**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.

# 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:

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**UNITED STATES DEPARTMENT OF JUSTICE**
**OFFICE OF THE ATTORNEY GENERAL**
**WASHINGTON, D.C.**

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|---|---|
| *In the Matter of*:<br><br>B-Z-R-<br><br>Interim Decision #4033 | 28 I&N Dec. 424 (A.G. 2021)<br><br>On Certification to Attorney General<br>Merrick B. Garland |

# BRIEF OF AMICI CURIAE CAPITAL AREA IMMIGRANTS' RIGHTS COALITION, DIOCESAN MIGRANT AND REFUGEE SERVICES, IMMIGRANT DEFENDERS LAW CENTER, IMMIGRANT JUSTICE IDAHO, IMMIGRANT LEGAL DEFENSE, IMMIGRATION SERVICES AND LEGAL ADVOCACY, FLORENCE IMMIGRANT & REFUGEE RIGHTS PROJECT, LAS AMERICAS IMMIGRANT ADVOCACY CENTER, MARIPOSA – A LEGAL PROGRAM OF COMMON FOUNDATION, NORTHWEST IMMIGRANT RIGHTS PROJECT, REFUGEE AND IMMIGRANT CENTER FOR EDUCATION AND LEGAL SERVICES, ROCKY MOUNTAIN IMMIGRANT ADVOCACY NETWORK, AND TAHIRIH JUSTICE CENTER

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## I. INTRODUCTION

In removal proceedings, an immigration judge's ("IJ") determination that a noncitizen has committed a particularly serious crime ("PSC") unequivocally bars that person from asylum and withholding of removal. Until the Board of Immigration Appeals's ("Board") ruling in *Matter of G-G-S-*, 26 I&N Dec. 339 (BIA 2014), immigration courts consistently applied a comprehensive "totality of the circumstances" standard in case-by-case PSC determinations, including consideration of mental health evidence. *G-G-S-* created an unprecedented, categorical rule that "a person's mental health is not a factor to be considered in a particularly serious crime analysis." *Id*. This prohibition marks an abrupt departure from longstanding Board and federal court precedent and is the singular exception to an otherwise inclusive evidentiary standard. This deviation also hampers counsel, like *amici*, in their representation of their clients because counsel cannot submit and IJs cannot consider mental health evidence, including potentially mitigating evidence. Counsel for applicants impacted by *G-G-S-*'s evidentiary abnormality can represent their clients on a single, extremely onerous claim for relief, deferral of removal under the Convention Against Torture ("CAT"), the abysmal grant rate for which all but guarantees their removal. The Attorney General should vacate *G-G-S-* to reharmonize PSC determinations with established immigration court evidentiary standards and restore the avenues by which counsel can pursue protection for their clients.

## II. INTEREST OF AMICI CURIAE

*Amici*—Capital Area Immigrants' Rights Coalition ("CAIR Coalition"), Diocesan Migrant and Refugee Services ("DMRS"), Immigrant Defenders Law Center ("ImmDef"), Immigrant Justice Idaho, Immigrant Legal Defense ("ILD"), Immigration Services and Legal Advocacy ("ISLA"), Florence Immigrant & Refugee Rights Project ("FIRRP"), Las Americas

Immigrant Advocacy Center, Mariposa Legal - A Program of Common Foundation, Northwest Immigrant Rights Project ("NWIRP"), Refugee and Immigrant Center for Education and Legal Services ("RAICES"), Rocky Mountain Immigrant Advocacy Network ("RMIAN"), and Tahirih Justice Center—are nonprofit legal services providers from across the country that represent noncitizens in removal proceedings, including noncitizens with mental illness, and that seek to offer the Attorney General a practitioners' perspective on the impact of *G-G-S-*. *Amici* share a concern and mission of ensuring that all individuals appearing before our immigration courts get a fair shake in their removal proceedings. *Amici* seek to make sure that individuals with mental illness, who are at a uniquely heightened risk of persecution and torture in their native countries, are not deported because of this irrational, overbroad, and inconsistent interpretation of the PSC bar to fear-based relief from removal.

## III. ARGUMENT

### A. *MATTER OF G-G-S-* DIVERGES FROM ESTABLISHED EVIDENTIARY STANDARDS AS WELL AS LONGSTANDING BOARD PRECEDENT THAT PERMITS IJS TO CONSIDER ALL EVIDENCE THAT IS PROBATIVE, RELEVANT, AND FUNDAMENTALLY FAIR AS PART OF THE "TOTALITY OF THE CIRCUMSTANCES" IN PSC DETERMINATIONS.

#### 1. In Immigration Court, Nearly All Evidence Is Admissible if It Is Probative, Relevant, and Fundamentally Fair.

*G-G-S-* must be scrutinized in the broader context of evidentiary rules in immigration court, which provide wide latitude in what evidence either party may present. As one legal scholar noted, in immigration courts "there are no restrictions as to the admissibility of evidence other than materiality, relevancy, and redundancy. . . . [T]he flexible evidentiary standards under the INA allow the admissibility of all types of evidence with little or no restriction." Won Kidane, *Revisiting the Rules of Procedure and Evidence Applicable in Adversarial Administrative Deportation Proceedings: Lessons from the Department of Labor Rules of*

*Evidence*, 57 CATH. U.L. REV. 93, 118, 119 (2007). To the extent that there are limitations, the Board and federal courts have repeatedly held that "the tests for the admissibility of documentary evidence in deportation proceedings are that evidence must be probative and that its use must be fundamentally fair." *Matter of Barcenas*, 19 I&N Dec. 609, 611 (BIA 1988); *see also Nyama v. Ashcroft*, 357 F.3d 812, 816 (8th Cir. 2004) (citing *Espinoza v. INS*, 45 F.3d 308, 310 (9th Cir. 1995)).

Immigration courts are administrative tribunals, with evidentiary rules grounded in broader doctrinal principles within administrative law that seek to balance flexibility and practical considerations with due process and fairness. In 1946, Congress passed the Administrative Procedure Act ("APA"), emphasizing a flexible approach to evidence that its sponsor Senator McCarran described as "an intermediate ground which we thought would be protective of the rights of individuals, and at the same time would not handicap the agencies." 92 Cong. Rec. 2,157 (1946). The APA allows agencies to consider "any oral or documentary evidence" that is not "irrelevant, immaterial, or unduly repetitious." 5 U.S.C. § 556(d). Immigration proceedings are not governed directly by the APA, but instead by the language of the Immigration and Nationality Act ("INA") and its corresponding regulations. *See Ardestani v. INS*, 502 U.S. 129, 133 (1991) (citing *Marcello v. Bonds*, 349 U.S. 302 (1955)). Nevertheless, asylum scholar Deborah Anker has observed that "[t]he [Board] effectively has adopted the much broader approach of the [APA]" in crafting the evidentiary rules used in immigration court. Deborah E. Anker, *Law of Asylum in the United States* 91 (3d ed. 1999).

In practice, this means that immigration courts may consider anything that is relevant and probative to their tasks of developing the record and adjudicating cases. *See* 8 C.F.R. § 1240.7(a) (an "immigration judge may receive in evidence any oral or written statement that is material and

relevant to any issue in the case previously made by the respondent or any other person during any investigation, examination, hearing, or trial"). Such a policy goes far beyond the confines of the Federal Rules of Evidence ("FRE"), which set limitations on the admissibility of evidence in federal court. Indeed, the Board and numerous federal courts have affirmed for decades that "the [FRE] are not binding in immigration proceedings and that Immigration Judges have broad discretion to admit and consider relevant and probative evidence." *Matter of D-R-*, 25 I&N Dec. 445, 458 (BIA 2011). With such wide-ranging admissibility, free of the confines of the FRE, "[e]videntiary determinations are limited only by due process considerations." *Anim v. Mukasey*, 535 F.3d 243, 256 (4th Cir. 2008). Assessing due process constraints in the context of removal proceedings centers on "whether the evidence is probative and whether its use is fundamentally fair so as not to deprive the [noncitizen] of due process of law." *Ezeagwuna v. Ashcroft*, 325 F.3d 396, 405 (3d Cir. 2003) (quoting *Bustos-Torres v. INS*, 898 F.2d 1053, 1055 (5th Cir. 1990)).

This permissive approach reflects the specific challenges of adjudicating cases in immigration court, particularly for individuals seeking humanitarian relief like asylum and their counsel, who must prove the occurrence of events abroad. *See Singh v. Holder*, 638 F.3d 1264, 1270 (9th Cir. 2011) (explaining that in "[a]sylum cases . . . the events happened in foreign countries, and the expense and difficulty of obtaining corroboration can be overwhelming"). The Seventh Circuit pointedly remarked that "[to] expect these individuals to stop and collect dossiers of paperwork before fleeing is both unrealistic and strikingly insensitive to the harrowing conditions they face." *Dawoud v. Gonzales*, 424 F.3d 608, 612–13 (7th Cir. 2005). These more open-ended rules are not merely applied on behalf of asylum seekers and their counsel trying to piece together evidence of events that occurred halfway across the world. The government regularly makes use of these rules to submit evidence related to documents or

witnesses in the United States, including evidence that would otherwise be inadmissible under the FRE. Indeed, "it is often the government that benefits the most from the advantage of flexible rules of evidence as it has access to an array of resources that helps it better prepare and argue its cases." Lilibet Artola, *In Search of Uniformity: Applying the Federal Rules of Evidence in Immigration Removal Proceedings*, 64 RUTGERS L. REV. 863, 870 (2012). The purpose of these permissive evidentiary rules is for immigration courts to consider all evidence that may be relevant or probative to a case—regardless of who submitted it.

By categorically excluding mental health evidence from PSC determinations, *G-G-S-* constitutes a dramatic, inexplicable, and discriminatory departure from the more flexible evidentiary rules in immigration court that the Board and federal courts have repeatedly affirmed for decades. *G-G-S-* not only uniquely compels IJs to ignore a category of evidence that would otherwise be highly probative and relevant, but also does so in the context of a determination for which the stakes are life and death.

2. PSC Determinations Must Look to the "Totality of the Circumstances" and Allow for Consideration of "All Reliable Information."

In keeping with these more permissive evidentiary rules, immigration courts take a holistic approach to PSC determinations by admitting and weighing a broad range of evidence, and then assessing whether a conviction constitutes a PSC under the "totality of the circumstances" and with "all reliable information." *Matter of G-G-S-* is the sole exception to this "totality of the circumstances" approach. In *Matter of Frentescu*, the seminal case on PSC determinations, the Board explained that "the record in most proceedings will have to be analyzed **on a case-by-case basis**," with IJs weighing different factors ("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") to determine whether a conviction is a PSC. 18 I&N Dec. 244, 247 (BIA 1982) (emphasis added). *Frentescu* thus established a "**totality of the circumstances**" framework for PSC determinations in which IJs weigh any probative and relevant evidence related to a conviction. *Id.* (emphasis added).

