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Matter of B—Z—R—, Respondent	Amicus Invitation 28 I&N Dec. 424 (A.G. 2021)

Response to Invitation to Appear as *Amicus* of the Immigration Reform Law Institute

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INTEREST OF *AMICUS*

The Immigration Reform Law Institute ("IRLI") files this *amicus* brief at the invitation of the Attorney General. *See* Amicus Invitation 28 I&N Dec. 424 (A.G. 2021). IRLI is a nonprofit 501(c)(3) public interest law firm incorporated in the District of Columbia. IRLI is dedicated to litigating immigration-related cases on behalf of United States citizens and lawful permanent residents, as well as organizations and communities seeking to control illegal immigration and reduce lawful immigration to sustainable levels. IRLI has litigated or filed *amicus curiae* briefs in many immigration-related cases before federal courts and administrative bodies. For more than twenty years, the Board of Immigration Appeals (the "Board") has solicited *amicus* briefs, drafted by IRLI staff, from the Federation for American Immigration Reform, of which IRLI is a supporting organization, because the Board considers IRLI an expert in immigration law.

ISSUE PRESENTED

The issue presented is:

> Whether mental health may be considered when determining whether an individual was convicted of a "particularly serious crime" within the meaning of 8 U.S.C. §§ 1158(b)(2)(A)(ii) and 1231(b)(3)(B)(ii).

SUMMARY OF THE ARGUMENT

An alien is ineligible for relief when *convicted* of a particularly serious crime. A crime is defined by its elements. Thus, the fact that an alien was convicted of a crime with elements that make it particularly serious—not the mental health of the alien—alone determines whether that alien was convicted of a particularly serious crime.

To the extent mental health bears on whether the elements that constitute a particularly serious crime have been met, it has already been considered, according to law, by the trier of fact when considering whether the defendant had the mental state required for conviction. Any other mental health condition is thus irrelevant to determining whether an alien has been convicted of a particularly serious crime.

The main policy reason for the law's denial of immigration relief to aliens who have committed particularly serious crimes is that their criminal actions, as demonstrated by their conviction in a court of law of a particularly serious crime, make them a danger to the community. Considering an alien's purportedly extenuating mental illness does not serve this policy goal. Aliens with mental illnesses that drive them to commit particularly serious crimes present a danger to the community just as great as—and perhaps greater than—aliens who commit the same crimes without being motivated by mental illness.

ARGUMENT

An alien who is deportable may request discretionary relief from the Attorney General that can include asylum. *Moncrieffe v. Holder*, 569 U.S. 184, 187 (2013). An alien who has committed a *particularly serious crime*, however, is ineligible for such relief. *Id.*; 8 U.S.C. §§ 1158(b)(2)(A)(ii) & 1231(b)(3)(B)(ii).

In *Matter of G—G—S—*, the Board held that "a person's mental health is not a factor to be considered in a particularly serious crime analysis and [] adjudicators are constrained by how mental health issues were addressed as part of the criminal proceedings." 26 I. & N. Dec. 339 (B.I.A. July 17, 2014). The Board's standard for determining a particularly serious crime has been explicitly affirmed by several courts of appeals. *E.g.*, *Mosquera-Perez v. INS*, 3 F.3d 553, 559 (1st Cir. 1993); *Hamama v. INS*, 78 F.3d 233, 240 (6th Cir. 1996); *Gilbertson v. Garland*, 7 F.4th 700 (8th Cir. Aug. 2, 2021); *Birhanu v. Wilkinson*, 990 F.3d 1242 (10th Cir. 2021); *Lapaix v. U.S. Attorney General*, 605 F.3d 1138, 1143 (11th Cir. 2010).

In contrast, the Eighth and Ninth Circuits have overruled *Matter of G—S—S—*. The Eighth Circuit did so less thoroughly than the Ninth Circuit. The Ninth Circuit is the only court of appeals to hold consistently that the mental health of the defendant must be considered when determining whether a particularly serious crime was committed. *E.g.*, *Gomez-Sanchez v. Sessions*, 892 F.3d 985 (9th Cir. 2018).

In *Shazi v. Wilkinson*, the Eight Circuit held that *Matter of G—S—S—*'s ban on considering the alien's mental health was arbitrary and capricious

where the alien had been convicted in Minnesota of making terroristic threats and domestic violence. 988 F.3d 441, 445 & 449–50 (8th Cir. 2021). The Eight Circuit stated that *Matter of G—S—S—* represented an "unexplained inconsistency" with an earlier Board decision. *Id.* at 449; *contra Birhanu v. Wilkinson*, 990 F.3d 1242, 1261 (10th Cir. 2021) (holding that *Matter of G—S—S—* was consistent with past Board practice and adequately explained). The Eight Circuit's analysis is puzzling because the Board gave a detailed explanation of its reasoning, and the Board had not addressed the mental health issue previously. *Matter of G—G—S—*, 26 I. & N. Dec. at 345. Oddly, in *Gilbertson v. Garland*, the same court came to a conflicting result. 7 F.4th 700 (8th Cir. 2021). In *Gilbertson*, the alien had been convicted in Minnesota of selling controlled substances. *Id.* at 703. In that case, the Eighth Circuit held that the Board properly excluded evidence of the alien's mental health. *Id.* at 705. The Eight Circuit agreed with the alien that the court had overruled *Matter of G—S—S—*. *Id.* at 704. But the court found that the Board had determined that the alien had committed a particularly serious crime under a Board decision that had held drug trafficking was inherently a particularly serious crime, and affirmed the Board's decision. *Id.* The only way to reconcile *Shazi* and *Gilbertson* is to interpret the former as requiring mental health to be considered for crimes that are not particularly serious *per se*. This is in conflict with the Ninth Circuit, which rejects the

concept of particularly serious crimes *per se*. *Beltran-Zavala v. INS*, 912 F.2d 1027, 1031 (9th Cir. 1990).

