once. Chupina, 570 F.3d at 103 ("An order of removal is 'final' upon . . . the BIA's affirmance of the immigration judge's order of removal. . . ."); see also Stone v. INS, 514 U.S. 386, 398 (1995) ("Deportation orders are self-executing orders, not dependent upon judicial enforcement."); Aquavella v. Richardson, 437 F.2d 397, 404–05 (2d Cir. 1971) (considering "impact of the challenged action on the parties" in determining whether agency action is final).

In any event, we are bound by precedent holding that an adjudication of a claim for deferral under the CAT "qualifies as an order of removal that [an alien] may appeal." Pierre v. Holder, 738 F.3d 39,

47 (2d Cir. 2013) ("Our cases make clear that an agency order may qualify as an order of removal where it establishes the alien's removability, even if it does not order that the alien be immediately removed."). The Seventh Circuit posits that an adjudication of CAT deferral can be "final enough to permit judicial review, but at the same time not be the kind of 'final' order covered by § 1252(a)(2)(C)," Wanjiru, 705 F.3d at 264; but that formulation finds no support in the statute or case law. See Chupina, 570 F.3d at 103 (opining that, "having remanded the case to the immigration judge for consideration of applications which directly affect whether Chupina, who conceded removability, can in fact be removed to Guatemala, the BIA's decision cannot constitute a 'final order of removal' "); see also Foti v. INS, 375 U.S. 217, 226 (1963) (construing earlier version of immigration statutes and holding denial of discretionary relief from removal was "antecedent to and a constituent part of the 'final order of deportation' ").

V

Ortiz-Franco argues (relying on the reasoning of the Ninth Circuit), that there is no limitation on this Court's jurisdiction to review the denial of deferral of removal because an alien's commission of a criminal offense is not the basis for denying deferral of removal. See Lemus–Galvan, 518 F.3d at 1083 ("The jurisdiction-stripping provision of 8 U.S.C. § 1252(a)(2)(C) does not deprive us of jurisdiction over denials of deferral of removal under the CAT, which are always decisions on the merits."). However, denial of the application for deferral of removal under the CAT is not the reason the alien is

removable. Ortiz-Franco is removable—and concededly so—because he entered the country illegally and then committed crimes that render an alien removable, 8 U.S.C. § 1182(a)(2). Deferral under the CAT is simply "an impediment" to removal that is removed by denial of that relief. Alibasic v. Mukasey, 547 F.3d 78, 83 (2d Cir. 2008) (stating that after the BIA overturned the IJ's finding that the alien was eligible for asylum, the "IJ's underlying finding of removability based on Alibasic's concessions . . . still stands").

Accordingly, "once we are satisfied that a given alien has been found 'removable by reason of' conviction of a crime covered by § 1252(a)(2)(C), we lack jurisdiction to conduct further review of the 'final order of removal,' whether relating to asylum, withholding of removal, or CAT relief," except to the extent the alien raises constitutional claims or questions of law. Pechenkov v. Holder, 705 F.3d 444, 450 (9th Cir. 2012) (Graber, J., concurring) (citing Constanza, 647 F.3d at 753–54; Saintha, 516 F.3d at 249–51; Conteh v. Gonzales, 461 F.3d 45, 62–63 (1st Cir. 2006); Alaka v. Att'y Gen., 456 F.3d 88, 102 & n. 24 (3d Cir. 2006)); see also Alphonsus v. Holder, 705 F.3d 1031, 1050 (9th Cir. 2013) (Graber, J., concurring in part and dissenting in part) ("Our court has read an additional exception into the statute's otherwise unequivocal text, under which we review such orders if the BIA did not rest its decision on the fact of the aggravated felony but instead denied relief from removal on the merits. That interpretation of § 1252(a)(2)(C) ignores the statute's text and conflicts with the views of at least four of our sister circuits.").

Ortiz-Franco emphasizes that deferral is mandatory for a criminal alien who sustains his burden, 8 C.F.R. § 208.17(a); but that mandate does not expand our jurisdiction, which remains limited to review claims raised under the CAT only "as part of the review of a final order of removal." 8 U.S.C. § 1231 note (United States Policy with Respect to the Involuntary Return of Persons in Danger of Subjection to Torture). In conducting our review, "the applicability of § 1252(a)(2)(C) is a straightforward inquiry: Was the alien charged with removability because of a relevant crime, and did the IJ correctly sustain that charge? If so, we lack jurisdiction over all questions not covered by § 1252(a)(2)(D)." Pechenkov, 705 F.3d at 451–52 (Graber, J., concurring).

VI

Ortiz-Franco has conceded that he is removable as an alien present in the United States without being admitted or paroled and as an alien convicted of a controlled substance violation and a crime of moral turpitude. As set forth above, we nevertheless retain jurisdiction to review any colorable constitutional claim and legal question raised in connection with his claim for deferral of removal under the CAT. Ortiz-Franco raises none. He simply "disputes the correctness of [the] IJ's fact-finding" that underpins her conclusion that he had not established that it was more likely than not that MS–13 would torture him with the acquiescence of the Salvadoran government. Xiao Ji Chen, 471 F.3d at 329. To the extent Ortiz-Franco attempts to recharacterize this factual dispute as an error of law through his conclusory assertion that the BIA

misstated or ignored his arguments, this is insufficient.[2] See id. at 330–31 ("[A] petitioner's mere resort to the terms conventionally used in describing constitutional claims and questions of law will not overcome Congress's decision to deny jurisdiction over claims which in reality consist of nothing more than quarrels over the correctness of fact-finding and of discretionary decisions.").

CONCLUSION

For the foregoing reasons, we DISMISS the petition for review for lack of jurisdiction and any outstanding motions are DENIED as moot.

---

[2] This case was argued in tandem with Alvarez–Monroy v. Holder and Laurent v. Holder. On October 21, 2014, this Court remanded the petition in Alvarez–Monroy because the IJ's fact-finding was "flawed by an error of law," Xiao Ji Chen, 471 F.3d at 329, and the agency erred in applying the government acquiescence standard, *De La Rosa,* 598 F.3d at 110. *Alvarez–Monroy,* 12–2749, Dkt. No. 156 (2d Cir. Oct. 21, 2014). On November 5, 2014, we remanded Laurent's petition for review. Laurent v. Holder, 581 F. App'x 77 (2d Cir. 2014) (summary order). We concluded the BIA committed legal error because it ignored and mischaracterized record evidence, see Mendez v. Holder, 566 F.3d 316, 323 (2d Cir. 2009) (per curiam), and engaged in impermissible fact-finding, see Weinong Lin v. Holder, 763 F.3d 244, 247 (2d Cir. 2014). We did not reach the jurisdictional question we address here because of the presence of legal questions that provided a narrow ground for decision. See Baraket v. Holder, 632 F.3d 56, 59 (2d Cir. 2011) (observing that when resolution of a question is not "necessary for the decision of the case," it is dictum).

