

NON-DETAINED

Veronica Barba
Lucas & Barba, LLP
453 S. Spring Street, Suite 630
Los Angeles, CA 90013
Telephone: 213.802.0633
Facsimile: 213.802.0636

Eva Bitran
Michael Kaufman
ACLU Foundation of Southern California
1313 W. 8th Street
Los Angeles, CA 90017
Telephone: 909.380.7505
Facsimile: 213.977.5299

Attorneys for Respondent
Edgar SOLANO

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE IMMIGRATION JUDGE
LOS ANGELES, CALIFORNIA

In the Matter of:

Edgar SOLANO,

Respondent,

In Removal Proceedings.

No. [REDACTED]
Hearing date: July 30, 2018
Hearing time: 9:00 A.M.
Before: Hon. Judge Gita Vahid-Tehrani
Courtroom: 3

MOTION TO TERMINATE PROCEEDINGS

Introduction

Respondent Edgar Solano, by and through counsel, hereby moves to terminate these proceedings because Customs and Border Protection (CBP) officials arrested him in violation of controlling regulations and the United States Constitution.

On January 11, 2018, two CBP officers detained Mr. Solano as he prepared to board a Greyhound bus in Indio, California. Knowing nothing about him other than his name and the fact that he appeared to be of Latino ethnicity, the CBP officers asked Mr. Solano to step out of the line to board the bus, handcuffed Mr. Solano, and permitted the bus to leave the station. Although the CBP agents had no reasonable suspicion to believe Mr. Solano was a noncitizen subject to removal, they nonetheless detained him—in clear violation of regulations, statute, and the Fourth Amendment. The integrity of the administrative and judicial process requires that proceedings arising out of these regulatory violations be terminated. *See Sanchez v. Sessions*, 870 F.3d 901, 910 (9th Cir. 2017); *Gonzalez-Rivera v. I.N.S.*, 22 F.3d 1441, 1448 (9th Cir. 1994).

Statement of Facts

Mr. Solano is a resident of Los Angeles, where he works as a property manager and a handyman. Decl. of Respondent Edgar Solano, Exh. A at ¶ 2. He has developed a network of clients across southern California, and at times travels within the region to provide services at his clients' residences. *See* Exh. A at ¶ 2. On January 11, 2018 Mr. Solano agreed to help a client at a property in Indio. *See* Exh. A at ¶ 3. Because his car was out of order, Mr. Solano took a Greyhound bus from Los Angeles to Indio, and then an Uber to the jobsite. Exh. A at ¶¶ 3, 9; Photograph of Respondent Edgar Solano's Bus Ticket, Exh. B.

When he finished work in the evening, Mr. Solano returned to the Greyhound station. Exh. A at ¶ 3. He intended to take the 9:25 p.m. bus back to Los Angeles—the last bus of the day—but the bus was delayed. Exh. A at ¶ 4. He waited at the station. *See* Exh. A at ¶¶ 3, 4.

Over an hour after the bus's scheduled departure time, as Mr. Solano stood in line to finally board, two men in plain clothing approached him and asked him to state his name and where he lives. Exh. A at ¶¶ 4,5. Mr. Solano gave his name and answered that he lives in Los Angeles. Exh. A at ¶ 5. Next, the men asked Mr. Solano to step out of the line and show his identification. Exh. A at ¶ 5. As the line was advancing and this was his last opportunity to board a bus home for the evening, Mr. Solano replied that he would rather not. Exh. A at ¶ 5. He attempted to show the men his ticket, which was on his cell phone, and insisted that he needed to board. Exh. A at ¶ 5.

One of the men—who appeared to be Latino—ordered Mr. Solano to step out of the line. Exh. A at ¶ 6. He then took Mr. Solano by the upper arm and steered him away from the bus toward an unmarked pickup truck in the parking lot. Exh. A at ¶ 6. Mr. Solano felt he had no choice but to walk with the man who had ordered him to step aside and taken him by the arm. Exh. A at ¶ 6. As Mr. Solano and the men walked away from the bus toward the pickup truck, one of the men indicated to the bus driver that he could drive away—and indeed, as soon as the bus finished boarding, it left the station. Exh. A at ¶ 6.