Subsequent PSC case law from the Board reinforced the use of an all-encompassing, flexible analysis in PSC determinations that examines all available evidence. In *Matter of S-S-*, the Board wrote that "[i]n the absence of a satisfactory showing that every . . . conviction, under this or any other statute constitutes a 'particularly serious crime' in all cases, **consideration of the individual facts and circumstances is appropriate**." 22 I&N Dec. 458, 464–65 (BIA 1999) (emphasis added). The Board observed that "any other evidence of the nature or circumstances of the crime" and "any evidence of mitigating circumstances relevant to our determination of the seriousness of the crime" would have also been relevant to the PSC determination. *Id.* at 466–67. Several years later, the Board decided *Matter of N-A-M-*, which affirmed that "**all reliable information** may be considered in making a particularly serious crime determination, including the conviction records and sentencing information, **as well as other information outside the confines of a record of conviction.**" 24 I&N Dec. 336, 342 (BIA 2007) (emphasis added). The Board explained that:

> "It has been our practice to allow both parties to explain and introduce evidence as to why a crime is particularly serious or not. **We see no reason to exclude otherwise reliable information** from consideration in an analysis of a particularly serious crime once the nature of the crime, as measured by its elements, brings it within the range of a 'particularly serious' offense."

*Id.* at 344 (emphasis added).

Both *S-S-* and *N-A-M-* reinforce the importance of admitting a wide range of evidence and information[1] that directly relates to the nature of the crime and the context in which it occurred. This approach allows the IJ to examine and weigh any evidence that might be relevant and reliable to reach a decision on whether a conviction is a PSC.

This holistic "totality of the circumstances" analysis weighing "all reliable information" aligns with the broad evidentiary rules that are generally applied in immigration court and routinely employed in other contexts beyond PSC determinations. *See Matter of Pula*, 19 I&N Dec. 467, 473–74 (BIA 1987) (stating that IJs must consider "the totality of the circumstances" in asylum proceedings); REAL ID Act of 2005, INA § 208(b)(1)(B)(iii), codified at 8 U.S.C. § 1158(b)(1)(B)(iii) (2012) (requiring that credibility determinations in asylum proceedings "[c]onsider[] the totality of the circumstances"); *see also Matter of Monreal*, 23 I&N Dec. 56, 64 (BIA 2001) (in non-LPR cancellation of removal proceedings, "all hardship factors should be considered in the aggregate").

Besides *G-G-S-*, there is no asterisk next to "totality of the circumstances" or "all reliable information" to exclude substantive evidence that would otherwise be highly relevant to an IJ's decision. The agency has always been clear that, unlike the categorical approach, where there are limits to what evidence may be considered, a PSC analysis examines a broad range of information. *G-G-S-* undermines Board precedent on the "totality of the circumstances" analysis and prevents IJs from considering what may otherwise be relevant, reliable, and probative mental health evidence in decisions that, as discussed below, carry life-threatening consequences.

[1] In *Matter of N-A-M-*, the Board uses the terms "evidence" and "information" interchangeably, and it is not fully clear how these concepts differ from and overlap with each other.

## B. IJS ROUTINELY CONSIDER MENTAL HEALTH EVIDENCE IN IMMIGRATION COURT, INCLUDING TO IMPOSE SAFEGUARDS AND APPOINT COUNSEL, BUT *G-G-S-* UNDERMINES THE LEGAL REPRESENTATION OF CLIENTS WITH MENTAL ILLNESS.

### 1. To Promote Fundamentally Fair Proceedings for Noncitizens, IJs Consider Mental Health Evidence to Provide Safeguards and Appoint Counsel.

"To meet the traditional standards of fairness," the Board gave instructions in *Matter of M-A-M-*, 25 I&N Dec. 474, 479 (BIA 2011) on how to observe indicia of incompetency and consider mental health evidence to assess competency. The Board not only encouraged IJs to consider "evidence of mental illness or incompetency" within the record, but also mandated that the Department of Homeland Security ("DHS") produce any records in its possession that would aid the court in its competency inquiry. *Id*. at 479–80. If there are any indicia of incompetency, *M-A-M-* compels the IJ to consider evidence, including mental health evidence, to determine competency. *Id*. at 484. In keeping with the evidentiary standards in immigration court discussed above and the requirements of *M-A-M-*, IJs already admit and consider mental health evidence and assess its relevance, probative value, and fundamental fairness to make competency determinations.

A finding of incompetency results in the implementation of safeguards. *Id*. at 481. Safeguards include "identification and appearance of a family member or close friend who can assist the individual and provide the court with information . . . participation of a guardian in the proceedings . . . [and] actively aiding in the development of the record." *Id*. at 483. The Board has further safeguarded clients with mental illness from adverse credibility findings. *Matter of J-R-R-A-*, 26 I&N Dec. 609 (BIA 2015). Additional safeguards that attorneys have requested include non-adversarial cross-examination, proffer of statements on the applications, and the waiver of their clients' appearance in court. App. A, Declaration of Katharine M. Gordon ("App.

A") ¶ 8; App. B, Declaration of Tilman Jacobs ("App. B") ¶ 7; App. C, Declaration of Shaleen Morales ("App. C") ¶ 8.

An important safeguard for individuals in detention is the appointment of counsel through the National Qualified Representative Program ("NQRP"). Dep't of Justice, *National Qualified Representative Program (NQRP)* (Feb. 18, 2020), https://www.justice.gov/eoir/national-qualified-representative-program-nqrp. NQRP is a program run by the Department of Justice's Executive Office for Immigration Review and provides Qualified Representatives ("QR") to unrepresented and detained noncitizens found incompetent to proceed *pro se* in removal proceedings. *Id*.; App. A ¶ 5; App. B ¶¶ 4–5; App. C ¶ 4. While not all individuals with mental illness are incompetent (at the time of the proceedings or otherwise) or vice versa, attorneys have observed substantial overlap between the two groups. App. A ¶ 10. Additionally, individuals with mental illness are not always detained and deemed incompetent during removal proceedings in such a way that requires appointment of a QR. *Amici* include non-NQRP legal service providers that offer services to detained and non-detained individuals with mental illness. App. C ¶ 5. But regardless of whether an attorney is appointed through NQRP or other means, attorneys who are tapped to represent individuals with mental illness may have to confront the problem of *G-G-S-*.

2. With Incomplete PSC Determinations, Counsel Can Represent Clients on Just One Application: Deferral of Removal Under the Convention Against Torture, a Protection of Last Resort.

*G-G-S-* operates to severely restrict the scope of legal representation counsel can give to individuals with mental illness. Through NQRP appointment or otherwise, counsel for clients with mental illness enter into an attorney-client relationship to help their clients pursue protection from harm. However, that representation can, and often does, quickly narrow in scope,

becoming an arduous but likely unavailing exercise in obtaining deferral of removal under the CAT for their clients.[2]

A noncitizen who has a PSC is barred from two crucial forms of protection from persecution: asylum and withholding of removal. INA §§ 208(b)(2)(B)(i); 241(b)(3)(B). Even if an applicant demonstrates that they meet the definition of a "refugee" and will *more likely than not* face persecution or death due to protected grounds, they will nevertheless be deported if convicted of a PSC. *Id.* Counsel will therefore be barred from presenting a case—no matter how meritorious the need—to protect their clients from likely persecution in their home countries on account of a protected ground, for example, due to mental illness. Clients' past persecution in their countries often arose from and/or contributed to their mental illness, with episodes and behavior in the United States arising from that mental illness then having led to contact with law enforcement and the convictions at issue in PSC determinations. *See* App. A ¶¶ 10, 12; App. B, ¶¶ 9–11; App. C ¶¶ 10, 12.

This all occurs against a backdrop of mental health evidence being readily considered in immigration court for competency, credibility, appointment of counsel, termination of proceedings, discretionary determinations, mental illness-related particular social groups, and more. *See, e.g.*, *Acevedo Granados v. Garland*, 992 F.3d 755, 761–64 (9th Cir. 2021)

[2] *G-G-S-* also negatively impacts pro se noncitizens with mental illness, including those who receive limited pro se assistance with completing forms and "know your rights" trainings from attorneys in the Legal Orientation Program ("LOP"). App. D, Declaration of Eleanor Gourley ("App. D") ¶ 3; App. E, Declaration of Jennifer P. Nelson ("App. E") ¶ 2, 7. LOP attorneys cannot provide them with legal advice or representation in removal proceedings. *Id.* Pro se LOP individuals are often not fluent in English and may struggle to understand the substantive and procedural details, or even the existence, of their criminal record. App. D ¶ 13; App. E ¶ 7. Even trained counsel struggle to reconcile the contradictions *G-G-S-* injects into the already complex analysis of PSC determinations; for pro se noncitizens, assessing what evidence may or may not be used in highly consequential PSC determinations becomes even more burdensome and unrealistic. App. D ¶ 13; App. E ¶ 15.

(recognizing the particular social group of "El Salvadoran men with intellectual disabilities who exhibit erratic behavior"); *Temu v. Holder*, 740 F.3d 887, 892–96 (4th Cir. 2014) (finding that "individuals with bipolar disorder who exhibit erratic behavior" in Tanzania constituted a particular social group); *Kholyavskiy v. Mukasey*, 540 F.3d 555, 572–74 (7th Cir. 2008) (BIA/IJ erroneously determined that mental illness was not a PSG where petitioner feared persecution in Russia); USCIS, *RAIO Combined Training Program: Nexus-Particular Social Group* at 35–36 (Jul. 20, 2021), https://www.uscis.gov/sites/default/files/document/foia/Nexus_-_Particular_Social_Group_PSG_LP_RAIO.pdf (delineating that individuals with physical or mental disabilities can qualify for fear-based protections); App. A ¶¶ 6–9; App. B ¶¶ 5–8; App. C ¶¶ 6–9.

NQRP attorneys have observed that a number of their clients were eligible for asylum and/or withholding, based on membership in a particular social group akin to that which was endorsed in *Temu*. App. A ¶ 21; App. B ¶ 19; App. C ¶ 21. In some clients' countries, mental illness is falsely associated with disfavored sexual orientations, giving rise to asylum claims on account of imputed sexual orientation. *Id*. Some clients also had viable claims entirely independent of their mental illness, such as religion or political opinion. *Id*. However, because of incomplete PSC determinations that discounted mental health evidence, NQRP counsel could not present and the IJs could not consider those claims. *Id*.

The sole remaining option for clients with a PSC is deferral of removal under the CAT. In applying for deferral under the CAT, counsel must put forth an application that demonstrates that the client will more likely than not suffer the intentional infliction of severe pain and suffering, committed by, or at the acquiescence of, the government in the country of removal. 8 C.F.R. § 1208.18(a)(1). This torture must be "an **extreme** form of cruel and inhuman treatment and does

not include lesser forms of cruel, inhuman or degrading treatment or punishment." 8 C.F.R. § 1208.18(a)(2) (emphasis added). Furthermore, the harm is not torture worthy of protection unless **a public official** in that country acquiesces or is willfully blind to the extreme harm. 8 C.F.R. § 1208.18(a)(7) (emphasis added).

