IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Case No. 03-74666

Virgilio ANAYA-ORTIZ

Petitioner,

v.

Eric H. HOLDER, Jr.,

Respondent

On Review from the Board of Immigration Appeals

BRIEF OF *AMICI CURIAE* IN SUPPORT OF PETITIONER'S PETITION FOR PANEL REHEARING AND REHEARING *EN BANC*

Michael K. Mehr
Law Offices of Michael K. Mehr
100 Doyle Street, Suite A
Santa Cruz, CA 95062
Telephone: (831) 425-5757
Facsimile: (831) 425-0515
Counsel for *amici curiae*
(Listed on next page)

The Florence Immigrant and Refugee Rights Project
P.O. Box 654
Florence, Arizona 85232
(520) 868-0191

Immigrant Legal Resource Center
1663 Mission Street, Suite 602
San Francisco, California 94103
(415) 255-9499

Immigration Law Clinic
University of California, Davis
School of Law
400 Mrak Hall Drive
Davis, California 95616-5201
(530) 752-6942

Washington Defender Association's Immigration Project
110 Prefontaine Place S., Suite 610
Seattle, WA 98104
(206) 623-4321

Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

Federal Statutes

State cases

State Statutes

Publications

Handbook on Procedures and Critiera for Determining Refugee Status, (1979)……..….24

Grahl-Madsen, *Commentary on the Refugee Convention, 1951* (1997)…..23

U.S. Department of Justice, Executive Office for Immigration Review, FY 2006 Statistical year Book, F1 (Feb. 2007)……..16

U.S. Department of Justice, Executive Office for Immigration Review, FY 2008 Statistical Year Book, 01 (Feb. 2009)…….……16

I. INTRODUCTION

Pursuant to Federal Rule of Appellate Procedure 29 and Circuit Rule 29-2, *amici curiae* file this brief in support of Petitioner's Petition for Panel Rehearing and Rehearing *En Banc* of the panel's decision in *Anaya-Ortiz v. Mukasey*, 553 F.3d 1266, 1271 (9th Cir. 2009)("*Anaya-Ortiz*"). As shown below and in the principal petition, this case should be reheard by an *en banc* Court to secure uniformity of the Court's decisions, and because this case raises issues of exceptional importance. *See* Fed. R. App. P. 35. *Amici*'s brief specifically provides reasons in addition to those discussed by Petitioner as to why rehearing or rehearing *en banc* is necessary to secure uniformity of the Court's decisions with respect to prior decisions of this Court and the United States Supreme Court.

The panel erred in ignoring prior precedent which was directly contrary to its prior decisions with regard to the use of abstracts of judgment in the modified categorical analysis. *See, e.g., United States v. Navidad-Marcos*, 367 F.3d 903, 908 (9th Cir. 2004)(holding that an abstract of judgment is *not* a document upon which a court may rely in determining the nature of a conviction as opposed to the fact of a conviction). The panel was also incorrect to rely on *United States v. Snellenberger*, 548 F.3d 699 (9th Cir. 2008) (en banc) because *Snellenberger* did not consider, and expressly declined to consider, whether a minute order provided sufficient information to establish a generic offense. Further, the panel's erroneous

reading of *Snellenberger* conflicts with this Court's *en banc* decision in *United States v. Vidal*, 504 F.3d 1072 (9th Cir. 2007).

The panel also erred in both its analysis and final decision affirming the Board's denial of withholding of removal based on a conviction for a particularly serious crime. The panel should not have deferred to the Board's decision in *Matter of N-A-M-*, 24 I. & N. Dec. 336 (BIA 2007) because the plain language of the statute strongly suggests that the factfinder is limited to the categorical and modified categorical approach in determing whether the person was "convicted" of a "particularly serious crime."

II. STATEMENT OF INTEREST OF *AMICI CURIAE*

As described in the accompanying motion, *amici curiae* – the Florence Immigrant and Refugee Rights Project, the Immigrant Legal Resource Center, the Immigration Law Clinic of the University of California, Davis School of Law, and the Washington Defender Association's Immigration Project – are regional and national organizations committed to fair and humane administration of United States immigration laws and respect for the civil and constitutional rights of all persons. Many of their clients and the communities they serve will be significantly affected by this case. Thus, *amici* have a direct interest in this matter.

III. ARGUMENTS

A. THE PANEL OPINION CREATES AN INTRA-CIRCUIT AND INTER-CIRCUIT SPLIT BY PERMITTING THE USE OF AN ABSTRACT OF JUDGMENT TO DETERMINE THE NATURE OF AN UNDERLYING CONVICTION.

