No. 14-74033

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JESUS MANUEL HERNANDEZ
A.K.A. JESSICA HERNANDEZ,

Petitioner,

v.

LORETTA E. LYNCH, ATTORNEY GENERAL,

Respondent.

ON PETITION FOR REVIEW FROM THE
BOARD OF IMMIGRATION APPEALS

BRIEF OF NATIONAL IMMIGRATION PROJECT OF THE NATIONAL LAWYERS GUILD AND IMMIGRANT DEFENSE PROJECT AS AMICI CURAIE IN SUPPORT OF PETITIONER

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, I, Trina Realmuto state that:

The National Immigration Project of the National Lawyers Guild is a non-profit organization which does not have any parent corporations or issue stock and consequently there exists no publicly held corporation which owns 10% or more of its stock;

and

The Immigrant Defense Project/Fund for the City of New York, is a non-profit organization which does not have any parent corporations or issue stock and consequently there exists no publicly held corporation which owns 10% or more of its stock.

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I. INTRODUCTION[1]

The National Immigration Project of the National Lawyers Guild (National Immigration Project) and the Immigrant Defense Project proffer this brief to address the definition and application by the Board of Immigration Appeals (BIA or Board) of the term "particularly serious crime" in 8 U.S.C. § 1231(b)(3)(B). *See* Fed. R. App. P. 29(b). Subsection (ii) of 8 U.S.C. § 1231(b)(3)(B) authorizes the Attorney General to exclude from eligibility for withholding of removal any individual who "having been convicted by a final judgment of a particularly serious crime is a danger to the community." At issue in this case is whether Petitioner's Texas driving while intoxicated offense involving no injury to another, or other such simple driving under the influence (DUI) offenses, constitutes a "particular serious crime" which would bar her from applying for withholding of removal.

Amici urge the Court to create a presumption that an offense that lacks a mental state is not a "particularly serious crime" within the meaning of § 1231(b)(3)(B)(ii). This presumption is supported by Supreme Court case law that routinely holds that a lack of *mens rea* cannot correspond to harsh penalties. *See*,

[1] Amici state pursuant to Fed. R. App. P. 29(c)(5) that no party's counsel authored the brief in whole or in part; that no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and that no person other than amici, its members, and its counsel contributed money that was intended to fund preparing or submitting the brief.

e.g., *Morissette v. U.S.,* 342 U.S. 246, 251-52 (1952); *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 70-74 (1993); *Staples v. United States,* 511 U.S. 600, 616 (1994). Similarly, since deportation is considered a severe penalty in the immigration context, *see Padilla v. Kentucky*, 559 U.S. 356, 365 (2010), the Court cannot consider a crime that lacks a *mens rea* component to be a "particularly serious crime" leading to deportation and the clear probability of persecution.

At the very least, based on the facts of this case, the Court should find that DUIs that do not involve injury to another are not "particularly serious crimes" within the meaning of § 1231(b)(3)(B)(ii) and that, therefore, individuals facing a likelihood of persecution may apply for withholding notwithstanding such a DUI conviction. The term "particularly serious crime" covers only exceptionally grave offenses, not offenses, like simple DUIs involving no injury to another, that are rather common. Interpreting the term "particularly serious crime" to encompass only exceptionally grave offenses gives meaning to Congress's use of the word "particularly" to modify "serious crime" and thus avoids rendering this word superfluous. *Astoria Federal Savings & Loan Ass'n v. Solimno*, 501 U.S. 104, 111 (1991). In addition, Congress' definitions of a "serious criminal offense" in 8 U.S.C. § 1101(h), which requires actual physical injury, and its definitions of "serious violent crime" and "serious drug offense" in 18 U.S.C. §§ 3559(c)(2)(F)(ii) and 924(e)(2)(A), respectively, both of which generally are

punishable by a lengthier sentence than simple DUI, further support this interpretation.

