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DETAINED

UNITED STATES DEPARTMENT OF JUSTICE

EXECUTIVE OFFICE FOR IMMIGRATION REVIEW

BOARD OF IMMIGRATION APPEALS

In the Matter of:	)	FILE NO. Axxx xxxx xxx
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XXXXX XXXXX XXXXX	)	
	)	
	)	
IN REMOVAL PROCEEDINGS.	)	
	)	

RESPONDENT'S BRIEF IN SUPPORT OF APPEAL AND MOTION TO REMAND

I.

STATEMENT OF FACTS & PROCEDURAL HISTORY

The facts of Respondent XxxxxXxxxx Xxxxx's entry into the United States are not in dispute.[1] Respondent, a Cuban national, applied for admission in El Paso, Texas, on or around June 1st, 2019. Tr. at 7:6-11. On July 24, 2019, he was found removable as charged. Tr. at 7:12-14. At the same hearing, Respondent stated that he feared returning to Cuba. Tr. at 7:17-20. He applied for asylum, withholding of removal, and relief under the Convention Against Torture. Tr. at 8:8-12. Respondent believes he has been persecuted for his political opinion. Tr. 43:20-44:2.

Starting in 2017, Respondent has had "problems" with the police due to his daughter's birthday falling on the anniversary of the death of Fidel Castro. Tr. at 51:2-6, 51:14-23. On November 25, 2018, Respondent was celebrating his daughter's birthday at his home when the President of the CDR[2] appeared and accused him of celebrating Fidel Castro's death. Tr. at 50:21-24. Next, the Police and DTI[3] arrived and arrested him. Tr. at 50:21-51:1. Respondent was detained for 24 hours. Tr. at 50:25. He was "beaten, tortured, and psychologically damaged." Tr. at 50-51. As a result of this incident, he suffers depression. Tr. at 51:1. Respondent was injured, but was denied medical treatment. Tr. at 52:5-9. When pressed by the DHS attorney, Ms. Watkins, as to the motive behind his detention and beating, Respondent stated that "I manifested[4] myself against the government." Tr. at 50:21-24, 51:21-23.

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[1] No Notice to Appear issued to Respondent was ever obtained by Respondent's counsel, therefore Respondent respectfully reserves the right to challenge any facts inconsistent with the record.

[2] "CDR" refers to "Comités de Defensa de la Revolución," which translates to "Committees for the Defense of the Revolution."

[3] DTI refers to "Departamento Técnico de Investigaciones" which translates to "Technical Department of Investigation."

[4] The interpreter's translation to "manifested" is likely a mistranslation of the Spanish word "manifesté," which also means "demonstrated."

Respondent was also summoned by the police on February 24, 2019 for his failure to vote in the 2019 Referendum. Tr. at 53:8-22. Respondent stated that he "disagree[d]" with the vote. Tr. 53:15-17.

Respondent also has had problems at his work on a chicken farm. Tr. 52:2-4. Furthermore, he has been subject to police mistreatment at his home, Tr. at 52:3-4, and he fears that he and his family will be subject to "reprisals" from the Cuban government, Tr. at 47:2-6.

At the hearing on his application for asylum, Respondent requested more time to gather evidence. Tr. at 44:5-7. His request was denied, Tr. at 44:8-10, and upon conclusion of the hearing, the Immigration Judge summarily denied Respondent's application for asylum and request for withholding of removal without consideration of whether Respondent's testimony was credible or further development of the record. The Immigration Judge's decision was given orally and in writing. Tr. at 56:8-24.

II.

ISSUES PRESENTED FOR REVIEW

(1) Whether Respondent's Due Process rights were violated by the Immigration Judge's failure to adequately explain the proceedings to Respondent and failure to fully develop the record on issues critical to Respondent's application for asylum.

(2) Whether the Immigration Judge erred in denying Respondent's application for asylum under 8 U.S.C. § 1158 on the grounds that Respondent had not experienced past persecution on account of his political beliefs despite his detention, beating, and harassment by government authorities in response to his opposition to the Cuban regime.