The decision in this case is in conflict with all prior cases in the Ninth Circuit to have considered the exact same issue. This Court held in 2004 that abstracts of judgment are not sufficient to establish the *nature* of a defendant's conviction for purposes of the modified categorical analysis. *See United States v. Navidad-Marcos*, 367 F.3d 903, 908 (9th Cir. 2004). Subsequently, this Court has repeatedly and consistently rejected the use of an abstract to characterize an offense of conviction. *See e.g., United States v. Narvaez-Gomez*, 489 F.3d 970, 977 (9th Cir. 2007); *Ruiz-Vidal v. Gonzales*, 473 F.3d 1072, 1078-79 (9th Cir. 2007); *Sandoval-Lua v. Gonzales*, 499 F.3d 1121, 1129 (9th Cir. 2007); *Martinez-Perez v. Gonzales*, 417 F.3d 1022, 1029 (9th Cir. 2005).

The decision in this case is also in conflict with the consistent decisions of the Fifth Circuit Court of Appeals which have followed *United States v. Gutierrez-Ramirez*, 405 F.3d 352, 357-59 (5th Cir. 2005) (following *Navidad-Marcos)*; *United States v. Moreno-Florean*, 542 F.3d 445, 449 n. 1 (5th Cir. 2008); *United States v. Neri-Hernandes*, 504 F.3d 587, 590-92 (5th Cir. 2007), *cert. denied*, 128 S.Ct. 1106 (2008) (New York certificate of disposition like a California abstract may only be used to prove fact of prior conviction); *United States v. Bonilla*, 524 F.3d 647, 653 (5th Cir. 2008). The decision is also in conflict with the Sixth Circuit

and the D.C. Circuit. *See United States v. Sanders*, 470 F.3d 616, 620 (6th Cir. 2006); *United States v. Price*, 409 F.3d 436, 445 (D.C. Cir. 2005)(explaining that a docket sheet is not a reliable source of information).

By contrast, this Court has recognized that an abstract of judgment *can* be used to establish the existence of a conviction and length of a sentence. *United States v. Sandoval-Sandoval*, 487 F.3d 1278, 1280 (9th Cir. 2007) (per curiam) (comparing and contrasting the impermissible use of an abstract of judgment to determine the nature of a conviction with the permissible use to determine "a discrete fact regarding Defendant's prior conviction, namely, the length of a sentence"); *United States v. Valle-Montalbo*, 474 F.3d 1197, 1201-02 (9th Cir. 2007) (fact of conviction).

Because this panel failed to address this prior binding precedent, rehearing is necessary to achieve uniformity. This issue is of exceptional importance in U.S. Sentencing Guideline cases and immigration court cases.

1. The panel's conclusion that an abstract of judgment alone may satisfy the modified categorical approach constitutes a misreading of *Snellenberger* and is in conflict with *United States v. Vidal*.

The panel holds that "the abstract of judgment provides sufficient information to establish that [Mr. Anaya] was convicted of each element of the generic federal crime, without reference to his charging document." *Anaya-Ortiz*,

at 1273. According to the panel this was true, "[b]ecause under *Snellenberger* the information in the abstract of judgment is sufficient to establish that Anaya was convicted of all the elements of an 'aggravated felony' under § 1101(a)(43)." *Id.* As *Snellenberger* did not authorize reliance on just one document, and *Vidal* holds that "[i]n order to identify a conviction as the generic offense through the modified categorical approach, when the record of conviction comprises only the indictment and the judgment, the judgment must contain 'the critical phrase 'as charged in the Information,'" 504 F.3d at 1087 (quoting *Li v. Ashcroft*, 389 F.3d 892, 898 (9th Cir.2004)), the opinion must be withdrawn or reheard *en banc*.

While *Snellenberger* does hold that a minute order may be considered in the modified categorical approach, it offers no guidance as to whether such a judgment-like document provides sufficient information to establish a generic offense. The fact that *Snellenberger* is limited to the question of *consideration*, rather than *sufficiency*, is apparent from its opening sentence: "We must decide whether *a court may consider* a clerk's minute order when applying the modified categorical approach of *Taylor*." *Snellenberger*, 548 F.3d at 700 (emphasis added). On appeal Mr. Snellenberger argued only that the minute order "isn't among the documents listed by the Court in *Shepard*" and "is not something that is approved, or even seen, by the parties, so he shouldn't be held responsible for its contents."

Id. at 701-02. The *en banc* court rejected these arguments, and held that "district courts may rely on clerk minute orders." *Id.* at 702.

Significantly, *Snellenberger* expressly declined to consider the issue of whether the minute order provided *sufficient* information to establish a generic offense. This Court noted that "[i]n the district court, Snellenberger unsuccessfully argued that, even if the minute order were considered, his conviction wasn't a generic burglary within the meaning of *Taylor*." *Id.* As Mr. Snellenberger did not make this argument in his opening brief, however, this Court "decline[d] to reach the issue." *Id.*

The scope of *Snellenberger* is further shown by reviewing the dissent. While the *Snellenberger* majority held that a minute order could be considered (but did not explain when a minute order would, in fact, provide sufficient evidence of a generic offense), the dissent explained that reliance on a minute order is limited to: 1) reviewing the document for the statute of conviction; or 2) determining which count of a charging document to which the defendant pled. Judge Smith explained:

> I believe it important to clarify that the facts one may consider reliably established by the minute order's function, i.e., to record the statute of conviction and the count in the information or indictment to which the defendant pleaded guilty or nolo contendere. By its nature, a minute order cannot be used to establish the underlying facts of the crime committed.