Lohier, Circuit Judge, concurring:

I join the opinion of the Court. However much I favor judicial review of administrative action in immigration matters, the text of 8 U.S.C. § 1252 plainly precludes our review of the Government's denial of Elenilson Ortiz-Franco's claim for deferral of removal under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT"). Here, Ortiz-Franco's final order of removal is subject to the jurisdictional bar of § 1252(a)(2)(C) because he was deemed removable by reason of having committed crimes listed in that provision, see De La Rosa v. Holder, 598 F.3d 103, 107 (2d Cir. 2010), and his challenge to the denial of deferral does not fall within the exception to that jurisdictional bar because it is entirely fact-based, unaccompanied by any legal or constitutional claim, see 8 U.S.C. § 1252(a)(2)(D). As the majority opinion points out, most circuits that have grappled with the same issue would agree that these two features combine to strip us of jurisdiction to decide this case.[1]

---

[1] I appreciate that two sister circuits have arrived at the opposite result after interpreting the same statutory text. See Wanjiru v. Holder, 705 F.3d 258 (7th Cir. 2013); Lemus–Galvan v. Mukasey, 518 F.3d 1081, 1083 (9th Cir. 2008). But it is a statutory stretch to accept the Seventh Circuit's view that CAT deferral of removal is at once non-final for purposes of avoiding the jurisdiction-stripping provision, § 1252(a)(2)(C), but final "enough" to permit judicial review of CAT deferral claims under § 1252(a)(4). Wanjiru, 705 F.3d at 264. "Final order of removal" in § 1252(a)(2)(C) means just what it means in other surrounding provisions of the same statute. And I am ultimately unconvinced by the Ninth Circuit's interpretation of § 1252(a)(2)(C) as eliminating jurisdiction to review only those orders that remove an alien "by reason of" a covered criminal offense. Lemus–Galvan, 518 F.3d at 1083; see also Alvarez–Santos v. INS, 332 F.3d 1245, 1247 (9th Cir. 2003) (Section

To the majority's analysis, however, I would add the following.

Although I know it cuts against the current orthodoxy of statutory construction, in my view this is a high-stakes case in which checking the legislative history is "useful, even when the meaning can be discerned from the statute's language, to reinforce or confirm a court's sense of the text." Robert A. Katzmann, Judging Statutes 35 (2014). Among other things, this case implicates our judicial power to review an important category of petitions—a power of review that the Government claims for itself alone. And the stakes are very high for petitioners, like Ortiz-Franco, who may face torture if the Government's denial of deferral of removal proves to be mistaken.

My review of the legislative history of § 1252 confirms the majority's reading of the text. The conference report for the REAL ID Act of 2005, Pub.L. No. 109–13, 119 Stat. 231, makes clear that Congress sought broadly to limit judicial review of appeals of orders of removal by "criminal aliens." See H.R.Rep. No. 109–72, at 174 (2005) (Conf.Rep.) (describing § 106 of the REAL ID Act as intended to ensure that "criminal aliens will have fewer

---

1252(a)(2)(C) "strips us only of jurisdiction to review orders of removal predicated on commission or admission of a crime, not orders of removal not so predicated."). The relevant text of § 1252(a)(2)(C) ("[N]o court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a [qualifying] criminal offense") limits jurisdiction based on the category of "alien" whose final order of removal is the subject of appeal, not the reason the "order" issues. In other words, "by reason of" modifies "alien," not "order."

opportunities to delay their removal" and that "criminal aliens will not receive more judicial review than non-criminals"). By contrast, nothing in the legislative history supports the Ninth Circuit's view that § 1252(a)(2)(C)'s jurisdictional bar applies only to orders that determine an alien is removable by virtue of having committed a qualifying crime. See supra note 1.

The Senate legislative history relating to the CAT's ratification—years before the implementing legislation was enacted—only reinforces the conclusion that Congress did not contemplate judicial review of the denial of CAT claims standing alone. During the ratification process, the Senate made clear that the treaty would not be self-executing, see Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, S. Exec. Rep. 101–30, at 18 (1990), suggesting that courts would have no role in reviewing CAT claims while implementing legislation was pending. Indeed, the ratifying Senate clearly intended to leave the decision to grant or deny CAT claims exclusively in the hands of the "competent authorities"—that is, "the Secretary of State in extradition cases and . . . the Attorney General in deportation cases." Id. at 17.

A final word. I have little reason to doubt the Government's representation that it would never remove a noncitizen to a country where (in its judgment) he is likely to be tortured. See, e.g., Immigration Relief Under the Convention Against Torture for Serious Criminals & Human Rights Violators: Hearing Before the Subcomm. on Immigration, Border Sec., and Claims of the H. Comm. on the Judiciary, 108th Cong. 11 (2003) (statement of C. Stewart Verdery, Assistant

Secretary for the Border and Transportation Security Policy, Department of Homeland Security); id. at 15 (statement of Eli Rosenblum, Director, Office of Special Investigations, U.S. Department of Justice); Convention Against Torture: Hearing Before the S. Comm. on Foreign Relations, 101st Cong. 718, 14–15 (1990) (statement of Mark Richard, Deputy Assistant Att'y Gen., Criminal Division, Department of Justice); Regulations Concerning the Convention Against Torture, 64 Fed.Reg. 8478, 8478–79 (Feb. 19, 1999). But the state of play today is that noncitizens with criminal convictions who appeal the Government's denial of deferral of removal under the CAT will have access to federal court in a wide geographic swath of the Nation (the Seventh and Ninth Circuits), while similarly situated men and women in other parts of the country (including, now, this Circuit) will not. This is not a sustainable way to administer uniform justice in the area of immigration. Congress, or the Supreme Court, can tell us who has it right and who has it wrong.

