Matter of B-Z-R-, Respondent

Decided by Attorney General December 9, 2021

U.S. Department of Justice
Office of the Attorney General

BEFORE THE ATTORNEY GENERAL

Pursuant to 8 C.F.R. § 1003.1(h)(1)(i), I direct the Board of Immigration Appeals ("Board") to refer this case to me for review of its decision. The Board's decision in this matter is automatically stayed pending my review. *See Matter of Haddam*, A.G. Order No. 2380-2001 (Jan. 19, 2001). To assist me in my review, I invite the parties to these proceedings and interested amici to submit briefs on: 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). *See Matter of G-G-S-*, 26 I&N Dec. 339 (BIA 2014) (holding that "a person's mental health is not a factor to be considered in a particularly serious crime analysis and that adjudicators are constrained by how mental health issues were addressed as part of the criminal proceedings").

The parties' briefs shall not exceed 6,000 words and shall be filed on or before January 10, 2022. Interested amici may submit briefs not exceeding 4,500 words on or before January 17, 2022. The parties may submit reply briefs not exceeding 3,000 words on or before January 24, 2022. All filings shall be accompanied by proof of service and shall be submitted electronically to AGCertification@usdoj.gov, and in triplicate to:

United States Department of Justice
Office of the Attorney General, Room 5114
950 Pennsylvania Avenue, NW
Washington, DC 20530

All briefs must be both submitted electronically and postmarked on or before the pertinent deadlines. Requests for extensions are disfavored.

Matter of B-Z-R-, Respondent

Decided by Attorney General January 6, 2022

U.S. Department of Justice
Office of the Attorney General

BEFORE THE ATTORNEY GENERAL

On December 9, 2021, pursuant to 8 C.F.R. § 1003.1(h)(1)(i), I directed the Board of Immigration Appeals to refer this case to me for review of its decision. To assist me in my review, I directed that opening briefs from the parties be filed on or before January 10, 2022, that briefs from amici be filed on or before January 17, 2022, and that reply briefs from the parties be filed on or before January 24, 2022.

On December 20, 2021, counsel for respondent filed a request to extend the deadline for submitting respondent's opening brief by twenty-one days, to January 31, 2022. In response to that request, I set the following briefing schedule in this matter:

The parties' briefs shall not exceed 6,000 words and shall be filed on or before January 31, 2022. Interested amici may submit briefs not exceeding 4,500 words on or before February 7, 2022. The parties may submit reply briefs not exceeding 3,000 words on or before February 14, 2022. All filings shall be accompanied by proof of service and shall be submitted electronically to AGCertification@usdoj.gov, and in triplicate to:

United States Department of Justice
Office of the Attorney General, Room 5114
950 Pennsylvania Avenue, NW
Washington, DC 20530

All briefs must be both submitted electronically and postmarked on or before the pertinent deadlines. Requests for further extensions are disfavored.

Mark R. Barr
Lichter Immigration
1601 Vine Street
Denver, Colorado 80206
Tel: 303.554.8400
Email: mbarr@lichterimmigration.com

Peter G. Wilson
Katten Muchin Rosenman LLP
525 W. Monroe Street
Chicago, Illinois 60661-3693
Tel: 312.902.5649
Email: peter.wilson@katten.com

UNITED STATES DEPARTMENT OF JUSTICE
OFFICE OF THE ATTORNEY GENERAL
WASHINGTON, DC

In the Matter of: B-Z-R-	On Certification to Attorney General Merrick B. Garland

BRIEF OF AMICUS CURIAE AMERICAN IMMIGRATION LAWYERS ASSOCIATION

TABLE OF CONTENTS

STATEMENT OF INTEREST

The American Immigration Lawyers Association (AILA) is a nonpartisan, nonprofit national association of over 15,000 attorneys and law professors who practice and teach immigration law. Founded in 1946, AILA provides continuing legal education, professional services, and expertise through its 39 chapters and over 50 national committees. AILA members regularly represent non-citizens seeking persecution-based relief from removal, often on a *pro bono* basis.