Id. at 705 (Smith, J., dissenting). As the majority expressed no dissatisfaction with the dissent's interpretation, it is reasonable to assume that the majority did not intend for a minute order to be used more liberally within the modified categorical approach, as the panel did here.

Thus, the panel mistakenly relied upon *Snellenberger* to hold that "the information in the abstract of judgment is sufficient to establish that he was convicted of each element of the generic federal crime." The *sufficiency* of the document simply was not at issue in *Snellenberger*. [1]

In contrast to *Snellenberger*, which specifically declined to reach the issue, the *en banc* decision in *Vidal*, specifically holds, "when the record of conviction comprises only the indictment and the judgment, the judgment must contain the critical phrase 'as charged in the Information.'" *Vidal*, 504 F.3d at 1087 (quotations omitted). Thus, under *Vidal*, a judgment-like document provides sufficient information to establish a generic offense only when such document is

[1] The Court in *Snellenberger* did go on to note casually in one sentence, without considering relevant precedent, that the language of the criminal complaint with proof he pleaded guilty to Count 1 could "establish that Snellenberger committed burglary of a dwelling" rather than another structure. *Id.* This casual statement by the court amounts to no more than *dicta* and is certainly not sufficient to overrule the *en banc* decision in *Vidal*. *See Patookas v. Teck Camino Metals, Ltd.*, 452 F.3d 1066, 1082 (9th Cir. 2006)("Where it is clear that a statement is made casually and without analysis, where the statement is uttered in passing without due consideration of the alternatives, or where it is merely a prelude to another legal issue that commands the panel's full attention, it may be appropriate to re-visit the issue in a later case")(internal quotations and citation omitted).

considered along with a charging document, and only when the judgment contains the critical phase, "as charged in," that document.[2]

The panel's contrary conclusion, that "*Vidal* does not help Anaya," *Anaya-Ortiz*, 553 F.3d at 1273, results from a misreading of this Court's *en banc* decision. The panel asserts that, "[i]n *Vidal*, the defendant's judgment stated that he was convicted of unlawfully driving or taking a vehicle and receiving stolen property, but did not provide sufficient information to establish that he had been convicted of each element of the federal crime." *Id.* (citing *Vidal*, 504 F.3d at 1075-77). The only part of this sentence that is accurate is the fact that Vidal held that the documents presented "did not provide sufficient information to establish that he had been convicted of each element of the federal crime." *Id.* Indeed, a "judgment" was not presented in *Vidal*. See *Vidal*, 504 F.3d at 1087 ("The only two judicially noticeable documents were the Complaint and the written plea and waiver of rights form."); *id.* at 1075 ("The district court record does not contain a transcript of the plea hearing or a copy of the judgment and sentence."). Moreover, the document upon which *Vidal* did rely, the written plea and waiver of rights form, did not state that "he was convicted of unlawfully driving or taking a vehicle

[2] Significantly, adherence to this rule in *Vidal* is fully consistent with the "important" clarification of the *Snellenberger* dissent - that a minute order can only be used to determine the statute of conviction and/or to determine the count of conviction.

and receiving stolen property," as the panel claims. Instead, this form showed that Mr. Vidal "pled guilty ... to 'Count 1 10851(a) VC Driving a Stolen Vehicle.'" *Id.* at 1087; *see also id.* at 1075 ("the written plea and waiver of rights form shows that Vidal pled guilty only to 'driving a stolen vehicle.'").

The panel's inaccurate account of *Vidal* is significant. In *Vidal*, this Court held that unlawfully driving or taking a vehicle in violation of Cal. Veh. Code § 10851, was overly broad because the statute extends liability to accessories after the fact. Although the plea form referenced principal liability, as opposed to accessory after the fact liability, in that Mr. Vidal pled to "Driving a Stolen Vehicle," the plea form did not "establish that Vidal admitted to all, or any of the factual allegations in the Complaint." *Id.* at 1087. Instead something more was required to satisfy the modified categorical approach -- a document that contains "the critical phrase 'as charged in the Information.'" *Id.*

The abstract of judgment here is just as insufficient as the plea form in *Vidal*. Just as in *Vidal*, the abstract references what the panel concluded was a generic offense, "POSSESSION OF A FIREARM BY A FELON." *Anaya-Ortiz* at 1272. But this advances the ball no more than the plea form in *Vidal* showing a plea to "Driving a Stolen Vehicle." Neither document establishes an admission "to all, or any, of the factual allegations in the Complaint," and both may be only a short-hand expression for the code sections rather than an admission of the factual basis

for the plea. *See* Argument 1.A.3. *infra*. *Vidal*, 504 F.3d at 1087. Thus, the opinion must be withdrawn and reheard, because it is in conflict with *Vidal*.