Finally, amici notes that a panel of this Court recently upheld the BIA's conclusion that a California conviction for driving under the influence *and causing bodily injury* constituted a particularly serious crime. *Avendano-Hernandez v. Lynch*, No. 13-73744, 2015 U.S. App. LEXIS 15685, -- F.3d -- (9th Cir. Sept. 3, 2015). In addition to the fact that *Avendano-Hernandez* relied on the causation of bodily injury, a fact that was present in that case but not in the record of this case, that decision is not binding on this Court. First, examination of the briefing in *Avendano-Hernandez* reveals that the parties did not present, and this Court did not "squarely address," the arguments amici (and Petitioner[2]) address herein. *Brecht v. Abrahamson*, 507 U.S. 619, 630-31 (1993). Thus, the doctrine of *stare decisis* does not apply and amici urge this Court to recognize that *Avendano-Hernandez* does not bind this panel. Second, whether an offense constitutes a particularly serious crime requires an individualized analysis. *Id*. at *11; *Blandino-Medina v. Holder*, 712 F.3d 1338, 1345 (9th Cir. 2013); *Matter of Frentescu*, 18 I&N Dec. 244, 247 (BIA 1982). Even *Avendano-Hernandez* recognizes that not all individuals who have been convicted of a DUI offense also will have been convicted of a particularly serious crime and are a danger to the community; i.e., this

[2] The panel also did not address many of the arguments made by Petitioner in her opening brief, which are beyond the scope of this brief.

determination requires a case-by-case analysis. *Avendano-Hernandez*, 2015 U.S. App. LEXIS 15685 at *11.

II. STATEMENT OF INTEREST

The National Immigration Project and the Immigrant Defense Project have a direct interest in ensuring that noncitizens are not unduly denied the opportunity to apply for withholding of removal under 8 U.S.C. § 1231(b)(3)(B). The National Immigration Project is a non-profit organization of immigration attorneys, legal workers, grassroots advocates, and others working to defend immigrants' rights and to secure a fair administration of the immigration and nationality laws. The Immigrant Defense Project is a non-profit legal resource and training center dedicated to promoting fundamental fairness for immigrants accused and convicted of crimes. Both organizations are committed to ensuring the accuracy and predictability of the impact of a conviction on a noncitizen's eligibility for withholding of removal.

For purposes of this brief, amici accept existing precedent, which does not necessarily reflect amici's views regarding the scope and applicability of the term "particularly serious crime." In addition, this brief does not reflect all amici's views regarding the analysis an adjudicator must conduct when determining whether a conviction constitutes a "particularly serious crime."

III. ARGUMENT

THE BOARD ERRED IN CONCLUDING THAT PETITIONER'S 2006 CONVICTION WAS A PARTICULARLY SERIOUS CRIME AND, THUS, ERRED IN DENYING HER AN OPPORTUNITY TO APPLY FOR WITHHOLDING OF REMOVAL.

A. This Court Should Adopt a Presumption that A Crime, Like DUI, that Does Not Involve a Culpable Mental State is Not a Particularly Serious Crime.

Although the Supreme Court treats the presence of a mental state as a fundamental feature of a criminal statute, *see*, *e.g.*, *Morissette v. U.S.*, 342 U.S. 246, 250-52 (1952), this basic rule has exceptions, which permit strict liability statutes to be lawful. In light of the fundamental role of scienter in criminal culpability, however, amici urge the Court to presume that an offense that lacks a mental state is not a particularly serious crime.

As this Court already has held, unless a person has been convicted of an aggravated felony (or felonies) and sentenced to five or more years, the Board must conduct a "case-by-case analysis" when determining whether an offense is a particularly serious crime. *Blandino-Medina v. Holder*, 712 F.3d 1338, 1345 (9th Cir. 2013). In conducting that case-by-cases analysis, the agency may employ reasonable presumptions and generic rules. *Reno v. Flores*, 507 U.S. 292, 313 (1993) (explaining that the fact that an agency is required to use individualized determinations "does not mean that [the agency] must forswear use of reasonable presumptions and generic rules."). The BIA itself has created similar presumptions

in the context of analyzing particularly serious crimes. *See*, *e.g.*, *Matter of Juarez*, 19 I&N Dec. 664, 665 (BIA 1988) ("[e]xcept possibly under unusual circumstances … we would not find a single conviction for a misdemeanor offense to be a 'particularly serious crime'").