INTRODUCTION

This case concerns the interpretation of two provisions of the immigration code that create exceptions to the rule of *non-refoulement* (non-return to persecution) for non-citizens who have committed "particularly serious crimes" and constitute "a danger to the community of the United States." 8 U.S.C. §§ 1158(b)(2)(A)(ii), 1231(b)(3)(B)(ii) (2018). One provision eliminates asylum eligibility for a non-citizen "if the Attorney General determines that . . . the [non-citizen], having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States." *Id.* § 1158(b)(2)(A)(ii). The other restricts withholding of removal using substantively identical language, replacing "constitutes a danger" with "is a danger." *Id.* § 1231(b)(3)(B)(ii).

On their face, these exceptions ask two distinct questions, one about the seriousness of the crime of conviction and the other concerning the immigrant's dangerousness at the time he seeks relief. As framed by the Attorney General, this case turns on the first question: whether "mental health may be considered when

determining whether an individual was convicted of a 'particularly serious crime.'" *Matter of B-Z-R-*, 28 I&N Dec. 424, 424 (A.G. 2021).

AILA agrees that immigration courts should consider an immigrant's mental health when determining whether the crime of conviction was "particularly serious." However, the Attorney General should also take this opportunity to clarify that the Board has erroneously answered the exceptions' *second* question. The Board has adopted an irrebuttable presumption that non-citizens who committed "particularly serious crimes" are *always* a "danger to the community of the United States." That interpretation ignores the plain language of the statute and the underlying refugee convention, and the Attorney General should reject it for that reason alone. But even if the exceptions were ambiguous, the Board's implicit assumption that non-citizens convicted of serious crimes cannot rehabilitate themselves is indefensible. The Attorney General should resolve this case by recognizing that recovery from mental illness is one example of a broader set of reasons why a non-citizen's dangerousness in the *past* is not conclusive evidence of his dangerousness in the *present*.

BACKGROUND

The Refugee Act of 1980, Pub. L. 96-212, 94 Stat. 107, "established a new statutory procedure for granting asylum to refugees." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 427 (1987), by adopting nearly verbatim the language of the U.N. Convention Relating to the Status of Refugees, *opened for signature* July 28, 1951, 189 U.N.T.S. 137 (the "Convention"). *See INS v. Stevic*, 467 U.S. 407, 416 (1984). The Refugee Act codified the principle of *non-refoulement*, a "refugee's right not to be

expelled from one state to another . . . where his or her life or liberty would be threatened." *Nonrefoulement*, *Black's Law Dictionary* (11th ed. 2019); *see also Stevic*, 467 U.S. at 416–18. In particular, it provided that "the Attorney General may not remove [a non-citizen] to a country if the Attorney General decides that the [non-citizen]'s life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1231(b)(3)(A). Congress adopted that language nearly verbatim from Article 33.1 of the Convention:

> No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

189 U.N.T.S. at 176.

The Refugee Act implemented this principle by codifying various forms of relief, including asylum and withholding of removal, for non-citizens who suffered persecution or fear future persecution in their home country. *See* 8 U.S.C. § 1158; *id.* § 1231. The statute also included the two exceptions relevant to this case, which limit a non-citizen's eligibility for asylum or withholding of removal "if the Attorney General determines that . . . the [non-citizen], having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States."[1] These exceptions find their source in Article 33 of the Convention, which provides:

[1] 8 U.S.C. § 1158(b)(2)(A)(ii). The exceptions use slightly different language—one speaks of an immigrant who "constitutes" a danger, *id.*, while the other, *id.* §

> The benefit of [*non-refoulement*] may not . . . be claimed by a refugee . . . who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

189 U.N.T.S. 176.

On their face, the exceptions pose two distinct questions: whether a non-citizen *was* convicted by a final judgment of a particularly serious crime, and whether the non-citizen *is* a danger to the community. The Board initially adopted this straightforward reading, and held that determining whether the exceptions applied required considering "such factors as the nature of the conviction, the circumstances and underlying facts of the conviction, the type of sentence imposed, and, most importantly, whether the type and circumstances of the crime indicate that the [noncitizen] will be a danger to the community." *Matter of Frentescu*, 18 I&N Dec. 244, 247 (BIA 1982). *Frentescu* confirmed that multiple factors, including the crime, the punishment, and the non-citizen's future dangerousness, all were relevant in deciding whether the exceptions applied.