(3) Whether the Immigration Judge additionally erred in finding, based on assumptions contradicted by the record, including Respondent's testimony of repeated acts of politically motivated persecution against him and a high probability of future persecution, that Respondent

did not have a "well-founded fear of persecution" upon his return to Cuba.

(4) Whether the Board should remand for further proceedings before the Immigration Judge on the grounds that relevant evidence is newly available.

III.

STANDARD OF REVIEW

The Board reviews Immigration Judge's findings of fact, including those relating to credibility, to determine whether they are "clearly erroneous." 8 C.F.R. § 1003.1(d)(3)(i) (2010). All other questions of law, discretion, and judgment, including the question whether the parties have met the relevant burden of proof, are reviewed de novo, including the Immigration Judge's determination that Respondent had not suffered past persecution for political opinion and did not have a well-founded fear of future persecution pursuant to 8 U.S.C. 1158 et seq. *Id*. *See also Matter of Z-Z-O-*, 26 I. & N. Dec. 586, 586 (BIA 2015).

Additionally, Respondent here seeks a remand due to the availability of new evidence. Title 8, subsection 1003.1(d)(3)(iv) of the Code of Federal Regulations provides that "[i]f further factfinding is needed in a particular case, the Board may remand the proceeding to the Immigration Judge or, as appropriate, to the Service." Furthermore, pursuant to BIA Practice Manual, Chapter 4.8(b) (Sept. 23, 2019), new evidence submitted with an appeal brief may be deemed a Motion to Remand under BIA Practice Manual, Chapter 5.8 (Sept. 23, 2019).

IV.

SUMMARY OF ARGUMENT

Respondent is the victim of severe and repeated mistreatment, both physical and mental, at the hands of a repressive Cuban regime. However, despite testifying to his harassment, detention, and beating by Cuban police, the Immigration Judge found that Respondent's suffering was due to a "misunderstanding" about the celebration of Respondent's daughter's birthday, which

coincides with the date of Fidel Castro's death. Accordingly, the Immigration Judge erroneously found that Respondent had not suffered "past persecution" on the basis of political opinion and denied his application for asylum.

As a matter of law and Board policy, this matter should be remanded for further proceedings given the Immigration Judge's failure to advise Respondent of the nature of the proceedings and his right to present evidence before the Immigration Judge, including additional testimony, in violation of Respondent's Due Process rights. More specifically, the Immigration Judge failed to develop the record on numerous critical points of evidence, including Respondent's political opinions, prior harassment of him and his family by Cuban authorities, threats of future reprisals by authorities, and his persecution at his job, among other relevant evidence and testimony.

Additionally, even on the existing record, the Immigration Judge's decision is reversible and Respondent's application ought to be granted under applicable Board precedent. First, the Immigration Judge wrongly assumed, without evidence or further inquiry, that Respondent's mistreatment by police was the result of a misunderstanding. However, Respondent specifically testifies that he was punished for "manifest[ing]" himself against the government.

Second, the Immigration Judge failed to analyze the totality of the circumstances under the proper precedent, including the Board's decision in *Matter of O-Z- & I-Z-*, 22 I. & N. Dec. 23, 26 (BIA 1998), which holds that "past persecution" can be established over time and as a result of several otherwise isolated incidents. In particular, the Immigration Judge failed to consider that Respondent had also suffered persecution at work and that his family was only safe in "certain points" in Cuba.

Third, the Immigration Judge incorrectly assigned no weight to Respondent's testimony

concerning his refusal to vote in the referendum. In punishing him for his refusal to participate in a vote which he is opposed to, the Cuban authorities sought to force Respondent's participation in an activity abhorrent to his deeply held political views.

Accordingly, the Board should reverse the Immigration Judge's decision or remand for further proceedings and consideration of new evidence.

V.