2. Even if *Snellenberger* can be read as allowing minute orders to be used to determine the nature of conviction, an abstract of judgment is not a comparable document to a minute order.

Even assuming, *arguendo*, that *Snellenberger* decided that a minute order can be used for purposes of the modified categorical analysis to determine the *nature* of a conviction, an abstract of judgment is not a comparable document. At least a minute order is "...prepared...at the time the guilty plea is taken (or shortly afterward)..." (*Snellenberger*, 548 F.3d at 702), but an abstract of judgment cannot be prepared until after the sentence. Cal. Pen. Code § 1213, 1213.5.[3] The problem with this is that *Shepard v. United States*, 544 U.S. 13 (2005) rejected "...going beyond conclusive records *made* or *used* in adjudicating guilt..." *Id.* at 21 (emphasis added). *Shepard* limited the documents that could be used in the modified categorical analysis to "the terms of the charging document, the terms of a plea agreement or transcript of colloquy between judge and defendant in which

[3] Penal Code § 1213.5 requires that an abstract contain only a "designation of the crime or crimes and the degree thereof, if any, of which defendant has been convicted," and the "sections of the Penal Code or other provisions of law of which the designated crimes constitute violations" (as well as other requirements irrelevant to this inquiry). Cal. Pen. Code § 1231.5. It does not require a specification of which part of a divisible statute the defendant has been convicted of (unless the divisible parts of the statute are specified in subsections) and it does not require, or even provide for, inclusion of the factual basis for the plea.

the factual basis for the plea was confirmed by the defendant, or to some comparable judicial record of this information." *Id.* at 26. To be a "comparable" document, an abstract would have to record the factual basis for the plea as confirmed by the defendant, which can only take place at the time of the plea. As pointed out by Petitioner, the abstract cannot be completed until after the sentence and, in this case, as in many cases, that will be months later. For example, in this case, the date of the plea in this case was March 21, 2001. AR 164. The date of the sentencing hearing was June 4, 2001. *Id.*

In addition, an abstract is not a "comparable" document because an abstract does not contain admitted facts about the offense and accordingly an abstract cannot be used to clearly and unequivocally establish the facts underlying the prior conviction. Yet, the Court in *Shepard* stated that "the only certainty of a generic finding lies in jury instructions, or bench trial findings and rulings, or (in a pleaded case) in the defendant's own admissions or accepted findings of fact confirming the factual basis for a valid plea." *Shepard*, 544 U.S. at 25; *see also Ngaeth v. Mukasey*, 545 F.3d 796, 802 (9th Cir. 2008)("We have the 'defendant's own admissions…[to] confirm[] the factual basis for the valid plea' to the elements of the generic offense of attempted theft.")(omissions in original)(quoting *Penuliar v. Mukasey*, 528 F.3d 603, 613 (9th Cir. 2008)).

3. Even assuming that an abstract of judgment is a comparable document, the abstract in this case is ambiguous and does not satisfy the "rigorous" standards of *Taylor/Shepard* or the government's burden of proof that removability be shown by "clear, unequivocal, and convincing evidence."

Even assuming that an abstract of judgment could be used for purposes of the modified categorical analysis, the abstract of judgment in this case is ambiguous because it is not clear whether the description of the crime in the abstract of judgment – "Possession of a Firearm by a Felon" (A.R. 164) is short-hand for the offense or the manner in which the defendant violated that statute. A violation of Cal. Pen. Code § 12021(a)(1) is commonly referred to as "felon in possession of a firearm" as is shown in CALJIC jury instructions by the title "Firearm – Possession by person convicted of felony" (CALJIC 12.43), even though the statute can be violated by possession of a firearm by a defendant convicted of certain misdemeanor offenses or "who is addicted to any narcotic drug." Cal. Pen. Code §1201(a)(1).

In discussing why the digest or summary of the conviction in a California abstract of judgment is often ambiguous – and in that sense unreliable – this Court stated in *United States v. Navidad-Marcos* the following:

> The form simply calls for the identification of the statute of conviction and the crime, and provides a very small space in which to type the description. It does not contain information as to the criminal

> Acts to which the defendant unequivocally admitted in a plea colloquy before the court**...[i]t is equally plausible, if not more probable, that the abbreviation in the [portion of the abstract identifying the offense] merely summarized the title of the statute of conviction rather than – as the government would have us presume – a conscious judicial narrowing of the charging document.**

United States v. Navidad-Marcos, 367 F.3d 903, 909 (9th Cir. 2004) (emphasis supplied). In that case, the Court found that the abstract of judgment "fail[ed] to satisfy the 'rigorous standard' required by Taylor's modified categorical approach." *Id*.