Four years later, the Board reversed its approach, rejecting the position that the exceptions "require that two separate and distinct factual findings be made in order to render an [noncitizen] ineligible for withholding of deportation." *Matter of Carballe*, 19 I&N Dec. 357, 360 (BIA 1986). Instead, it held that non-citizens "who have been finally convicted of particularly serious crimes are presumptively dangers to this country's community." *Id.* In support of that holding, the Board cited the

---

1231(b)(3)(B)(ii), says "is" a danger—but neither the Board nor any court of which AILA is aware has attached any significance to this discrepancy.

government's argument that if Congress had "intended to establish two separate criteria" to determine whether the exceptions applied, it "could have easily done so by its use of the conjunction 'and.'" *Id.* at 359. It also cited a House Judiciary Committee Report that described the exceptions as applying to non-citizens "who have been convicted of particularly serious crimes *which* make them a danger to the community of the United States." *Id.* (citing H.R. Rep. No. 96-608 (1979)). Although the Board spoke in terms of a "presumpt[ion]," it emphasized that the presumption was irrebuttable: "If it is determined that the crime was a 'particularly serious' one, the question of whether the [noncitizen] is a danger to the community of the United States is answered in the affirmative" without further inquiry. *Id.* at 360.

Subsequent decisions of the appellate courts deferred to the Board's new interpretation of the exceptions under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). But many courts did so while acknowledging the "strong arguments that the [Board] is not accurately interpreting the statute and its treaty-based under-pinnings." *N-A-M v. Holder*, 587 F.3d 1052, 1057 (10th Cir. 2009); *see also Mosquera-Perez v. INS*, 3 F.3d 553, 556 (1st Cir. 1993) (noting the "considerable logical force" of the arguments against *Carballe*); *Ahmetovic v. INS*, 62 F.3d 48, 53 (2d Cir. 1995) (Winter, J.) (deferring to the Board's "interpretation conflating the two requirements").

Most recently, the Board reformulated the statutory inquiry to focus explicitly on the respondent's *past* dangerousness. *Matter of G-G-S-*, 26 I&N Dec. 339 (BIA 2018). The respondent in *G-G-S-* claimed the exceptions did not apply because he had

chronic paranoid schizophrenia when he committed his crime of conviction. *Id.* at 340. The Board did not directly address whether the respondent posed a danger in the present (for example, by considering whether he had received treatment for or recovered from his schizophrenia). *Id.* at 341. Instead, it held that mental illness "does not relate to the pivotal issue in a particularly serious crime analysis, which is whether the nature of his conviction, the sentence imposed, and the circumstances and underlying facts indicate that he *posed* a danger to the community." *Id.* at 346 (emphasis added). Because "[t]he respondent's claim that his violent act was a result of his mental illness does not lessen the danger that his actions *posed* to others," the Board held that evidence of mental illness was "not relevant to [its] determination that his offense is a particularly serious crime." *Id.* (emphasis added). On that basis, the Board denied relief. *Id.* at 347–48.

ARGUMENT

I. The plain language of the exceptions poses two distinct questions: whether the crime of conviction was "particularly serious" and whether the non-citizen is a danger at the time he seeks relief.

The exceptions remove eligibility for asylum and withholding "if the Attorney General decides that . . . the [noncitizen], 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). By their terms, the exceptions pose two distinct questions, the first focused on the seriousness of a non-citizen's crime of conviction and the second on his dangerousness when he seeks relief. The Board's construal of the exceptions in *Carballe* and *G-G-S-*, which requires answering the second question

solely by reference to the crime of conviction, flouts established rules of statutory interpretation.

It is beyond serious dispute that the statute requires the Attorney General to determine a non-citizen's dangerousness at the time he seeks relief, rather than at the time when he was convicted. That is confirmed by the use of the present tense to ask whether the immigrant "*is*" (or "*constitutes*") a danger to the community. Courts "frequently look[] to Congress' choice of verb tense to ascertain a statute's temporal reach," a rule the Supreme Court has described as "[c]onsistent with normal usage." *Carr v. United States*, 560 U.S. 438, 448 (2010); *accord*, *United States v. Wilson*, 503 U.S. 329, 333 (1992) ("Congress' use of a verb tense is significant in construing statutes."); *Sherley v. Sebelius*, 644 F.3d 388, 394 (D.C. Cir. 2011) ("The use of the present tense in a statute strongly suggests it does not extend to past actions.")