Claims for deferral under the CAT have exceptionally low rates of success. In 2018, the most recent year for which data is available, 69,618 people applied for CAT protection and only 177—about .0025%—were granted deferral of removal. EOIR FY 2018 Statistics Yearbook at 30, https://www.justice.gov/eoir/file/1198896/download. *G-G-S-* ties the hands of counsel so that securing protection for clients with mental illness—who face a uniquely heightened risk of harm—becomes a nearly Sisyphean task.

3. Clients with Mental Illness Who Are Deported Face a Heightened Risk of Harm.

When counsel cannot prove the high burden for CAT, the client is deported, with significant risk to their health and safety. Although there are no formal records kept regarding outcomes for people deported from the United States, there are many accounts of subsequent persecution, torture, and death. *E.g.*, Human Rights Watch, *Deported to Danger: United States Deportation Policies Expose Salvadorans to Death and Abuse* (Feb. 5, 2020), https://www.hrw.org/report/2020/02/05/deported-danger/united-states-deportation-policies-expose-salvadorans-death-and (identifying 138 cases of Salvadorans killed after deportation from the United States); Sarah Stillman, *When Deportation is a Death Sentence*, The New Yorker (Jan. 8, 2018), https://www.newyorker.com/magazine/2018/01/15/when-deportation-is-a-death-sentence. *G-G-S-* increases the risk of *refoulement*, and thus of persecution, torture, and death.

Courts in the United States recognize the heightened risk of harm that individuals with mental illness face upon repatriation. *See e.g.*, *Acevedo Granados*, 992 F.3d at 761–64; *Temu*, 740

F.3d at 892–96; *Kholyavskiy*, 540 F.3d at 572–74. For people experiencing mental illness, deportation can have life-or-death implications, given that in many countries, people who exhibit mental illness are routinely abandoned, confined, abused, and tortured. *See* Juan Méndez (Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment), *Report on Abusive Practices in Health-Care Settings*, ¶¶ 57–70, UN Doc. A/HRC/22/53 (Feb. 1, 2013).

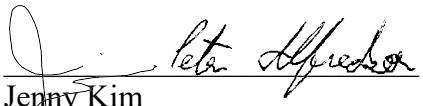
For an NQRP client with mental illness from Guinea who was at risk of deportation, country conditions evidence demonstrated that individuals with mental illness were tied up, kept hidden and locked away, and otherwise subjected to intense stigma. App. A ¶ 12. Clients who exhibit plainly visible signs of mental illness such as facial tics and conversations with hallucinatory figures are particularly vulnerable to heightened public attention and persecution and torture in their home countries, including from the police and gangs. App. A ¶¶ 14–16; Nelson Decl. ¶ 8; App. C ¶¶ 12–14. In some countries, mental illness is also associated with disfavored sexual orientations, leading to persecution of people with mental illness on the basis of their perceived sexual orientation. App. A ¶ 21. In a cruel irony, by excluding any evidence of mental illness in PSC determinations, *G-G-S-* drastically increases noncitizens' likelihood of being returned to their countries to face persecution, torture, and death because of that same mental illness.

## IV. CONCLUSION

*G-G-S-* stands in stark contrast to both Board precedent and the evidentiary norms of immigration court, stifling IJs' ability to consider "all reliable information," including potentially mitigating mental health evidence, in PSC determinations. *G-G-S-* is an inexplicable departure from the "totality of the circumstances" standard and positions itself as an insurmountable wall, towering over both counsel and their clients. To restore the mere chance to seek viable avenues

of relief for noncitizens with mental illness and their counsel's role in their pursuit of protection, the Attorney General must permit immigration courts to consider all relevant evidence, including mental health evidence, in PSC determinations. The Attorney General must vacate *G-G-S-*.

Respectfully submitted,



February 7, 2022
Date

Jenny Kim
Peter Alfredson
Amelia Dagen, Law Student
CAPITAL AREA IMMIGRANTS' RIGHTS (CAIR) COALITION

/s/ Laura Lunn
Laura Lunn
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ROCKY MOUNTAIN IMMIGRANT ADVOCACY NETWORK

February 7, 2022
Date

Counsel for *Amici Curiae*

**UNITED STATES DEPARTMENT OF JUSTICE**
**OFFICE OF THE ATTORNEY GENERAL**
**WASHINGTON, D.C.**

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| *In the Matter of*:<br><br>B-Z-R-<br><br>Interim Decision #4033 | 28 I&N Dec. 424 (A.G. 2021)<br><br>On Certification to Attorney General Merrick B. Garland |

## CERTIFICATE OF SERVICE

I, Jenny Kim, hereby certify that on this day I filed a copy of this PRACTITIONERS' PERSPECTIVE AMICUS BRIEF and attached pages 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

I further certify that I served counsel for the U.S. Department of Homeland Security with the abovementioned brief by FedEx at:

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625 Evans Street, Room 135
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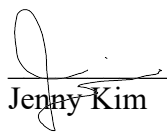
I further certify that I served counsel for respondent B-Z-R- with the abovementioned brief by FedEx at:

Lauren Major
American Friends Service Committee
570 Broad Street, Suite 1001
Newark, New Jersey 07102

Keren Zwick
National Immigrant Justice Center
224 S. Michigan Avenue, Suite 600
Chicago, Illinois 60604



Jenny Kim

February 7, 2022
Date

**UNITED STATES DEPARTMENT OF JUSTICE**
**OFFICE OF THE ATTORNEY GENERAL**
**WASHINGTON, D.C.**

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| *In the Matter of*:<br><br>B-Z-R-<br><br>Interim Decision #4033 | 28 I&N Dec. 424 (A.G. 2021)<br><br>On Certification to Attorney General Merrick B. Garland |

## CERTIFICATE OF SERVICE

I, Eleanor Gourley, hereby certify that on this day I served counsel for the U.S. Department of Homeland Security with this PRACTITIONERS' PERSPECTIVE AMICUS BRIEF by e-service at eservice.ice.gov at:

DHS – Office of Chief Counsel – Elizabeth
625 Evans Street, Room 135
Elizabeth, NJ 07201

/s/ Eleanor Gourley
Eleanor Gourley

February 7, 2022
Date

**UNITED STATES DEPARTMENT OF JUSTICE**
**OFFICE OF THE ATTORNEY GENERAL**
**WASHINGTON, D.C.**

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| *In the Matter of*:<br><br>B-Z-R-<br><br>Interim Decision #4033 | 28 I&N Dec. 424 (A.G. 2021)<br><br>On Certification to Attorney General Merrick B. Garland |

## APPENDIX LIST

| Appendix | Description |
|---|---|
| A | Declaration of Attorney Katharine M. Gordon |
| B | Declaration of Attorney Tilman Jacobs |
| C | Declaration of Attorney Shaleen Morales |
| D | Declaration of Attorney Eleanor Gourley |
| E | Declaration of Attorney Jennifer P. Nelson |

# Appendix A: Declaration of Attorney Katharine M. Gordon

**UNITED STATES DEPARTMENT OF JUSTICE**
**OFFICE OF THE ATTORNEY GENERAL**
**WASHINGTON, D.C.**

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| *In the Matter of:*<br><br>B-Z-R-,<br><br>Respondent. | **PRACTITIONERS' PERSPECTIVE AMICUS BRIEF** |

**DECLARATION OF KATHARINE M. GORDON IN SUPPORT OF PRACTITIONERS' PERSPECTIVE AMICUS BRIEF**

I, Katharine M. Gordon, hereby state under penalty of perjury pursuant to 28 U.S.C. § 1746 that the following statements are true and accurate to the best of my knowledge, information, and belief, and that I incorporate the following statements in support of the practitioners' perspective amicus brief and respectfully represent to the Honorable Attorney General the following:

1. I am a Staff Attorney with the Capital Area Immigrants Rights' (CAIR) Coalition, a nonprofit that provides immigration legal services to noncitizens detained in Maryland and Virginia. As an attorney with CAIR Coalition's Detained Adult Program, I have represented adult clients with mental health issues in removal proceedings for the past two years. I am a graduate of Bryn Mawr College and the George Washington University Law School and am admitted to practice law in New York.

2. Prior to joining CAIR Coalition, I worked at Al Otro Lado, in Tijuana, Mexico, coordinating the pro bono response to asylum seekers impacted by the "Metering" and "Migration Protection Protocols" policies. I also worked for two years as a child advocate on

behalf of unaccompanied minors—including children with mental health and developmental disabilities—detained in residential treatment centers by the Office of Refugee Resettlement.

3. As an attorney at CAIR Coalition, I have provided full legal representation in immigration court and/or before the Board of Immigration Appeals ("BIA") to 11 clients, all of whom had both mental health issues and criminal records. In nearly all these cases, the primary forms of relief sought were asylum, withholding of removal, and/or protection under the Convention Against Torture ("CAT").

4. The Arlington Immigration Court in Arlington, Virginia adjudicates noncitizens' immigration applications in removal proceedings, including applications for asylum, withholding of removal under the Immigration and Nationality Act ("INA") § 241(b)(3), 8 U.S.C. § 1231(b)(3), and protection under the CAT. I currently represent noncitizen clients in their removal proceedings in the Arlington Immigration Court.

5. I, as a Qualified Representative ("QR"), represent noncitizens in their removal proceedings through the U.S. Department of Justice's Executive Office for Immigration Review's National Qualified Representative Program ("NQRP"). NQRP is a program that provides legal representatives, QRs, to certain unrepresented and detained respondents who are found by an Immigration Judge ("IJ") or the BIA to be mentally incompetent to represent themselves in immigration proceedings.

6. In immigration court, for a QR to be appointed to represent a detained noncitizen, the IJ needs to find the noncitizen mentally incompetent. Indicia of incompetency triggering a competency hearing can be flagged by the IJ or a third party. Furthermore, if the U.S. Department of Homeland Security ("DHS") is in possession of indicia of incompetency, its attorney must present it to the IJ. Our organization provides Legal Orientation to noncitizens

detained in Maryland and Virginia. If the intake staff member observes indicia of incompetency, the organization may submit third-party notification of indicia of incompetency to the IJ.

7. Indicia of incompetency can be observations of and interactions with the noncitizen throughout the course of the removal proceedings, as well as evidence in the record, such as mental health assessments, medical reports, testimony from mental health professionals, friends, and family, and reports or letters from teachers, counselors, or social workers. Documents such as mental health assessments related to a noncitizen's contact with the criminal justice system and conviction may also serve as indicia of incompetency. Respondent's retained counsel and/or a third party may submit, the DHS attorney with relevant materials must provide, and the IJ will consider similar observations and evidence at the competency hearing to make a competency determination.