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

Falls Church, Virginia 2204

File: A094 102 474 – New York, NY
Date: AUG 30, 2013

In re: ELENILSON J. ORTIZ-FRANCO

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Genet Getachew, Esquire

CHARGE:

Notice:	Sec. 212(a)(6)(A)(i), I&N Act [8 U.S.C. §1182(a)(6)(A)(i)]- Present without being admitted or paroled (sustained)
Lodged:	Sec. 212(a)(2)(A)(i)(II), I&N Act [8 U.S.C. §1182(a)(2)(A)(i)(II)]- Controlled substance violation (sustained)
	212(a)(2)(A)(i)(I), I&N Act [8 U.S.C. §1182(a)(2)(A)(i)(I)]- Crime involving moral turpitude (sustained)
APPLICATION:	Convention Against Torture

The respondent, a native and citizen of El Salvador, appeals from the decision of the Immigration Judge, dated March 19, 2013, denying his application for deferral of removal under the Convention Against Torture, 8 C.F.R. §§ 1208.16-.18.[1] The appeal will be dismissed.

We review the findings of fact made by the Immigration Judge, including the determination of credibility, for clear error. 8 C.F.R. § 1003.1(d)(3)(i). We review all other issued, including questions of judgment, discretion, and law, de novo. 8 C.F.R. § 1003.1(d)(3)(ii). The respondent's application for relief, which was filed after May 11, 2005, is governed by the Amendments made to the Act by the REAL ID Act. *See Matter of S-B-*, 24 I&N Dec. 42 (BIA 2006).

The respondent's application for deferral of removal is based upon his fear that he will be targeted by members of MS-13 in El Salvador. The respondent fears that he will be so targeted because on July 8, 2010, he attended a proffer session with individuals from the office of the United States Attorney for the Eastern District of New York and provided information about two men, who along with the respondent are members of MS-13. The respondent and the two men were all suspects in an

[1] The respondent does not contest the Immigration Judge's determination that his conviction of witness tampering under 18 U.S.C. § 1512, for which he was sentenced to 24 months incarceration, is a particularly serious crime which renders him ineligible for asylum and withholding of removal under both the Act and the Convention Against Torture (I.J. at 1-2). *See* sections 208(b)(2)(A)(ii), (B)(i), of the Immigration and Nationality Act, 8 U.S.C. § 1158(b)(2)(A)(ii), (B)(i); section 241(b)(3)(B)(ii) of the Act, 8 U.S.C. § 1231; 8 C.F.R. § 1208.16(d)(2).

assault case. The respondent contends that members of MS-13 in the United States are aware that he attended this session and provided information. He claims additionally that the MS-13 members in El Salvador will learn that he met with law enforcement officials in the United States and will seek to harm or kill him. He further contends that the government of El Salvador will turn a blind eye to the harm to which he would be subjected by the MS-13 in El Salvador (I.J. at 9-12).

We affirm the Immigration Judge's determination that the respondent did not establish eligibility for deferral of removal under the Convention Against Torture.[2] First, we affirm the Immigration Judge's determination that the respondent did not establish he will be identified by anyone in El Salvador as an MS-13 member who cooperated with law enforcement officials in the United States. The respondent does not specifically challenge this finding on appeal. There is insufficient evidence in the record to establish that the respondent's co-defendants have sufficient contacts and influence in El Salvador to enable them to

[2] The Immigration Judge appears to have found the respondent not credible (I.J. at 16-17). The respondent does not specifically challenge this adverse credibility assessment. We do not find clear error in the Immigration Judge's determination that the respondent diminished his involvement with MS-13 and therefore undermined his credibility. However, despite the respondent's lack of credibility there is sufficient evidence in the record to establish he is a member of MS-13, that he met with law enforcement authorities in the United States on at least one occasion, and that he provided at least some information about his co-defendants. Thus, the adverse credibility finding is not dispositive of the respondent's application for deferral of removal.

inform anyone in that country about the respondent's alleged cooperation with law enforcement in the United States or to otherwise harm the respondent from the United States. There is no evidence in the record regarding the status of the respondent's co-defendants within the respondent's "clique" or the broader MS-13 organizational structure. Moreover, there is insufficient evidence in the record regarding the ability of the respondent's "clique" to influence events in El Salvador. Additionally, there is insufficient evidence in the record to establish what specific information is communicated by United States officials to their counterparts in El Salvador. We therefore agree with the Immigration Judge that the respondent did not establish that his alleged cooperation with law enforcement authorities in the United States will become known in El Salvador. Thus, we do not find clear error in the Immigration Judge's determination that the respondent did not establish that it is more likely than not he will harmed upon his return to El Salvador on the basis of his contact with law enforcement in the United States (I.J. at 17).[3]

Second, we affirm the Immigration Judge's determination that the respondent has not established that the government of El Salvador will acquiesce to any harm caused to the respondent by criminal gangs unaffiliated with the government (I.J.

---

[3] Moreover, there is insufficient evidence in the record to establish the respondent will more likely than not be tortured only on the basis of an actual or imputed membership in MS-13. While the record indicates there is pervasive violence associated with MS-13, it does not indicated that any particular member of that criminal organization is more likely than not to experience harm meeting the definition of torture. *See* 8 C.F.R. § 1208.18(a)

at 18). *Kouzam v. Ashcroft*, 361 F.3d 161, 171 (2d Cir. 2004) (stating protection under the Convention Against Torture is only available where government officials perform the anticipated torture or "know of or remain willfully blind to an act and thereafter breach their legal responsibility to prevent it"). We acknowledge the evidence of record cited by the respondent in his brief (Respondent's Br. at unnumbered page 5). However, the isolated quote from the report does not convince us of clear error in the Immigration Judge's determination that the respondent did not establish the government of El Salvador would acquiesce to his torture. Other evidence in the record undermines the respondent's contention in this regard. For example, a report produced by the United States Department of State indicates that, "[a]dditionally, it is neither the policy nor the practice of the Salvadoran law enforcement authorities to decline or refuse to protect gang members or to condone abuses by anyone against gang members" (Exh. 39 at 8). Inasmuch as the evidence of record is ambiguous as to whether the Salvadoran government would acquiesce to any harm perpetrated against the respondent by private actors, we agree with the Immigration Judge that the respondent did not meet his burden of proof with respect to his application for deferral of removal

In sum, we affirm the Immigration Judge's determination that the respondent has provided insufficient evidence to establish: (1) it is more likely than not he will be identified as an MS-13 member who cooperated with United States law enforcement officials; (2) it is more likely than not he will experience harm meeting the definition of torture; or (3) that the government of El Salvador would

acquiesce to such harm. We therefore affirm the Immigration Judge's determination that the respondent did not establish eligibility for deferral of removal under the Convention Against Torture. *See Matter of J-F-F-*, 23 I&N Dec. 912 (A.G. 2006). Accordingly, the following order will be entered.