Although *Frentescu* appeared to acknowledge that the relevant question was whether an immigrant "*will be* a danger to the community," 18 I&N Dec. at 247, the Board's later decisions did not answer that question directly. Instead, they presumed to answer a question about the future solely by looking to the past: "If it is determined that the crime was a 'particularly serious' one, the question of whether the [non-citizen] is a danger to the community of the United States is answered in the affirmative." *Matter of Carballe*, 19 I&N Dec. at 360. Most recently, the Board has abandoned the pretense of a "presumption" and instead reformulated the statutory inquiry, asserting that the "pivotal issue in a particularly serious crime analysis" is "whether the nature of [the] conviction, the sentence imposed, and the circumstances

and underlying facts indicate that [the immigrant] *posed* a danger to the community." *Matter of G-G-S-*, 26 I&N Dec. at 342, 346 (emphasis added). Following *Carballe* and *G-G-S-*, even overwhelming evidence that a non-citizen is not dangerous when he seeks relief is insufficient to avoid triggering the exceptions.

That interpretation disregards the "cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (quoting *Duncan v. Walker*, 533 U.S. 167, 174 (2001)). If conviction of a particularly serious crime were the only finding necessary to trigger the exceptions, the entire phrase "is a danger to the community of the United States" would be superfluous. Congress could simply have disqualified anyone "convicted by a final judgment of a particularly serious crime" from receiving asylum or withholding of removal. The rule against superfluities disfavors a reading that would have only some of the words in a statutory provision "do all the necessary work." *See Hibbs v. Winn*, 542 U.S. 88, 101 (2004). Interpreting the exceptions to require two separate findings, one regarding the crime of conviction and the other regarding future dangerousness, gives all of the exceptions' words independent meaning. *Carballe* and *G-G-S-* did just the opposite, and for that reason should be overruled.[2]

[2] The House Judiciary Committee Report cited in *Carballe* is not to the contrary. *See* 19 I&N Dec. at 359. The Report simply echoed the statute, observing without further analysis that "[t]he exceptions are those provided in the Convention relating to aliens . . . who have been convicted of particularly serious crimes which make them a danger to the community of the United States." H.R. Rep. No. 96-608, at 18. Like the exceptions and the Convention, this comment distinguishes between individuals who are dangerous when they seek immigration relief and those who are not. Contrary to

II. Any ambiguity in the statutory text should be resolved in favor of requiring a separate inquiry into present dangerousness.

Even if the statutory language were ambiguous, there is no sound rationale for a rule forbidding immigration courts from considering evidence of rehabilitation when deciding whether an immigrant "is a danger to the community of the United States." *Carballe* and *G-G-S-* are at odds with how other signatories have interpreted the Convention, counseling against that interpretation. More fundamentally, these decisions ignore the widespread recognition that past crimes are *not* a reliable indicator of present dangerousness. Should the Attorney General continue to find the exceptions ambiguous, he should interpret them in a manner consistent with other nations' interpretation of the Convention and the overwhelming evidence that people convicted of crimes can rehabilitate themselves.

a. *The Department should interpret the exceptions in a manner consistent with the Convention.*

When "interpreting any treaty, the 'opinions of our sister signatories' . . . are entitled to considerable weight." *Abbott v. Abbott*, 560 U.S. 1 (2010) (quoting *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155, 176 (1999)). That principle counsels in favor of construing the exceptions consistently with other signatories' interpretations of the Convention's near-identical language. "If one thing is clear from the legislative history of the new definition of 'refugee,' and indeed the entire 1980 Act, it is that one of Congress' primary purposes was to bring United States refugee

---

Carballe, the Report does state or imply that *all* non-citizens convicted of *any* "particularly serious crime" are *necessarily* a "danger to the community of the United States" at the time they seek relief.

law into conformance with the 1967 United Nations Protocol Relating to the Status of Refugees." *Cardoza-Fonseca*, 480 U.S. at 436–37. Yet *Carballe* makes the United States an outlier among Convention signatories, a telling sign that the Board's interpretation has come unmoored from the statutory text.