8. If a noncitizen is found to be incompetent, the IJ must implement safeguards throughout the removal proceedings, including, as discussed above, possibly appointing a QR like myself through NQRP. An attorney may submit mental health information in support of a finding of incompetency for safeguards. I have submitted mental health information on behalf of clients to request that the IJ implement various safeguards. Safeguards that I have previously requested include that the noncitizen's appearance be waived, cross-examination be non-adversarial, and that counsel be allowed to proffer statements on the applications.

9. Another significant safeguard for an individual whose mental health issues affect competency is for the IJ to accept that the individual believes what he has presented, even though his account may not be believable to others or otherwise sufficient to support the claim. *Matter of J-R-R-A-*, 26 I&N Dec. 609, 612 (BIA 2015). The IJ thus can consider mental health information to protect against an adverse credibility finding.

10. Upon appointment and in building applications with noncitizens as their QR, I have observed that many of my noncitizen clients' mental incompetence was attributable to mental health issues, and that those mental health issues oftentimes gave rise to erratic behavior, episodes, or psychotic breaks that led to their contact with the criminal justice system. For several of my clients, that psychotic break or episode led to their their one and only experience of being criminally prosecuted.

11. I have submitted mental health information on behalf of the noncitizens I represent in immigration court in support of their applications for asylum and withholding of removal. In *Temu v. Holder*, 740 F.3d 887 (4th Cir. 2014), the United States Court of Appeals for the Fourth Circuit decided that "individuals with bipolar disorder who exhibit erratic behavior" is a cognizable particular social group for purposes of asylum and withholding of removal eligibility. For an individual who is part of a similar particular social group, I submit mental health information to establish the noncitizen's membership in this group that is at risk of persecution in their home country. I have observed that many of my clients' mental health issues arose in whole or in part from, or were exacerbated by, past persecution in their countries of origin.

12. For example, I represented an NQRP client from Guinea who had been diagnosed with Major Depressive Disorder with Psychotic Features, as well as Post-Traumatic Stress Disorder ("PTSD"). His mental health issues as an adult partly stemmed from experiences as a child in Guinea, where he was regularly subject to physical abuse in order to "beat the devil out of him." In Guinea, he also witnessed severe mistreatment of other people with mental health issues. At his merits hearing, we presented testimony from an expert witness on the horrific

conditions for people with mental illness in Guinea, including people with mental health issues being tied up, kept hidden and locked away, and otherwise subject to intense stigma.

13. I also represented another NQRP client from El Salvador who had been diagnosed with Major Depressive Disorder with Psychotic Features and PTSD. As a child in El Salvador, he endured brutal beatings from his father—who was a gang member—and from the police. He first came to the attention of NQRP because he was unable to sleep due to flashbacks to the abuse that he had suffered as a child.

14. In applications for asylum, withholding of removal, or protection under the CAT, the noncitizen must demonstrate a likelihood of future persecution or torture. For a noncitizen who belongs to a *Temu*-like particular social group, I have submitted evidence about the visibility of the noncitizen's mental illness and how that would attract the attention of civilians, gangs, and law enforcement in the country of persecution.

15. For purposes of protection under the CAT, I have submitted evidence about the visibility of the noncitizen's mental illness and how that would attract the attention of civilians, gangs, and law enforcement, who would then more likely than not torture the noncitizen.

16. For example, I worked with a client from Guyana who had clear indicia of mental health issues. He displayed facial tics, including erratic tongue movements, and would speak to invisible individuals not actually in the room with him. There was clear evidence that he was hallucinating, and his public defender noted that she "viewed [his criminal] actions as related to his inability to comprehend proper conduct and boundaries when his mental illness is untreated or spirals." Nevertheless, the IJ ordered this client removed while appearing pro se at his *M-A-M-* hearing. I was later able to take on his case pro bono, successfully filed a Motion to Reopen, and ultimately won asylum for him. But this case shows that clients with mental illness often behave

in erratic ways that would make them uniquely vulnerable to negative attention and persecution if deported.

17. Even though the IJ considers mental health information to determine if a noncitizen is competent, should be appointed counsel, or merits asylum, withholding of removal, and/or protection under the CAT, the IJ cannot consider that same information or additional mental health information to determine whether, under the *totality of the circumstances*, the noncitizen was convicted of a particularly serious crime ("PSC") and constitutes a danger to the community of the United States. *Matter of G-G-S-*, 26 I&N Dec. 339 (BIA 2014). A PSC finding strips the noncitizen of the ability to apply for asylum and withholding of removal.

18. To my knowledge, this is the only bar to mental health information, or even to a specific type of evidence, that exists in immigration court procedure. Immigration courts do not abide by the Federal Rules of Evidence and it is within the IJ's discretion to admit and weigh all kinds of evidence. To make a PSC determination, the IJ is to consider the totality of the circumstances. *Matter of Frentescu*, 18 I&N Dec. 244, 245–47 (BIA 1982); *see also Matter of N-A-M-*, 24 I&N Dec. 336, 338 (2007) ("all reliable information may be considered in making a particularly serious crime determination"). *G-G-S-* runs contrary to that rule and is the unique instance in which a type of evidence is categorically barred from consideration under the PSC analysis, and more generally, under the totality of the circumstances analysis.

19. DHS, the agency that prosecutes noncitizens in removal proceedings, considers mental health information as part of the totality of the circumstances analysis to exercise prosecutorial discretion. In his September 2021 memorandum, DHS Secretary Alejandro N. Mayorkas reiterated this standard, stating that a determination that an immigrant is a threat to public safety to warrant enforcement requires "an assessment of the individual and the totality of

the facts and circumstances." In listing mitigating factors for such public safety analyses, Secretary Mayorkas specifically included "a mental condition that may have contributed to the criminal conduct." I have submitted several requests for release or termination of removal proceedings on behalf of clients in light of this memorandum. While DHS has denied some of my requests, the DHS policy is that the mental health information I submit be considered in deciding whether to exercise prosecutorial discretion.

20. Because mental health information is relevant for competency, legal representation, safeguards, and the discretionary *initiation and termination* of removal proceedings, the IJ has all this mental health information before them but is to disregard it for PSC determinations *only*. Practically, I've observed that IJs do consider *incomplete* mental health information and take *G-G-S-* to mean that mental health information cannot be considered as a mitigating factor in making PSC determinations. This is because any information about the circumstances arising from a psychotic break or episode and subsequent conviction will highlight the mental health symptoms in a vacuum and fail to put it in context as an anomaly or the counterpart with which to demonstrate evidence of rehabilitation.

21. Importantly, a PSC determination with a bar on mental health information discriminates against noncitizens with mental health issues, foreclosing any possibility of obtaining asylum and withholding of removal. In effect, I have been assigned as a QR to represent individuals who are deemed incompetent and at risk of persecution due to their mental health illness, but because of a PSC determination that fails to consider mental health issues, I can't help them apply for protection from persecution on account of the very same mental health illness. Furthermore, in some countries, mental health issues are associated with a disfavored sexual orientation, which could give rise to claims for asylum and/or withholding of removal

based on imputed sexual orientation. I have also had individuals who had more "traditional" asylum and/or withholding of removal claims, for persecution on account of their religion or political opinion. However, none of this is of any value to a noncitizen who cannot even apply at all for relief from persecution.

22. A noncitizen with mental health issues with an incomplete and fundamentally erroneous PSC determination will then only be eligible for the CAT, a burdensome application for relief that requires the noncitizen to demonstrate that he is more likely than not to be tortured upon return to his home country.

23. Because of *G-G-S-*, a number of my NQRP clients eligible for asylum and withholding of removal were unable to have their claims considered. Some were returned back their country of persecution.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed on this Second day of February, 2022.

Katharine M. Gordon
Staff Attorney
Capital Area Immigrants' Rights (CAIR) Coalition
1025 Connecticut Ave NW, Suite 701
Washington, DC 20036
Phone: 202 919 6493
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Email: Katharine.gordon@caircoalition.org

# Appendix B: Declaration of Attorney Tilman Jacobs

**UNITED STATES DEPARTMENT OF JUSTICE**
**OFFICE OF THE ATTORNEY GENERAL**
**WASHINGTON, D.C.**

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|---|---|
| *In the Matter of:*<br><br>B-Z-R-,<br><br>Respondent. | **PRACTITIONERS' PERSPECTIVE AMICUS BRIEF** |

**DECLARATION OF TILMAN JACOBS IN SUPPORT OF PRACTITIONERS' PERSPECTIVE AMICUS BRIEF**

I, Tilman Jacobs, hereby state under penalty of perjury pursuant to 28 U.S.C. § 1746 that the following statements are true and accurate to the best of my knowledge, information, and belief, and that I incorporate the following statements in support of the practitioners' perspective amicus brief and respectfully represent to the Honorable Attorney General the following:

1. I am a senior staff attorney in the Rocky Mountain Immigrant Advocacy Network's Detention Program. I received my juris doctor from the Georgetown University Law Center and have been admitted to the State Bar of California since 2012.

2. Since 2012, my practice has primarily involved noncitizen clients in detention, often as a result of interactions with the criminal justice system, and the majority of my clients have experienced mental health issues which impacted their lives. I have spent most of my legal career at nonprofit organizations serving large numbers of detained individuals and I have performed legal screenings, including particularly serious crime determinations, for hundreds of

individuals. Additionally, I have taught Immigration Law courses at the University of Wyoming College of Law and the University of Colorado Law School.

3. The Aurora Immigration Court adjudicates noncitizens' immigration applications in removal proceedings, including applications for asylum, withholding of removal under the Immigration and Nationality Act ("INA") § 241(b)(3), 8 U.S.C. § 1231(b)(3), and protection under the Convention Against Torture ("CAT"). I currently represent noncitizen clients in their removal proceedings in Aurora Immigration Court.

4. I, as a Qualified Representative ("QR"), represent noncitizens in their removal proceedings through the U.S. Department of Justice's Executive Office for Immigration Review's National Qualified Representative Program ("NQRP"). NQRP is a program that provides legal representatives, QRs, to certain unrepresented and detained respondents who are found by an Immigration Judge ("IJ") or the Board of Immigration Appeals ("BIA") to be mentally incompetent to represent themselves in immigration proceedings.

5. In immigration court, for a QR to be appointed to a detained noncitizen, the IJ needs to find the noncitizen mentally incompetent. Indicia of incompetency triggering a competency hearing can be flagged by the IJ or a third party. Furthermore, if the U.S. Department of Homeland Security ("DHS") is in possession of indicia of incompetency, its attorney must present it to the IJ. Our organization provides Legal Orientation to noncitizens detained in Colorado. If the intake staff member observes indicia of incompetency, the organization may submit third party notification of indicia of incompetency to the immigration court.