Here, this Court should adopt the presumption that an offense that lacks a mental state is not a particularly serious crime. The Supreme Court long has established the notion that *mens rea* is the touchstone of criminality and that this notion "is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil." *See Morissette*, 342 U.S. at 251-52. Even a conviction for the transportation and sale of child pornography was reversed by the Supreme Court due to the absence of *mens rea*. *See United States v. X-Citement Video, Inc.*, 513 U.S. 64, 70-74 (1993).

In the immigration context, the Supreme Court has "long recognized that deportation is a particularly severe 'penalty.'" *Padilla v. Kentucky*, 559 U.S. 356, 365 (2010) (citation omitted). Additionally, the Supreme Court has linked the gravity of the consequences for penalties on the availability of *mens rea*. *See Staples v. United States,* 511 U.S. 600, 616 (1994) ("a penalty imposed under a statute has been a significant consideration in determining whether the statute should be construed as dispensing with *mens rea.*"). The *Staples* Court relies on

Blackstone's *Commentaries* to further illustrate the point that "imposing severe punishments for offenses that require no *mens rea* would seem incongruous." *Id.* at 617 (*citing* 4 W. Blackstone, *Commentaries* at 21). Therefore, it would be equally incongruous to deem an offense that lacks a mental state as a particularly serious crime, where such deeming would impose the penalty of deportation to a place where one faces a clear possibility of persecution.

This Court's decisions affirming a BIA finding that a DUI was a particularly serious crime do not preclude it from adopting this presumption. *See*, *e.g.*, *Anaya-Ortiz v. Holder*, 594 F. 3d 673 (9th Cir. 2010); *Delgado v. Holder*, 648 F.3d 1095 (9th Cir. 2011) (en banc); *Avendano-Hernandez v. Lynch*, No. 13-73744, 2015 U.S. App. LEXIS 15685, -- F.3d -- (9th Cir. Sept. 3, 2015). In these cases, the issue was not "squarely addressed." *See Brecht v. Abrahamson*, 507 U.S. 619, 630-31 (1993).; *see also* Section III.C.1 and n.6, *infra*.

In sum, because of the historical and moral link between a culpable mental state and criminality, which the Supreme Court routinely has affirmed, *see*, *e.g.*, *Morrisette*, *Staples*, *and X-Citement*, *supra*, an offense that lacks a *mens rea* component cannot be a "*particularly* serious crime." Any other conclusion would banish people facing persecution based on an offense that fails the hallmark test of criminality, and the Supreme Court's rule that harsh penalties require *mens rea*. *Staples*, 511 U.S. at 616.

B. At a Minimum, this Court Should Interpret the Term "Particularly Serious Crime" to Encompass Only Exceptionally Grave Offenses, But Under No Test Should It Include an Offense Such as Simple Driving Under the Influence with No Injury to Another

1. The term "particularly serious crime" must be read to refer only to offenses that are far more severe than even serious crimes.

The definition of a "particularly serious crime" encompasses a distinctively more severe offense than that of a serious crime. This Court already has recognized that a particularly serious crime "must be not just any crime, and not just any *serious* crime – already a subset of all crimes – but one that is '*particularly* serious.'" *Alphonsus v. Holder*, 705 F.3d 1031, 1048-49 (9th Cir. 2013) (emphasis in the original); *see also Delgado v. Holder*, 648 F.3d 1095, 1109 (9th Cir. 2011) (en banc) (Reinhardt, J., concurring) (stating that "a particularly serious crime must be one that is *more* than serious - one that stands clearly apart from the broader category of 'serious crimes.'") (emphasis in the original).

