UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CASE No. 12-14048-D

ANDRES JIMENEZ-DOMINGO,

Petitioner,

v.

ERIC HOLDER, U.S. ATTORNEY GENERAL

Respondent.

PETITION FOR REVIEW OF A FINAL ORDER OF
OF THE BOARD OF IMMIGRATION APPEALS

REPLY BRIEF FOR PETITIONER

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I. The Immigration Judge Based His Decision on the Premise that Gitto Had Authority to Detain for Suspected "Unlawful Presence." The Government, However, Never Argues That Gitto Had Such Authority.

The Government at no point argues that police officer Gitto was authorized to detain Mr. Jimenez-Domingo because he had authority to enforce civil immigration law. Instead, the Government asserts that Gitto's actions were lawful because the traffic stop lasted the length of Mr. Jimenez-Domingo's detention and that Customs and Border Protection (CBP) officials ordered Gitto to hold Mr. Jimenez-Domingo. (Resp. Br. 29, 37). The Government's rationales, however, did not form basis of the Immigration Judge's (IJ) decision and are not supported by the record.

The Court must review the IJ's decision only on the basis upon which it was decided. In *SEC v. Chenery Corp.*, the U.S. Supreme Court ruled that federal appellate courts cannot substitute their own rationale to affirm an agency judgment if it misapplied the law. 318 U.S. 80, 88 (1943); *see also id.* at 87 ("The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based."); *Fla. Dept. of Labor and Emp't v. U.S. Dept. of Labor*, 893 F.2d 1319, 1322 (11th Cir. 1990) ("If the agency has misapplied the law, its order cannot stand – even if the reviewing court believes that the agency either would reinstate its order under a different theory or would

reach the same decision under the proper rule of law. Instead, the case must be remanded to the agency to make a new determination."). Moreover, the Court may not engage in fact-finding. *See Silva v. U.S. Att'y Gen.*, 448 F.3d 1229, 1236 (11th Cir. 2006) ("[W]e do not engage in a *de novo* review of factual findings by the Immigration Judge.").

The basis of the IJ's decision was that police officer Gitto had authority to prolong his seizure of Mr. Jimenez-Domingo because he had reasonable suspicion to believe that Mr. Jimenez-Domingo was violating civil immigration law as someone unlawfully present in the United States. The IJ found that Gitto was authorized to prolong Mr. Jimenez-Domingo's detention under 8 U.S.C. 1357(g)(10) and that there was "no Fourth Amendment violation in Officer Gitto's decision to detain Respondent for approximately one hour while he awaited the arrival of CBP officers." (R. 397). According to the IJ, "[Mr. Jimenez-Domingo] had admitted he was not lawfully in the United States and this admission provided a reasonable basis for Officer Gitto to conclude Respondent was present in violation of federal immigration law." (*Id.*).[1] The IJ did not find that Gitto had any

[1] This fact is disputed as Mr. Jimenez-Domingo stated in his declaration that he did not respond to Gitto's inquiries regarding his immigration status. (R. 178, ¶ 7). Because the IJ did not grant Mr. Jimenez-Domingo an evidentiary hearing, he was obligated to take the facts as presented by Mr. Jimenez-Domingo. *See* 8 C.F.R. § 1240.10(d) (The IJ "shall receive evidence as to any unresolved issues" except for "any facts admitted during the pleading"). *See also* Pet. Br. Part I. However, as explained below and in Petitioner's principal brief, the disposition of this factual

reasonable suspicion that a *crime* was being committed by Mr. Jimenez-Domingo or any of the other passengers. The IJ specifically noted that "Officer Gitto did not actually *arrest* [Mr. Jimenez-Domingo]." (R. 398). Nor did the IJ find that Customs and Border Protection (CBP) instructed Gitto to detain Mr. Jimenez-Domingo for immigration enforcement purposes or that Gitto's prolonged detention of Mr. Jimenez-Domingo lasted the duration of the traffic stop. The IJ justified Gitto's behavior on the sole basis that he had reasonable suspicion that Mr. Jimenez-Domingo was unlawfully present, a civil immigration law violation.