ARGUMENT

A. THE BOARD SHOULD REMAND TO ALLOW THE PARTIES TO FULLY DEVELOP THE RECORD AND FOR CONSIDERATION OF SUBSTANTIAL NEW EVIDENCE

1. THE CONDUCT OF THE HEARING ON RESPONDENT'S APPLICATION FOR ASLYUM AND WITHHOLIDNG CAUSED SUBSTANTIAL PREJUDICE TO RESPONDENT IN VIOLATION OF HIS DUE PROCESS RIGHTS

(a) *The Immigration Judge Failed To Conduct A Full Hearing And Failed To Develop The Record As To Critical Facts*

The Immigration Judge violated Respondent's due process right by not conducting a full hearing and not fully developing the record. "One of the components of a full and fair hearing is that the Immigration Judge must adequately explain the hearing procedures to the alien, including what he must prove to establish his basis for relief." *Agyeman v. INS*, 296 F.3d 871, 877 (9th Cir. 2002). "In addition, when the alien appears *pro se*, it is the Immigration Judge's duty to 'fully develop the record.'" *Id*. (quoting *Jacinto v. I.N.S.*, 208 F.3d 725, 733–34 (9th Cir. 2000)).

> "Because aliens appearing *pro se* often lack the legal knowledge to navigate their way successfully through the morass of immigration law, and because their failure to do so successfully might result in their expulsion from this country, it is critical that the Immigration Judge 'scrupulously and conscientiously probe into, inquire of, and explore for all the relevant facts.'"

Id. (quoting *Jacinto*, 208 F.3d at 733); *see also Delgado v. Mukasey*, 508 F.3d 702, 706 (2d Cir. 2007) ("[T]he Immigration Judge has an affirmative obligation to help establish and develop the record . . . especially when, as here, an alien is unrepresented by counsel."); *Mendoza-Garcia v.*

Barr, 918 F.3d 498, 504 (6th Cir. 2019) (same); *Al Khouri v. Ashcroft*, 362 F.3d 461, 464–65 (8th Cir. 2004) (same).

Prominent among the duties of an Immigration Judge is to provide respondents with a "full and fair hearing." *Matter of M-A-M-*, 25 I & N Dec. 474, 482 (BIA 2011); INA § 240(b)(1) (requiring IJs to "administer oaths, receive evidence, and interrogate, examine and cross-examine the alien and any witnesses"); 8 CFR § 1003.10(b) (same and requiring IJs to take other actions that are "appropriate and necessary for the disposition of" an individual case); 8 CFR § 1240.10(a) (requiring IJs to, *inter alia*, advise noncitizens of certain rights in proceedings and explain factual allegations and charges in non-technical language). *See also J-F-F-*, 23 I & N Dec. 912, 922 (A.G. 2006); *Mekhoukh v. Ashcroft*, 358 F.3d 118, 129 n. 14 (1st Cir. 2004). The judge's duty in this regard includes advising respondents of the potentially dispositive issues at play in the case. *Campos-Sanchez v. INS*, 164 F.3d 448, 450 (9th Cir. 1999); *United States v. Copeland*, 376 F.3d 61, 71 (7th Cir. 2004) ("[O]ur removal system relies on IJs to explain the law accurately to *pro se* [noncitizens]. Otherwise, [they] would have no way of knowing what information was relevant to their cases and would be practically foreclosed from making a case against removal"); *Higgs v. Att'y Gen.*, 655 F.3d 333, 340 (3rd Cir. 2011) (noting that, "the immigration system must be accessible to individuals who have no detailed knowledge of the relevant statutory mechanisms and agency processes.") (quotation omitted).

i. The Immigration Judge Failed To Adequately Explain The Hearing Procedures

The Immigration Judge conducted Respondent's hearing in a manner that is almost identical to the unconstitutional hearing in *Jacinto*. First, the Immigration Judge "neither [ ] asked, or otherwise determined, whether [Respondent] understood the legal procedures." *Jacinto*, 208 F.3d at 728. "Second, the judge[] failed to explain adequately what [Respondent's] various roles

could be at the hearing[,]" such as explaining "that [Respondent] could both testify on h[is] own behalf and serve as an advocate by making arguments to the judge and explaining the evidence to him." *Id.* And third, while Respondent understood he would "be questioned by the judge and counsel for the government, [he] was not told that [he] could present h[is] own affirmative testimony in narrative form." *Id.*

In lieu of any adequate explanation, the Immigration Judge's entire explanation of the hearing procedures is found in four lines of text, just after Respondent was sworn in:

> Very well. With that, sir, you may begin your case. The burden is upon you to show that, upon your return to Cuba, that you would be singled out for persecution, or that your life or freedom would be threatened, either because of your race, religion, nationality, membership in a particular social group, or political opinion. Please tell me why.