Other statutory provisions addressing "serious" crimes in both the Immigration and Nationality Act and the United States Criminal Code should inform this Court's understanding of whether the "particularly serious crime" term should apply to a simple DUI offense without injury to another. For example, 8 U.S.C. § 1101(h) defines the phrase "serious criminal offense" and gives an indication of the degree of seriousness associated with a serious crime. In § 1101(h), Congress defines a "serious criminal offense" for purposes of

inadmissibility under 8 U.S.C. § 1182(a)(2)(E), as any felony, crime of violence or, significantly here, "crime of reckless driving or of driving while intoxicated or under the influence of alcohol or of prohibited substances *if such crime involves personal injury to another*." 8 U.S.C. § 1101(h)(1)-(3) (emphasis added).

Although Congress used the term "serious criminal offense" in § 1101(h) and "particularly serious crime" in § 1231(b)(3)(B)(ii), the Court should read the two terms in harmony. *Ariz. Cattle Growers' Ass'n v. U.S. Fish and Wildlife*, 273 F.3d 1229, 1241 (9th Cir. 2001) ("It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme. A court must therefore interpret the statute as a symmetrical and coherent regulatory scheme and fit, if possible, all parts into an harmonious whole.") (internal citations and quotation marks omitted); *see also Coyt v. Holder*, 593 F.3d 902, 907 (9th Cir. 2013) (finding that the only way to "harmonize" the motion to reopen statute with the removal period statute was to find that physical removal does not preclude filing a motion). Accordingly, for reckless driving or DUI offenses to constitute a "particularly" "serious criminal offense," the crime must, at the very least, involve personal injury to another person.

Congress' use of the modifier '"serious" in other related definitions of types of crimes in the U.S. Code further demonstrates that a "particularly serious crime"

must involve a degree of gravity far more significant than a simple DUI involving no injury to another. *See Northcross v. Board of Ed. of Memphis City Schools*, 412 U.S. 427, 428 (1973) (using a provision from the Civil Rights Act of 1964 to interpret the meaning of a similarly worded provision in the Emergency School Aid Act of 1972). For example, in 18 U.S.C. § 3559(c)(2), Congress defines a "serious violent felony" as an offense punishable by a maximum sentence of 10 years or more and "has as an element the use, attempted use, or threatened use of physical force against the person of another or that, by its nature, involves a substantial risk that physical force against the person of another may be used in the course of committing the offense." 18 U.S.C. § 3559(c)(2)(F)(ii). Similarly, a "serious drug offense" is defined as certain federal and state drug offenses provided that they are punishable by a maximum sentence of 10 years or more. 18 U.S.C. § 924(e)(2)(A). As such, the maximum sentence for a "particularly serious" offense necessarily is longer than the 10 years or more for a "serious . . offense." *United States v. Nordic Village, Inc.*, 503 U.S. 30, 36 (1992) (holding that "a statute must, if possible, be construed in such a fashion that every word has some operative effect."). Accordingly, according to a leading treatise, "[a] reasonable interpretation would reserve the term [particularly serious crime] for offenses carrying maximum terms of 20 years or more in prison." Dan Kesselbrenner & Lory Rosenberg, *Immigration Law & Crimes* § 9:17 (2013 ed.).

In sum, this Court must interpret the term a "*particularly* serious crime" "so as to avoid rendering superfluous" any statutory language. *Astoria Federal Savings & Loan Ass'n v. Solimno,* 501 U.S. 104, 111 (1991). The Court should give meaning to the word "particularly" by looking to Congress' definition of a "serious criminal offense" in 8 U.S.C. § 1101(h), which requires actual physical injury, and its definitions of "serious violent crime" and "serious drug offense" in 18 U.S.C. §§ 3559(c)(2)(F)(ii) and 924(e)(2)(A), respectively, both of which carry sentences that are generally more lengthy than that of simple DUI offenses. *Begay v. United States*, 553 U.S. 137, 158 (2008). Compared with these other measures of seriousness, the BIA's view that a simple DUI with no injury to another can be a "particularly serious crime" is plainly inconsistent with Congressional intent.[3]