This Court is bound to review this case based on the facts and rationale presented in the IJ's decision. If this Court finds that the IJ erred in determining that there was no Fourth Amendment violation or that the IJ misapplied the law, the Court must remand this case to the BIA for further proceedings. Any new rationale now offered by the Government on appeal is irrelevant and cannot be considered by the Court.

The Government does not justify Gitto's seizure of Mr. Jimenez-Domingo on the ground that Gitto was authorized to enforce civil immigration law. Instead, the Government argues that Gitto was authorized to detain Mr. Jimenez-Domingo because the traffic stop lasted the duration of the seizure and CBP instructed Gitto to hold Mr. Jimenez-Domingo. The Government states that the traffic stop

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dispute is irrelevant to Mr. Jimenez-Domingo's primary argument that Gitto lacked authority to prolong a seizure based on a suspicion of unlawful presence.

initiated by Gitto was not completed until Mr. Alonso, the driver, was issued a traffic citation at 9:12 a.m. and that "the argument that the traffic stop ended before Officer Gitto cleared the driver and cited him for traffic violations is unavailing." (Resp. Br. 25).

The Government's justification for the prolonged detention is inconsistent with the IJ's decision. (R. 397). The Government states that Gitto's detention of Mr. Jimenez-Domingo lasted 41 minutes from Gitto's initial stop to when CBP arrived and took Mr. Jimenez-Domingo into custody. (Resp. Br. 25). The IJ, however, made no such finding. He found that Gitto stopped the vehicle at "approximately 7:45 a.m." (R. 391) and that he detained "Respondent for approximately one hour while he awaited the arrival of CBP officers." (R. 397).

The Government also contends that Gitto "was instructed by CBP to detain the illegal aliens." (Resp. Br. 37). This is also unsupported by the record or the IJ decision. The IJ decision says nothing about an instruction from CBP to Gitto. To the contrary, the transcript shows that the CBP agent who spoke with Gitto by telephone explained that CBP might lack the "manpower" to respond to his call. The end of the radio conversation between Gitto and the CBP agents contains the following exchange:

> Officer Gitto: I mean they came out the last time to help out. . .
>
> Border Patrol Agent #2: I'm sure . . . It's a manpower issue sir . . . it's not that they're not going to come.

> Officer Gitto: Yeah I understand.
>
> Border Patrol Agent #2: It's not that they're not going to come, it's that, you know, with their manpower at this moment . . .

(R. 189). The transcript does not suggest that CBP gave any instructions to Gitto to hold Mr. Jimenez-Domingo or that CBP was promising to arrive on scene. CBP never gave Gitto any instructions to detain Mr. Jimenez-Domingo and Gitto acted on his own accord for the sole purpose of attempting to enforce federal immigration laws.[2]

The Government attempts to confuse the issues in this case by discussing at length issues that Mr. Jimenez-Domingo does not contest or that are absent from the IJ's decision. The Government quotes *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1039 (1984), for the proposition that "[t]he 'body' or identity of a defendant or respondent in a criminal or civil proceeding is never itself suppressible as a fruit of an unlawful arrest." (Resp. Br. 22). Mr. Jimenez-Domingo's case is not about the suppression of his identity but the suppression of the sole piece of evidence offered to establish his alienage, the I-213 Record of Deportable Alien.

The Government points out that under *Muehler v. Mena*, 544 U.S. 93 (2005), law enforcement officers may permissibly question people about their immigration

[2] Even if CBP had instructed Gitto to detain Mr. Jimenez-Domingo, this would not have made the detention lawful under 8 U.S.C. 1357(g), as discussed in Part III.