ORDER: The respondent's appeal is dismissed.

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
201 VARICK STREET
NEW YORK, NEW YORK, 10014

File: A094-102-474 March 19, 2013

In the Matter of

ELENILSON J. ORTIZ-FRANCO,) IN REMOVAL
) PROCEEDINGS
RESPONDENT)

CHARGES: Immigration and Nationality Act Section 212(a)(6)(i).

Immigration and Nationality Act Section 212(a)(6)(i)(II).

Immigration and Nationality Act Section 212(a)(6)(i)(I).

APPLICATION: Deferral under Article III of the Convention Against Torture.

ON BEHALF OF RESPONDENT:

GENET GETACHEW, Esquire
26 Court Street
Brooklyn, New York 1242

ON BEHALF OF DHS:

SUSAN BESCHTA, Assistant Chief Counsel New York District Catherine Lowe For The Decision Only

ORAL DECISION OF THE IMMIGRATION JUDGE

This respondent is a native and citizen of El Salvador who entered the United States without inspection and without permission. The proceedings were initially initiated against the respondent by issuance of a Notice to Appear on July 6, 2005 charging the respondent with entry on or about September 1, 1987, at or near San Diego, California. In proceedings before a prior Immigration Judge, who marked the NTA as Exhibit 1, allegations 1 through 4 were admitted and removability conceded under Section 212(a)(6)(A)(I) for entry without inspection.

The Department of Homeland Security served a new I-261, dated October 13, 2005, adding a charge, allegation 5, and adding an additional ground of removability under Section 212(a)(2)(A)(i)(II). That document was superseded by yet another I-261, Exhibit 3 in the record, including two additional allegations which, before a prior Immigration Judge, were initially denied, relating to a conviction on December 8, 1993 in Nassau County for attempted petty larceny in violation of New York Penal Law Section 110-155.25 and on March 13, 1996, also in Nassau County, a conviction for criminal possession of a controlled substance in violation of 220.03 of the State Penal Law, charging two additional ground of removability under Section 212(a)(2)(A)(ii) and Section 212(a)(2)(A)(i)(II).

The respondent subsequently admitted those allegations on July 13, 2006 and conceded removability on those two grounds on February 2, 2012 before this Court. Exhibit 3 in the record of

proceedings. Removability is shown by evidence that is clear and convincing on all three grounds.

The Court record includes the following exhibits. Exhibit 1 is the Notice to Appear dated July 6, 2005, as noted. Exhibit 2 is the first I-261 from October 13, 2005. Exhibit 3 is the second I-261, also denominated at one point as Exhibit 1-A, dated April 9, 2006. Exhibit 4 is a rap sheet. Exhibit 5 is a Form I-589 from September 25, 1995. Exhibit 6 is a certificate of disposition from Nassau County from March 13, 1996 for criminal possession of a controlled substance in the seventh degree. Exhibit 7 is the conviction record for criminal possession of a weapon in the third degree from Nassau County on September 1, 1992. Exhibit 8 is a certificate of disposition from Nassau County on December 8, 1993 for attempted petty larceny. Exhibit 9 is an order of removal entered against the respondent on June 2, 2009. Exhibit 10 is the reopening of the case on June 4, 2009.

Exhibit 11 is a complaint from Nassau on Case No. 030037. Exhibit 9 is the rap sheet from 2009. Exhibit 13 is a 2012 rap sheet. Exhibit 14 is background evidence from April 7, 2012. Exhibit 15 is a birth certificate for the respondent's son, Kevin, born January 13, 1994. Exhibit 16 for ID is a birth certificate for Jennifer for July 23, 1992 and Wendy for July 23, 1992, neither of which lists the respondent as the father. Exhibit 17 is a letter from the AUSA to DHS and the Court from the Easter District of New York in connection with the respondent's federal conviction. Exhibit 18 is background evidence. Exhibit 19 is a new I-589 from March of 2012 with a statement. Exhibit 20 is a judgment from the Eastern District of New York

from December 29, 2011 indicating the respondent's plea to witness tampering. Exhibit 21 is the complaint for the arrest.

Exhibit 22 is proof of filing of the application. Exhibit 23 is the July 15, 2010 indictment in 10CR-074. That is actually S-2. Exhibit 24 is the April 8, 2010 complaint S-1. Exhibit 25 is the February 4, 2010 original indictment on 10M0004 and 10M0030. Exhibit 26 is the judgment for witness tampering. Exhibit 27 is the criminal docket from the Eastern District of New York. Exhibit 28 is background. Exhibit 29 is a subpoena. Exhibit 30 is a response that there were no records of the Verizon telephone relating to the records requested. Exhibit 31 are the Department of Justice releases. Exhibit 32 is the third indictment. Exhibit 33 is the sentencing minutes. Exhibit 34 is a call-up notice. Exhibit 35 is the respondent's statement. Exhibit 36 is material from the New York Times. Exhibit 37 for ID is material from something called Motherjones.com, not admitted due to lack of verification of the source. Exhibit 38 is material from Foxnews.com. Exhibit 39 is background filed by the Department of Homeland Security. Exhibit 40 is an additional certificate of disposition and Exhibit 41 significantly post-hearing background with regard gangs in Central America.

The Court, at an earlier ruling, made a ruling that witness tampering is a particularly serious crime that renders the respondent ineligible for both asylum under Section 208 and, of course, for withholding under both Section 241(b)(3) and under Article III of the Convention Against Torture for withholding. It reduces the respondent to being eligible only for WCAT deferral. I do not think that there is a legal argument to be made that witness

tampering involving the attempt to influence a victim of a crime not to testify is unquestionably in the Court's view a particularly serious crime by its very nature. The Court does note in that regard that the respondent's counsel was given many adjournments to get the plea minutes to see if they would be relevant to such a finding. They were never produced. Only the sentencing minutes were ever produced. The Court does not find that the respondent has been able to rebut the presumption of the particularly serious crime and, thus, limiting him to relief under Article III of the Convention Against Torture.