6. Indicia of incompetency can be observations of and interactions with the noncitizen throughout the course of the removal proceedings, as well as evidence in the record,

such as mental health assessments, medical reports, testimony from mental health professionals, friends, and family, and reports or letters from teachers, counselors, or social workers. Documents such as mental health assessments related to a noncitizen's contact with the criminal system and conviction may also serve as indicia of incompetency. Respondent's retained counsel and/or a third party may submit, the DHS attorney with relevant materials must provide, and the IJ will consider similar observations and evidence at the competency hearing to make a competency determination.

7. If a noncitizen is found to be incompetent, the IJ must implement safeguards throughout the removal proceedings, including, as discussed above, possibly appointing a QR like myself through NQRP. An attorney may submit mental health information in support of a finding of incompetency for safeguards. I have submitted mental health information on behalf of clients to request that the IJ implement various safeguards. Safeguards that I have previously requested include that the noncitizen's appearance be waived, cross-examination be non-adversarial, counsel be allowed to proffer statements on the applications, and the noncitizen be allowed to testify in the courtroom, rather than proceed via video-teleconferencing from the detention center.

8. Another significant safeguard for an individual whose mental health issues implicate credibility, is for the IJ to accept that the individual believes what he has presented, even though his account may not be believable to others or otherwise sufficient to support the claim. *Matter of J-R-R-A-*, 26 I&N Dec. 609, 612 (BIA 2015). The IJ thus can consider mental health information as a safeguard for respondents with mental disabilities even in instances where the court has not entered an order of incompetence.

9. Upon appointment and in building applications with noncitizens as their QR, I have observed that many of my noncitizen clients' indicia of mental incompetence were attributable to mental health issues, and that those mental health issues oftentimes gave rise to erratic behavior, episodes, or psychotic breaks that led to their contact with the criminal justice system. For several of my clients, the psychotic break or episode was their one and only contact with the criminal system.

10. I have submitted mental health information on behalf of the noncitizens I represent in immigration court in support of their applications for asylum and withholding of removal. In *Temu v. Holder*, 740 F.3d 887 (4th Cir. 2014), the United States Court of Appeals for the Fourth Circuit decided that "individuals with bipolar disorder who exhibit erratic behavior" is a cognizable particular social group for purposes of asylum and withholding of removal eligibility. For an individual who is part of a similar particular social group, I submit mental health information to establish the noncitizen's membership in this group that is at risk of persecution in their home country. I have observed that many of my clients' mental health issues arose in whole or in part from, or were exacerbated by, past persecution in their countries of origin.

11. For example, a recent client of mine only narrowly survived the murder of his entire family as a child. His family was targeted by his country's government on account of his father's and brother's political activities. He was diagnosed with Posttraumatic Stress Disorder, Major Depressive Affective Disorder Recurrent Episode Severe Degree Specified as with Psychotic Behavior, and Unspecified Anxiety Disorder.

12. In applications for asylum, withholding of removal under the INA, or withholding or deferral of removal under the CAT, the noncitizen must demonstrate the likelihood of future

persecution or torture. For a noncitizen who belongs to a *Temu*-like particular social group, I have submitted evidence about the visibility of the noncitizen's mental illness and how that would attract the attention of civilians, gangs, and law enforcement in the country of persecution.

13. For purposes of protection under the CAT, I have submitted evidence about the visibility of the noncitizen's mental illness and how that would attract the attention of civilians, gangs, and law enforcement, who would then more likely than not torture the noncitizen.

14. For example, the client referred to above exhibited paranoia and erratic behavior during stressful situations, like proceedings in immigration court, which led the IJ to find him not competent and ultimately grant protection under the CAT. However, the IJ was unable to consider these same factors in her particularly serious crime ("PSC") analysis.

15. Even though the IJ considers mental health information to determine if a noncitizen is competent, should be appointed counsel, or merits asylum, withholding of removal, and/or protection under the CAT, the IJ cannot consider that same information or additional mental health information to determine whether, under the *totality of the circumstances*, the noncitizen was convicted of a PSC and constitutes a danger to the community of the United States. *Matter of G-G-S-*, 26 I&N Dec. 339 (BIA 2014). A PSC finding strips the noncitizen of the ability to apply for asylum under the INA and withholding of removal both under the INA and under the CAT.

16. To my knowledge, this is the only bar to mental health information, or even to a specific type of evidence, that exists in immigration court procedure. Immigration courts do not abide by the Federal Rules of Evidence and it is within the IJ's discretion to admit and weigh all kinds of evidence. To make a PSC determination, the IJ is to consider the totality of the circumstances. *Matter of Frentescu*, 18 I&N Dec. 244, 245–47 (BIA 1982); *see also Matter of N-*

*A-M-*, 24 I&N Dec. 336, 338 (2007) ("all reliable information may be considered in making a particularly serious crime determination). *G-G-S-* runs contrary to that rule and is the unique instance in which a type of evidence is categorically barred from consideration under the PSC analysis, and more generally, under the totality of the circumstances analysis.

17. The DHS, the agency that prosecutes noncitizens in removal proceedings, considers mental health information, as part of the totality of the circumstances analysis, to exercise prosecutorial discretion. In his September 2021 memorandum, DHS Secretary Alejandro N. Mayorkas reiterated this standard, stating that a determination that an immigrant is a threat to public safety to warrant enforcement requires "an assessment of the individual and the totality of the facts and circumstances." In listing mitigating factors for such public safety analyses, Secretary Mayorkas specifically included "a mental condition that may have contributed to the criminal conduct." I have submitted several requests for release or termination of removal proceedings on behalf of clients. While DHS does not always grant the requests, the DHS policy is that the mental health information I submit be considered in deciding whether to exercise prosecutorial discretion.

18. Because mental health information is relevant for competency, legal representation, safeguards, and the discretionary *initiation and termination* of removal proceedings, the IJ has all this mental health information before them but is to disregard them for PSC determinations *only*. Practically, I've observed that IJs do consider *incomplete* mental health information and take *G-G-S-* to mean that mental health information cannot be considered as a mitigating factor in making PSC determinations. This is because any information about the circumstances arising from a psychotic break or episode and subsequent conviction will highlight

the mental health symptoms in a vacuum and fail to put it in context as an anomaly or the counterpart with which to demonstrate evidence of rehabilitation.

19. Importantly, a PSC determination with a bar on mental health information discriminates against noncitizens with mental health issues, foreclosing any possibility of obtaining asylum and withholding of removal. In effect, I have been assigned as a QR to represent individuals who are deemed incompetent and at risk of persecution due to their mental health illness, but because of a PSC determination that fails to consider mental health issues, I can't help them apply for protection from persecution on account of the very same mental health illness. Furthermore, in some countries, mental health issues are associated with a disfavored sexual orientation, which could give rise to claims for asylum based on imputed sexual orientation. I have also had individuals who had more "traditional" asylum claims, for persecution on account of their race religion or political opinion. However, none of this is of any value to a noncitizen who cannot even apply at all for relief from persecution.

20. For example, one of my clients experienced severe past persecution on account of his race, and would continue to be targeted for his race in his home country. The mental health issues from which he suffered were directly linked to his past harm and were a significant factor in his criminal history. Even though the psychological consequences of my client's past harm were powerful evidence of his need for protection against persecution, the immigration court was unable to consider them for the PSC analysis. As a result, he was only eligible for protection under the CAT.

21. The noncitizen with mental health issues with an incomplete PSC determination will only be eligible for deferral under the CAT, a most burdensome application for relief that requires the noncitizen to demonstrate that he is more likely than not to be tortured upon return

to his home country. Based on my experience, it is nearly impossible for someone to be granted relief under the CAT.

22. Because of *G-G-S-*, a number of my NQRP clients eligible for asylum and withholding were unable to have their claims considered. Some were returned back their country of persecution.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed on this 1st day of February, 2022.

Tilman Jacobs
Senior Staff Attorney
Rocky Mountain Immigrant Advocacy Network
7301 Federal Blvd. Ste. 300
Westminster, CO 80304
Phone: 720-649-8883
Fax: 303-433-2823
Email: tjacobs@rmian.org

# Appendix C: Declaration of Attorney Shaleen Morales

**UNITED STATES DEPARTMENT OF JUSTICE**
**OFFICE OF THE ATTORNEY GENERAL**
**WASHINGTON, D.C.**

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| *In the Matter of:*<br><br>B-Z-R-,<br><br>Respondent. | **PRACTITIONERS' PERSPECTIVE AMICUS BRIEF** |

**DECLARATION OF SHALEEN MORALES IN SUPPORT OF PRACTITIONERS' PERSPECTIVE AMICUS BRIEF**

I, Shaleen Morales, hereby state under penalty of perjury pursuant to 28 U.S.C. § 1746 that the following statements are true and accurate to the best of my knowledge, information, and belief, and that I incorporate the following statements in support of the practitioners' perspective amicus brief and respectfully represent to the Honorable Attorney General the following:

1. I am an attorney at the Rocky Mountain Immigrant Advocacy Network ("RMIAN"), a graduate of the University of Illinois College of Law, and a member of the Missouri bar.

2. For the past three years, I have been working at RMIAN, specializing on asylum, withholding of removal and protection under the Convention against Torture cases for clients that have experienced mental and emotional trauma, survived persecution, and those living with mental illness, including severe schizophrenia, depression and post-traumatic stress disorder ("PTSD"). I have also represented individuals deemed unable to represent themselves by an

Immigration Judge. Most of my clients living with mental illness have had prior contact with law enforcement and/or conviction records, as a result.

3. The Aurora Immigration Court adjudicates noncitizens' immigration applications in removal proceedings, including applications for asylum, withholding of removal under the Immigration and Nationality Act ("INA") § 241(b)(3), 8 U.S.C. § 1231(b)(3), and protection under the Convention Against Torture ("CAT"). I currently represent noncitizen clients in their removal proceedings at the Aurora Immigration Court.

4. I have represented noncitizens in their removal proceedings through the U.S. Department of Justice's Executive Office for Immigration Review's National Qualified Representative Program ("NQRP"), as a Qualified Representative ("QR"). NQRP is a program that provides legal representatives, QRs, to certain unrepresented and detained respondents who are found by an Immigration Judge ("IJ") or the Board of Immigration Appeals ("BIA") to be mentally incompetent to represent themselves in immigration proceedings.

5. The majority of my professional time is spent serving clients under a universal representation model. I am essentially a public defender in the immigration context. Through this role, I represent individuals with mental illness but are not appointed a QR.

6. In immigration court, for a QR to be appointed to a detained noncitizen, the IJ needs to find the noncitizen mentally incompetent. Indicia of incompetency triggering a competency hearing can be flagged by the IJ or a third party. Furthermore, if the U.S. Department of Homeland Security ("DHS") is in possession of indicia of incompetency, its attorney must present it to the IJ. Our organization provides Legal Orientation to noncitizens detained in Colorado. If the intake staff member observes indicia of incompetency, the

organization may submit third party notification of indicia of incompetency to the immigration court.