status during a lawful stop motivated by reasonable suspicion. (Resp. Br. 22). Mr. Jimenez-Domingo's case, however, is not about questioning after a lawful stop but rather about prolonging a seizure based upon a suspected civil immigration violation. The Government acknowledges this Court's interpretation of *Muehler* as holding that "it is the unreasonable extension of the duration – not the scope of conversation – that could render an otherwise justified detention unreasonable for Fourth Amendment purposes." *United States v. Hernandez*, 418 F.3d 1206, 1209 n.3 (11th Cir. 2005); (Resp. Br. 22). The illegality of Gitto's detention of Mr. Jimenez-Domingo was not the scope of his questioning but the fact that he unlawfully prolonged the seizure in order to enforce civil immigration laws, something he was not authorized to do. *See Illinois v. Caballes*, 543 U.S. 405, 407 (2005) ("A seizure that is justified solely by the interest in issuing a warning ticket to the driver can become unlawful if it is prolonged beyond the time reasonably required to complete that mission."); *United States v. Purcell*, 236 f.3d 1274, 1277 (11th Cir. 2001) ("the *duration* of the traffic stop must be limited to the time necessary to effectuate the purpose of the stop.") There was no lawful reason for Gitto to prolong the detention of Mr. Jimenez-Domingo unless there was reasonable suspicion that a crime was being committed. *See Terry v. Ohio*, 392

U.S. 1, 30 (1968). Unlawful presence in the United States in not a crime. *See Arizona v. United States*, 132 S.Ct. 2492, 2505 (2012).[3]

The Government also suggests that the length of the detention was justified because Gitto improperly believed that the NCIC database indicated possible derogatory information about the driver – a U.S. born citizen. (Resp. Br. 25, 28). These alleged facts are nowhere mentioned in the IJ's decision and thus cannot be considered under *Chenery* and *Silva*. Moreover, as acknowledged by the Government, Gitto "misinterpreted the information in NCIC." (Resp. Br. 28). Finally, during his call to CBP, Gitto made clear that he was not investigating any criminal activity, stating that "[the vehicle occupants] are not going to be arrested." (R. 188, ¶¶ 20, 23, 32).

II. Mr. Jimenez-Domingo Has Established a Prima Facie Case of a Fourth Amendment Violation As Well As a Prima Facie Case That the Violation Was Egregious.

A. The Government Does Not Respond To Mr. Jimenez-Domingo's Arguments That the Exclusionary Rule Applies in His Case, Regardless of Whether the Violation Was Egregious.

The Government has declined to address Mr. Jimenez-Domingo's arguments that the exclusionary rule applies to his case even if the Fourth Amendment violation was not egregious. The Government correctly notes that this issue of whether the exclusionary rule applies "has not garnered much discussion in this

[3] The Government cites to pre-*Arizona* case law to suggest that unlawful presence does constitute a crime. *See* Resp. Br. 24.

Court." (Resp. Br. 18). The Government cites only the unpublished decision *Rampasard v. U.S. Att'y Gen.*, 147 F. App'x 90 (11th Cir. 2005), which declined to expressly address whether the exclusionary rule would apply to immigration proceedings in cases of egregious violations. The Government does not cite another, more recent, unpublished decision from this Court that indicated that the exclusionary rule would apply in the case of an egregious constitutional violation. *See Ghysels-Reals v. U.S. Att'y Gen.*, 418 F. App'x 894, 895 (11th Cir. 2011) ("Moreover, evidence obtained illegally can be used in deportation proceedings, unless the violation was so 'egregious. . .that [it][ ] [transgress[es] notions of fundamental fairness and undermine[s] the probative value of the evidence obtained.'") (citing *Lopez-Mendoza*, 468 U.S. at 1050).

The Government does not respond to Mr. Jimenez-Domingo's arguments that *Lopez-Mendoza* compels the application of the exclusionary rule to this case *without* the need for a finding of egregiousness. As argued in Petitioner's principal brief and by *amicus curiae*, *Lopez-Mendoza* engaged in a multi-factor analysis to determine whether the benefits of the exclusionary rule outweigh the social costs. (Pet. Br. 24-32; Am. Br. 15-21). The factors examined by the Court were that 1) immigration proceedings are "purely civil" in nature; 2) immigration authorities could easily meet their burden of proof in immigration court and very few non-citizens in immigration proceedings actually challenged their deportations; 3)

internal administrative deterrence mechanisms existed; and 4) alternative civil remedies were available. *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038-45 (1984). Mr. Jimenez-Domingo has argued extensively that these factors weighed in favor of applying the exclusionary rule to his case. (Pet. Brief 27-32).