Tr. at 43:21-25. This barebones and technical explanation of Respondent's burden falls far short of an Immigration Judge's duty to explain hearing procedures to a *pro se* applicant. Beyond telling Respondent the elements he needs to prove, the Immigration Judge was required to "apprise [Respondent] of reasonable means of proving them" and "suggest [ ] sources of evidence, which would have supported his application . . . ." *Agyeman*, 296 F.3d at 877 (finding unconstitutional the Immigration Judge's failure to explain adjustment of status hearing procedures to *pro se* applicant). This requirement is "especially critical when the alien is in the INS's custody" and therefore "depend[s] even more heavily on the Immigration Judge for assistance in identifying appropriate sources of evidence to support his claim." *Id.* at 884.

The Immigration Judge did not apprise Respondent of any "reasonable means" to establish his claim, nor suggest "sources of evidence." Instead, the record shows the *only* supposed opportunity the Immigration Judge allowed Respondent to offer affirmative evidence was by occasionally asking Respondent "Anything else?" or a similar variation. Tr. at 44:13-14, 46:20-22, 49:20-21, 49:24-25, 50:3-4, 50:7-8, 54:18-19. This is no opportunity at all. Respondent was a

pro se applicant in INS custody and without legal training. It was not reasonable for the Immigration Judge to expect Respondent to understand that the words "Anything else?" provided him an opportunity to explain all relevant evidence *and* to make his argument as an advocate. *See Jacinto*, 208 F.3d at 728 (applicant must be informed he can "serve as an advocate by making arguments to the judge and explaining the evidence to him"). And certainly the words "Anything else?" fail to explain what sources of evidence Respondent could use to support his application or advise him of potentially dispositive issues. *See id*; *Campos-Sanchez*, 164 F.3d at 450.

Respondent's responses to these open-ended questions illustrate his lack of understanding. Respondent offered only conclusory statements regarding his fears of persecution or responded simply with his desire to not be deported:

JUDGE TO MR. XXXXX

Do you have anything else for the Court, sir?

MR. XXXXX TO JUDGE

Yes, that I fear returning to my country.

JUDGE TO MR. XXXXX

Anything else?

MR. XXXXX TO JUDGE

That I fear reprisals against me and my family, and I cannot return to my country.

. . .

JUDGE TO MR. XXXXX

Do you have anything else for the Court, sir?

MR. XXXXX TO JUDGE

That I wish you would allow me to remain here and not send me back to Cuba.

Tr. at 49:24-50:6, 54:18-21. These responses do not indicate a lack of *evidence*, but rather a lack

of understanding of the procedures. Respondent had, and has, substantial evidence establishing his asylum claim – but he did not know he could offer it unless he was responding to specific questioning by the Immigration Judge or government's counsel. By asking these exceptionally open-ended questions, the Immigration Judge provided Respondent only an illusory opportunity to present evidence. He did not apprise Respondent of the *means* to establish his claim or tell Respondent what *sources* of evidence he should provide. *See Agyeman*, 296 F.3d at 877. He did not tell Respondent he could present evidence in narrative form or to present an argument on how his evidence established his burden of proof. *See Jacinto*, 208 F.3d at 728. Simply put, because the Immigration Judge did not explain the procedures, Respondent did not understand the process.