7. Indicia of incompetency can be observations of and interactions with the noncitizen throughout the course of the removal proceedings, as well as evidence in the record, such as mental health assessments, medical reports, testimony from mental health professionals, friends, and family, and reports or letters from teachers, counselors, or social workers. Documents such as mental health assessments related to a noncitizen's contact with the criminal system and conviction may also serve as indicia of incompetency. Respondent's retained counsel and/or a third party may submit, the DHS attorney with relevant materials must provide, and the IJ will consider similar observations and evidence at the competency hearing to make a competency determination.

8. If a noncitizen is found to be incompetent, the IJ must implement safeguards throughout the removal proceedings, including, as discussed above, possibly appointing a QR like myself through NQRP. An attorney may submit mental health information in support of a finding of incompetency for safeguards. I have submitted mental health information on behalf of clients to request that the IJ implement various safeguards in cases where I acted as a QR and as non-QR attorney. Safeguards that I have previously requested include that the noncitizen's appearance be waived, cross-examination be non-adversarial, and counsel be allowed to proffer statements on the applications.

9. Another significant safeguard for an individual whose mental health may affect credibility, is for the IJ to accept that the individual believes what he has presented, even though his account may not be believable to others or otherwise sufficient to support the claim. *Matter of*

*J-R-R-A-*, 26 I&N Dec. 609, 612 (BIA 2015). The IJ thus can consider mental health information to protect against an adverse credibility finding where there is evidence of mental illness, and this safeguard applies even when a respondent has not been deemed incompetent by the immigration court.

10. Upon appointment and in filing applications and evidence in support thereof with noncitizens both as their QR and non-QR attorney, I have observed that many of my noncitizen clients' mental health issues gave rise to erratic behavior, episodes, or psychotic breaks that led to their contact with the criminal system.

11. I have submitted mental health information on behalf of the noncitizens I represent in immigration court in support of their applications for asylum and withholding of removal. In *Temu v. Holder*, 740 F.3d 887 (4th Cir. 2014), the United States Court of Appeals for the Fourth Circuit decided that "individuals with bipolar disorder who exhibit erratic behavior" is a cognizable particular social group for purposes of asylum and withholding of removal eligibility. For an individual who is part of a similar particular social group, I submit mental health information to establish the noncitizen's membership in this group that is at risk of persecution in their home country. I have observed that many of my clients' mental health issues arose in whole or in part from, or were exacerbated by, past persecution in their countries of origin.

12. For example, I, as a QR, represented Mr. Z, who fled his native country due to internal conflict. As a young child, Mr. Z would be tied and burned because he could not recite his religious text, in addition to being "different." Years after his persecution, Mr. Z resettled in the United States, where doctors diagnosed him with severe and persistent mental illness,

including mood instability, psychotic spectrum disorders and behavioral impulsivity. Mr. Z experiences auditory and visual hallucinations, fluctuating insight, and difficulty with reality testing, the objective evaluation of an emotion or thought against real life. Mr. Z's psychologist reasoned that his quality of life would be greatly impacted if he were removed as his behavior is unpredictable, and the severity of his paranoia could put him at grave risk for maltreatment in response to his bizarre behavior and verbalizations about other's intent. Due to the severe harm Mr. Z endured during his childhood, it is unclear when his symptoms first began but the trauma he experienced likely exacerbated and intensified his mental illness.

13. In applications for asylum, withholding of removal under the INA, or withholding or deferral of removal under the CAT, the noncitizen must demonstrate the likelihood of future persecution or torture. For a noncitizen who belongs to a *Temu*-like particular social group, I have submitted evidence about the visibility of the noncitizen's mental illness and how that would attract the attention of civilians, gangs, and law enforcement in the country of persecution.

14. For purposes of protection under the CAT, I have submitted evidence about the visibility of the noncitizen's mental illness and how that would attract the attention of civilians, gangs, and law enforcement, who would then more likely than not torture the noncitizen.

15. For example, in Mr. Z's case, I weighed whether to submit police reports demonstrating his erratic behavior, which were extremely helpful to support his membership in a cognizable particular social group for withholding, but also simultaneously increased the likelihood of barring him from that relief. Mr. Z's membership in multiple particular social groups was related to his mental illness but had the IJ found that Mr. Z's conviction, involving harm to another, was a particularly serious crime (PSC), it would have stripped his eligibility for

asylum and withholding of removal. Specifically, the police reports were helpful because they showed that when Mr. Z was approached by police officers, he acted in ways that fit the characteristics of multiple particular social groups. On the other hand, I knew the police officer's conclusions about what occurred on the night of Mr. Z's arrest would likely result in the IJ finding him ineligible for withholding. Mr. Z had difficulty trusting others and his family did not fully understand his mental health, so making the decision was extremely difficult. If the IJ granted Mr. Z withholding of removal he would be eligible for mental and medical health care public benefits that Mr. Z desired to continue. Ultimately, we chose to only submit the mental health expert's report concluding that Mr. Z's contact with law enforcement in the U.S. demonstrates his likelihood of future harm.

16. Another example is Mr. Q. In this instance, I served as a non-QR attorney for Mr. Q's deferral under CAT case since the Court did not deem him incompetent, even though he lives with mental illness. Mr. Q elected to withdraw his withholding under CAT claim due to his conviction history. As a child, Mr. Q witnessed the murder of his father and was also shot himself. While he survived, he did not receive treatment to aid in his recovery from the physical and psychological trauma he experienced, until the age of 30 when he was diagnosed with PTSD. Police reports that could have demonstrated an individual living with agonizing painful memories of the past while undiagnosed, only depicted him as a "reckless" individual on drugs. Normally, police reports do not capture multidimensional human beings, rather they demonstrate a person's worst conduct on a particular day. Mr. Q's case was difficult because he was not an NQRP client so the IJ did not have to rely on his mental health records as heavily as they would for a QR case. In proceeding with extra caution, we did not file police reports demonstrating his

erratic behavior or likely contact with law enforcement in the future because despite the reports providing helpful evidence of his likelihood to have contact with law enforcement in his country of origin, we feared they would instead prejudice Mr. Q. because the IJ would rely on them to find his conviction a PSC. Instead, we filed country conditions evidence and evidence that demonstrated Mr. Q used drugs as a treatment tool to subdue his mental health symptoms, and argued that all of those factors led to his contacts with law enforcement in the United States.

17. Even though the IJ considers mental health information to determine if a noncitizen is competent, should be appointed counsel, or merits asylum, withholding of removal, and/or protection under the CAT, the IJ cannot consider that same information or additional mental health information to determine whether, under the *totality of the circumstances*, the noncitizen was convicted of a particularly serious crime (PSC) and constitutes a danger to the community of the United States. *Matter of G-G-S-*, 26 I&N Dec. 339 (BIA 2014). A PSC finding strips the noncitizen of the ability to apply for asylum under the INA and withholding of removal both under the INA and under the CAT.

18. To my knowledge, this is the only bar to mental health information, or even to a specific type of evidence, that exists in immigration court procedure. Immigration courts do not abide by the Federal Rules of Evidence and it is within the IJ's discretion to admit and weigh all kinds of evidence. To make a PSC determination, the IJ is to consider the totality of the circumstances. *Matter of Frentescu*, 18 I&N Dec. 244, 245–47 (BIA 1982); *see also Matter of N-A-M-*, 24 I&N Dec. 336, 338 (2007) ("all reliable information may be considered in making a particularly serious crime determination). *G-G-S-* runs contrary to that rule and is the unique

instance in which a type of evidence is categorically barred from consideration under the PSC analysis, and more generally, under the totality of the circumstances analysis.

19. The DHS, the agency that prosecutes noncitizens in removal proceedings, considers mental health information, as part of the totality of the circumstances analysis, to exercise prosecutorial discretion. In his September 2021 memorandum, DHS Secretary Alejandro N. Mayorkas reiterated this standard, stating that a determination that an immigrant is a threat to public safety to warrant enforcement requires "an assessment of the individual and the totality of the facts and circumstances." In listing mitigating factors for such public safety analyses, Secretary Mayorkas specifically included "a mental condition that may have contributed to the criminal conduct." I have submitted several requests for release on behalf of clients. While DHS does not always grant the requests, the DHS policy is that the mental health information I submit be considered in deciding whether to exercise prosecutorial discretion.

20. Because mental health information is relevant for competency, legal representation, safeguards, and the discretionary *initiation and termination* of removal proceedings, the IJ has all this mental health information before them but is to disregard them for PSC determinations *only*. Practically, I've observed that IJs do consider *incomplete* mental health information and take *G-G-S-* to mean that mental health information cannot be considered as a mitigating factor in making PSC determinations. This is because any information about the circumstances arising from a psychotic break or episode and subsequent conviction will highlight the mental health symptoms in a vacuum and fail to put it in context as an anomaly or the counterpart with which to demonstrate evidence of rehabilitation.

21. Importantly, a PSC determination with a bar on mental health information discriminates against noncitizens with mental health issues, foreclosing any possibility of obtaining asylum and withholding of removal. In effect, I have been assigned as a QR to represent individuals who are deemed incompetent and at risk of persecution due to their mental health illness, but because of a PSC determination that fails to consider mental health issues, I can't help them apply for protection from persecution on account of the very same mental health illness. Furthermore, in some countries, mental health issues are associated with a disfavored sexual orientation, which could give rise to claims for asylum based on imputed sexual orientation. I have also had individuals who had more "traditional" asylum claims, for persecution on account of their religion or political opinion. However, none of this is of any value to a noncitizen who cannot even apply at all for relief from persecution.

22. The noncitizen with mental health issues with an incomplete PSC determination will only be eligible for deferral under the CAT, a most burdensome application for relief that requires the noncitizen to demonstrate that he is more likely than not to be tortured upon return to his home country. Based on my experience, it is nearly impossible for someone to be granted relief under the CAT.

23. Because of *G-G-S-*, a number of my NQRP clients and non-QR clients, eligible for asylum and withholding were unable to have their claims considered.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed on this 3rd day of February, 2022.

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# Appendix D: Declaration of Attorney Eleanor Gourley

**UNITED STATES DEPARTMENT OF JUSTICE**
**OFFICE OF THE ATTORNEY GENERAL**
**WASHINGTON, D.C.**

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| *In the Matter of:*<br><br>B-Z-R-,<br><br>Respondent. | **PRACTITIONERS' PERSPECTIVE AMICUS BRIEF** |

**DECLARATION OF ELEANOR GOURLEY IN SUPPORT OF PRACTITIONERS' PERSPECTIVE AMICUS BRIEF**

I, ELEANOR GOURLEY, hereby state under penalty of perjury pursuant to 28 U.S.C. § 1746 that the following statements are true and accurate to the best of my knowledge, information, and belief, and that I incorporate the following statements in support of the practitioners' perspective amicus brief and respectfully represent to the Honorable Attorney General the following:

1. I am currently a Senior Staff Attorney at the Capital Area Immigrants' Rights Coalition ("CAIR Coalition"), an organization that provides legal representation and services to indigent noncitizens in immigration detention in Maryland and Virginia. I obtained my J.D. from Washington University School of Law. Prior to joining CAIR Coalition in September 2019, I served as a Staff Attorney for the United States Court of Appeals for the Eleventh Circuit. I am currently admitted to practice law in Maryland (since December 2016) and Washington, D.C. (since July 2019).