The Convention Against Torture and its implementing regulations provide that no person may be removed to a country where it is more likely than not that such a person would be subject to torture. 8 C.F.R. Section 1208.16 to 1208.18.

To constitute torture, the harm must be specifically intended to inflict severe physical or mental plain or suffering and must be at the instigation of or with the consent or acquiescence of a public official 8 C.F.R. 1208.18(a); See Matter of J-E-, 23 I&N Dec. 291 at 297-99 (BIA 2002).

Acquiescence of a public official requires that the official know of or remain willfully blind to an act and thereafter breach their legal responsibility to prevent such activity. Khouzam v. Ashcroft, 361 F.3d 161 at 171 (2nd Cir. 2004); and 8 C.F.R. Section 1208.18(a)(7).

The applicant for CAT protection bears the burden of proof. 8 C.F.R. Section 1208.16(c)(2). A pattern of human rights violations alone is not sufficient to show that a particular person would be

in danger of being subjected to torture upon his return to a country. See Matter of S-V-, 22 I&N Dec. 1306 at 1313 (BIA 2000).

The applicant must establish that someone in his particular alleged circumstances is more likely than not to be tortured in the country designated for removal and general evidence regarding certain types of harm suffered by criminal deportees is not sufficient unless is has a distinguishing characteristic linking it to the respondent. The respondent cannot meet the burden of proof by stringing together a series of suppositions to show torture is more likely than not to occur unless the evidence show that each step in a hypothetical chain of events is more likely than not to happen. See Matter of J-F-F-, 23 I&N Dec. 912 at 917-18 (A.G. 2006).

The respondent's claim is that he will be identified as a gang snitch, to use his word, by the MS-13 Gang, which has a significant presence in El Salvador, and it is his claim that a threat has been passed to that gang in El Salvador by members of the gang in the United States to harm the respondent in the event of his deportation to that country, and further claims that the police in El Salvador will do nothing to protect him whatsoever even in the face of a known threat.

The Court commenced testimony on two separate dates. The Court will start with the September 7, 2012 testimony to set the framework. The respondent claims he has never had any other names. He is 41 years of age. He came to the United States from El Salvador in September of 1987 and has had no departure. He is single. He is the father

of five children. We only have proof as to one. The respondent is not listed on two other birth certificates that we have and there are two that we do not have at all. The respondent has four convictions. The key conviction with regard to this case is from 2009 when he was involved in a gang fight in a bar between numbers of MS-13 and MS-18.

The respondent claims to have been a member of MS-13, a gang that has a significant presence in the United States in both New York and Los Angeles among other cities, and also a very significant presence in El Salvador as documented in background evidence. It is the respondent's claim, however, that as a member of MS-13 he never involved himself in any gang activities other than drinking in bars with his friends. He claims that he never went through any initiation process. He never was involved in any requirement that he commit a crime as part of an initiation process and claims that his only involvement together with gang members was getting into this bar fight on a given night in 2009 on Long Island. Nonetheless, the respondent claims that he was "forced" to join this gang in 2008 because he wanted to drink at certain bars. He claims that this force involved requiring him to buy beer for members of MS-13. He said he was asked if he wanted to join, that he was pressured, that they were always around after work pressuring him, and that he should join the gang or he could have problems. He understood that those problems might involve being hurt by them and his problem was the he liked to visit the bars that they went to also. The respondent claims that the town of Freeport is small. There are only so many bars and that is how it all happened. He later claimed there was no initiations

process other than being invited to join and asked to pay for the beers.

It is the respondent's claim that the gangs, both MS-13 and MS-18, have special signs by which they identify themselves to others. He said that at one time he was in a bar. At the first hearing he said he was there. He went back into the bar. He was accused of being involved in a fight in which a kid of 18 years of age was injured. He claims he had been drinking in the bar with members of 13, as he called them. He was arrested along with others by the police and taken to the police station and booked. That case was completed. It was, in fact, tried as part of a multi-defendant indictment in a set of criminal proceedings in the Eastern District of New York. It is his claim that he was in the Nassau Jail for 94 months before it became an Eastern District case and he does not really understand how that all happened.

Turning back to the events of November 21, 2009, he said that there was a bar fight, that one of the people he was with got a baseball bat and used the bat to hit the victim. The respondent's involvement in the federal case came because he made a phone call to a girlfriend to visit the victim. The respondent claims that he made a phone call to one Ventura Joya Benitez. He described her at the first hearing as having a food business. He later pointed out she was the owner of a deli and that the uncle of the victim used to go to that deli owned by Ms. Benitez. The respondent claims that his girlfriend was told by the uncle of the victim that the girlfriend could go to the hospital to visit the victim. It is the respondent's claim that the girlfriend mentioned this to the respondent in a phone call and

that he said it would not be a good idea, but that apparently she went anyway. The respondent claims that he was told by agents of the Federal Government that they had a recording of his conversation with Ms. Benitez that the respondent has never heard and that he became afraid he would lose the case if he went to trial and so he pled guilty.

We stopped the first hearing at that time due to the fact that it was clear that we did not have the final indictment and did not have the plea minutes to what the respondent had plead to. The hearing continued on February 7, 2013 still without the plea minutes, but with the additional indictment. The respondent's account of the events of November 21, 2009 was different at the second hearing.

At the second hearing the respondent said that on November 21, 2009 he was at home. He was not at work that day and that he went to the gas station to get a six pack of beer that he was planning on drinking at home. At 7 o'clock in the evening he got called by friends of the deli, apparently Ms. Benitez's deli, to go and drink with them at the deli. The respondent claims he said, no, that they pressured him, and so he decided to go, and he stayed there until it closed having a couple of beers. He claims then they all went to a bar across the street, that in the back of the bar there was a room where they went because the bar was pretty busy, that guys from another gang, MS-18, came in and started insulting them. The respondent said that somebody told him that he as being insulted. Allegedly someone came towards him and the respondent punched that person. As a result there was a big fight. The respondent went out the back door, jumped the fence, came back into the front of the bar, saw someone

with a bat, saw someone on the ground, asked the bar tender to call him a taxi so he could leave, but before the taxi came the police came and the respondent was arrested together with the others. He claims that someone said that he had been there. He was taken to the local precinct. There at the precinct they took his information. They said he was arrested and that he was part of the problem involving the victim. He claims he did not know who the victim was. The respondent said he told them that he had hit someone because they were coming at him and that the respondent was taken to court the next day, charged, and given bail of $50,000, and, because no one could pay it for him, he went to jail.