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[3] The Supreme Court's decision in *INS v. Aguirre-Aguirre*, 526 U.S. 415 (1999) supports this view. In that case, the Court reviewed the BIA's test for evaluating the "serious nonpolitical crime" exception to withholding of removal under former 8 U.S.C. § 1253(h)(2)(B) (1995). The Court affirmed using the "atrocious" nature of the offense as a factor in making this determination, noting that "[i]n common usage, the word 'atrocious' suggests a deed more culpable and aggravated than a serious one." *Id*. at 430 *citing* Webster's Third New International Dictionary. The Court concluded that the language of the "serious nonpolitical crime" exemption does not require a crime to be an atrocious act to fall within the exception. *Id*. Although the Court cited to the "particularly serious crime" exception as supporting a proposition different from, but sufficiently analogous to, the main proposition (*cf.*), the meaning of the modifier "particularly" in this exception was not "squarely presented" and the Court did not consider the arguments and statutory provisions (8 U.S.C. § 1101(h), and 18 U.S.C. §§ 3559(c)(2)(F)(ii) and 924(e)(2)(A)), raised above, and, thus, is not binding on this Court. *See Brecht v. Abrahamson*, 507 U.S. 619, 630-31 (1993); *see also Webster v. Fall*, 266 U.S. 507, 511 (1925).

2. That Congress adopted verbatim the term "particularly serious crime" from the 1951 Refugee Convention and 1967 Protocol further evidences its intent that the term encompasses only exceptionally grave crimes.

As the Supreme Court already has recognized, Congress adopted the Refugee Act of 1980 ("Refugee Act")[4] with the clear intent to "bring United States refugee law into conformance with the 1967 United Nations Protocol Relating to the Status of Refugees, 9 U.S.T. 6223, T.I.A.S. No. 6577, to which the United States acceded in 1968." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 436-437 (1987).[5] The term "particularly serious crime" first appeared in Article 33 of the United Nations Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150 (hereinafter 1951 Refugee Convention).

In addition, as Judge Berzon pointed out in her dissent in the panel decision in *Delgado v. Holder*, the Court in *Aguirre-Aguirre* concluded that "'a serious nonpolitical crime' is not susceptible of rigid definition" and that, since most "serious nonpolitical crimes" constitute aggravated felonies, "offenses *less serious* than aggravated felonies cannot be 'particularly serious crime[s].'" 563 F.3d 863**,** 882 (9th Cir. 2009) (Berzon, J., dissenting) (citations omitted), *withdrawn as precedent by Delgado v. Holder*, 621 F.3d 957 (9th Cir. 2010).

[4] Pub. L. No. 96-212, 94 Stat. 102 (1980).

[5] The Protocol Relating to the Status of Refugees, Jan. 31, 1967, art. I, 19 U.S.T. 6223, 606 U.N.T.S. 267(1967) (hereinafter 1967 Protocol) incorporates all the provisions of the 1951 Refugee Convention and removes the temporal and geographic restrictions set by the 1951 Convention. The 1951 Refugee Convention only applied its provisions to individuals who became refugees as a "result of events occurring before 1 January 1951" and gave states the option of limiting the geographic scope of the Convention to "events occurring in Europe." 1951 Refugee Convention, Ch. 1, Art. 1, A(2) & B(1).

At the time Congress adopted it verbatim in former 8 U.S.C § 1253(h) (1980), the international law community already had interpreted it as limited to exceptionally grave offenses. Specifically, Atle Grahl-Madsen, whose views on the Convention have been cited by the Supreme Court and this Court, *see Cardoza-Fonseca*, 480 U.S. at 421 and *Alphonsus v. Holder*, 705 F.3d 1031, 1037 n.6 (9th Cir. 2013), and who has been regarded as authoritative since he wrote the Commentary to the 1951 Refugee Convention, explains that "the offence must normally be a capital crime (murder, arson, rape, armed robbery, etc.)." Atle Grahl-Madsen, *Commentary on the Refugee Convention, Division of International Protection of the United Nations High Commissioner for Refugees* (1963), ¶9.