2. The Baltimore Immigration Court in Baltimore, Maryland adjudicates noncitizens' immigration applications in removal proceedings, including applications for asylum, withholding of removal under the Immigration and Nationality Act ("INA") § 241(b)(3), 8 U.S.C. § 1231(b)(3), and protection under the Convention Against Torture ("CAT"). During my tenure at CAIR Coalition, I have primarily worked with noncitizens in detention in Maryland as they prepare *pro se* for their removal proceedings in Baltimore Immigration Court.

3. As a Senior Staff Attorney, I work with noncitizens in preparation for their removal proceedings through the U.S. Department of Justice's Executive Office for Immigration Review's Legal Orientation Program ("LOP"). LOP is a program that provides legal information to unrepresented immigrants in detention, both about their legal rights and generally about immigration court processes. In 2021, CAIR Coalition's LOP team conducted around 900 intakes, and we did around three times that many intakes prior to the COVID-19 pandemic. Our goal as LOP providers is to reach every unrepresented noncitizen in ICE detention in our region. For the many detained noncitizens who do not secure legal representation during removal proceedings, LOP provides them with "know your rights" presentations, individual orientations, and pro se workshops. We also provide limited pro se assistance such as collecting and translating evidence, assisting in filling out applications, or filing applications and evidence in court. As possible, LOP staff also work to secure pro bono representation for unrepresented immigrants in detention.

4. For noncitizens who the Immigration Judge ("IJ") determines are not competent to represent themselves, one way that they can then secure representation in immigration court is by being appointed a Qualified Representative ("QR") through the National Qualified Representative Program ("NQRP"). While the U.S. Department of Homeland Security ("DHS")

attorney must present any indicia of incompetency in their possession, the IJ or a third party can also flag indicia of incompetency to trigger a competency hearing.

5. In administering LOP, if a staff member observes indicia of incompetency and receives consent from the noncitizen, CAIR Coalition may submit a third-party notification of indicia of incompetency to the IJ. I have filed such notifications on behalf of pro se litigants in the past. Without third party intervention, a pro se applicant may not know to raise issues concerning mental health evidence or what could qualify as such evidence.

6. Under *M-A-M-*, indicia of incompetency can be observations of and interactions with the noncitizen throughout the course of the removal proceedings, as well as evidence in the record, such as mental health assessments, medical reports, testimony from mental health professionals, friends, and family, and reports or letters from teachers, counselors, or social workers. Documents such as mental health assessments related to a noncitizen's contact with the criminal justice system and conviction may also serve as indicia of incompetency. Pro se applicants, especially immigrants in detention, may struggle to collect such evidence in support of their claim. Furthermore, even if an applicant were able to collect evidence of a diagnosis of a serious mental illness, that alone would "not automatically equate to a lack of competency" for the applicant to be appointed representation, as noncitizens with mental health issues can be determined competent to proceed without counsel for removal proceedings. *Matter of M-A-M-*, 25 I&N Dec. 474, 480 (BIA 2011). If noncitizens with mental illness don't receive an incompetency finding, but are then unable to otherwise obtain an attorney, they must proceed pro se.

7. If a noncitizen is found to be incompetent, the IJ must implement safeguards throughout the removal proceedings, including, as discussed above, possibly appointing a QR.

Even for those applicants for whom a QR is not appointed, other safeguards may be put into place. For example, a significant safeguard for individuals whose mental health issues affect competency is for the IJ to accept that the individual believes what he has presented, even though his account may not be believable to others or otherwise sufficient to support the claim. *Matter of J-R-R-A-*, 26 I&N Dec. 609, 612 (BIA 2015). The IJ thus can consider mental health information to protect against an adverse credibility finding.

8. In my interactions with noncitizens through the LOP, I have observed that mental incompetency was often attributable to mental health issues, and that those mental health issues oftentimes gave rise to erratic behavior, episodes, or psychotic breaks that led to contact with the criminal justice system. Of the noncitizens serviced by our LOP in Maryland, the vast majority have been transferred to ICE custody from criminal custody.

9. Through the LOP, I have explained to noncitizens that a person can submit mental health documentation in support of their applications for asylum and withholding of removal. In *Temu v. Holder*, 740 F.3d 887 (4th Cir. 2014), the United States Court of Appeals for the Fourth Circuit decided that "individuals with bipolar disorder who exhibit erratic behavior" is a cognizable particular social group for purposes of eligibility for asylum and withholding of removal.

10. In applications for asylum, withholding of removal under the INA, or withholding of removal under the CAT, the noncitizen must demonstrate a likelihood of future persecution, and for deferral of removal under the CAT, the likelihood of future torture. For purposes of protection under the CAT, I have explained to pro se litigants that a person who exhibits symptoms of a mental illness that are externally visible to others could submit evidence about the

visibility of their mental illness and how that would attract the attention of people in their home countries who would then more likely than not torture them.

11. Even though the IJ considers mental health information to determine if a noncitizen is competent, should be appointed counsel, or merits asylum, withholding of removal, and/or protection under the CAT, the IJ cannot consider that same information or additional mental health information to determine whether, under the *totality of the circumstances*, the noncitizen was convicted of a PSC and constitutes a danger to the community of the United States. *Matter of G-G-S-*, 26 I&N Dec. 339 (BIA 2014). A PSC finding strips the noncitizen of the ability to apply for asylum under the INA and withholding of removal both under the INA and under the CAT.

12. To my knowledge, this is the only bar to mental health information, or even to a specific type of evidence, that exists in immigration court procedure. Immigration courts do not abide by the Federal Rules of Evidence and it is within the IJ's discretion to admit and weigh all kinds of evidence. To make a PSC determination, the IJ is to consider the totality of the circumstances. *Matter of Frentescu*, 18 I&N Dec. 244, 245–47 (BIA 1982); *see also Matter of N-A-M-*, 24 I&N Dec. 336, 338 (2007) ("all reliable information may be considered in making a particularly serious crime determination"). *G-G-S-* runs contrary to that rule and is the only instance in which a type of evidence is categorically barred from consideration under the PSC analysis, and more generally, under a totality of the circumstances analysis.

13. Furthermore, pro se litigants face additional hurdles in challenging a PSC determination: first, many pro se litigants are not fluent in English and may not properly understand the details of their conviction. Relatedly, many pro se litigants find it difficult to track the procedural history of their criminal case, particularly in distinguishing charges from final

convictions. Second, even trained counsel can find it difficult to navigate the complexity of PSC determinations; requiring pro se litigants with mental health issues to assess what evidence can and cannot be used in their PSC determinations because it somehow relates to mental health is burdensome and unrealistic.

14. The DHS, the agency that prosecutes noncitizens in removal proceedings, considers mental health information, as part of the totality of the circumstances analysis, to exercise prosecutorial discretion. In his September 2021 memorandum, DHS Secretary Alejandro N. Mayorkas reiterated this standard, stating that a determination that an immigrant is a threat to public safety to warrant enforcement requires "an assessment of the individual and the totality of the facts and circumstances." In listing mitigating factors for such public safety analyses, Secretary Mayorkas specifically included "a mental condition that may have contributed to the criminal conduct." While attorneys may leverage DHS policy to petition for termination of removal, pro se litigants are asked to make another complex legal decision on if/when to submit mental health information and when it is inadmissible.

15. Because mental health information is relevant for competency, legal representation, safeguards, and the discretionary *initiation and termination* of removal proceedings, the IJ has all this mental health information before them but must disregard it for PSC determinations *only*.

16. Importantly, a PSC determination with a bar on mental health information discriminates against pro se noncitizens with mental health issues, foreclosing any possibility of obtaining asylum and withholding of removal. Pro se litigants may have legitimate claims to asylum, including due to persecution on account of their mental health, but because of a PSC

determination that fails to consider mental health issues, they are ineligible to even apply for protection from such persecution.

17. A noncitizen with mental health issues with an incomplete PSC determination will only be eligible for deferral under the CAT, a burdensome application for relief that requires the noncitizen to demonstrate that he is more likely than not to be tortured upon return to his home country. *See* 8 C.F.R. § 1208.18(a)(1). Requiring these pro se litigants with mental health issues and incomplete PSC determinations to undertake the requisite fact-finding and record collection to demonstrate such a claim by a preponderance of the evidence is unreasonable, given the administrative and financial limitations facing pro se litigants in detention. The challenges of accessing records, especially from abroad, while in detention can be even more burdensome for pro se litigants with mental health issues.

18. Additionally, pro se litigants may expend all their resources preparing to present a claim for asylum before encountering a PSC determination before the IJ, and thus be ill-equipped mentally and practically to pivot to present a claim under the CAT. Based on my observation of pro se litigants through the LOP, it is nearly impossible for someone to be granted relief under the CAT, especially when they are not represented by counsel.

19. Because of *G-G-S-*, I have observed that many pro se litigants with mental health issues who were eligible for asylum and withholding were unable to have their claims considered. Unable to meet the heavy evidentiary burden under the CAT, some were returned back their country of persecution.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed on this 4th day of February, 2022.

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# Appendix E: Declaration of Attorney Jennifer P. Nelson

**UNITED STATES DEPARTMENT OF JUSTICE**
**OFFICE OF THE ATTORNEY GENERAL**
**WASHINGTON, D.C.**

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| *In the Matter of:*<br><br>B-Z-R-,<br><br>Respondent. | **PRACTITIONERS' PERSPECTIVE AMICUS BRIEF** |

**DECLARATION OF JENNIFER P. NELSON IN SUPPORT OF PRACTITIONERS' PERSPECTIVE AMICUS BRIEF**

I, Jennifer P. Nelson, hereby state under penalty of perjury pursuant to 28 U.S.C. § 1746 that the following statements are true and accurate to the best of my knowledge, information, and belief, and that I incorporate the following statements in support of the practitioners' perspective amicus brief and respectfully represent to the Honorable Attorney General the following:

1. I am the Legal Orientation Program ("LOP") Supervisory Attorney at the Rocky Mountain Immigrant Advocacy Network ("RMIAN"), a nonprofit legal services organization located in Westminster, Colorado. I graduated from the University of Michigan Law School in 2017 and was admitted to the Colorado bar that same year.

