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U.S. COURT OF APPEALS

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

No. 04-76644

**Nelson, Callahan, and Carney,¹Circuit Judges
Filed September 12, 2007**

**ARMANDO MARMALEJO-CAMPOS, aka
Campos Ramos Armando,
A71 616 204,
Petitioner,**

v.

**PETER D. KEISLER,²
Acting Attorney General of the United States,
Respondent.**

**On Petition for Review of an Order of the
Board of Immigration Appeals**

**PETITION FOR REHEARING AND SUGGESTION FOR
REHEARING EN BANC**

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¹The Honorable Cormac J. Carney, United States District Judge for the Central District of California, sitting by designation.

²Acting Attorney General Peter D. Keisler is substituted for the former Attorney General Alberto Gonzales as the proper Respondent in this case. *See* 8 U.S.C. § 1363(b)(3)(A); Fed. R. App. P. 43(c)(2).

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INTRODUCTION

Pursuant to Federal Rules of Appellate Procedure (“Fed. R. App. P.”) 35, 40, and the U.S. Court of Appeals for the Ninth Circuit’s Rule 40, the appellant requests reconsideration and rehearing *en banc* of the Panel’s decision of September 12, 2007. Respectfully, the Panel’s decision is not legally sustainable or supported under current case precedent. The Petitioner’s position is strongly supported by senior circuit Judge Nelson’s well-reasoned dissent in the above captioned case. Consideration of the full court is, therefore, necessary to secure and maintain uniformity of case law.

The above captioned case involves a question of exceptional importance: Is a conviction for aggravated driving under the influence (“DUI”) with a suspended drivers license in violation of Arizona Revised Statutes (“Ariz. Rev. Stat.”) section 28-697(A)(1), now section 28-1383(A)(1),³ a crime involving moral turpitude (“CIMT”), when neither a DUI standing alone, nor driving with a suspended license standing alone, constitute CIMTs?

The Court should grant rehearing *en banc* because the Panel’s decision is

³Ariz. Rev. Stat. section 28-697(A)(1) will be referred to under its current numbering, section 28-1383(A)(1). *See* 1996 Ariz. Sess. Laws ch.1, § 108 (effective Oct. 1, 1997); 1997 Ariz. Sess. Laws ch. 220, § 82.

inconsistent with all current case law in the Ninth Circuit, and Board of Immigration Appeals (“BIA” or “Board”) decisions, with the exception of *Matter of Lopez-Meza*, 22 I&N Dec, 1188, 1193 (BIA 1999). However, the Ninth Circuit does not owe the Board deference when it issues a decision contrary to well-established law. *Kankamalage v. INS*, 335 F.3d 858, 861 (9th Cir. 2003) (“[t]he BIA’s interpretation of immigration laws is entitled to deference, however, the Court is not obligated to accept an interpretation clearly contrary to the plain and sensible meaning of the statute.”); *Melkonian v. Ashcroft*, 320 F.3d 1061, 1065 (9th Cir. 2003) (the Court “will not defer to BIA decisions that conflict with circuit precedent.”); *Garcia-Lopez v. Ashcroft*, 334 F.3d 840, 843 (9th Cir. 2003) (the Court will not defer to the BIA’s interpretation of statutes that it does not administer, therefore, the Court would not give deference to agency interpretation of the California Penal Code). *Chevron* deference is only applied when an agency construes or interprets a statute it administers. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Therefore, the Court should have reviewed *de novo*, whether the Petitioner’s conviction under Ariz. Rev. Stat. section 28-1383(A)(1) is a CIMT.

Furthermore, if the Panel had as much as a scintilla of doubt as to whether a violation of Ariz. Rev. Stat. section 28-1383(A)(1) is a CIMT, “matters of doubt should be resolved in favor of the alien in deportation proceedings.” *Fong Haw Tan*

v. Phelan, 333 U.S. 6 (1948).

STATEMENT OF FACTS

The Petitioner is a thirty-six year-old male, native of Mexico, who entered the United States without inspection, sometime in 1983. His status was adjusted to that of a lawful permanent resident (“LPR”) on March 14, 2001, under section 245 of the Immigration & Nationality Act (“INA”), 8 U.S.C. §§ 1101, *et. seq.* The Petitioner is married to a United States (“USC”) citizen and has three USC children.

On May 15, 1997, the Petitioner was convicted in the Superior Court of Arizona, Maricopa County for the offense of aggravated DUI, committed on April 29, 1995, in violation of Ariz. Rev. Stat. sections 28-1381(A)(1), and 28-1383(A)(1). On July 25, 2002, the Petitioner was convicted in the Superior Court of Arizona, Maricopa County for the offense of aggravated DUI, committed on May 11, 2000, in violation of Ariz. Rev. Stat. sections 28-1381(A)(1), and 28-1383(A)(1).

On November 17, 2003, the Department of Homeland Security (“DHS”) issued a Notice to Appear (“NTA”) charging the Petitioner with removability under INA section 237(a)(2)(A)(i), for having committed a CIMT within five years after admission for which a sentence of one year or longer may be imposed.⁴ The

⁴The DHS withdrew the charge under INA section 237(a)(2)(A)(i), conviction for a crime involving moral turpitude committed within five years of admission.

Petitioner was also charged with removability under INA section 237(a)(2)(A)(ii), for having committed two crimes involving moral turpitude not arising out of a single scheme of criminal misconduct .