In January of 2010 he was purportedly transferred to federal custody. It is not entirely clear whether it was a physical transfer or merely a paper transfer into federal custody. The respondent said that he and other members of MS-13 were charged and that he was a member of that gang. He does not remember how many charges related to him. He was asked if he knew what he had pled guilty to. He said he made a phone call to his girlfriend who wanted to go to the hospital to visit the victim. He claims that the girlfriend owned a deli and that the uncle of the victim was speaking about his nephew, that the girlfriend said, oh, I know something about that. My boyfriend was arrested in connection with that, that she provided his name to the uncle, and the uncle said, I do not think he was involved because I know him. The respondent never identified who this uncle was. He claims that the girlfriend was somebody called Ana Ventura, apparently the same person he has previously identified as Ventura Joya Benitez. She has not been presented as a witness. She was

never arrested herself. The respondent claims that Ana Ventura went to visit the victim, but did not go into the room because others were visiting, that when the respondent spoke on the phone to Ms. Ventura the federal agents told the respondent that they had taped the call and had a tape of the respondent telling Ms. Ventura to visit the victim which the respondent continues to deny. As noted, the plea minutes have never been provided. It is clear that the respondent, in fact, pled to witness tampering as a indicated in the indictment.

The respondent claims that this phone call was the basis of why the respondent should plead guilty and not go to trial. The respondent claims he did not accept the offer when it was first given to him, but later he was given an offer essentially to time served and he thought that would be a good idea so he plead guilty. When asked whether he pled guilty to tampering with a witness, he again maintained, no, he did not, only to a phone call, but he does acknowledge it was to Count 40 in the indictment.

It is the respondent's claim that he spoke to the federal authorities while he was in custody and therein lies his problem. He claims that he was taken to court on a separate day, that he was pressured because of the witness tampering, that he was asked to tell the federal agents about the fight in the bar and about how the fight began, that he supplied the names of two people who were with him, one Giovanni Prado and on Alvarado, both of who were members of MS-13. He claims that the federal agents wrote this information down and that allegedly this information was provided to the co-defendants. The Court notes parenthetically that the Court sought

verification of this information to be gotten either from the respondent's prior criminal lawyers, who were fully identified to the respondent's present counsel and to the respondent, and were private counsel, and that an effort be made to get from the U.S. Attorney's Office whatever Brady statements or other statements may have been handed over to the co-defendants. That did not occur despite repeated adjournments for that purpose.

Back to the respondent's testimony. It is his claim that he saw the co-defendants with papers that they claimed were the respondent's statements. He claims he was told by the co-defendants that he would have a problem because he had ratted on them and that now the respondent was in trouble. When asked what the trouble was, he said he felt they could kill him because he did not play around with gangs like that or ought not to have played around with gangs like that. The respondent was asked where the co-defendants are now. He said they were in jail the last he knew. He does not know if they have been deported, but he claims that the co-defendants were able to make copies of this paper, give them to other members of MS-13 in the jail with the respondent, and that they were given to other people with whom the respondent was held in custody at that time and subsequently.

On cross-examination, the respondent was asked when he first knew about this paper. He said it was on June 14, 2011 when he pled guilty. He claims he was in the bullpen with 16 other co-defendants on that day. He was on that day told he was in trouble. He claims to have perceived that as a threat. He was asked whether he reported it to custodians. He said that back at the jail he saw some

people from the gang unit who had visited him and he told them a week later allegedly. He does not know the name of any of the people he met from the gang unit or anyone from the Long Island Gang Force of the FBI. He claims that he asked to go into protective custody. He suggested that he be put into a drug program and he claims a week later he was moved into a drug program and had no further problems because no one from MS-13 was in that program.

The respondent confirmed that none of the co-defendants were held in the same dorm with him at the detention facility, that his room, in fact, was only one bunk per cell and that he only ever saw the co-defendants in court, but then he said he saw them also at a church service in the detention facility. He claims that the threats started on June 4, 2011 in the cell at court. He believes that these people were MS-13 who knew his co-defendants, but he did not know these people individually. The respondent also claims that people went to the library at the detention facility and showed him the paper, that he believed these people were MS-13 members because they made specific hand signs raising their index and little fingers, but he was afraid and so moved into the drug program where there were no further problems.

The respondent has had no contact whatsoever with the co-defendants since he was sentenced, but he believes nonetheless that if he goes to El Salvador he will be killed. The respondent claims that he will be killed by the gang belongs to because they think that he ratted on them and they do not permit that activity. When asked how they would know in El Salvador of his cooperation in the United States, he said they send information there from here all the

time and that he imagined they have contacts there because this is a big gang in El Salvador. He said also that when one is deported they tell the government of El Salvador why you are being deported and that some of these people in the gang could be police officers or the police could have family members in the gang so there may be contact and the information may be leaked to them. The respondent is convinced that somehow copies of these papers have been sent to El Salvador, although he has no proof to support that whatsoever.

The respondent was not able to supply the names of any of the people who he thought might have this paper other than the co-defendants and the respondent claims that there is no way to fix the problem, although he was told he should fix the problem. He was also told that when he arrives in El Salvador. He was also told that when he arrives in El Salvador he should watch out for unknown gang members.

The respondent, about ten minutes later in the hearing, was asked again how he could fix the problem. He said the only way was by giving up his life. The Court notes that he had been asked that question over five minutes before three or four times without answering and it was clear that he had finally figured out an answer to give.

The respondent was asked if he were to go to El Salvador was there any way to protect himself from MS-13. He said, no, if they see him they will kill him and they will know why he was deported. He said in El Salvador these type of people are members of the gangs and they know things. The respondent believes he cannot get protection from the police

because he does not have money to get someone to protect him and he does not think the police will protect him. He says he believes that because the police do not want to protect fellow gang members and would not protect people like that. When asked if he feared harm from anything other than MS-13, he said the other gang MS-18 also might be a problem. He was asked what he knows about MS-13 in El Salvador. He said he does not know anything, but they do exist there because there are many people deported from Los Angeles. He was asked if he was afraid of the government of El Salvador. He said because they do not protect people He does not know if they cooperate with those people as well and many people there have problems.