Likewise, in the case at bar, it is equally plausible that the summary or digest referred to the short-hand for the statute, rather than describing the portion of the divisible offense which Anaya-Ortiz pleaded to.

Although the panel in this case relied on *People v. Delgado*, 183 P.3d 1286, 1234 (2008) in comparing an abstract to a minute order, the court in *Delgado* only allowed abstracts as admissible evidence to prove the nature of a prior conviction under the less demanding standard of being sufficient "to permit the inference" that a prior conviction was a serious felony. *Id.* at 1230. The court in *Delgado* stated that "[the] trier of facts is entitled to draw reasonable inferences from certified records offered to prove a defendant suffered a prior conviction…." *Id.* at 1231)(citing *People v. Henley*, 72 Cal.App. 4th 55 (Cal. Ct. App. 1999)). By

contrast, under the modified categorical analysis inferences are not permitted. *Cisneros-Perez v. Gonzalez*, 465 F.3d 386, 393 (9th Cir. 2006). The permissible record of conviction must "unequivocally" establish that the alien pleaded guilty to the generic offense. *Vidal*, 504 F.3d at 1076; *United States v. Corona-Sanchez*, 291 F.3d 1201, 1211 (9th Cir. 2002)(en banc); *United States v. Navidad-Marcos*, 367 F.3d at 907. Under the modified categorical approach the "record" must "confirm[] that the plea "'necessarily' rested on the fact identifying the [offense] as generic." *Shepard*, 544 U.S. at 21 (quoting *Taylor*, 495 U.S. at 602).

In *Shepard*, the government argued for a more inclusive set of records than was ultimately adopted by that Court "by invoking the virtue of a nationwide application of a federal statute unaffected by idiosyncrasies of record keeping in any particular state." *Shepard*, 544 U.S. at 22. The Supreme Court held that it could not have *Taylor* and the government's position both, and rejected the government's position. The argument is no more persuasive here than it was before the Supreme Court.

The requirement that the record of conviction "unequivocally" establish that the alien pleaded guilty to the generic offense is not only required by the *Taylor/Shepard*, but is also required in this case by the government's burden of proof. The government in this case must establish by "clear, unequivocal, and convincing evidence" that an alien is removable as charged. 8 U.S.C. §

1229a(b)(5)(A); *Woodby v. INS*, 385 U.S. 276, 286 (1966).) This has recently been described as a "high burden." *Al Mutarreb v. Holder*, ___ F.3d ___, 2009 WL 903358, *4 (9th Cir. April 6, 2009)(Berzon, J.)

The burden of proof by the government also includes the burden of production of documents. Where the government simply decides to introduce an abstract of judgment, as in the case at bar, which is ambiguous at best, they have failed in their burden to produce clear, unequivocal, and convincing evidence. Yet, this failure to produce other evidence was not considered by the IJ or Board and was not considered by this panel. A transcript of the hearing or plea agreement would have presumably revealed exactly which facts, if any, Petitioner stipulated to in entering his plea, yet the government did not introduce this evidence.

The panel concluded that abstracts of judgment may be relied on because, like minute orders, a court may correct any error and a defendant has "the right to examine and challenge its content." *Anaya-Ortiz*, at 1271 (quoting *Snellenberger*, 548 F.3d at 702). But this turns the "demanding" requirements of *Taylor/Shepard* and the government's heavy burden of proof on its head. *See Ruiz-Vidal*, 473 F.3d at 1079). Having the right to examine and challenge an abstract of judgment may well prove practically impossible in the immigration context where many aliens

speak little if any English[4] and are typically unrepresented by counsel.[5] As *amici* attest, it is very often not until aliens are in removal proceedings, and no longer represented by criminal counsel, that they learn for the first time that they are subject to removal based on their criminal conviction. To make matters worse, almost 50% of those in immigration court proceedings are detained.[6] Unlike minute orders, which are typically given to defendants at the time of the entry of plea, abstracts of judgment are prepared after sentencing, after the defendant leaves the courtroom, and are for Department of Justice records and custodial records. Most defendants and their counsel will never even see these records. The panel's suggestion that defendants or their attorneys must, at some undesignated time subsequent to sentencing, return to the file to make sure that the abstract of judgment conforms to what took place during the entry of plea, and that it is

[4] In 2006, 88.36% of proceedings before immigration courts concerned non-English speakers. U.S. Department of Justice, Executive Office for Immigration Review, FY 2006 Statistical year Book, F1 (Feb. 2007).

[5] Of the 323,845 matters before immigration courts in 2006, 210,705 respondents (65.06%) were unrepresented by counsel. *Id*. at G1. Because a defendant's criminal representation is over by the time the clerk prepares an abstract and the defendant is placed in removal proceedings, the alien is unlikely to have the means to examine his abstract with criminal counsel and contest it if it is incorrect or ambiguous in immigration court.