On July 9, 2004, the Immigration Judge (“IJ”) found that a violation of Ariz. Rev. Stat. section 28-1383(A)(1), is a CIMT, and ordered the Petitioner removed to Mexico. The Petitioner filed a timely appeal with the BIA, which dismissed his appeal. The Petitioner filed a timely Petition for Review with the Ninth Circuit.

On September 12, 2007, after oral argument, a three-judge panel, voted 2 to 1, and found the Petitioner’s conviction under Ariz. Rev. Stat. section 28-1383(A)(1) a CIMT. This Petition for Rehearing, and Suggestion for Rehearing *En Banc* ensues.

ISSUES PRESENTED

- I. Ariz. Rev. Stat. section 28-1383(A)(1) does not require an evil mental state for a conviction, and is a regulatory statute, therefore, it cannot be morally turpitudinous.**
- II. Neither driving under the influence, nor driving on a suspended license, are crimes involving moral turpitude, therefore, necessarily driving under the influence on a suspended license, can not be a crime involving moral turpitude.**
- III. With the exception of one BIA decision to which the Ninth Circuit owes no deference, but the Panel majority fully relies upon, neither Arizona legal precedent, nor Ninth Circuit or BIA precedent, support a finding that a violation of Ariz. Rev. Stat. section 28-1383(A)(1) is a CIMT.**

DISCUSSION

I. Intent is required for a crime to be one involving moral turpitude.

The definition of “moral turpitude” is not defined by statute and is a matter left to the interpretation of the court. *Matter of Lopez-Meza*, 22 I&N Dec. 1188 (BIA 1999). As a matter of court interpretation, its precise meaning has never been fully settled. *Matter of Torres-Varela*, 23 I&N Dec. 78 (BIA 2001). Courts have construed “moral turpitude” as a term of art. *See Matter of L-V-C-*, 22 I&N Dec. 594 (BIA 1999) (moral turpitude refers generally to conduct that is inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general.).

“[I]t is the combination of base or depraved act and the *willfulness* of the action that makes the crime one of moral turpitude.” *Grageda v. INS*, 12 F.3d 919, 921 (9th Cir. 1993) (emphasis added).

The seriousness of the offense, the severity of the sentence, and the fact that a crime is a felony are among those factors that have no bearing on the finding of moral turpitude. *Matter of Torres-Varela*, 23 I&N Dec. at 84. However, some statutory elements of a crime may give guidance. Specifically, an evil intent is often an element in crimes adjudged to be of moral turpitude however, “such a specific intent

is not a prerequisite.” *Id.* at 83. “[A] crime involving the willful commission of a base or depraved act is a crime involving moral turpitude, whether or not the statute requires proof of evil intent.” *Gonzalez-Alvarado v. INS*, 39 F.3d 245, 246 (9th Cir. 1994). “Among the tests to determine if a crime involves moral turpitude is whether the act is accompanied by a vicious motive or corrupt mind.” *Matter of Franklin*, 20 I&N Dec. 867, 868 (BIA 1994).

The nature of the crime, i.e., whether it involves moral turpitude, is limited to the elements necessary to prove a conviction under the relevant criminal statute. Additional evidence or judgments about the conduct leading to the conviction, are irrelevant. *Matter of Lopez-Meza*, 22 I&N Dec. 1200 (Rosenberg, J., dissenting). “In determining whether a particular crime involves moral turpitude, the specific statute under which the conviction occurred is controlling.” *Matter of Torres-Varela*, 23 I&N Dec. at 84. “Thus, whether a particular crime involves moral turpitude ‘is determined by the statutory definition or by the nature of the crime, *not by the specific conduct that resulted in the conviction.*’” *Id.* (emphasis added). Therefore, it is necessary to *objectively* analyze whether the elements of an offense are sufficient to render the crime one of moral turpitude. *Id.* at 85. (emphasis added).

Arizona state law does not require a culpable mental state for a DUI conviction. In its decision, the Panel cites *both Grageda*, 12 F.3d at 922, and *Gonzales-Alvarado*,

39 F.3d at 246, to support its holding that Ariz. Rev. Stat. section 28-1383(A)(1) is a CIMT. *Grageda*, 12 F.3d at 922, stands for the proposition that it is the combination of a base or depraved act with willfulness of the action, that makes the crime one of moral turpitude, while *Gonzalez-Alvarado*, 12 F.3d at 922, stands for the proposition that a crime may be morally turpitudinous if it involves the “willful commission of a base or depraved act,” whether or not the statute requires proof of evil intent. Under the holdings in both cases, however, willful acts are required in order for conduct to be morally turpitudinous. *See also Fernandez-Ruiz v. Gonzales*, 468 F.3d 1159 (9th Cir.2006) (holding that, in general, willfulness or “evil intent” is required in order for crime to be classified as one involving moral turpitude for purposes of the INA).