The transcript is replete with opportunities where the Immigration Judge was required to further explain hearing procedures to Respondent and explain Respondent's ability to present evidence and argument. For example, Respondent recounted incidents of persecution that occurred at his daughter's birthday party and while Xxxxx was at work. Tr. 50:15-52:4. The Immigration Judge should have, but did not, explain to Respondent that he had the right to present witness testimony to the Court, via telephone if needed. *See, e.g.*, 8 U.S.C. § 1229a(b)(4)(B) ("[T]he alien shall have a reasonable opportunity to examine the evidence against the alien, to present evidence on the alien's own behalf, and to cross-examine witnesses presented by the Government . . . ."); *see also* 8 C.F.R. § 1003.25(c); *Agyeman*, 296 F.3d at 877 (Immigration Judge should explain that witnesses can participate telephonically). If Respondent knew a witness could testify telephonically, he could have arranged for his wife, daughter, and/or colleagues to testify on his behalf and corroborate these accounts. Instead, the Immigration Judge listened to this testimony, reasonably should have known corroborative witness testimony would be an important source of evidence, but never told Respondent his right to offer such testimony.

The Immigration Judge failed at another opportunity to adequately explain the hearing procedures after he accepted into evidence the written application. Identical to the Immigration Judge's error in *Al Khouri*, the Immigration Judge here "informed [Respondent] that his application was in evidence and would be considered. Without counsel and without further instruction from the Immigration Judge, [Respondent] did not have reason to believe that his testimony need be as detailed as his application." *See Al Khouri*, 362 F.3d at 465. The Immigration Judge should have instructed Respondent to give detailed accounts of his claims of persecution, notwithstanding the fact his application was in evidence.

As a result of the Immigration Judge's failure to explain the hearing procedures, "[Respondent] did not understand h[is] rights in the hearing." *Jacinto*, 208 F.3d at 728. Critically, Respondent did not know he was able to offer testimony in narrative form and offer argument as his own advocate. Instead, Respondent believed he could only answer the questions asked of him – and nothing more. The Immigration Judge's failure substantially prejudiced Respondent and violated his due process.

(b) *The Immigration Judge Failed To Fully Develop The Record*

The Immigration Judge also violated Respondent's due process by failing to fully develop the record. An Immigration Judge fails to develop the record, in violation of the applicant's due process, where the Immigration Judge conducts only "a cursory examination" and gives the applicant "a limited opportunity to present her own affirmative testimony" without "explain[ing] that she could testify further, clarify or add to her answers, or offer additional evidence to substantiate her claim." *See Naw v. Gonzalez*, 138 Fed. Appx. 991, 992 (9th Cir. 2005) (citing *Jacinto*, 208 F.3d at 733–34). All these elements are present here.

First, the Immigration Judge's questioning of Respondent was clearly "cursory." The Immigration Judge's questioning addressed only three topics: (1) whether Respondent had ever

been in jail; (2) what kind of work Respondent did in Cuba and the city where he lived; and (3) whether he had a wife and kids and whether they were "okay." Tr. 44:17-46:19. Far from "'scrupulously and conscientiously prob[ing] into, inquir[ing] of, and explor[ing] for all the relevant facts,'" *Jacinto*, 208 F.3d at 733, these questions barely scratched the surface of Respondent's asylum claim, which includes evidence of Respondent's political opinions, prior harassment of Respondent and his family by Cuban authorities, threats of future reprisals by authorities, and Respondent's persecution at his job.

The Immigration Judge had several opportunities to explore further evidence or give Respondent a chance to "testify further, clarify or add to h[is] answers, or offer additional evidence to substantiate h[is] claim." *See Naw*, 138 Fed. Appx. at 992 He failed to do so. For example, the Immigration Judge elicited testimony that Respondent had been detained in Cuba for twenty-four hours. Tr. 45:1-8. Though the Immigration Judge stopped there, government's counsel did elicit further facts about the detention:

> I was celebrating the birthday of my daughter, and then the president of the CDR showed up and accused me of celebrating Fidel Castro's death. I then manifested myself against the government. Then the police arrived, along with the DTI. I was detained. They locked me up for 24 hours. I was beaten, tortured, psychologically damaged. I suffer depression.