In addition, although it is not binding on this Court, the Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol "provides significant guidance in construing the Protocol, to which Congress sought to conform." *Cardoza-Fonseca*, 480 U.S. at 439 n.22; *see also Aguirre-Aguirre*, 526 U.S. at 427. The Handbook explains that "a 'serious' crime must be a capital crime or a very grave punishable act." *UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees,* U.N. Doc. HCR/IP/4/Eng/REV.1, ¶ 155 (1979, re-edited Jan. 1992).

Thus, at the time Congress adopted the term "particularly serious crime" both the Commentary to the 1951 Refugee Convention and the 1967 Protocol, required a "*particularly* serious crime" to be even more serious than capital crimes or grave offenses. "[W]here, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute." *Lorillard v. Pons*, 434 U.S. 575, 581 (1978); *Goodyear Atomic Corporation v. Miller*, 486 U.S. 174, 184-85 (1988) (same).

Accordingly, it follows that, when it enacted the "particularly serious crime" bar in former § 1253(h)(2)(B) (presently § 1231(b)(3)(B)(ii)) by using the exact same language used in Article 33 of the Convention, Congress intended to adopt the then established meaning of the term. *See Molzof v. United States*, 502 U.S. 301, 307 (1992) ("[W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed.") (citation omitted).

Furthermore, the legislative history of the 1980 Refugee Act confirms Congress' intent to adopt the meaning prescribed to the term "particularly serious crime" in the Convention. The House Conference Report explains that the

withholding provision has been "adopted . . . with the understanding that it is based directly upon the language of the Protocol and it is intended that the provision be construed consistently with the Protocol." H.R. Rep. No. 96-781, at 20 (1979) (Conf. Rep.).

In sum, Congress' verbatim adoption of the 1951 Convention's provision on particularly serious crimes, the presumption that Congress knew that such crimes were limited to something more than a "capital crime or a very grave punishable act," as confirmed by the legislative history of the 1980 Refugee Act, further evidence that Congress intended the definition of a "particular serious crime" only to apply to exceptionally grave offenses, of which DUI offenses – at the very least those that do not involve injury to another – are not. *Accord Leocal v. Ashcroft*, 43 U.S. 1, 11 (2004) ("[a crime of violence] suggests a category of violent, active crimes that cannot be said naturally to include DUI offenses"); United Kingdom, Nationality, Immigration and Asylum Act 2002 (Specification of Particularly Serious Crimes) Order 2004 (UK) (designating certain DUI-type offenses as presumptively particularly serious crimes, but only offenses that involve "causing the death of, or grievous bodily injury to, another..." under Northern Ireland's Road Traffic Order and offenses "causing the death of another" under the Road Traffic Act 1988) *available at* http://www.legislation.gov.uk/uksi/2004/1910/made (last visited Sept. 15, 2015).

3. The rule of lenity supports limiting the definition of "particularly serious crime" to exceptionally grave crimes.

Even if the Court were to find the meaning of "particularly serious crime" ambiguous (notwithstanding the above-mentioned rules of statutory construction and legislative history), the rule of lenity requires courts to construe "any lingering ambiguities in deportation statutes in favor of the alien." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987); *see also Lara-Cazares v. Gonzales*, 408 F.3d 1217, 1221 (9th Cir. 2005) (finding that gross vehicular manslaughter while intoxicated is not a crime of violence, in part because the rule of lenity resolves any potential ambiguity in 18 U.S.C. § 16 in favor of the petitioner). Here application of the rule would require limiting particularly serious crimes to exceptionally grave offenses, and not extending the term to simple DUI offenses that do not involve injury to another.