In order to obtain a conviction for aggravated DUI under Ariz. Rev. Stat. section 28-1383(A)(1), the only intent required is the intent to ignore a state administrative directive. *Matter of Lopez-Meza*, 22 I&N Dec. 1201 (Rosenberg, J., dissenting). “It is a level of intent that is based upon an actor’s knowledge of a regulatory obligation and a breach of that obligation.” *Id.*

Curiously, in an attempt to justify its holding that the Petitioner’s conviction under Arizona Revised Statutes section 28-1383(A)(1) is a CIMT, the Panel also cites *Matter of Medina*, 15 I&N Dec. 611, 614 (BIA 1976). In *Matter of Medina*, 15 I&N

Dec. at 614, the BIA held that the “presence or absence of a corrupt or vicious mind is not controlling,” and criminally reckless behavior *may* be a basis for a finding of moral turpitude, *aff’d sub nom. Medina-Luna v. INS*, 547 F.2d 1171 (7th Cir. 1977). *Matter of Medina*’s holding appears to conflict not only with *Fernandez-Ruiz*, 468 F.3d 1159, but also with the BIA’s later decisions defining moral turpitude, which specifically hold that evil intent is required for moral turpitude. See *Matter of Khourn*, 21 I&N Dec. 1041, 1046 (BIA 1997) (holding “that ‘evil intent’ is a requisite element for a crime involving moral turpitude.”); *Matter of Flores*, 17 I&N Dec. 225, 227 (BIA 1980) (holding that an “evil or malicious intent is said to be the essence of moral turpitude.”). Due to these conflicts within the BIA’s own precedent, the Ninth Circuit need not defer to the BIA’s decisions.

Every statute requiring a showing of intent, is not the “evil intent” contemplated for morally turpitudinous acts. *Matter of Lopez-Meza*, 22 I&N Dec. 1201–1202 (Rosenberg, J., dissenting). As this Court has held, *the focus must remain on the crime categorically as defined by statute, and not on the respondent’s specific conduct*, no matter how heinous that conduct may be. *Id.* (citing *Rodriguez-Herrera v. INS*, 52 F.3d 238, 240 (9th Cir. 1995) (citing *Goldeshtein v. INS*, 8 F3d 645, 647 (9th Cir. 1993))).

As Judge Rosenberg noted in her dissent in *Matter of Lopez-Meza*, 22 I & N

Dec. at 1202:

The level of intent necessary to convict the respondent under the Arizona statute for aggravated driving is not an evil intent. Aggravated driving merely requires the offender's knowledge that he is not authorized to drive because his license is restricted. When he drives, knowing that he is not supposed to be driving, he violates the law. Such conduct may be knowing and even reckless, but it is not evil. *See Matter of Fualaau*, 21 I&N Dec. 475, 478 (BIA 1996). By contrast, *a finding that a crime involved moral turpitude requires a showing that the criminal statute specifically proscribes either an evil intent or conduct that, by its nature, is vile and depraved, or both* (citing *Matter of Khourn*, [21 I&N Dec. 1041] ([holding that] evil intent is inherent in the knowing or willful sale and distribution of controlled substances.) (emphasis added).

II. While DUI with a suspended license may be morally reprehensible, neither act is a CIMT. Therefore, the Panel's finding that two morally reprehensible acts put together transform into CIMTS, is neither a cogent conclusion, nor is it legally sustainable.

Both the Ninth Circuit and the Board have held that simple DUIs are not crimes involving moral turpitude. In *Murillo-Salmeron v. INS*, 327 F.3d 898, 902 (9th Cir. 2003), this Court held that "simple DUI convictions, even if repeated, are not crimes of moral turpitude." Similarly, in *Hernandez-Martinez v. Ashcroft*, 329 F.3d 1117 (9th Cir. 2003), the Court held that Ariz. Rev. Stat. section 28-1383(A)(1), is not categorically a crime involving moral turpitude. "Nothing in either the federal or the Arizona statutes suggest that the regulatory offense of DUI becomes an inherently

base, vile, and deportable crime of moral turpitude simply because the offender's driver's license has been suspended." *Id.* at 1119 (Wardlaw, J., concurring). In *Matter of Torres-Varela*, 23 I&N Dec. 78, the Board held that convictions for multiple DUI's in violation of Ariz. Rev. Stat. section 28-1383(A)(2) is not a crime involving moral turpitude.

In *Matter of Short*, 20 I&N Dec. 136, 139 (BIA 1989), the Board held that neither the offense of aiding and abetting, nor the offense of assault with intent to commit a felony upon the person of a minor, independently involved moral turpitude. As a result, the Board held that the two crimes combined also do not involve moral turpitude. *Id.* Arizona's designation of DUI with a suspended license as "aggravated," or the fact that DUI with a suspended license is morally repugnant, does not convert a conviction that is lacking moral turpitude into a crime involving moral turpitude. *See Matter of Lopez-Meza*, 22 I&N Dec. at 1197-98 (Rosenberg, J., dissenting). Reliance on state labels is insufficient to establish that a state conviction satisfies a uniform federal definition. *Id.* at 1202 (citing *United States v. Anderson*, 989 F.2d 310, 312 (9th Cir. 1993)).

Regulatory offenses are not crimes involving moral turpitude. *Matter of Abreu-Semino*, 12 I&N Dec. 775 (BIA 1968). DUI and driving with a suspended license are both regulatory offenses in Arizona. Both DUI and driving with a

suspended license may be committed “in the absence of an evil intent or conduct that is base, vile, or depraved.” *Matter of Lopez-Meza*, 22 I&N Dec. at 1203 (Rosenberg, J., dissenting). The “bare presence of some degree of evil intent is not enough to convert a crime that is not serious into one of moral turpitude leading to deportation.” *Id.* at 1204 (citing *Rodriguez-Herrera v. INS*, 52 F.3d at 241).

III. With the exception of one BIA decision to which the Ninth Circuit owes no deference, but the Panel majority fully relies upon, neither Arizona legal precedent, nor Ninth Circuit or BIA precedent support a finding that a violation of Ariz. Rev. Stat. section 28-1383(A)(1) is a CIMT.