Tr. 50:22-51:1. Respondent also testified that he was refused medical treatment. Tr. 52:5-9. Neither the Immigration Judge nor government's counsel probed further.[5] This was a critical opportunity for the Immigration Judge to develop the record. The Immigration Judge could have asked, as examples, what statements by the police or DTI established their actions were politically

[5] Government's counsel did inquire whether Xxxxx sought medical treatment after being beaten and tortured. Xxxxx answered no because his cousin was a doctor and was waiting for him upon his release. Tr. 52:10-15. As discussed in Section V.A.1.a.i, *supra*, the Immigration Judge should have informed Xxxxx of the right to present corroborating testimony from his cousin or other witnesses.

motivated; whether they threatened further persecution if Respondent continued anti-government activities; whether Respondent could offer additional evidence to corroborate his account, such as testimony from his wife or other attendees at the party. But the Immigration Judge failed to probe, inquire, or explore this critical testimony. As a result, the Immigration Judge did not give Respondent a chance to develop the record with additional evidence.

Respondent then testified to *at least three further incidents* with police: (1) in 2017, again on his daughter's birthday; (2) an unspecified incident "at work"; and (3) on February 24, 2019, when he was summoned for refusing to vote.[6] Tr. at 51:5-52:4, 53:8-22. The Immigration Judge failed to probe into any of these incidents to determine if the Cuban government's actions were politically motivated and if Respondent could offer corroborative evidence.

Yet another of the Immigration Judge's failure to develop the record occurred after he asked whether Respondent's wife and children were "okay" in Cuba, and Respondent responded: "Within certain points." Tr. 46:4-19. The implication of this answer is that his wife and children are *not* okay in Cuba unless they remain in certain safe areas. The Immigration Judge did not ask Respondent what he meant by this answer nor explain that Respondent had an opportunity to clarify. Just a few lines later, Respondent told the Immigration Judge that he feared for his family and that "they make take reprisals against them." Tr. at 47:2-6. Yet still the Immigration Judge failed to ask *who* would make reprisals against Respondent's family and *why* such reprisals would be made – such as, for example, whether Respondent's and his family's political beliefs would motivate these reprisals. Certainly, persecution of Respondent's family members – based on either

[6] Xxxxx also mentions that "the police has mistreated me at my home and has persecuted me." Tr. at 52:2-4. It is not clear from context whether Xxxxx is discussing an incident separate from the police arriving, twice, at his daughter's birthday party. These types of undetailed answers illustrate a *pro se* applicant's inability to develop the record on his or her own, necessitating the Immigration Judge to probe further in order to afford due process.

Respondent's political opinion or their own – is relevant evidence to establish Respondent's asylum claim. *See, e.g.*, *Cham v. Attorney Gen. of U.S.*, 445 F.3d 683, 693 (3d Cir. 2006) (finding due process violation where Immigration Judge refused to consider evidence of the persecution of family members).

Further, after the Immigration Judge asked Respondent the open-ended questions "Anything else?", the Immigration Judge should have "conscientiously probed" into Respondent's undetailed answers. Respondent's answers, again, were as follows: "*I fear returning to my country*"; "*I fear reprisals against me and my family, and I cannot return to my country*"; "*I wish you would allow me to remain here and not send me back to Cuba*." Tr. at 49:24-50:6, 54:18-21. The Immigration Judge left all these answers unexplored and failed to give Respondent an opportunity to clarify.

The Immigration Judge's failure to develop the record, as demonstrated above, substantially prejudiced Respondent. Indeed, based on the sparse record, the Immigration Judge concluded that Respondent had no "real problems" with Cuban authorities and wouldn't upon his return to Cuba. I.J. at 5. But these conclusions would have been easily rebutted had the Immigration Judge probed further. This is not a Herculean task – the Immigration Judge is not required to obsessively pour over each minute detail. But when Xxxxx testified to: (1) *torture* at the hands of the government; (2) at least three further incidents of police persecution; (3) the fact that his wife and children were *not* safe beyond "certain points" in Cuba; and (4) that he feared reprisal upon returning to Cuba – any reasonable Immigration Judge would probe further. Indeed, not doing so was not only unreasonable, but substantially prejudiced Xxxxx in failing to afford him the constitutional protection of due process.