B. To Establish Egregiousness, Mr. Jimenez-Domingo Need Only Establish a Prima Facie Case Such That an Evidentiary Hearing is Warranted.

Even if a finding of egregiousness is necessary for the exclusionary rule to apply, Mr. Jimenez-Domingo only needs to establish a prima facie case that his seizure was egregious to warrant an evidentiary hearing. "[O]ne who raises the claim questioning the legality of the evidence must come forward with proof establishing a prima facie case before the Service will be called on to assume the burden of justifying the manner in which it obtained the evidence." *Matter of Barcenas*, 19 I. & N. Dec. 609, 611 (BIA 1988). Mr. Jimenez-Domingo has established a prima facie case such that the IJ must hold an evidentiary hearing.

Mr. Jimenez-Domingo has established a prima facie case that Gitto lacked any objective or articulable basis for believing there to be a civil immigration violation other than Mr. Jimenez-Domingo's ethnicity.[4] Mr. Jimenez-Domingo did not respond to Gitto's inquiries regarding his immigration status. (R. 177, ¶ 7; R. 182, ¶ 3). The only reason Gitto assumed Mr. Jimenez-Domingo was unlawfully

[4] The Government concedes that a race-based seizure would be an egregious constitutional violation. Resp. Br. 26.

present was because he was Hispanic and did not speak English. Most notably, Gitto did not believe that the driver Mr. Alonso, a U.S. born citizen who is also Hispanic, was in fact a citizen, despite Mr. Alonso's statements to that effect. (*Id.*; R. 182, ¶ 4). The fact that Gitto refused to believe that Mr. Alonso was a U.S. citizen and held him for 89 minutes in order to turn him over to CBP is evidence that Gitto prolonged the stop solely based upon the ethnicity of the vehicle's occupants. (R. 191-192).

The Government cites to *Whren v. United States*, 517 U.S. 806 (1966), for the proposition that an officer's subjective motive is irrelevant when his conduct conforms to objectively justifiable behavior. (Resp. Br. 27). The Court in *Whren* determined that an officer's "actual motivations" for a traffic stop are not part of the constitutional analysis under the Fourth Amendment if the stop is objectively reasonable. *Id.* at 813. However, *Whren's* holding regarding subjective motivation is inapposite here because Mr. Jimenez-Domingo only refers to Gitto's subjective motive to establish egregiousness. Gitto's prolonged detention of Mr. Jimenez-Domingo was not objectively justifiable. The Fourth Amendment violation was Gitto's unlawful detention of Mr. Jimenez-Domingo. A local police officer has no objectively reasonable basis to detain a person for a suspected civil immigration violation. The Government incorrectly characterizes the questioning of Mr. Jimenez-Domingo as the behavior at issue. (Resp. Br. 22, 27-28). As discussed

above, however, Mr. Jimenez-Domingo does not dispute Gitto's authority to inquire about immigration status, as such questioning is permitted under *Muehler v. Mena*, 544 U.S. 93 (2005). The Fourth Amendment violation was Gitto's unjustified prolonging of the traffic stop when he had no reasonable suspicion that a crime was being committed.

Having established the existence of a Fourth Amendment violation based solely on Gitto's objective conduct, Mr. Jimenez-Domingo is permitted to establish that the constitutional violation was egregious because of the officer's subjective motivations. *See Almeida-Amaral v. Gonzales*, 461 F.3d 231, 235 (2d Cir. 2006) ("even where the seizure is not especially severe, it may nevertheless qualify as an egregious violation if the stop was based on race (or some other grossly improper consideration)"); *Ghysels-Reals v. U.S. Att'y Gen.*, 418 F. App'x 894, 895-96 (11th Cir. 2011) ("abuse, force, [or] racial profiling" would make a Fourth Amendment violation egregious). The only reason that Gitto could have had for suspecting that Mr. Jimenez-Domingo was unlawfully present was his perceived ethnicity, a ground that is prohibited. Mr. Jimenez-Domingo has established a prima facie case of racial profiling that the Government has the burden of rebutting in an evidentiary hearing.