2. The LOP is funded by the Executive Office for Immigration Review and administered by the Vera Institute of Justice. Through the LOP, representatives from nonprofit organizations educate detained noncitizens about their rights and the immigration court process so that they can make informed decisions about their legal cases. RMIAN is the LOP provider

for noncitizens detained at the Aurora ICE Processing Center in Aurora, CO. This detention center is administered by the GEO Group. Through the LOP, RMIAN meets with noncitizens to explain their rights in detention, the mechanisms available to request release from detention, the applications available to defend against deportation, and the consequences of having a removal order, among other important topics. The LOP is designed to both educate noncitizens about their legal options while in immigration detention and to also explain how a noncitizen can represent themselves in immigration court. As the LOP Supervisory Attorney at RMIAN, I manage the legal services that RMIAN provides to detained pro se noncitizens at the Aurora ICE Processing Center in addition to providing those services myself. I also provide direct legal representation to noncitizens in immigration detention, including those who experience mental health disabilities.

3. Prior to working at RMIAN, I served as an Attorney Advisor to the Louisville Immigration Court through the United States Attorney General's Honors Program. I joined RMIAN in January 2020 as an LOP Staff Attorney. In March 2021, I assumed my current position as the LOP Supervisory Attorney.

4. Since joining RMIAN, I have worked extensively with hundreds of detained noncitizens through the LOP, including many who experience mental health challenges, many with criminal convictions, and many who fear persecution and torture if returned to their country of origin. According to the GEO Group's website, the total capacity of the Aurora ICE Processing Center is 1,532 individuals. While I have observed the population fluctuate over the past two years, the LOP has consistently maintained contact with more than a hundred participants even when the population dipped to its lowest during the peak of the global health crisis in 2020.

5. Noncitizens in removal proceedings who are detained at the Aurora ICE Processing Center appear before the Aurora Immigration Court. The Aurora Immigration Court adjudicates noncitizens' immigration applications in removal proceedings, including applications for asylum, withholding of removal under the Immigration and Nationality Act ("INA") § 241(b)(3), 8 U.S.C. § 1231(b)(3), and protection under the Convention Against Torture ("CAT"). Through the LOP, I am currently working with pro se noncitizens who are applying for fear based protection before the Aurora Immigration Court. Separately, I am also representing noncitizen clients in their removal proceedings before the Aurora Immigration Court.

6. Through the LOP, RMIAN endeavors to provide a Group Orientation to every noncitizen detained at the Aurora ICE Processing Center. This Group Orientation is an interactive general overview of immigration removal proceedings, including forms of relief, and is open to general questions. Following a Group Orientation, a pro se noncitizen is able to meet with one of RMIAN's LOP providers for an Individual Orientation, during which the noncitizen can briefly discuss their case and pose more specific questions. In addition to Individual Orientations, RMIAN's LOP offers Self Help Workshops on various topics as capacity allows. During a Self Help Workshop, a group of noncitizens with a shared potential relief option are provided detailed guidance on specific topics related to that potential relief option (such as how to complete an asylum application) and given self-help legal materials.

7. A key aspect of any LOP service is explaining eligibility requirements for relief applications, including any bars to relief. As an LOP provider, I must distill complex legal standards and considerations into digestible material for detained noncitizens, many of whom have no formal education, do not speak English, and are experiencing severe mental health issues. Through my contact with pro se noncitizens through the LOP, I have observed that many

individuals in detention experience mental health issues that oftentimes give rise to erratic behavior or episodes. This makes it extremely difficult for any given individual in this situation to understand or truly absorb the information being given during an LOP service, especially because mental health issues are often exacerbated by detention where individuals are stripped of their liberty and any support system they may have had outside of detention. I have observed the vicious cycle of individuals with mental health problems entering detention and struggling to understand why they are in proceedings and what their options are, which in turn fuels increased feelings of isolation and negatively impacts their mental health, which makes it *even more* difficult for that person to adequately represent themselves, and so on.

8. Of those individuals who attend LOP and experience mental health issues, I have observed that many have had contact with law enforcement, often *because of* their mental health problems and the erratic behavior, episodes, or psychotic breaks that result from their conditions. I have also observed that many LOP participants' mental health issues arose in whole or in part from, or were exacerbated by, past persecution or torture in their countries of origin. In fact, I have worked with many individuals whose fear of future persecution or torture is rooted in their mental illness and how it is perceived in their country of origin, or rooted in their ability to manage their illness in their country of origin and the attendant risk of institutionalization or harsher treatment at the hands of family, community members, or government authorities. I have also worked with individuals with more "traditional" fear based claims who nonetheless also have criminal records due to the various ways in which their mental illness has manifested.

9. Because many participants are desperate to avoid removal because they fear they will be persecuted or tortured because of their mental illness, many individuals ask me how they can obtain evidence of their mental health conditions in order to submit this evidence in support

of their fear based application in immigration court or to use in support of a release request with Immigration Customs and Enforcement ("ICE").

10. As I explain to all LOP participants, the Immigration Judge must consider mental health information to determine if a noncitizen is competent, should be appointed counsel, or merits asylum, withholding of removal, and/or protection under the CAT; the Immigration Judge cannot, however, consider that same information or additional mental health information to determine whether, under the *totality of the circumstances*, the noncitizen was convicted of a particularly serious crime ("PSC") and constitutes a danger to the community of the United States. *Matter of G-G-S-*, 26 I&N Dec. 339 (BIA 2014). A PSC finding bars the noncitizen from eligibility for asylum under the INA in addition to withholding of removal both under the INA and under the CAT.

11. Mental health information is not only relevant for considerations related to competency, legal representation, and safeguards in the immigration court, but is also vital to the discretionary *initiation and termination* of removal proceedings. The Department of Homeland Security ("DHS"), which houses ICE, is the agency that prosecutes noncitizens in removal proceedings. DHS explicitly considers mental health information, as part of the totality of the circumstances analysis, when determining whether to exercise prosecutorial discretion. In his September 2021 memorandum, DHS Secretary Alejandro N. Mayorkas reiterated this standard, stating that a determination that an immigrant is a threat to public safety to warrant enforcement requires "an assessment of the individual and the totality of the facts and circumstances." In listing mitigating factors for such public safety analyses, Secretary Mayorkas specifically included "a mental condition that may have contributed to the criminal conduct." I have personally submitted several requests for release on behalf of clients citing to mental health

conditions, and RMIAN's LOP provides this information to all LOP participants to consider when deciding whether to submit a pro se request for release or to seek favorable discretion such as termination or administrative closure of proceedings, waiver of appeal, or narrowing of issues. While DHS does not always grant the requests, the DHS policy is that evidence related to mental health must be considered in deciding whether to exercise prosecutorial discretion and can serve as a mitigating factor.

12. Unfortunately, RMIAN's LOP is not able to provide detailed, individualized support to every participant. I work closely with two other staff attorneys and a small team of legal advocates to provide as much robust pro se support as possible to detained noncitizens at the Aurora ICE Processing Center, but even together we are only able to provide individualized services to a small sliver of those who require assistance. This means that many individuals are left to piece together the legal information from an initial orientation on their own without the ability to speak with an LOP provider more than one or two times. Due to our limited capacity, many participants must also navigate evidence collection on their own from within detention.

13. While many participants with mental health problems are desperate to collect evidence of their conditions to submit in their legal cases, record collection is extremely difficult from within detention – individuals struggle to find the correct contact information for a hospital, clinic, police stations, jail, or prison, especially when they do not speak English and when they are often prevented from using the internet available in the law library because of near constant quarantines. Even when the individual does identify the proper mechanism for requesting records, the process is often time intensive and prohibitive for someone who does not have money to pay the common fees associated with record production. Nonetheless, I have observed some individuals successfully obtain records on their own, in particular when the individual is

lucky enough to have a friend or family member outside of detention who is willing to assist them.

14. In those cases where an individual is actually able to obtain mental health records, however, in my experience most pro se noncitizens with severe mental illness never fully grasp that these same records might hurt their chances of obtaining fear based relief if they are submitted as evidence in their legal case. The legal analysis required to understand that evidence of having a visible mental health condition, such as evidence of erratic behavior leading to contact with law enforcement, could weigh in favor of their fear based claim *but cut against them in the PSC analysis* is simply too complicated for most pro se litigants, let alone those struggling with mental health problems while detained. To the contrary, most individuals in this position are so desperate for ICE or a judge to understand that they are struggling with a mental health condition, that the condition is getting worse in detention, and that they would be in danger *because of* that condition if they were to be removed, that their instinct is to submit every piece of evidence that they have without a second thought as to the implications. The immigration judge thus has all this mental health information before them that a respondent is able to gather when the individual goes to apply for fear based relief, but the judge must disregard it for the PSC determination. As a result, pro se individuals submit information that they believe will help their case only to realize that the court relied on it in finding them ineligible for asylum and/or withholding due to a PSC finding.

15. This unjust circumstance is further compounded by the LOP's limitations when it comes to providers' ability to respond clearly to participants questions and to point out various legal considerations when reviewing participants case details and documents. Currently, services through the LOP are limited to "orientation," which has been interpreted to prohibit both legal

advice and limited legal representation. These restrictions fundamentally undercut the goals of the LOP and undermine providers' ability to meaningfully support pro se individuals and advance just outcomes in the immigration court system. When presented with a case-specific question, like "Do I have a PSC?", I am only permitted to respond by giving general information that does not constitute legal advice. This often results in me having to engage in verbal gymnastics, using odd linguistic constructions utilizing the third person and speaking in hypotheticals. Such generalized answers are confusing to participants and make it even more difficult for them to understand the legal issues they must navigate in deciding how to present their claim in court. In my experience, this conundrum of the LOP disproportionately affects our ability to meaningfully support noncitizens with mental health conditions.

16. To my knowledge, the immigration court's inability to consider mental health information in the PSC analysis is the only such carve out of the court's otherwise well-established duty to consider mental health information. Because of how strange it is for there to be this incongruence in what the court can and cannot consider as to this sole determination, I find it extremely difficult to explain the proper legal analysis to pro se noncitizens through the LOP, and not many are able to fully understand the implications. The likelihood of comprehension of this complex legal framework is further reduced when an LOP participant is living with a mental disability.

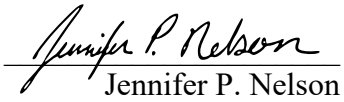
17. Importantly, a PSC determination with a bar on mental health information discriminates against noncitizens with mental health issues, foreclosing any possibility of obtaining asylum and withholding of removal and jeopardizing their likelihood of being released from detention.

18. A noncitizen with mental health issues who is found to be ineligible for asylum or withholding of removal due to a PSC determination will only be eligible for deferral under the CAT, a truly burdensome application for relief that requires the noncitizen to demonstrate that they are more likely than not to be tortured upon return to their home country. Based on my experience, it is nearly impossible for someone to be granted relief under the CAT, especially when that person is pro se.

19. Because of *G-G-S-*, many pro se individuals eligible for asylum and withholding are not able to have their claims considered, which often results in them being returned back their country of feared persecution.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed on this 3rd day of February, 2022.



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