When Mr. Solano and the two men reached the pickup truck, one of the men instructed him to turn around and handcuffed him. Exh. A at ¶ 6. Once Mr. Solano was cuffed, the men told him that they are immigration enforcement agents and showed badges reading “Customs and Border Protection.” Exh. A at ¶ 7.

After he was handcuffed, the officers asked Mr. Solano questions. Exh. A at ¶ 8. They asked again for his identification, and he said he had none with him because he had left his license in his car in Los Angeles. Exh. A at ¶ 8. They asked for his country of origin, and he said he is from Mexico. Exh. A at ¶ 8. They asked if he has papers authorizing his presence in the United States, and he said he did not. Exh. A at ¶ 8. They asked about his travel that day, and Mr. Solano answered how he got from Los Angeles to the jobsite and back to the station. Exh. A at ¶ 9. One of the officers indicated he did not believe Mr. Solano: he told him not to lie, and to admit that he had just recently crossed the border. Exh. A at ¶ 9. Mr. Solano insisted this was not true, and reiterated that he could prove he had a ticket if he could show the officers his telephone. Exh. A at ¶ 9; *see also* Exh. B. The officers asked him how he paid for the ticket, and Mr. Solano replied that he had used his credit card. Exh. A at ¶ 9.

Next, the Latino officer turned to the other and made a comment about Mr. Solano's shoes looking suspicious. Exh. A at ¶ 10. Mr. Solano was surprised: although one of his shoes was untied, he did not find anything suspect about his attire. Exh. A at ¶ 10. He had simply changed from his work clothing back into his street clothing to make the trip home. Exh. A at ¶ 10.

The officers asked Mr. Solano several more questions about his background, including how long he had been in the United States, his marital status, whether he has children, and whether he has a criminal history. Exh. A at ¶ 11. Mr. Solano answered these questions truthfully. Exh. A at ¶ 11. The officers then asked why Mr. Solano did not run into the station when he saw the men approach. Exh. A at ¶ 12. Mr. Solano replied that he wanted to make sure he could take the last bus home, and further, that he had no reason to fear the two men. Exh. A at ¶ 12.

Finally, the men made a few calls on their radios and ordered Mr. Solano to board the pickup truck. Exh. A at ¶ 13. They told Mr. Solano he was under arrest for being in the United States without authorization. Exh. A ¶13. They drove Mr. Solano to a nearby Customs and Border Protection station, where he spent the night. Exh. A at ¶ 13. The following morning, agents from Immigration and Customs Enforcement took custody of Mr. Solano and drove him to the San Bernardino field station, and from there to the Adelanto Detention Facility. Exh. A at ¶ 15.

Mr. Solano spent more than two months in detention, separated from his partner and his two step-daughters. Exh. A at ¶ 16. Because Mr. Solano is the principal provider for his family, they experienced hardship while he was away: they fell behind on car and insurance payments and lost their vehicle, and Mr. Solano feared they would go hungry and lose basic utilities for failure to pay the bills. Exh. A at ¶ 17.

On March 19, 2018 Mr. Solano had a bond hearing and was granted a \$5,000 bond. After raising funds from his friends, family, and employers, Mr. Solano paid the bond and was released, subject to ankle monitoring, on March 30, 2018. Exh. A at ¶ 16.