2. THE BOARD SHOULD REMAND SO THE IMMIGRATION JUDGE CAN CONSIDER RELEVANT NEW EVIDENCE CONCERNING RESPONDENT'S HISTORY OF THREATS BY CUBAN AUTHORITIES AGAINST RESPONDENT AND HIS FAMILY

Respondent submits herewith some of the evidence recently acquired by his *pro bono* counsel which counsel believes was not presented to the Immigration Judge by no fault of Respondent.[7] *See* Respondent's Appendix Of Exhibits And Declarations In Support Of Appeal And Remand Brief (filed concurrently herewith) (hereinafter "Appendix").[8] As the record shows, Respondent, appearing without representation by counsel at all proceedings below and while he was in detention, was not made aware of the need to present evidence of his political opinions, prior harassment of him and his family by Cuban authorities, threats of future reprisals by authorities, and his persecution at his job, among other relevant evidence and testimony.

These documents show that Respondent was repeatedly cited by the Cuban government in the past, which is evidence of Respondent's anti-Castro beliefs and opposition to the Cuban regime, see Appendix, Ex. 6-10, and that the police are aware of his political views and have threatened to send Respondent to prison upon his return, see Appendix, Ex. 1-3. The Board is thus urged for this reason as well to remand the case to the Immigration Judge for further proceedings.

B. THE IMMIGRATION JUDGE FAILED TO PROPERLY APPLY THE BOARD'S PRECEDENT BY DECLINING TO FIND PAST PERSECUTION FOR RESPONDENT'S POLITICAL OPINION AND A WELL-GROUNDED FEAR OF FUTURE PERSECUTION BY THE COMMUNIST REGIME IN CUBA

Contrary to the ruling below, Respondent's testimony to his persecution at the hands of Cuban authorities and, separately, his objectively reasonable fear of additional torture were he to return establishes, as a matter of law, his eligibility for asylum as a "refugee" under section 208(b)

[7] Respondent's counsel does not possess a full record of the proceedings below and could not obtain one before the deadline to file this brief.

[8] Respondent's counsel obtained the vast majority of these new documents, many of which were handwritten in Spanish and very difficult to read, on January 23, 2020, just 8 days before the deadline to file this brief. Some translations were completed in time to be filed with this brief, but others are still pending translations. Respondent's counsel will supplement its appendix with additional translations within one week of this filing.

of the Immigration and Nationality Act ("the INA"), 8 U.S.C. 1158 et seq.

The INA provides that a refugee "is a person who is outside of his or her country and is unable or unwilling to return 'because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.'" *Sharma v. Holder*, 729 F.3d 407, 411–12 (5th Cir. 2013) (citing 8 U.S.C. § 1101(a)(42)(A) and 8 C.F.R. § 1208.13(b)). Although Respondent has "the burden of proving that he is a refugee and that one of these five protected grounds 'was or will be at least one central reason for persecuting' him. 8 U.S.C. § 1158(b)(1)(B)(i) . . . [his testimony] may be sufficient to sustain his burden if it is credible, is persuasive, and refers to sufficient specific facts to demonstrate he is a refugee." *Sharma*, 729 F.3d at 411–12. Respondent's testimony did just that, as an examination of the record and proper application of the Board's precedent reveals.

1. THE IMMIGRATION JUDGE FAILED TO APPLY APPLICABLE PRECEDENT IN ANALYZING WHETHER RESPONDENT HAD SUFFERED PAST PERSECUTION

The Immigration Judge's decision to dismiss Respondent's repeated "problems" and "misunderstanding" with Cuban authorities, I.J. at 5, to borrow the Immigration Judge's conspicuously understated terms, as not "aris[ing] to the level of persecution" is not supported by the law or record. I.J. at 4. While the term "persecution" under the INA is by no means well-defined, *Eduard v. Ashcroft*, 379 F.3d 182, 187 and fn. 4 (5th Cir. 2004), the story of Respondent's life in Cuba is demonstrably one of political persecution under even the narrowest reading of the relevant decisions of the Board and federal Circuit Courts.