“While criminal intent is generally required for criminal conduct, it is within the power of the legislature to criminalize certain acts without regard to the actor’s intent.” *State v. Thompson*, 674 P.2d 895, 899 (Ariz. Ct. App. 1983) (citing *State v. Cutshaw*, 437 P.2d 962 (Ariz. Ct. App. 1968)). Ariz. Rev. Stat. section 13-202(B), states in pertinent part:

[i]f a statute defining an offense does not expressly prescribe a culpable mental state that is sufficient for commission of the offense, no culpable mental state is required for the commission of such offense, and the offense is one of strict liability unless the proscribed conduct necessarily involves a culpable mental state.

In *State v. Williams*, 698 P.2d 732, 734 (Ariz. 1985), the Arizona Supreme Court held that the offense of “driving without a license” necessarily involves a

culpable mental state, so that State must show that the driver knew or should have known that his license had been suspended. The Court noted that although Ariz. Rev. Stat. section [28-1383(A)(1)] contains no language concerning *mens rea*, “driving without a license” necessarily involves a “culpable mental state.”

Ariz. Rev. Stat. section 28-1383(A)(1) states:

Aggravated driving or actual physical control while under the influence; violation; classification; definition

A. A person is guilty of aggravated driving or actual physical control while under the influence of intoxicating liquor or drugs if the person does any of the following:

1. Commits a violation of section 28-1381, section 28-1382 or this section while the person's driver license or privilege to drive is suspended, canceled, revoked or refused or while a restriction is placed on the person's driver license or privilege to drive as a result of violating section 28-1381 or 28-1382 or under section 28-1385.

Therefore, in violating Ariz. Rev. Stat. section 28-1383(A)(1), the culpable mental state is “knowing” one’s driver’s license is revoked and intent to ignore a state administrative directive not to drive. This level of intent may be characterized as a knowing violation of a statutory mandate that an individual may not drive when one’s license has been suspended or revoked. The intent is based upon an actor’s knowledge of a regulatory obligation, and a breach of that obligation. Such intent

does not rise to the level of morally turpitudinous.

Furthermore, the Arizona Supreme Court has specifically held that a conviction under Ariz. Rev. Stat. section 28-1383(A)(1) is not a CIMT entitling a defendant to a jury trial. The Court stated that “[a]cts of “moral turpitude” constitute behavior which is “depraved and inherently base. . . .” *Benitez v. Dunevant*, 7 P.3d 99 (Ariz. 2000) (citing *O’Neill v. Mangum*, 445 P.2d at 844 (Ariz. 1968)). The Court noted that “[c]rimes of moral turpitude are necessarily jury eligible because the “[d]amage to reputation, humiliation, and loss of dignity beyond that associated with all crimes brings moral turpitude crimes ... into the realm of serious cases.” *Id.* (citing *State ex rel. Dean v. Dolny*, 778 P.2d 1193, 1196 (Ariz. 1989)).

As the Arizona Supreme Court stated:

[the defendant’s] offense, in one sense, does question his honesty because he did something he was expressly required by law not to do. But this is true of virtually all criminal offenses, serious or minor. Accordingly, offenses similar in quality to driving on a suspended license have been found lacking moral turpitude. Such offenses include reckless driving, selling liquor to a minor, operating without a contractor’s license, simple assault, simple assault designated as domestic violence, and disorderly conduct [(citations omitted).] It may be said that each crime enumerated implicates the offender’s personal values, but not necessarily his moral deficiencies. *Moral turpitude is implicated when behavior is morally repugnant to society. It is not implicated when the offense merely involves poor judgment, lack of self-control, or*

disrespect for the law involving less serious crimes.
(emphasis added). *Benitez v. Dunevant*, 7 P.3d at 104.

In fact, the Panel's only support for its decision appears to come from *Matter of Lopez Meza*, 22 I&N Dec. 1188, and *United States v. Barner*, 195 F. Supp. 103, 108 (N.D. Cal. 1961), which noted that DUI with a suspended driver's license is an "innately reprehensible act." The Panel's decision has only added to the "schizophrenic law on the subject [of DUI]." *Hernandez-Martinez v. Ashcroft*, 329 F.3d 1117 (Wardlaw, J., concurring).

The Panel also cited *Knapik v. Ashcroft*, 384 F.3d 84, 90 (3d Cir. 2004) in support of the proposition that reckless conduct endangering the safety of others can be a crime involving moral turpitude.⁵ In *Knapik*, the Court noted that in the twenty-eight years since the BIA's holding in *Matter of Medina*, 15 I&N Dec. at 614, the BIA consistently has interpreted moral turpitude to include recklessness crimes if certain statutory aggravating factors are present. *Knapik*, 384 F.3d at 90. The Court noted that in *Medina*, the BIA found it persuasive that a person acting

⁵Under this Court's holding in *Fernandez-Ruiz*, 468 F.3d 1159, Ariz. Rev. Stat. sections 13-1203, and 13-1204, are not categorically CIMTs despite aggravating factors, such as the use of a deadly weapon, unless an intent other than "reckless" can be proven through the record of conviction. Thus, this Court has required a *mens rea* greater than reckless to sustain a showing of moral turpitude. Under the rationale of *Fernandez-Ruiz*, the Panel's decision in this case cannot stand.