Summary of Argument

Mr. Solano respectfully moves for termination of these proceedings. CBP officers violated governing regulations by detaining Mr. Solano without individualized reasonable suspicion to believe he was a noncitizen subject to removal from the United States. *See* 8 C.F.R. § 287.8(b). These regulations, which govern investigative detentions and arrests, are designed to implement the protections of the Fourth Amendment to the U.S. Constitution and to safeguard the rights of people like Mr. Solano. *See id.*; U.S. Const. amend. IV; *Sanchez v. Sessions*, 870 F.3d 901, 910 (9th Cir. 2017). Because these removal proceedings result from CBP agents'

violation of governing regulations, this Court should grant Mr. Solano’s motion to terminate. *See Matter of Garcia-Flores*, 17 I. & N. Dec. 325, 328 (BIA 1980).

Argument

I. This Court Should Terminate These Proceedings Because CBP’s Detention of Mr. Solano Was Unlawful

Mr. Solano requests that the Court terminate these removal proceedings because CBP arrested him in violation of governing regulations, statute, and the Fourth Amendment to the Constitution. In particular, CBP fields agent stopped and detained Mr. Solano without reasonable suspicion that he was a noncitizen subject to removal, in violation of 8 C.F.R. § 287.8(b)(1), (2). When the agents asked Mr. Solano to step out of the line to board the Greyhound bus and put him in handcuffs—after Mr. Solano protested that he did not want to, as he would miss his last opportunity to get home for the evening—they knew only his name and that he was of apparent Latino ethnicity. The stop was plainly unlawful. Longstanding Ninth Circuit and Supreme Court precedent holds that, to effectuate a lawful seizure, agents must have reasonable suspicion based on specific, articulable facts to believe that an individual is subject to removal—and critically, this suspicion cannot be based on that person’s ethnicity.

Because CBP agents disregarded regulatory provisions designed to safeguard Mr. Solano’s constitutional rights, this Court should terminate these proceedings. *See Sanchez*, 870 F.3d at 912–13.

A. Relevant Legal Standards

An immigration court must terminate removal proceedings when the government violates its own immigration regulation if (1) the regulation serves “a purpose of benefit to [the noncitizen]” and (2) the violation prejudiced the noncitizen’s protected “interests in such a way

as to affect potentially the outcome of the[] deportation proceeding.” *Garcia–Flores*, 17 I. & N. at 328; *accord Sanchez*, 870 F.3d at 912.

The Ninth Circuit has held that the regulations at issue in this case—8 C.F.R. § 287.8(b)(1), (2)—were designed to benefit noncitizens by protecting their right to privacy and preventing them from being subject to racial profiling and unjust detention. *Sanchez*, 870 F.3d at 912–13. The regulations enforce statutory and constitutional constraints on agents’ authority to carry out detentions and arrests. 8 C.F.R. § 287.8 sets out the rules that “*must* be adhered to by every immigration officer involved in enforcement activities.” *Id.* (emphasis added). These regulations implement INA § 287(a)(2), which enumerates the powers of immigration officers and incorporates constitutional standards. See *Tejeda-Mata v. Immigration & Naturalization Serv.*, 626 F.2d 721, 725 (9th Cir. 1980). CBP officials may only detain an individual for questioning if they have “reasonable suspicion, based on specific articulable facts, that the person being questioned” is a noncitizen without authorization to be in the United States. 8 C.F.R. § 287.8(b)(1), (2). Therefore, 8 C.F.R. § 287.8(b) serves “a purpose of benefit” to Mr. Solano: the regulation protects his rights under statute and under the Fourth Amendment.

“Where compliance with the regulation is mandated by the Constitution, prejudice may be presumed.” *Garcia–Flores*, 17 I. & N. at 329. This presumption of prejudice for certain regulatory violations is rooted in a long line of Supreme Court cases invalidating agency action when the agency violates a regulation promulgated to protect a fundamental right. *See, e.g., Bridges v. Wixon*, 326 U.S. 135, 152–53, 65 S. Ct. 1443, 89 L. Ed. 2103 (1945) (invalidating a deportation order based on statements obtained in violation of the INS’s rules designed “to afford [the noncitizen] due process of law”); *see also Leslie v. Attorney General of the U.S.*, 611 F.3d 171, 180 (3d Cir. 2010) (collecting cases and holding “when an agency promulgates a regulation