C. The Panel is Not Bound by *Avendano-Hernandez.*

In *Avendano-Hernandez v. Lynch*, No. 13-73744, 2015 U.S. App. LEXIS 15685, -- F.3d -- (9th Cir. Sept. 3, 2015), the petitioner, like Petitioner Hernandez here, also sustained a DUI-related conviction. As here, the BIA found that the petitioner's offense constituted a "particularly serious crime" rendering her ineligible for withholding of removal. *Id*. at *12. On review, the *Avendano-Hernandez* panel first noted that the test for determining whether an offense constitutes a particularly serious crime requires the trier of fact to "ask whether

'the nature of the conviction, the underlying facts and circumstances and the sentence imposed justify the presumption that the [person] is a danger to the community." *Id*. at *10-11 *citing Matter of Frentescu*, 18 I&N Dec. 244 (BIA 1982). The panel then upheld the BIA's finding. The panel noted that the petitioner's accident caused bodily injury to another driver and it rejected petitioner's argument that the immigration judge miscalculated her sentence. The decision in *Avendano-Hernandez* is not binding on this Court.

1. The Statutory Arguments Raised Here Were Not Raised or Addressed by That Panel.

As the Supreme Court long has recognized, *stare decisis* is not applicable unless the issue was "squarely addressed" in the prior decision. *Brecht v. Abrahamson*, 507 U.S. 619, 630-31 (1993); *Webster v. Fall*, 266 U.S. 507, 511 (1925) ("Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents.") (citations omitted).[6] Similarly, here, there is

[6] *See also Sakamoto v. Duty Free Shoppers, Ltd.*, 764 F.2d 1285, 1288 (9th Cir. 1985) ("unstated assumptions on non-litigated issues are not precedential holdings binding future decisions"); *Estate of Magnin v. Commissioner,* 184 F.3d 1074, 1077 (9th Cir. 1999) ("When a case assumes a point without discussion, the case does not bind future panels."); *Amalgamated Transit Union Local 1309 v. Laidlaw Transit Servs.*, 435 F.3d 1140, 1143 (9th Cir. 2006) ("Because we did not discuss the applicability of the rule in that case, *Bush* is not controlling authority on the issue of whether FRAP 5 governs appeals under § 1453(c)(1))" *citing Sakamoto,* 764 F.2d at 1288.

no holding on (a) whether offenses that lack a culpable mental state should be presumed not to be particularly serious crimes; or (b) whether the plain language of the statute, the 1951 Refugee Convention and 1967 Protocol, or rule of lenity compel the conclusion that particularly serious crimes are limited to exceptionally grave crimes. As such, this Court owes no deference to *Avendano-Hernandez*. Amici's review of the briefing and video of oral argument in *Avendano-Hernandez* shows that the parties did not raise either of these arguments. Indeed, the vast majority of both briefing and argument was devoted to the petitioner's claim under the Convention Against Torture.

In her opening brief, Ms. Avendano-Hernandez argued that, by their nature, DUIs cannot constitute particularly serious crimes because courts have held that they are not crimes of violence, crimes involving moral turpitude, and do not involve an intent to injure.[7] *See* Petitioner's Opening Brief at 31-33, *Avendano-Hernandez v. Lynch* (No. 12-73774). Additionally, she argued that the facts of her case were distinguishable from the facts in *Anaya-Ortiz*, *supra*. *Id*. at 34. Finally, she argued that the immigration judge erroneously calculated the sentence imposed. *Id*. at 35-36.

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[7] The last claim –that DUIs do not involve an intent to injure – was made in a single sentence in Petitioner's brief. *See Avendano-Hernandez v. Lynch*, No. 12-73774, Petitioner's Opening Brief at 32-33 ("Finally, DUI is not a crime that involves any intent to injure—instead it is a crime "most nearly comparable to . . . crimes that impose strict liability." *Begay v. United States*, 553 U.S. 137, 145 (2008).").