Courts in Canada, Australia, and the United Kingdom have consistently interpreted Article 33.2 of the Convention to require a separate "dangerousness" finding when a non-citizen seeks immigration relief. The Canadian Supreme Court, for example, has noted that if a non-citizen has committed a particularly serious crime, it must "make the added determination that the person poses a danger to the safety of the public or to the security of the country . . . to justify *refoulement*." *Pushpanathan v. Minister of Citizenship & Immigration*, [1998] 1 S.C.R. 982, 999 (Can.). The Australian Administrative Appeals Tribunal has similarly reversed a deportation order because a non-citizen did not pose a future danger despite his prior conviction. *Baias v. Minister for Immigr. & Multicultural Affs.,* [1996] AATA 410 (5 Nov. 1996) (Austl.). English courts have reached the same result. *See EN (Serbia) v. Sec'y of State for Home Dep't*, [2010] QB 633 (U.K.) ("[I]t is clear that Article 33(2) imposes two requirements," including a separate finding that a non-citizen "constitut[es] a danger to the community"); *R v. Sec'y of State for Home Dep't*, [2006] EWHC 3513 (Eng. Q.B. 2006) (reaching same result).

The holding of *Carballe* is squarely at odds with these and other decisions interpreting the Convention. Given the "considerable weight" to which the views of other Convention signatories are entitled, the Attorney General should restore the

Department's original view that the exceptions require consideration of all relevant evidence to determine a non-citizen's present danger to the community.

b. *The Department should interpret the exceptions to recognize the possibility of rehabilitation.*

The *Carballe* presumption also ignored *any* possibility of rehabilitation, and instead assumed that *all* immigrants who commit "particularly serious crimes" are *always* a danger. Such conclusive presumptions are commonly justified as helping "avoid the costs of excessive inquiry where a *per se* rule will achieve the correct result in almost all cases." *Coleman v. Thompson*, 501 U.S. 722, 737 (1991). But "*per se* rules should not be applied" where "the generalization is incorrect as an empirical matter," *Johnson v. Williams*, 568 U.S. 289, 302 (2013) (quoting *Coleman*, 501 U.S. at 737)—including where an "irrebuttable presumption . . . would occasionally miss the mark." *Id.* Judged by that standard, *Carballe* is indefensible, because courts routinely acknowledge that people convicted of crimes may rehabilitate themselves to the point that they are no longer dangerous.

In resentencing cases, for example, courts regularly "consider evidence of the defendant's . . . rehabilitation" in deciding whether to impose continued incarceration. *Pepper v. United States*, 562 U.S. 476, 481 (2011). They do so because a defendant's post-conviction conduct "provides the most up-to-date picture" of his "history and characteristics," and "sheds light on the likelihood that he will engage in future criminal conduct." *Id.* at 492; *see also Gall v. United States*, 552 U.S. 38, 59 (2007) (defendant's post-offense "self-motivated rehabilitation . . . lends strong support to the conclusion that imprisonment was not necessary to deter [him] from engaging in

future criminal conduct or to protect the public from his future criminal acts."). With the passage of time, defendants may seek treatment for addiction, attend school or professional training programs, obtain employment, or reestablish family relationships, all of which may bear on the likelihood that they will become a productive member of society. *Pepper*, 562 U.S. at 491–93. Although district courts are free to consider this evidence when sentencing criminal defendants, immigration courts following *Carballe* are *forbidden* from doing so when considering eligibility for asylum or withholding, no matter how compelling the evidence.

Juvenile offenders provide an equally stark example of how far *Carballe* misses the mark. The Eighth Amendment bars the States from sentencing juvenile offenders to life in prison without the possibility of parole, even in cases of homicide. *Miller v. Alabama*, 567 U.S. 460, 465 (2012) (homicide offenses); *Graham v. Florida*, 560 U.S. 48, 74 (2010) (non-homicide offenses). That interpretation rests on the understanding that "[d]eciding that a juvenile offender forever will be a danger to society would require making a judgment that he is incorrigible—but incorrigibility is inconsistent with youth." *Miller*, 567 U.S. at 472–73 (quoting *Graham*, 560 U.S. at 72–73). Sentencing a juvenile to mandatory life without parole "precludes consideration of his chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences"—and "disregards the possibility of rehabilitation even when the circumstances most suggest it." *Id.* at 477–78. Yet while parole boards are *required* to consider evidence of rehabilitation for juvenile offenders prosecuted as adults, immigration judges applying *Carballe* are

forbidden from doing so. As a result, while the criminal system recognizes that U.S. citizen youths convicted of homicide can rehabilitate themselves and earn release, the immigration courts assume that non-U.S. citizen youths convicted of "particularly serious crimes" will *always* pose a "danger to the community of the United States."