protecting fundamental statutory or constitutional rights of parties appearing before it, the agency must comply with that regulation. Failure to comply will merit invalidation of the challenged agency action without regard to whether the alleged violation has substantially prejudiced the complaining party.”). As noted, 8 C.F.R. § 287.8 creates an “entire procedural framework” that was “designed to insure the fair processing of an action affecting an individual,” *Garcia–Flores*, 17 I. & N. at 328—here, by safeguarding that individual’s Fourth Amendment rights. *Sanchez*, 870 F.3d at 912–13. Therefore, CBP’s violation of these regulations “can be deemed prejudicial.” *See Garcia–Flores*, 17 I. & N. at 329.

B. CBP Detained Mr. Solano Without Reasonable Suspicion to Believe He Was a Noncitizen Subject to Removal

This Court should terminate Mr. Solano’s removal proceedings because CBP detained him in violation of 8 C.F.R. §§ 287.8(b)(1)–(2). As described above, the regulations governing enforcement operations make clear that CBP officials may only stop and detain an individual for questioning if they have “reasonable suspicion, based on specific articulable facts, that the person being questioned” is a noncitizen without authorization to be in the United States. 8 C.F.R. § 287.8(b)(1). Absent such suspicion, an official may only question an individual so long as that person knows that he or she is free to leave. *See Enhancing the Enforcement Authority of Immigration Officers*, 59 FR 42406, 42411, 59 FR 42406-01, 42411; *see also* 59 Fed. Reg. 42406, 42411 (Aug. 17, 1994) (“[Q]uestioning must not lead the person being questioned to believe that he or she is not free to leave the presence of the officer.”); *I.N.S. v. Delgado*, 466 U.S. 210 (1984). These regulations track and implement the protections of the Fourth Amendment, *see Sanchez*, 870 F.3d at 912–13, and therefore case law defining a reasonable seizure for constitutional purposes provides the appropriate standard. *See, e.g., United States v. Manzo–Jurado*, 457 F.3d 928, 939 (9th Cir. 2006) (finding Fourth Amendment violation in

immigration context because detention lacked “particularized suspicion of the person to be stopped”).

The Fourth Amendment, which safeguards against unreasonable searches and seizures, “applies to all seizures of the person, including seizures that involve only a brief detention short of traditional arrest.” *United States v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975); *see also Terry v. Ohio*, 392 U.S. 1 (1968). A law enforcement officer may only make an investigatory stop if he has “a reasonable suspicion supported by articulable facts” that the person detained has engaged in unlawful conduct. *United States v. Montero-Camargo*, 208 F.3d 1122, 1129 (9th Cir. 2000) (en banc) (quoting *United States v. Sokolow*, 490 U.S. 1, 7 (1989)). The reasonable suspicion analysis is “not readily, or even usefully, reduced to a neat set of legal rules.” *Id.* (quotation marks omitted). Rather, courts consider the totality of the circumstances to determine whether the officer was “aware of specific, articulable facts which, when considered with objective and reasonable inferences, form[ed] a basis for *particularized* suspicion.” *Id.* (emphasis in original).

A person’s race or ethnicity cannot provide reasonable suspicion to stop and detain them. “Hispanic-looking appearance and presence in an area where [noncitizens without status] frequently travel are not enough to justify a stop to interrogate the occupants of a vehicle. More is required.” *Nicacio v. U.S. I.N.S.*, 797 F.2d 700, 703 (9th Cir. 1985), *overruled in part on other grounds by Hodgers-Durgin v. de la Vina*, 199 F.3d 1037, 1045 (9th Cir.1999) (en banc); *see also Sanchez*, 870 F.3d at 910 (it is “clearly established” that “seizing a person solely based on ethnic appearance” is unlawful); *Manzo-Jurado*, 457 F.3d at 935 (individuals’ appearance as a Hispanic work crew, inability to speak English, proximity to the border, and unsuspecting behavior, taken together, did not provide a federal immigration officer reasonable suspicion to conduct a stop); *Orhorhaghe v. I.N.S.*, 38 F.3d 488, 494 (9th Cir. 1994) (“[A]llowing INS agents

to seize and interrogate an individual simply because of his foreign-sounding name *or* his foreign-looking appearance risks allowing race or national-origin to determine who will and who will not be investigated.”).