For its part, in the answering brief, the government cited to the case-by-case particular serious crime test and defended the BIA's application of the test based on the individualized facts and underlying circumstances of the petitioner's case and claimed that whether the immigration judge erroneously calculated the sentence was unclear from the record. *See* Brief for Respondent at 24-29, *Avendano-Hernandez v. Lynch* (No. 12-73774).

In her reply brief, Ms. Avendano-Hernandez argued that the government failed to address the arguments in her opening brief and reemphasized her argument that the immigration judge considered the wrong sentence imposed. Reply Brief for Petitioner at 17-21, *Avendano-Hernandez v. Lynch* (No. 12-73774).

At oral argument on March 6, 2015, approximately 7 of the 30 minutes of argument addressed the petitioner's particularly serious crime claim and the discussion during virtually all of this time focused on the immigration judge's miscalculation of the sentence imposed. See video of oral argument, *Avendano-Hernandez v. Lynch* (No. 12-73774) *available at* http://www.ca9.uscourts.gov/media/view_video.php?pk_vid=0000007313. The argument was devoid of any mention, let alone discussion, of the arguments made by Petitioner and amici in this case regarding the interpretation of the term "particularly serious crime" as limited to exceptionally grave crimes and the lack of a culpable mental state.

Given the parties' failure to make the panel aware of these claims in briefing and at oral argument, this Court is free to consider them in the first instance.

2. In Any Event, Whether an Offense Constitites a Particularly Serious Crime Requires an Individualized Analysis in Every Case.

As the *Avendano-Hernandez* panel recognized, "the BIA may determine that [a driving under the influence] offense consititutes a particularly serious crime on a case-by-case basis." *Avendano-Hernandez*, 2015 U.S. App. LEXIS 15685 at *11; *see also Blandino-Medina v. Holder*, 712 F.3d 1338, 1345 (9th Cir. 2013) ("We find that Congress has clearly expressed its intent: the overall structure of the INA compels the conclusion that Section 1231(b)(3)(B)(iv) establishes but one category of 'per se' particularly serious crimes, and requires the agency to conduct a case-by-case analysis of convictions falling outside the category established by Congress."); *Matter of Frentescu*, 18 I&N Dec. 244, 247 (BIA 1982) ("While there are crimes which, on their face, are 'particularly serious crimes' or clearly are not 'particularly serious crimes,' the record in most proceedings will have to be analyzed on a case-by-case basis.").

As such, it is axiomatic that two individuals may who may have the same or similar convictions may not both have been convicted of a "particularly serious crime." This is true because each trier-of-fact must individually assess and weigh the *Matter of Frentescu* factors (i.e., the nature of the conviction, underlying facts

and circumstances, sentence imposed, and dangerousness). Therefore, when reviewing the BIA's application of the factors in this case, the Court must start from a blank slate; i.e., what prior panels have said about application of these factors in other cases –based on other facts, circumstances, and equities regarding dangerousness – cannot dictate the outcome in a subsequent case. Such a result would nullify the requirement of a case-by-case assessment in each case. This is especially true in this case where, as discussed above, Petitioner and amici make arguments that the petitioner in *Avendano-Hernandez* did not make and where the offense at issue is different in that the offense here did not involve injury to another as did the offense in *Avendano-Hernandez.*

IV. CONCLUSION

The Court should grant the petition for review, vacate the Board's decision, and hold that Petitioner's DUI conviction is not a particularly serious crime.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and 29(d) because this brief contains 5,130 words, excluding the parts of this brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). Additionally, this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14 point Times New Roman font.

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CERTIFICATE OF SERVICE FOR ELECTRONIC FILINGS

I hereby certify that on September 16, 2015, I electronically filed the foregoing:

BRIEF OF NATIONAL IMMIGRATION PROJECT OF THE NATIONAL LAWYERS GUILD AND IMMIGRANT DEFENSE PROJECT AS AMICI CURAIE IN SUPPORT OF PETITIONER

with the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system. I certify that the following counsel of record is registered as an ECF Filer and that they will be served by the CM/ECF system:

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