Mental health (the circumstance here) offers another compelling reason to reject a conclusive presumption of dangerousness. The courts have consistently recognized that mentally ill people convicted of crimes will not necessarily pose a future danger to the community. In the commitment context, for example, although the States may confine a criminal defendant acquitted by reason of insanity "as long as he is both mentally ill and dangerous," the "'committed acquittee is entitled to release when he has recovered his sanity or is no longer dangerous.'" *Foucha v. Louisiana*, 504 U.S. 71, 77 (1992) (quoting *Jones v. United States*, 463 U.S. 354, 368 (1983)). That rule presupposes that mental illness can be temporary, and improve with appropriate medical and psychological care. Indeed, as the Supreme Court has recognized in a different context, "[m]anifestations of mental illness may be sudden, and past behavior may not be an adequate predictor of future actions," making it "no surprise that many psychiatric predictions of future violent behavior by the mentally ill are inaccurate." *Heller v. Doe*, 509 U.S. 312, 323–24 (1993).

Despite that recognition, immigration courts following *Carballe* and *G-G-S-* are *required* to *assume* (without evidence) that mentally ill non-citizens who commit "particularly serious crimes" will *always* pose a danger to the community, regardless of their subsequent diagnoses or treatment. There is no reason to believe such an

extreme presumption "achieve[s] the correct result in almost all cases," *see Coleman*, 501 U.S. at 737—and it is easy to imagine examples illustrating why it does not. *Cf. Gomez-Sanchez v. Sessions*, 892 F.3d 985, 996 n.10 (9th Cir. 2018) (discussing a hypothetical defendant "who had suffered from intimate partner violence, was convicted of assaulting his or her abuser, and reliable evidence showed that the individual's diagnosed post-traumatic stress disorder had played a substantial motivating role in the assault"—facts that "might well provide no defense to criminal conviction, even while bearing substantially on an IJ's determination of whether that individual poses a danger to the community.").

c. *Restoring the Department's original interpretation of the exceptions will not open the floodgates to meritless litigation.*

Restoring *Frentescu*'s interpretation of the exceptions and allowing immigration judges to consider all relevant evidence to determine whether an immigrant is dangerous would not overwhelm the immigration courts with meritless litigation. Immigration judges could still resolve easy cases (say, unrepentant murderers) quickly, but could also reach just results in cases where the immigrant is clearly *not* a "danger to the community." Several factors suggest that would not dramatically alter existing practice.

First, although *Carballe*'s presumption is indefensible as a matter of statutory interpretation and common sense, that is not to say that immigration judges should discount evidence regarding the crime of conviction. As *Frentescu* emphasized, the "type and circumstances of the crime" are likely to be the "most important[]" factors in evaluating whether a non-citizen remains a danger. 18 I&N Dec. at 247. Evidence

that a crime was premeditated and violent, for example, is surely strong evidence that the offender remains a danger. Recognizing the possibility of rehabilitation does not require ignoring the nature of a defendant's crime, and many cases may easily be resolved on this basis alone.

Second, just as many cases will be easy because there is compelling evidence of dangerousness, others will be easy because there is compelling evidence of rehabilitation. A victim of domestic violence who injures her abuser while suffering from post-traumatic stress disorder may have a powerful claim that, having escaped abuse, she will not pose a danger to society. *See Gomez-Sanchez*, 892 F.3d at 996 n.10. The same may be true of an individual who withdrew from criminal conduct and engaged in significant "self-motivated rehabilitation" even before being investigated or indicted. *See Gall*, 552 U.S. at 59. These claims may frequently not require significant litigation in immigration court, since the parties will have introduced much of the relevant evidence during the criminal process.