recklessly must consciously disregard a substantial and unjustifiable risk, and such disregard must constitute a gross deviation from the standard of care which a reasonable person would exercise in the situation. *Id.* at 89–90. The Third Circuit noted, as an example, that the BIA limits moral turpitude to crimes in which a respondent consciously disregards a substantial risk of serious harm or death to another. *Id.*

In *Knapik*, the statute at issue was New York Penal Law section 120.25, which states, a “person is guilty of reckless endangerment in the first degree when, under circumstances evincing a depraved indifference to human life, he recklessly engages in conduct which creates a grave risk of death to another person.” *Id.* The Court held that based upon the statute, which unlike the statute at issue in the instant case was clearly not regulatory in nature, the BIA could reasonably conclude that the elements of depravity, recklessness and grave risk of death, when considered together, implicate accepted rules of morality and the duties owed to society. *Id.*

In the instant case, however, it is not the act of driving with a suspended license that creates a substantial risk of serious harm or death to another, it is the reckless driving under the influence of alcohol. Therefore, the suspension of the license makes no difference in the degree of recklessness, or the possibility of substantial risk of serious harm to another. Here, the addition of driving on a suspended or revoked

license with a DUI to create an aggravated DUI, simply cannot, and does not, “create” a CIMT.

In contrast, under the Board’s holding in *Matter of Torres-Varela*, 23 I&N Dec. 78, and several Ninth Circuit decisions should have led the Panel to find that a violation of Ariz. Rev. Stat. section 28-1383(A)(1) is not a CIMT. *See Fernandez-Ruiz*, 468 F.3d 1159; *Hernandez-Martinez*, 329 F.3 1117, *Murillo-Salmeron*, 327 F.3d at 902; *Matter of Lopez-Meza*, 22 I&N Dec. 1194; *Matter of Short*, 20 I&N Dec. at 139; *Matter of Abreu-Semino*, 12 I&N Dec. at 775; *Benitez v. Dunevant*, 7 P.3d at 104.

DUI on a suspended license demonstrates poor judgment, is intuitively reprehensible, despicable, and immoral. Nevertheless, DUI on a suspended license simply does not meet the *required legal standard* for a crime involving moral turpitude because it lacks the requisite intent, and is a violation of two regulatory statutes. If convictions for multiple DUIs are not morally turpitudinous, a single DUI on a suspended license is most certainly not morally turpitudinous, because the “bad act,” in the chain of events is not driving with the suspended license, but rather, driving under the influence. Of the two regulatory crimes at issue, the one that creates a substantial risk of injury is the DUI. As a result, the Panel should reconsider its decision, or the Court should rehear the Petitioner’s case *en banc*.

CONCLUSION

The Panel erred in holding that a violation of Ariz. Rev. Stat. section 28-1383(A)(1) is a CIMT. As a result, the Panel should reconsider its decision. If the Panel chooses not to correct its error, an *en banc* panel of the Court should do so.

RESPECTFULLY SUBMITTED this 5th day of October, 2007.

STENDER & POPE, PC



Christopher J. Stender, Esq.
Deniz S. Arik, Esq.
Attorneys for Petitioner

CERTIFICATE OF COMPLIANCE

I certify that this Petition for Rehearing and Suggestion for Rehearing En Banc is proportionally spaced 14 point Roman, and contains 4, 013 words. While not in compliance with Federal Rule of Appellate Procedure 35(b)(2) because it exceeds 15 pages, the Petition is in full compliance with Ninth Circuit Rule 40-1, because it complies with the alternative length limitations of 4,200 words.



Christopher J. Stender, Esq.

Deniz S. Arik, Esq.

CERTIFICATE OF SERVICE

I hereby certify that on October ^{25th}, 2007, I caused the Petition for Rehearing and Rehearing En Banc for the Appellant to be served by causing two (2) copies to be mailed, postage paid to:

Office of Immigration Litigation
U.S. Dept. of Justice, Civil Division
PO BOX 878, Ben Franklin Station
Washington, DC 20044



Christopher J. Stender, Esq.
Deniz S. Arik, Esq.

No. 04-76644

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ARMANDO MARMALEJO-CAMPOS,
aka Campos Ramos Armando,

Petitioner,

v.

MICHAEL B. MUKASEY, U.S. Attorney General,

Respondent.¹

On Review from the Board of Immigration Appeals
(Agency No. A75-679-759)

**RESPONDENT'S OPPOSITION TO THE PETITION
FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC**

INTRODUCTION

Respondent, by and through his undersigned counsel, and pursuant to the Court's order of November 2, 2007, and Rule 35(e), Fed. R. App. P., respectfully submits this opposition to the Petition for Rehearing and Suggestion for Rehearing En Banc (Reh. Pet.) filed by Petitioner, Armando Marmalejo-Campos, aka Campos Ramos Armando (Marmalejo-Campos). Marmalejo-Campos' petition does not satisfy the requirements for rehearing set forth in Rules 35 and 40 Fed. R. App. P. The

¹ Pursuant to Rule 43(c)(2), Federal Rules of Appellate Procedure (Fed. R. App. P.), Attorney General Mukasey hereby is substituted in lieu of Peter D. Keisler.

FILED

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CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

petition simply reiterates the arguments Marmalejo-Campos made first to the Board of Immigration Appeals (BIA) and then in his appeal to this Court. The panel majority's conclusion that Marmalejo-Campos' two felony convictions for aggravated driving under the influence (DUI) in violation of Arizona law constitute crimes involving moral turpitude (CIMTs) within the meaning of the Immigration and Nationality Act, *Marmalejo-Campos v. Gonzales*, 503 F.3d 922 (9th Cir. 2007), is correct as a matter of law and does not overlook or misapprehend any point of law or fact. *See* Fed. R. App. P. 40(a)(2). Rehearing en banc is not warranted because the panel decision does not conflict with any of this Court's precedents, *cf.* Reh. Pet., 1-2, or those of the Supreme Court. Thus, the court should deny the petition.