The respondent did say that he thought he might have some problems if the police in El Salvador believe he was deported as a gang member, that co-defendants had told him that would be a problem if he were deported, and then when asked again why he was afraid of the El Salvadoran government he said he is not afraid of the government, but only of MS-13. When asked if he knew of a connection between the MS-13 and the government, he said he did not. When asked whether the only basis for his fear is MS-13 and other gangs, he answered yes. He said he is not afraid of anyone else and not afraid of the police.

There was extensive attempts by the Department of Homeland Security to clarify issues on cross-examination. The respondent noted that he had attended a session with the Assistant U.S. Attorney and representatives of the Federal Government on July 8, 2010 in a proffer session represented by counsel. The respondent confirmed

that he was in the same click as Giovanni Prado and Eric Alvarado, both of whom were MS-13 members. The respondent claims he does not know the leader of the click and that all he does is knows guys from bars. The respondent was asked again about his initiation. He said that he was called. He went to the bar. He was asked if he wanted to join. He was asked whether he went to any initiation at all. He said his first event of involvement with the gang as to any activity was November 21, 2009, the bar fight. He claims he was not asked to commit a crime to join the group and that he has not witnessed any other activities anywhere on Long Island. He is, however, aware that fellow members of the gang apparently were involved in drug dealing in the respondent's click and were dealing cocaine. When asked if he knew how they controlled their territory, he said he was not involved, but that they said they did that.

The respondent was asked specifically how he could be a member of the gang and not be involved in illegal acts. He said he was not involved in anything. He had a job and he had to work, and he was just in it for the drinking. The respondent claims that once you are in you cannot get out because you know about that. Nonetheless, it is the respondent's claim that he knows virtually nothing about this gang he was in for more than a year. He claims he was, however, friends with Mr. Prado and Mr. Alvarado, and that he had confirmed that they had started the fight in the bar, that it was between MS-13 and MS-18, and that he admitted being involved in the fist fight that then led to the eventual beating up with the bat. The respondent was also asked on cross-examination whether he had used cocaine on

November 20, 2009 and he said that at about 7 o'clock on the November 20 at the deli.

The respondent states that in his current custody in Hudson County there is no one from MS-13 where he is. He has never seen anyone showing gang signs of any sort. The respondent denied that his arrest in the early 1990's were in any way connected to MS-13 . The respondent was then asked about the situation in El Salvador.

The respondent was asked if he had any proof that the police in El Salvador have relatives in gangs. He answered no. When asked what the basis for his belief was, he said he has never been back to El Salvador, but what he sees is you could have family members in a gang or you could have lost family members. He said because there are so many problems there he is not sure about that.

The Court felt compelled to try to clarify some issues so after cross-examination the Court asked some questions of the respondent. He confirmed he was arrested at the end of the bar fight. He does not recall what charges were first lodged. It is his claim that he was arrested alone. The respondent says that he knows very little about the MS-13 click to which Alvarado and Prado belong, and knows even less about any larger organization. He was asked, in light of him having no knowledge, how it could be that he was accused of being a rat since the respondent could not have been the source of information for that click. The respondent said I do not know what was said, but apparently some paper was given. The respondent then said that Prado told the respondent that he had gone to where the man was lying on the ground and taken a paper from the victim, and

information was on that paper. This was a new claim as to Prado and/or Alvarado's involvement in the fight. The respondent had never volunteered this in a statement or indeed in the two hours of the hearing at all. The respondent clarified that he know of no connection between any of the co-defendants and any government authority in El Salvador. He knows of no connection between the co-defendants and any police authorities in El Salvador, but he thinks that the co-defendants might be deported and, therefore, might be a source of harm.

On re-direct the respondent was asked if he knew if anyone in El Salvador knew that he was a member of MS-13. He said no. It was said so how would they discover that he is MS-13 and he said, well, the co-defendants might give that information out and, when asked in a leading question do you believe they already gave information to MS-13 in El Salvador, he said it's possible. He believes that one of the co-defendants had been previously deported an re-entered, that that was Prado, that Prado had told him this. He does not know where Prado is today. He was sentenced to more time than the respondent and the respondent does not know if Prado is still in jail or not. The respondent claims that he never signed a statement that he remembers as to any paper that might have been shared with the co-defendants. DHS is willing to stipulate that some statement was given to the co-defendants based on Exhibit 17, the statements from the U.S. Attorney's Office, and that there was some claim then about the victim having some paper that Alvarado or Prado took. Prado was the one who had taken the bat from the car to hit the victim from that bar brawl in 2009.

Finally, the respondent states he is not anymore a member of MS-13 and that only the three people who hung out in the bar would have known he was in M-13. They would drink and go to parties, but he also said that he would make the MS-13 sign. He states that he has had some contact with some people in a dorm in Nassau County who might have been MS-13, but they did not specifically threaten him.

As was noted earlier, it is the respondent who has the burden of proof and persuasion in this case. The respondent must establish that he would be tortured within the meaning of the regulations set forth in 8 C.F.R. 1208.18 and he must show that both the harm amounts to the level of torture and that the government would either be the cause of that harm of acquiesce to that harm being caused by third parties by standing willfully blind to the known harm. In order for this claim to succeed at all the first issue is an issue of credibility. I do not find that the respondent has been any entirely credible witness. The respondent has changed his version of the events a couple of times. It is his claim that he is home on the evening not wanting to go out, but somehow despite the fact that all there is is a phone call he is forced to go out, forced then to have cocaine at a deli while he is drinking beers until they close, forced then across into a bar brawl that results in serious injury to a very young man in which the respondent was involved. Nonetheless, the respondent is not really a member of this gang even though this was clearly a gang fight between rival gangs.

The respondent denies witness tampering in this court, although he clearly pled guilty to it in

federal court and the respondent seeks to hide behind making comments like well I never heard the tape and I do not know what they had. The respondent at all times was represented by private counsel in that case, private counsel who is readily available to present counsel who has submitted no statement in this case with regard to that case, has not provided the statements that were allegedly provided to the co-defendants, and counsel has not gotten those from the U.S. Attorney's Office either.