Third, restoring *Frentescu*'s standard would limit the potentially unjust results of the increasingly expansive interpretation of the phrase "particularly serious crime." *Carballe* might be more defensible if "particularly serious crimes" included only offenses involving premeditated violence. Instead, the Board has interpreted that phrase to encompass a range of relatively minor, non-violent offenses. *See, e.g.*, *Matter of F-R-A-*, 28 I&N Dec. 460 (BIA 2022) (conspiracy to commit wire fraud); *Tian v. Holder*, 576 F.3d 890, 892–93 (8th Cir. 2009) (unauthorized computer access); *Tunis v. Gonzales*, 447 F.3d 547, 548 (7th Cir. 2006) (two counts of

selling less than one gram of cocaine). There is no rational reason to assume that *all* non-citizens convicted of such offenses will *always* be dangerous. Restoring *Frentescu* will reduce the number of cases where an expansive interpretation of "particularly serious" results in deporting people with well-founded fear of persecution but who have committed relatively minor offenses.

Finally, the placement of the burden of proof on the non-citizen claiming relief from removal, *see* 8 U.S.C. § 1229a(c)(4)(A), dispels any lingering concerns over frivolous litigation. The immigration courts are deeply experienced in resolving factual disputes, making credibility determinations, and weighing expert evidence—including mental health evidence. The courts will undoubtedly resolve close cases with reference to the burden of proof, and immigrants will need to produce persuasive evidence of rehabilitation to demonstrate their entitlement to relief.

There is no reason to believe that adjudicating the issues contemplated by the language of the exceptions will overwhelm the immigration courts with meritless litigation—and even if there were, it is not the Board's decision to make. The language Congress adopted compels the Attorney General to consider whether an immigrant poses a present danger to the community.

CONCLUSION

The Attorney General should restore the Board's original interpretation of the exceptions, overrule *Carballe*, and require the immigration courts to consider all relevant evidence of a non-citizen's present dangerousness before invoking the exceptions to deny asylum or withholding of removal.

Dated: February 7, 2022

Respectfully submitted,

/s/ Peter G. Wilson

Peter G. Wilson
Counsel of Record
KATTEN MUCHIN ROSENMAN LLP
525 West Monroe Street
Chicago, Illinois 60661
Tel: 312.902.5649
Email: peter.wilson@katten.com

Mark R. Barr
LICHTER IMMIGRATION
1601 Vine Street
Denver, Colorado 80206
Tel: 303.554.8400
Email: mbarr@lichterimmigration.com

Counsel for Amicus Curiae American Immigration Lawyers Association

CERTIFICATE OF COMPLIANCE

I, Peter G. Wilson, hereby certify that this brief complies with the certification notice's requirement for amicus briefs in that it contains 4,496 words (exclusive of the Certificate of Compliance and the Certificate of Service), fewer than the 4,500 word limit.

Dated: February 7, 2022

Respectfully submitted,

/s/ Peter G. Wilson

Peter G. Wilson
Counsel of Record
KATTEN MUCHIN ROSENMAN LLP
525 West Monroe Street
Chicago, Illinois 60661
Tel: 312.902.5649
Email: peter.wilson@katten.com

CERTIFICATE OF SERVICE

I, Peter G. Wilson, hereby certify that, on February 7, 2022, I mailed three copies of the foregoing Brief of Amicus Curiae American Immigration Lawyers Association in response to the certification of *Matter of B-Z-R-* to:

United States Department of Justice
Office of the Attorney General
Room 5114
950 Pennsylvania Avenue, NW
Washington, DC 20530

I further certify that I submitted it electronically to: AGCertification@usdoj.gov.

I also certify that I served counsel for the parties with this motion at the following:

DHS – Office of Chief Counsel – Elizabeth
625 Evans Street, Room 135
Elizabeth, New Jersey 07201
Service was completed via Federal Express.

Enoch Chang
Office of the Principal Legal Advisor
Department of Homeland Security
500 12th Street, SW, Mail Stop 5900
Washington, DC 20536
Service was completed by Federal Express.

Lauren Major
American Friends Service Committee
570 Broad Street, Suite 1001
Newark, New Jersey 07102
lmajor@afsc.org
Service was completed by electronic mail.

Dated: February 7, 2022

/s/ Peter G. Wilson
Peter G. Wilson