CBP detained Mr. Solano while he was waiting to board a Greyhound bus from Indio, where he had completed a job, back to his home in Los Angeles. Exh. A at ¶ 3. The CBP agents asked Mr. Solano to step out of line, despite his protestations that he wanted to board and would otherwise be unable to get home, seized him by the arm, walked him to a pickup truck, and placed him in handcuffs—without knowing anything about him but his name and that he appeared to be of Latino ethnicity. Exh. A at ¶¶ 5,6. Then, agents indicated to the bus driver that he could drive away. Exh. A at ¶ 6.

Mr. Solano did not feel free to leave, nor was he. The officers’ actions, words, and demeanor “communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business.” *Orhorhaghe*, 38 F.3d at 494 (relevant factors include whether a person’s path is blocked and whether officers act in an authoritative manner); *cf. Manzo–Jurado*, 457 F.3d at 934 n.3 (order requiring subject to “show hands” constituted detention). The fact that officers handcuffed Mr. Solano alone establishes that he was detained. *United States v. Juvenile (RRA-A)*, 229 F.3d 737, 743 (9th Cir. 2000) (“[H]andcuffing was the clearest indication that [juvenile] was no longer free to leave and therefore [found] to be the point of arrest.”); *United States v. Bravo*, 295 F.3d 1002 (9th Cir. 2002) (handcuffed individual was detained). In addition, the officers made clear that Mr. Solano was not “free to leave” by demanding that he step out of line, taking him by the arm and escorting him to their vehicle, and permitting the bus to depart. Exh. A at ¶ 6; *See United States v. Mendenhall*, 446 U.S. 544, 554 (1980) (“Examples of circumstances that might indicate a seizure, even where the person did not

attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, *some physical touching of the person of the citizen*, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled.” (emphasis added)).

The CBP agents who detained Mr. Solano knew nothing about him other than his name and his apparent ethnicity. It was only after he was seized and handcuffed that agents asked Mr. Solano questions that might have given rise to reasonable suspicion that he was in the country without authorization. Mr. Solano had no prior contact with immigration authorities, and the officers had no other information from which reasonable suspicion might arise. Indeed, when Mr. Solano asked why he had been singled out, agents told him it was because of his shoes, rather than because agents had any information about him in particular. Exh. A at ¶ 10. This was insufficient to provide reasonable suspicion that Mr. Solano was a noncitizen subject to removal, 8 C.F.R. § 287.8(b)(1). CBP’s conduct was contrary to governing regulations, statute, and the Fourth Amendment.

Because these regulations serve to protect individuals like Mr. Solano and are part of a regulatory scheme designed to implement constitutional requirements, *see Sanchez*, 870 F.3d at 912–13, the CBP agent’s violation is presumptively prejudicial. *Garcia–Flores*, 17 I. & N. at 329. Even if Mr. Solano were required to show prejudice, he could do so easily: he would not have spoken with the CBP officer had he not been seized. This Court should terminate Mr. Solano’s removal proceedings on the basis of these violations.

II. Relief Requested

Mr. Solano respectfully requests that the Court terminate these proceedings because CBP violated governing regulations in the course of his detention and arrest.

Dated: 7/17/18

Respectfully submitted,



Veronica Barba
Michael Kaufman
Eva Bitran
Attorneys for Mr. Solano