If the respondent is to be believed about the level of his involvement in MS-13, there is virtually no information he could have provided to the federal authorities in this multi-defendant case because he was not involved other than drinking. At best, the only information he might have been able to provide is information about the events on the night of November 20, 2009 as to two individuals only, Alvarado and Prado. It is unclear whether the indictment predates this fight and merely had this added as one of the additional pieces of evidence and it is clear from the letter of the Eastern District of New York AUSA that they did not believe the respondent was forthcoming with them either which is why they did not make more of a deal. They have written a letter to the Court, which has no discretion in this matter, and to the Department of Homeland Security that has discretion, and it will up to the Department of Homeland Security to decide whether they wish to defer the respondent's removal from the United States based upon the non-objection of the Eastern District to that event, but in order for the respondent to gain benefits from this Court he needs to meet a standard of law with regard to harm he would face if removed to El Salvador.

It is the Court's finding that the respondent has failed in that attempt. He has failed to provide that there is a link between establishing that he would be identified as a turncoat MS-13 member by anyone. He has failed to establish that the government of El Salvador would punish him or harm him. In fact, he specifically said he does not have a reason to believe that they would do it themselves.

The argument made in the post-hearing brief that the respondent will somehow be identified by tattoos, which have never been proven to exist to this Court, is speculative at best and further it is apparent from the respondent's appearance in court that those tattoos are easily covered by clothing since they have never been displayed in this court at any time so, it is not that he will be going around marked in a way that cannot be shielded from others finding out about his alleged former gang association.

The respondent's claim of noninvolvement and non-initiation do not comport with the evidence in the background record with regard to initiation procedures of MS-13. On the one hand, that would go with his theory that he is not really a gang member. On the other hand, it would support the inference that he does not know enough to have ever been accused of ratting out other members of MS-13. He was not involved in the drug dealing. He claims to have no knowledge of the drug dealing and there is no suggestion that other than a bar fight he has provided any information about anyone in MS-13's illegal activity anywhere.

The respondent has failed to prove that MS-13 has the ability to influence government authorities in

El Salvador. The Court notes that, according to background evidence, there has actually been an attempt to broker peace somewhat in El Salvador between the gangs, that, although it is too soon to tell, there is no suggestion that that is because the government is seeking to promote the gangs or further their objectives, but rather to protect the people of El Salvador. The record is devoid of evidence that would suggest that that same government would acquiesce in harm perpetrated against the respondent if he were to return to that country.

The Court again notes that I have grave concerns as to the respondent's truthfulness in these proceedings. Either he was privy to a whole lot more information than he has shared with this Court with regard to the activities of MS-13 and, therefore, his alleged usefulness to any federal investigation of that organization, or he was as peripheral, as he claims, in which case he has failed to show how he would be a meaningful target of harm in El Salvador from unknown people based on unknown contacts that might have happened. It is all too speculative to carry the burden of proving it is more likely than not.

The Court is aware that MS-13 has a presence in El Salvador. That is not what the Court is disputing. What the Court is disputing is whether that alone is sufficient to make a claim for deferral under Article III of the Convention Against Torture with its high standard both as to the level of harm and who the harm must be perpetrated by and that the government must acquiesce in such harm against a known threat Because he has failed to meet that standard the Court enters the following order.

ORDER

IT IS ORDERED that the respondent be ordered removed from the United States to El Salvador.

IT IS ORDERED that the respondent's application for deferral under Article III of the Convention Against Torture be denied.

_____

NOEL A. FERRIS
United States Immigration Judge

CONSTITUTIONAL, STATUTORY & REGULATORY PROVISIONS INVOLVED

8 USC 1252(a)(1)

(a) Applicable Provisions

(1) General Orders of Removal

Judicial review of a final order of removal (other than an order of removal without a hearing pursuant to section 1225(b)(1) of this title) is governed only by chapter 158 of title 28, except as provided in subsection (b) of this section and except that the court may not order the taking of additional evidence under section 2347(c) of such title.

* * * *

8 USC 1252 (a)(2)

(2) Matters Not Subject to Judicial Review

(C) Orders against criminal aliens

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, and except as provided in subparagraph (D), no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense covered in section 1182(a)(2) or 1227(a)(2)(A)(iii), (B), (C), or (D) of this title, or any offense covered by section 1227(a)(2)(A)(ii) of this title for which both predicate offenses are, without regard to their date of

commission, otherwise covered by section 1227(a)(2)(A)(i) of this title.

(D) Judicial review of certain legal claims

Nothing in subparagraph (B) or (C), or in any other provision of this chapter (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.

* * * *

8 USC 1252 (a)(4)

(4) Claims Under the United Nations Convention

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, 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 any cause or claim under the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman, or Degrading Treatment or Punishment, except as provided in subsection (e) of this section.

* * * *

8 USC 1252 (a)(5)

(5) Exclusive Means of Review

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, 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 chapter, except as provided in subsection (e) of this section. For purposes of this chapter, 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, 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).

* * * *

Foreign Affairs Reform and Restructuring Act of 1998 ("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)

(a) Policy

It shall be the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to

torture, regardless of whether the person is physically present in the United States.

(b) Regulations

Not later than 120 days after the date of enactment of this Act, the heads of the appropriate agencies shall prescribe regulations to implement the obligations of the United States under Article 3 of the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment, subject to any reservations, understandings, declarations, and provisos contained in the United States Senate resolution of ratification of the Convention.

(c) Exclusion of Certain Aliens

To the maximum extent consistent with the obligations of the United States under the Convention, subject to any reservations, understandings, declarations, and provisos contained in the United States Senate resolution of ratification of the Convention, the regulations described in subsection (b) shall exclude from the protection of such regulations aliens described in section 241(b)(3)(B) of the Immigration and Nationality Act (8 U.S.C. 1231(b)(3)(B)).

(d) Review and Construction

Notwithstanding any other provision of law, and except as provided in the regulations described in subsection (b), no court shall have jurisdiction to review the regulations adopted to implement this section, and nothing in this section shall be construed as providing any court jurisdiction to

consider or review claims raised under the Convention or this section, or any other determination made with respect to the application of the policy set forth in subsection (a), except as part of the review of a final order of removal pursuant to section 242 of the Immigration and Nationality Act (8 U.S.C. 1252).

(e) Authority to Detain

Nothing in this section [this note] shall be construed as limiting the authority of the Attorney General to detain any person under any provision of law, including, but not limited to, any provision of the Immigration and Nationality Act.

(f) Definitions

(1) Convention defined

In this section, the term "Convention" means the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment, done at New York on December 10, 1984.

(2) Same terms as in the Convention

Except as otherwise provided, the terms used in this section have the meanings given those terms in the Convention, subject to any reservations, understandings, declarations, and provisos contained in the United States Senate resolution of ratification of the Convention.