Furthermore, the detention was egregious because it was part of a widespread pattern of Fourth Amendment violations against noncitizens. *See*

Oliva-Ramos v. U.S. Att'y Gen., 694 F.3d 259, 280 (3d Cir. 2012) ("[W]e think that most constitutional violations that are part of a pattern of widespread violations of the Fourth Amendment would also satisfy the test for an egregious violation, as discussed above."). In Palm Beach Gardens alone, traffic stop event reports show that there have been at least 21 instances in which local police have unlawfully detained alleged noncitizens for the purpose of verifying their immigration status. (R. 538-82). Various reports from around the United States have documented widespread abuses by officers enforcing immigration laws. (*See* Pet. Br. 45-46). Mr. Jimenez-Domingo has presented a prima facie case that Gitto and CBP committed egregious constitutional violations that required the IJ to hold an evidentiary hearing.

III. The "Cooperation" Provision of 287(g) Did Not Permit Gitto To Hold Mr. Jimenez-Domingo While "Waiting For CBP to Arrive."

Both the IJ and the Government argue that Gitto's federal immigration enforcement activity was permitted by the law enforcement "cooperation" provision at 8 U.S.C. 1357(g)(10). (R. 401; Resp. Br. 38 fn 5). That provision reads as follows:

> (10) Nothing in this subsection shall be construed to require an agreement under this subsection in order for any officer or employee of a State or political subdivision of a State –

> (A) to communicate with the Attorney General regarding the immigration status of any individual, including reporting knowledge that a particular alien is not lawfully present in the United States; or
>
> (B) otherwise to cooperate with the Attorney General in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States.

The Government's reading is plainly incorrect. The U.S. Supreme Court has held that "no coherent understanding of the term [cooperation under 8 U.S.C. § 1357(g)(10)(B)] would incorporate the unilateral decision of state officers to arrest an alien for being removable absent any request, approval, or other instruction from the Federal Government." *Arizona v. United States*, 132 S.Ct. 2492, 2507 (2012). The Court listed circumstances that would be considered legitimate cooperation under federal law, including "situations where States participate in a joint task force with federal officers, provide operational support in executing a warrant, or allow federal immigration officials to gain access to detainees held in state facilities." *Id.*

The Government's reading of the statute suggests that there is permissible "cooperation" whenever a local officer takes action that he believes to be consistent with the enforcement of federal immigration laws. That is at odds with *Arizona*, which holds that, absent a formal agreement under § 1357(g), local officers have no authority to detain noncitizens suspected of civil immigration violations. Indeed, if 8 U.S.C. § 1357(g)(10) were read as expansively as the

government suggests, there would be no point to the formal agreements provided for under other provisions of § 1357(g) or for DHS to dedicate resources and funding to implementing that program.

The Government contends that *Arizona* is not relevant to Mr. Jimenez-Domingo's case because Mr. Jimenez-Domingo was simply detained for traffic purposes, not placed under arrest. (Resp. Br. 36) (drawing a distinction between a detention and an arrest). However, *Arizona* found that detaining or prolonging a detention to enforce immigration law is unlawful. *See* 132 S.Ct. at 2509 ("Detaining individuals solely to verify their immigration status would raise constitutional concerns. . . ."). The Supreme Court used the hypothetical of a police officer stopping an individual for a state offense, such as jaywalking. The Court stated: "unless the person continues to be suspected of some crime for which he may be detained by state officers, it would not be reasonable to prolong the stop for the immigration inquiry." *Id.*; *see also Brendlin v. Cal.*, 551 U.S. 249, 255-56, 263 (2007) (holding that a vehicle's passenger is considered "seized" under the Fourth Amendment for the duration of the roadside detention of a vehicle and its occupants).

IV. The Denial of Mr. Jimenez-Domingo's Right to Counsel After He Invoked It Established a Prima Facie Case of Coercion in Violation of the Fifth Amendment, Warranting An Evidentiary Hearing.