RELEVANT BACKGROUND

I. ADMINISTRATIVE PROCEEDINGS AND DECISIONS

Marmalejo-Campos was granted Lawful Permanent Resident alien status in the United States in 2001. Certified Administrative Record (AR) 190. In 2002 and in 1997, Marmalejo-Campos pled guilty to aggravated driving under the influence (DUI) under ARS § 28-1383.² AR 113-16, 131-34, respectively. The Arizona

² Marmalejo-Campos' 1997 conviction fell under ARS § 28-697(A)(1). *See* AR 131, but in 1996 the statute was renumbered as ARS § 28-1383, effective October 1, 1997. *See* 503 F.3d at 924 n. 1. Like the panel decision, *see id.*, this opposition hereafter refers only to § 28-1383.

statute defines aggravated DUI, *inter alia*, as driving or having actual or physical control of a vehicle while the person is under the influence of intoxicating liquor or drugs and while the person's driver license or privilege to drive is suspended, canceled, revoked, or refused. ARS § 1383(A)(1).

In 2003, the Department of Homeland Security (DHS) charged, *inter alia*, that the two aggravated DUI convictions made Marmalejo-Campos subject to removal pursuant to 8 U.S.C. § 1227(a)(2)(A)(i) (providing that an alien who commits two CIMTs not arising out of a single scheme is removable). AR 190-93. After a hearing, AR 87-96, the Immigration Judge ruled that the aggravated DUI convictions were CIMTs and ordered Marmalejo-Campos removed to Mexico. AR 78-79.

Following the holding of *Hernandez-Martinez v. Ashcroft*, 329 F.3d 1117, 1118-19 (9th Cir. 2003), that ARS § 1383 is divisible into CIMT and non-CIMT conduct, the Immigration Judge considered whether Marmalejo-Campos' conviction records establish that his convictions are CIMTs. AR 74-75. *See Taylor v. United States*, 495 U.S. 575, 602 (1990) (holding that consequences of a Federal statute may be applied to a state conviction only if elements of the state statute correspond to the elements of the applicable Federal statute), and *Shepard v. United States*, 544 U.S. 13, 19-20 (2003) (holding that transcripts of plea colloquies can be used to determine that a defendant pled guilty in state court to the same conduct covered by the

applicable Federal statute). The Immigration Judge found that Marmalejo-Campos' plea colloquies in 2002, AR 117-35, and in 1997, AR 137-50, provided a factual basis for the charge of removability. AR 75-78.

Marmalejo-Campos' appeal brief before the BIA contended that *Hernandez-Martinez* and BIA precedent foreclosed the Immigration Judge's CIMT findings, AR 29-30, and that it was not permissible for the Immigration Judge to rely on the transcripts of Marmalejo-Campos' guilty pleas to aggravated DUI. AR 30-33. The BIA's decision in December 2004 concurred with the finding that Marmalejo-Campos' aggravated DUI convictions each were CIMTs. AR 2-4. The BIA concluded that the Immigration Judge properly considered the transcripts of Marmalejo-Campos' plea colloquies, and that they established that Marmalejo-Campos was driving at the time of his arrests for aggravated DUI in 2002 and 1997.

Id.

II. THE PANEL DECISION

Marmalejo-Campos' brief in support of his petition for review in this Court repeated his claims that his aggravated DUI convictions do not constitute CIMTs, Opening Brief (Pet. Br.), at 8-13, arguing that numerous decisions of this Court and the BIA establish that aggravated DUI does not involve the requisite mental state, Pet. Br. 10-13, and that a "regulatory offense" does not fall within the definition of a

CIMT. Pet. Br. 10-11. Marmalejo-Campos also reasserted that the Immigration Judge should not have relied on the transcripts of Marmalejo-Campos' plea colloquies in 2002 and 1997. *Id.*, at 13-16.

The government's brief argued that the evidence established that Marmalejo-Campos' convictions for aggravated DUI were CIMTS. Brief for Respondent (Resp. Br.), at 12-18.

The decision of the panel majority, *Marmalejo-Campos v. Gonzales*, 503 F.3d 922, 925 (9th Cir. 2007), reviewed *de novo* the issue whether an aggravated DUI conviction based on driving on a suspended or revoked license under Arizona law is a CIMT, 503 F.3d at 925, and held that "a violation of [ARS] § 28-1353(A)(1) for aggravated DUI involving actual driving is a [CIMT,]" 503 F.3d at 926, and that Marmalejo-Campos' aggravated DUI convictions were CIMTs. 503 F.3d at 927. The majority decision reasoned that:

Driving while intoxicated is despicable, and when coupled with the knowledge that one has been specifically forbidden to drive, it becomes "an act of baseness, violence or depravity in the private and social duties which a [person] shows to [a] fellowman or to society in general, contrary to the accepted and customary rule of right and duty."