[6] In 2008, 48% of those in immigration court proceedings were held in detention. U.S. Department of Justice, Executive Office for Immigration Review, FY 2008 Statistical Year Book, 01 (Feb. 2009).

unambiguous, does not comport with reality, and unfairly shifts the burden of proof to defendants.

Amici Curiae are very concerned that unless that panel's decision in this case is reversed on the issue of the use of abstracts of judgment, that immigrants will be removed from this country based on incomplete, ambiguous, and sometimes incorrect information contained in abstracts which they and their criminal counsel have never seen. Furthermore, the government will have little incentive to provide anything more than the abstract of judgment. The heavy burden of proof demanded by *Woodby v. INS* is based on "the drastic deprivations that may follow when a resident of this country is compelled by our government to forsake all the bonds formed here and go to a foreign land where he often has no contemporary identification." *Woodby*, 385 U.S. 276, 285 (1966).

B. THE PANEL'S OPINION ON WHETHER PETITIONER WAS "CONVICTED" OF A "PARTICULARLY SERIOUS CRIME" FOR A D.U.I. WITH INJURY SHOULD BE REHEARD.

1. The panel should not have deferred to the Board's decision in *Matter of N-A-M-* because the plain language of the statute strongly suggests that the factfinder is limited to the categorical and modified categorical approach in determing whether the person was "convicted" of a "particularly serious crime."

The Panel in this case deferred to the Board's decision in *Matter of*

N-A-M-, 24 I. & N. Dec. 336 (BIA 2007) based on the holding in *Morales v. Gonzales*, 478 F.3d 972, 982 (9th Cir. 2007) that the Immigration and Nationality Act is "silent regarding the basis for determining whether a conviction is for a particularly serious crime." For that reason, *Morales v. Gonzales* deferred to *Matter of L-L-*, 22 I. & N. Dec. 645, 651 (BIA 1999) holding "that the particularly serious crime determination…may be made by looking only to the record of convicting and sentencing information." *Morales v. Gonzales*, 478 F.3d at 982. Ironically, the Board determined in *Matter of N-A-M-* that the Ninth Circuit had misinterpreted prior Board case law and held the following:

> Once the elements of the offense are examined and found to potentially bring the offense within the ambit of a particularly serious crime, 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. at 342. The panel in *Anaya-Ortiz* then deferred to the Board's formulation in *Matter of N-A-M-* under the dictates of *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980-82 (2005).

The problem is that this Court in *Morales v. Gonzales* never stopped to consider the normal rules of statutory construction and the plain language of the statute which must first be considered to determine the meaning of a statute.

Consumer Produce Safety Com'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980) ("[I]n determining the scope of a statute, one is to look first to its language.").

Title 8 U.S.C. §§ 1158(b)(2)(A)(ii)(asylum) and 1231(b)(3)(B)(ii) (withholding) both create a bar to eligibility for each respective form of relief if the person "having been *convicted* by a final judgment of a particularly serious crime, is a danger to the community of the United States." [Italics added for emphasis] The asylum statute also provides that a person "who has been *convicted* of an aggravated felony shall be considered to have been convicted of a particularly serious crime." 8 U.S.C. § 1158(b)(2)(B)(i) [Italics added for emphasis]. Finally, the withholding of removal statute— also provides, in relevant part, as follows:

> [a]n alien who has been *convicted* of an aggravated felony (or felonies) for which the alien has been sentenced to an aggregate term of imprisonment of at least 5 years shall be considered to have committed a particularly serious crime. The previous sentence shall not preclude the Attorney General from determining that, notwithstanding the length of sentence imposed, an alien has been convicted of a particularly serious crime.

8 U.S.C. § 1231(b)(3)(B) [italics added for emphasis].

Where Congress uses the words "convicted" by "a final judgment of a of a particularly serious crime," the word "convicted" should normally be given the same meaning as it is given in other sections of the Immigration and Nationality Act. *Atlantic Cleaners & Dryers, Inc. v. United States*, 286 U.S. 427, 433 (1932) ("Normally, the same word appearing in different portions of a single provision or

act is taken to have the same meaning in each appearance."). This strongly suggests that a categorical approach must be used as a threshold determination of whether a person is "convicted" of a "final judgment of a particularly serious crime." *Matter of Velazquez-Herrera*, 24 I. & N. Dec. 503, 513 (BIA 2008). ("For nearly a century, the Federal circuit courts of appeals have held that where a ground of deportability is premised on the existence of a 'conviction' for a particular type of crime, the focus of the immigration authorities must be on the crime of which the alien was *convicted*, to the exclusion of any other criminal or morally reprehensible acts he may have *committed*." [Emphasis in original].