CBP officers violated the Due Process Clause of the Fifth Amendment when they refused to allow Mr. Jimenez-Domingo to speak with his lawyer despite his repeated requests to do so. (R. 178, ¶ 11). CBP's refusal established an inherently coercive environment, warranting an evidentiary hearing on whether the I-213 Record of Deportable Alien should be excluded. CBP told Mr. Jimenez-Domingo that he would lose if he tried to contest his deportation and that his only viable option was to agree to voluntary departure. The examining officer also told Mr. Jimenez-Domingo that his attorney would not be able to help him and that he did not believe that Mr. Jimenez-Domingo had an attorney because attorneys are very expensive. (R. 177-78, ¶¶ 10-14).

Coerced confessions are fundamentally unfair and must be excluded from evidence. *See Matter of Sandoval*, 17 I. & N. Dec. 70, 83 n.23 (BIA 1979) (recognizing the inadmissibility of involuntary or coerced statements in immigration proceedings); *Matter of Garcia*, 17 I. & N. Dec. 319, 321 (BIA 1980) (holding that individual had made a prima facie showing that his admissions were involuntary, where he admitted alienage after "his requests to contact his attorney were repeatedly rebuffed," and after INS officers had led him to believe that his deportation was inevitable and that he had no rights); *Navia-Duran v. INS*, 568

F.2d 803, 810 (1st Cir. 1977) (lack of information about rights was relevant to finding that noncitizen was coerced).

The Government appears to imply that Mr. Jimenez-Domingo's admissions were voluntary because had he "ample opportunity" to repeat his previous request for an attorney after he was advised of his right to do so. (Resp. Br. 34). The Government argues that Mr. Jimenez-Domingo's "failure to request an attorney after receiving the advisals when he was formally placed into removal proceedings is his own doing, and CBP is not obligated to continually ask whether Jimenez-Domingo would like to contact an attorney." (Resp. Br. 35-36). The Government's position that Mr. Jimenez-Domingo had a continuing obligation to re-request access to his attorney during the same custodial event is based upon facts not on the record and constitutes legal error. The I-213 Record of Deportable Alien contains boilerplate language that "subjects were served with . . . [an] I-826 Notification of Rights and List of Free Legal Service Providers." (R. 425). The record contains no evidence about any specific time at which CBP may have advised Mr. Jimenez-Domingo of his right to an attorney (R. 178-179; 423-425). The record likewise contains no evidence as to whether any advisal was made in Spanish or English, a key fact given that Mr. Jimenez-Domingo speaks only Spanish. (*Id*.). Additionally, while the IJ found that the "second CBP officer to speak with [Mr. Jimenez-Domingo] informed him that he had a right to fight his

case," (R. 399), he did not find that any CBP agent advised Mr. Jimenez-Domingo of his right to counsel at any point or allowed him to contact his lawyer, even after Mr. Jimenez-Domingo asked to do so.

Moreover, assuming *arguendo* that the timeline of advisals in the government's brief is accurate, it does not support a finding that CBP upheld Mr. Jimenez-Domingo's right to counsel. The government concedes that prior to being advised of any right to an attorney, Mr. Jimenez-Domingo had asked to speak with his attorney multiple times and that CBP expressly denied these requests. (R. 178-79). As Mr. Jimenez-Domingo stated in his declaration, when he "said that [he] wanted to speak with [his] lawyer," a CBP officer told him that "he did not believe [Mr. Jimenez-Domingo] had a lawyer because lawyers are too expensive." (R. 178). The denial of Mr. Jimenez-Domingo's right to counsel and CBP's insistence that he would lose his case if he chose to fight it created a coercive and hopeless environment for Mr. Jimenez-Domingo, rendering his admissions involuntary. Because the alleged advisal was made in this coercive setting, just following repeated denials of his requests to speak with his attorney, Mr. Jimenez Domingo had no reason to believe this advisal or to think that continuing to demand contact with his attorney would be fruitful. Because Mr. Jimenez-Domingo has presented a prima facie case that his admissions were coerced, he is entitled to an evidentiary hearing on his suppression motion.