503 F.3d at 926 (*quoting* *Jordan v. DeGeorge*, 341 U.S. 223, 235 n. 7 (1951)) (*other citation omitted*).

The dissenting opinion, 503 F.3d at 927-33, contended that the non-CIMT offenses of driving while under the influence and of driving without a license cannot be combined to create a CIMT. 503 F.3d at 927-28. The dissent also argued that the majority decision should not have deferred to the BIA's conclusion in *Matter of Lopez-Meza*, 22 I & N Dec. 1188, 1194-96 (BIA 1999), that aggravated DUI under ARS § 28-1383(A)(1) is a CIMT, 503 F.3d at 928-32, and that the decision in *Hernandez-Martinez* does not support the conclusion that Marmalejo-Campos' conduct constituted a CIMT. 503 F.3d at 931-34.

ARGUMENT

I. THE PETITION FOR REHEARING HAS FAILED TO SHOW THAT PANEL REHEARING IS WARRANTED

Panel rehearing is not warranted because the petition does not state with particularity any point of law or of fact that the majority decision overlooked or misunderstood. *See* Rule 40(a)(2), Fed. R. Civ. P. Instead, the petition repeats Marmalejo-Campos' contention that aggravated DUI under ARS § 1383(A)(1) lacks the intent required for a conviction to qualify as a CIMT. Reh. Pet., at 5-9. The petition cites numerous decisions of this and other courts of appeals and of the BIA for the proposition that "evil intent" is required, but does not address at all the majority decision's conclusion that a person's knowledge that he does not have a

license while driving under the influence satisfies the intent element. *See* 503 F.3d at 926, and constitutes willful disregard of the law, as well as reckless indifference to the safety of others. *Id.*

Marmalejo-Campos' petition also presses the conclusion of the dissenting opinion that DUI and driving without a license, neither of which is a CIMT, do not constitute a CIMT when committed simultaneously. *Reh. Pet.*, at 9-11; *see* 503 F.3d at 927-28. However, the dissenting opinion did not demonstrate that the majority decision erred as a matter of law. Rather, it urged the majority to reach opposite conclusions from the applicable legal precedent. *See, e.g.*, 503 F.3d at 928 (dissenting opinion conclusion that *Lopez-Meza* and *Hernandez-Martinez* "counsel precisely the opposite finding."). However, the dissent did not demonstrate that the majority decision overlooked or misapprehended any issue of the law or fact.

The same applies to the dissenting opinion's criticism that the majority decision should not have shown deference to the BIA's conclusion in *Lopez-Mesa* or relied on *Hernandez-Martinez*. *See* 503 F.3d at 928-33. As an initial matter, the courts give deference to the BIA's interpretation of the statutes it administers. *See, e.g.*, *Abebe v. Gonzales*, 493 F.3d 1092, 1100-1101 (9th Cir. 2007) (*citing Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984) and *INS v. Aguirre-Aguirre*, 526 U.S. 415, 424 (1999)). The Court will sustain the BIA's

interpretation as long as it is reasonable. *Abebe*, 493 F.3d at 1101. Here, the dissenting opinion simply disagrees with the the BIA's conclusion in *Lopez-Meza* that aggravated DUI under Arizona law constitutes a CIMT, whereas the Court and the BIA have held that simple DUI is not a CIMT. 503 F.3d at 928-31. *See Murillo-Salmeron v. INS*, 327 F.3d 898, 902 (9th Cir. 2003); *Lopez-Meza*, 22 I & N Dec. at 1194. The dissenting opinion bases its disagreement on the subjective viewpoint that simple DUI is as "based, vile, or depraved" as aggravated DUI. 503 F.3d at 929. That policy choice does not mean that the majority decision overlooked or misapprehended a legal issue.

For these reasons, Marmalejo-Campos has not met the standards for panel rehearing.

II. THE PETITION FOR REHEARING HAS FAILED TO SHOW THAT EN BANC REHEARING IS WARRANTED

The petition does not demonstrate that en banc rehearing is necessary to secure and maintain uniformity of this Court's decisions. *See* Rule 35(b)(1)(A), Fed. R. Civ. P. To the contrary, the petition asserts that no precedent from this court, the BIA or Arizona law *supports* the majority decision's holding, Reh. Pet., at 11, but that does not mean that the majority decision is *inconsistent with* binding precedent. The petition does not cite *any* precedents of the Supreme Court, this Court, or any other

court of appeals that foreclose the majority decision's conclusion that aggravated DUI under Arizona law is a CIMT. That alone compels the conclusion that rehearing en banc is not warranted. It also follows that the absence of precedent on the issue, *a fortiori*, means that the majority decision does not create a conflict.

Rather than identifying a conflicting case or cases, the petition misconstrues other decisions in order to convince the Court that the majority decision conflicts with binding precedent. For example, the petition asserts that the majority decision should not have afforded *Chevron*-deference to the BIA's holding in *Lopez-Meza* because the Court was required to review *de novo* whether a conviction under ARS § 28-1383(A)(1) is a CIMT. Reh. Pet., at 2. The claim is a *non-sequitur*. The majority decision did review *de novo* the legal issue whether such a conviction is a CIMT. See 503 F.3d at 925. However, well-established precedent required the majority decision to defer to the BIA's conclusion in *Lopez-Meza* that an aggravated DUI conviction under Arizona law constituted a CIMT because the applicable Federal CIMT statute, 8 U.S.C. § 1227(a)(2)(A)(i), is silent on the question and the BIA's interpretation was reasonable. See, e.g., *INS v. Cardoza-Fonseca*, 480 U.S.

421, 448 (1987) (recognizing that if Congress leaves a “gap” in a statute, a court “*must* respect the interpretation of the agency to which Congress has delegated the responsibility for administering the statutory program.”) (*emphasis added*)).