I. Because a crime consists of its elements, circumstances extraneous to whether those elements have been met are irrelevant to whether a particularly serious crime has been committed.

The Attorney General has the authority to define "offenses" that will be considered particularly serious crimes. 8 U.S.C. § 1158 (a)(2)(B)(ii). Because an offense consists of its elements, factors extraneous to the elements of an offense, such as the mental health of a person who has satisfied all of its elements, are extraneous to the offense, and thus irrelevant to the determination of whether the offense is particularly serious. *See Matter of N-A-M*, 24 I. & N. Dec. 336 (BIA 2007) ("[A crime is] particularly serious [] based solely on its elements."). Considering the extraneous factor of mental health would fundamentally alter the analysis of what constitutes a particularly serious crime from one based solely on the crime's elements into an analysis of *how* those elements were satisfied. Under such an analysis, nonsensically, the Board could find that one individual was convicted of a particularly serious crime while another individual convicted of the same crime, with the same effect on victims, was not convicted of a particularly serious crime. Such an interpretation would thus go beyond the Attorney General's authority to define *offenses* as particularly serious crimes. 8 U.S.C. § 1158 (a)(2)(B)(ii).

II. Trial courts already consider the mental health of the defendant in the mental state analysis.

Matter of G—S—S— does not entail that an alien's mental health can play no role in his conviction of a particularly serious crime. Rather, the Board held that it will not retry the mental state determined by the finder of fact that resulted in the criminal conviction. 26 I. & N. Dec. at 345. Mental health can be relevant to whether the elements of an offense have been met. *E.g.*, Model Penal Code § 4.02 ("Evidence that the defendant suffered from a mental disease or defect is admissible whenever it is relevant to prove that the defendant did or did not have a state of mind that is an element of the offense."). The Board considers the mental state required in the elements of the offense in determining whether it is a particularly serious crime. *E.g., Valerio-Ramirez v. Sessions*, 882 F.3d 289, 297-98 (1st Cir. 2018). The trier of fact determines whether the mental state requirement is satisfied while taking mental health into account. *E.g.*, Model Penal Code § 4.02. Thus, the Board's current procedure allows mental health to be adequately considered, according to law, without resort to the paradox of defining an offense as something distinct from its elements.

III. Mental health considerations cannot demonstrate that an alien convicted of a crime is not a danger to the community.

The statues at issue seek to ensure that an alien who "constitutes a danger to the community of the United States" will not be allowed to remain in the country. 8 U.S.C. §§ 1158(b)(2)(A)(ii) and 1231(b)(3)(B)(ii). Those statutes

specify that a person *convicted* of a particularly serious crime constitutes such a danger. *Id.* In addition, Congress has defined a number of crimes as particularly serious *per se*. 8 U.S.C. §§ 1101(a)(43) & 1158(b)(2)(B), 1231(b)(3)(B). All of these crimes are defined in terms of the elements of the offense. *Id.* The alien's mental heath can play a part in determining whether the alien had the mental state required for conviction of a crime, *e.g.*, Model Penal Code § 4.02, but plays no part in determining whether it was a particularly serious crime *per se*. 8 U.S.C. §§ 1101(A)(43). Nor should it play a part in determining whether other offenses are particularly serious. The purpose of §§ 1158(b)(2)(A)(ii) and 1231(b)(3)(B)(ii) is to deny relief to aliens whose convictions—whether of particularly serious crimes *per se* or other particularly serious crimes—have demonstrated they are a "danger to the community of the United States." Thus, it would be arbitrary and capricious to permit or require mental health to be incorporated as an extenuating factor when determining whether a crime is particularly serious without some showing that, in general, aliens' mental illnesses are likely to reduce the danger they pose to the community.

This showing would appear most unlikely. On the contrary, that given aliens are driven to commit their crimes by mental illness would seem to make the danger they pose to the community at least as great as, and perhaps greater than, the danger posed by aliens who lack mental illness as a motivator for their crimes. Thus, absent a general showing to the contrary, permit-

ting an alien's mental illness to be considered as a factor weighing *against* a determination that he has committed a particularly serious crime, and thus in favor of asylum or other immigration relief, appears deeply at odds with the relevant statutes' central policy goal of maintaining public safety.

CONCLUSION

For the reasons given above, mental health issues, after being addressed to the extent appropriate by a trial court, should have no later relevance to whether an individual has been convicted of a particularly serious crime under 8 U.S.C. §§ 1158(b)(2)(A)(ii) and 1231(b)(3)(B)(ii).

Respectfully submitted, January 17, 2022,

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PROOF OF SERVICE

I certify that I filed the attached Response to Invitation to Appear as Amicus of the Immigration Reform Law Institute with the Attorney General by electronic mail to AGCertification@usdoj.gov, on January 17, 2022.

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