The categorical approach is also strongly suggested by the limitations with respect to persons "convicted of an aggravated felony" in the respective asylum and withholding provisions set forth above. With regard to determining whether a person is "convicted" of an "aggravated felony" the categorical approach is used. *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 187 (2007).

Finally, the definition of "conviction" in the Act requires a "formal judgment of guilt" (with different rules where adjudication of guilt has been withheld). 8 U.S.C. § 1101(a)(48)(A).

Congress clearly knows how to distinguish if a ground of deportation or inadmissibility is based on *conduct* as evidenced by the several conduct-based grounds of removability in the INA. *See e.g.*, 8 U.S.C. § 1182(a)(2)(C)("reason to

believe" a person is a drug trafficker), 8 U.S.C. § 1182(a)(1)(A)(iv)("drug addict or abuser"), 8 U.S.C. § 1182(a)(2)(D) ("smuggling, harboring or trafficking" other non-citizens.)

The problem with the Board's formulation in *Matter of N-A-M-*, *supra*, is that instead of confining the inquiry to the *least egregious conduct* based on the formal judgment of conviction (according to the categorical method)[7], the Board looks at the *most seriously offensive conduct* by emphasizing what *potentially* the crime *could have* entailed: "once the elements of the offense are examined and found to *potentially* bring the offense within the *ambit* of a particularly serious crime, all reliable information may be considered…." [Italics added for emphasis]. This turns the categorical test on its head and is hardly the test we use for determining whether deportability or inadmissibility has been shown based on grounds which require a predicate conviction. Most criminal acts — except very minor misdemeanors – can potentially be very serious. Instead, the language of the statute suggests we use the categorical method which looks at what the least egregious conduct for which the person was convicted under the categorical analysis and, if applicable, the modified categorical analysis.

[7] A categorical inquiry focuses "on the conduct falling at the least egregious end of [a statute's] full range of conduct." *United States v. Lopez-Solis*, 447 F.3d 1201, 1206 (9th Cir. 2006)(citing *United States v. Baron-Medina*, 187 F.3d 1144, 1146 (9th Cir. 1999)(holding that a criminal offense is a categorical match with a generic definition "if and only if the 'full range of conduct' covered by [the criminal statute] falls with the meaning of that term.")(citation omitted).

2. After determining the least egregious conduct for which the person was convicted, the factfinder should then assess the nature of the crime against the standards for what is a "particularly serious crime" in the context of the international origins of this exception.

The recent amended opinion in *Delgado v. Holder*, __ F.3d __, 2009 WL 1025874 (9th Cir. April 17, 2009) decided that *Matter of N-A-M-*, 24 I. & N. Dec. at 338-39 would also be deferred to with reference to permitting the Attorney General to decide by case-by-case adjudication that individual crimes are "particularly serious" even though they are not aggravated felonies. The concurrence and dissent by Judge Berzon expresses the opinion of amicus:

> [N]othing…in the current version of § 1231(b)(3)(B) indicates that Congress intended to allow an alien to be removed to a country where he probably will be persecuted …,because he committed a crime too minor to be designated an "aggravated felony" under the INA – too minor, for example, to disqualify him from other forms of relief or to require that he be detained pending removal proceedings. Instead, the current version of the statute recognizes that even among the crimes designated as "aggravated felonies," many – perhaps most – now would not meet the "particularly serious" exception of the Protocol and Convention, and so leaves the Attorney General the task of sorting out, on a case-by-case basis, which of the expanded class of "aggravated felonies" are "particularly serious."

Id. at *20 (Berzon, J., concurring and dissenting).

Nevertheless, even the majority opinion in *Delgado v. Holder* recognized that the determination of what is a "particularly serious crime" must be based on some

standards: "[T]he *Frentescu* factors are applied in the context of the international origins of the 'particularly serious crime' exception…" *Delgado*, __ F.3d __, 2009 WL 1025874, *8. The opinion notes the following about Delgado's three DUI convictions—one of which involved bodily injury: "Surely they do not exceed the 'capital or grave' standard of 'serious' nonpolitical crimes, and *Frentescu* indicates that particularly serious crimes should exceed that standard." For example, the concurring and dissenting opinion in *Delgado v. Holder* cites a leading commentator on the Refugee Convention who notes that examples of "particularly serious crimes" are instances of murder with aggravating circumstances for which conviction in our own legal system would typically be punishable by death or life sentence. *Id.* at *11 (Berzon, J., concurring and dissenting)(citing Grahl-Madsen, *Commentary on the Refugee Convention, 1951*, art. 33 cmt 10 (1997) (offering as examples "blowing up…passenger airplane in order to collect life insurance, or wanton killing in a public place.").

However, in the opinion in the case at bar, the Court adopted the determination of the Board that the crime of DUI causing bodily injury was a "particularly serious crime" without first examining what standard, if any, must be used other than the nature of the offense, the underlying facts, and the sentence.