The petition mistakenly assumes that the majority decision deferred to the BIA’s conclusion in *Lopez-Meza* as a substitute for the Court’s duty to decide legal issues. To the contrary, the principle of deference filters the scope of a court’s review of an administrative decision through the lens of the proper allocation of power – and expertise – among different branches of government. *See, e.g., INS v. Ventura*, 537 U.S. 12, 16 (2002) (holding that an appellate court may not “intrude upon the domain which Congress has exclusively entrusted to an administrative agency.”) (*internal citations omitted*). Therefore, the majority decision’s application of the principle of deference in this case does not conflict with applicable precedent.

The petition also contends that the majority decision “cannot stand[,]” in view of *Fernandez-Ruiz v. Gonzales*, 468 F.3d 1159 (9th Cir. 2006). *Reh. Pet.*, at 14 n. 5. Marmalejo-Campos argues that the decision required “a *mens rea* greater than recklessness” to sustain a CIMT charge. *Id.* However, the case is inapposite, and Marmalejo-Campos’ petition misconstrues the decision.

In *Fernandez-Ruiz*, the Court held that a conviction under an Arizona statute for “recklessly causing any physical injury to another person,” ARS § 13-1203(A)(1)

was not a CIMT because the statute did not require willfulness, and the term “any injury” covered conduct that was not so severe as to qualify as a CIMT. 468 F.3d at 1167-68. In distinct contrast, the majority decision here held that aggravated DUI is a CIMT because it “reflects a *willful* disregard for the law and a reckless indifference to the safety of others.” 503 F.3d at 926 (*emphasis added*). The majority decision’s citations to cases such as *Knapik v. Ashcroft*, 384 F.3d 84, 90 (3d Cir. 2004), and *Matter of Medina*, 15 I & N Dec. 611, 613 (BIA 1976), in support of that proposition, 503 F.3d at 926, were appropriate. *Cf.* Reh. Pet., at 14-15.

The petition similarly contends erroneously that the majority decision’s holding is contrary to other cases such as *Hernandez-Martinez*, *Murillo-Salmeron*, and *Torres-Varela*, 23 I & N Dec. 78 (BIA 2001). Reh. Pet., at 16. The majority decision is not in conflict with the cited cases. The holding in *Hernandez-Martinez* that ARS § 28-1383 is not categorically a CIMT, 329 F.3d at 1118, does not apply. In Marmalejo-Campos’ case, the Immigration Judge, BIA and the Court all applied the “modified” categorical approach approved in *Taylor*, 495 U.S. at 602, and concluded that the conviction documents established that Marmalejo-Campos’ aggravated DUI convictions were CIMTs. *See* AR 75-78 (Immigration Judge decision); AR 3-4 (BIA decision); and 503 F.3d at 926 (majority decision).

The Court's conclusion in *Murillo-Salmeron* that the petitioner's convictions for simple, not aggravated, DUI, were not CIMTs, 327 F.3d at 902, is not relevant to Marmalejo-Campos' convictions for aggravated DUI. In *Torres-Varela*, the petitioner was convicted under a different statute, ARS § 28-1383(A)(2), which provides that a conviction for simple DUI after a prior DUI conviction is an aggravated DUI. 23 I & N Dec. at 81. The government challenged Torres-Varela's application to adjust his immigration status, on the ground that Torres-Varela was inadmissible because his aggravated DUI conviction was a CIMT. *Id.*, at 79. The BIA disagreed, finding that a conviction under ARS § 28-1383(A)(2) did not require a culpable mental state, but only prior simple DUI convictions. 23 I & N Dec. at 85-86. Thus, the decision is consistent with the majority decision and inapposite to Marmalejo-Campos' convictions for driving under the influence when he knew he did not have a license to drive.

In sum, Marmalejo-Campos' petition has not established that the majority decision conflicts with applicable precedents.³

³ The other cases cited in the petition as contrary rulings, Reh. Pet. 16, also are inapposite. The BIA held in *Matter of Short*, 20 I & N Dec. 136, 139-40 (BIA 1989), that an alien's conviction for aiding and abetting an assault in an attempt to commit a felony was not a CIMT because the underlying offense was not. In *Torres-Varela*, the BIA kept distance from its prior holding in *Matter of Abreu-Semino*, 12 I & N Dec. 775, 777-78 (BIA 1968), that a conviction for violating a regulatory offense, in that case, the unlawful sale and possession of LSD, could never constitute a CIMT.

CONCLUSION

For all of the foregoing reasons, respondent respectfully requests that the Court deny the petition for panel rehearing and for rehearing en banc.

Respectfully submitted,

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December 4, 2007

23 I & N Dec. at 83-84. The cited state case, *Benitez v. Dunevant III*, 7 P.3d 99, 104 (Ariz. 2000), held that the petitioner's conviction for driving while his license was suspended for a prior DUI conviction was not a CIMT, and therefore, not jury eligible. Even assuming that the state law definition of a CIMT applied to this case, Benitez was appealing his conviction for driving without a license after a prior DUI, and not his DUI conviction.

CERTIFICATE OF SERVICE

I hereby certify that on this 3d day of December 2007 I caused an envelope containing a copy of the foregoing **Respondent's Opposition to the Petition for Rehearing and Suggestion for Rehearing En Banc** to be deposited in a FedEx pick-up box for same day collection and next-day delivery addressed to counsel for Petitioner:

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