V. Mr. Jimenez-Domingo Has Established a Violation of His Regulatory Right to Counsel, Requiring Termination of the Proceedings.

With respect to Mr. Jimenez-Domingo's separately filed motion to terminate, the government improperly conflates Mr. Jimenez-Domingo's right to counsel with his right to *be advised* of his right to counsel. The two rights are distinct. 8 C.F.R. § 287.3(c) states that "an alien arrested without warrant and placed in formal proceedings. . .will be advised of the reasons for his or her arrest and the right to be represented at no expense to the Government." The Government argues that Mr. Jimenez-Domingo's right to counsel did not attach until the filing of his Notice to Appear in immigration court. (R. 32-33); *citing Samayoa-Martinez v. Holder*, 558 F.3d 897, 901 (9th Cir. 2009) ("Formal proceedings do not commence until the [DHS] has flawschlawiled an NTA in immigration court."). *Samayoa-Martinez*, however, dealt only with *advisals* of the right to counsel and does not apply to the right to counsel established by other regulations and statutes.

Immigration regulations state that during any immigration examination "the person involved shall have the right to be represented by an attorney or representative. . . ." 8 C.F.R. § 292.5(b). Additionally, the Administrative Procedures Act states, "A person compelled to appear in person before an agency or representative thereof is entitled to be accompanied, represented, and advised by counsel or, if permitted by the agency, by other qualified representative." 5 U.S.C.

§555(b). Mr. Jimenez-Domingo was compelled to appear before CBP officers from the moment he was placed under warrantless arrest. This right to legal representation is distinct from the right to be *advised* of one's right to representation. Mr. Jimenez-Domingo was therefore entitled to counsel in any "examination" provided for under Chapter I of Title 8, *see* 8 CFR § 292.5(b), including post-arrest examinations by immigration authorities. *See, e.g.,* 8 CFR § 287.3(a). The right to counsel attaches immediately when an alleged noncitizen is placed under warrantless arrest by immigration authorities.[5] The Government incorrectly states that Mr. Jimenez-Domingo's right to counsel "did not attach until he was placed into formal removal proceedings" because it improperly conflates the right to advisals under 8 C.F.R. § 287.3 with the right to counsel under 8 C.F.R. § 292.5. (Resp. Br. 32). While the CBP officers may not have been required to notify Mr. Jimenez-Domingo of this right to counsel until the issuance of the NTA, they were required to allow Mr. Jimenez-Domingo to confer with counsel when he affirmatively and repeatedly requested to speak with his attorney. (R. 178, ¶ 11).

When immigration officials violate a regulation designed to benefit a noncitizen facing deportation proceedings and the noncitizen is prejudiced, proceedings must be terminated. *Matter of Garcia-Flores*, 17 I. & N. Dec. 325,

[5] The former INS handbook advised officers that "interrogation must be suspended until such desire [to consult with counsel] have been satisfied." INS Examinations Handbook (1988) at I-76.

328-29 (BIA 1980). Prejudice is presumed when the regulation implicates a constitutional right, such as the Fifth Amendment right to counsel. Because CBP violated regulations that implicated Mr. Jimenez-Domingo's right to counsel under the Fifth Amendment, the IJ was required to terminate the proceedings against him.

CONCLUSION

For the foregoing reasons, and those in Petitioner's principal brief, Mr. Jimenez-Domingo respectfully requests that this Court find that the IJ and BIA erred in denying Mr. Jimenez-Domingo's Motion to Suppress and Motion to Terminate without holding an evidentiary hearing and remand this case to the BIA for further proceedings.

Respectfully submitted,*

/s Rebecca Sharpless

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CERIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in FRAP 32(a)(7)(B)(ii). This brief contains 4,786 words.

s/ Rebecca Sharpless
REBECCA SHARPLESS

Attorney for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Petitioner's Reply Brief in *Jimenez-Domingo v. Holder*, Case No. 12-14048-D, with the Clerk of Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system on February 7, 2012.

s/ Rebecca Sharpless
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