3. Only after determining if the offense is a particularly serious crime should the factfinder consider all reliable information to determine if the nature of the offense, the

underlying facts, and the sentence outweigh the persecution the applicant will suffer if returned.

After determining what the conviction was and that the conviction is a particularly serious crime in the context of the international origins of the bar to asylum or withholding, then the factfinder must look at the individual circumstances involved and balance those circumstances against the persecution the applicant will suffer if returned to his or her home country. Paragraph 156 of the UN Handbook of Procedures and Criteria for Determining Refugee Status states:

> In applying this exclusion clause, it is also necessary to strike a balance between the nature of the offense presumed to have been committed by the applicant and the degree of persecution feared. If a person has well-founded fear of very severe persecution, e.g. persecution endangering his life or freedom, a crime must be very grave in order to exclude him. If the persecution is less serious, it will be necessary to have regard to the nature of the crime or crimes presumed to have been committed in order to establish whether the applicant is not in reality a fugitive from justice or whether his criminal character does not outweigh his character as a bona fide refugee.

UN High Commission for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status*, Ch. II B(2)(a), paragraph 156 (1979).

The Handbook at paragraph 157 states, in the context of serious non-political crimes, that "[i]n evaluating the nature of the crime presumed to have been committed, all relevant factors – including any mitigating circumstances –

must be taken into account." In making this determination, all reliable evidence should be taken into consideration. *Matter of Frentescu*, 18 I. & N. Dec. 244 (BIA 1982)(requiring review of underlying circumstances of the offense among other factors).

4. The merits of the Board's decision designating the offense as a particularly serious crime should be reviewed and the offense should be found not to be a particularly serious crime.

In the panel's decision in the case at bar, the panel adopted the reasoning of the Board that a DUI causing bodily injury was a particularly serious crime even though it did not utilize any standards based on the international origins of the bar to eligibility. The same crime was considered subsequently in the amended opinion of *Delgado v. Holder*, which came to a totally different conclusion.

> It is true that driving under the influence can be dangerous, and at least one of Delgado's episodes was. Yet there was no intent to injure. The crime itself is careless or even reckless, but requires no intent and is "most nearly comparable to[] crimes that impose strict liability." Thus, for other purposes DUI has been held not to be a violent felony. It is certainly a reprehensible crime, especially when repeated as it has been by Delgado, but Delgado's offenses had no distinguishing characteristics that elevate them to the high levels inherent in the origins of the "particularly serious crime" exception.

Delgado, __ F.3d __, 2009 WL 1025874, *8 (citations omitted).

Although the court in *Delgado* reviewed the merits of the Board's finding on the particularly serious crime issue with regard to asylum, the majority refused to review the merits with regard to withholding of removal, finding that they were compelled by prior precedent to consider this an unreviewable matter. *Id.* at *25 (citing *Matsuk v. INS*, 247 F.3d 999 (9th Cir. 2001)). However, the majority stated in footnote 12 that "Judge Berzon's concurring and dissenting opinion here offers trenchant and, to us, persuasive criticisms of this ruling…." *Id.* at *6 n.12. Since the amended opinion in *Delgado v. Holder* notes that "Delgado's petition for *en banc* rehearing remains pending with regard to all issues except his asylum claim, which is moot" and since "further petitions for panel or *en banc* rehearing may be filed," we urge this Court to rehear either *People v. Delgado en banc* or rehear this case *en banc* with reference to this issue among others.

IV. CONCLUSION

For the foregoing reasons, and those in Petitioner's principal brief, the Court should grant *en banc* rehearing of this case.

Date: April 23, 2009

Respectfully submitted,

/s/Michael K. Mehr
Michael K. Mehr, Attorney for Amici Curiae
Florence Immigrant and Refugee Rights Project, Immigrant Legal Resource Center, Immigration Law Clinic of the University of California, Davis School of Law, Washington Defender Association's Immigration Project

Certificate of Compliance Pursuant to Fed. R. App. P. 32(a)(7)(C) and Circuit Rule 32-1 for Case Number 03-74666

I certify that:

Pursuant to Fed. R. App. P. 29(d) and 9th Cir. R. 32-1, the attached amicus brief is proportionally spaced, has a typeface of 14 points or more and contains 7000 words or less.

Date: April 23, 2009

/s/ Michael K. Mehr
Michael K. Mehr
Attorney for Amici Curiae

CERTIFICATE OF SERVICE

I hereby certify that on April 23 2009, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days, to the following non-CM/ECF participants:

District Counsel Phoenix
OFFICE OF THE DISTRICT DIRECTOR
U.S. Department of Homeland Security
P.O. Box 25158
2035 N. Central Ave.
Phoenix, AZ 85002

Jennifer Keenery
DOJ - U.S. DEPARTMENT OF JUSTICE
Civil Division/Office of Immigration Litigation
P.O. Box 878, Benjamin Franklin Station
Washington, DC 20044

s/ Michael K. Mehr