First, "even a single beating can constitute persecution, assuming that the beating results in significant physical injury." *Voci v. Gonzales*, 409 F.3d 607, 615–16 (3d Cir. 2005) (citing *Asani v. INS*, 154 F.3d 719, 722–23 (7th Cir.1998) (respondent suffered past persecution where he was detained by police, beaten, and had two of his teeth knocked out) and *Vaduva v. INS*, 131 F.3d 689, 690 (7th Cir.1997) (single beating in which petitioner's face was bruised and his finger broken constituted past persecution)). By contrast, "general harassment does not rise to the level of a serious punishment or harm that would justify a grant of asylum." *Eduard*, 379 F.3d at 188 (finding

substantial evidence for denial of asylum where respondents "were [not] interrogated, detained, arrested, or convicted" in their home country).

Second, the "harm or suffering need not be physical, but may take other forms, such as the deliberate imposition of severe economic disadvantage or the deprivation of liberty, food, housing, employment or other essentials of life." *Abdel-Masieh v. U.S. I.N.S.*, 73 F.3d 579, 583–84 (5th Cir. 1996) (citing *Matter of Laipenieks*, 18 I & N Dec. 433, 456–457 (BIA 1983), rev'd on other grounds, 750 F.2d 1427 (9th Cir.1985)). Furthermore, "the concept of persecution is broad enough to include governmental measures that compel an individual to engage in conduct that is not physically painful or harmful but is abhorrent to that individual's deepest beliefs." *See Fatin v. I.N.S.*, 12 F.3d 1233, 1242 (3d Cir. 1993) ("assum[ing] for the sake of argument that requiring some women to wear chadors may be so abhorrent to them that it would be tantamount to persecution").

Finally, "[i]n determining whether an alien has suffered past persecution, the IJ [and the BIA] must consider the cumulative effects of the incidents." *Delgado v. U.S. Att'y Gen.,* 487 F.3d 855, 861 (11th Cir.2007). In *Matter of O-Z- & I-Z-*, 22 I. & N. Dec. 23, 26 (BIA 1998), in which the respondent was found to have experienced a break-in and his son to have suffered beatings, one requiring medical treatment, harassment, and humiliation at school, the Board found that "[i]n the aggregate, [the incidents] rise to the level of persecution as contemplated by the Act [INA]."

Here, the Immigration Judge failed to analyze Respondent's testimony under *any* standard and found that Respondent had not faced past persecution without citation to any authority, let alone the mandatory authority set out in *Matter of O-Z- & I-Z-*. I.J. at 3-4. Had the Immigration Judge done so, given the severity of Respondent's mistreatment, it would have reached the opposite conclusion.

2. RESPONDENT'S TORTUROUS TREATMENT AT THE HANDS OF THE CUBAN GOVERNMENT IS SUFFICIENT TO ESTABLISH PAST PERSECUTION UNDER THE BOARD'S PRECEDENTS

Respondent credibly testified to *three* separate types of persecution by the Cuban authorities, only *two* of which were considered by the Immigration Judge. I.J. at 4. Taken together,

as required by *Matter of O-Z- & I-Z-*, and applying the appropriate legal authorities, the Board has ample evidence in the record to reverse the Immigration Judge's decision.

First, Respondent testified to his arrest by Cuban police and physical assault in captivity. Specifically, Respondent testified that he was "beaten, tortured, [and] psychologically damaged." Tr. at 50:25-51:1. Additionally, Respondent was denied necessary medical treatment. Tr. at 52:5-9. If nothing else, the Immigration Judge clearly errs in finding that "there is no evidence of any injuries or problems from [Respondent's detention]," I.J. at 2. Respondent's testimony, which was not disputed, is just such evidence.

Furthermore, after describing two specific encounters with the Cuban police, Respondent states that "the police has mistreated me at my home", Tr. at 52:-4[9], and that he "fear[s] reprisals" against himself and his family, Tr. at 47:3-6, 50:5-6. Like the detained and abused petitioner in *Asani*, 154 F.3d at 723, Respondent's injury and abuse at the hands of the Cuban police offends any rational view of how prisoners should be treated.

Second, Respondent described how he was summoned by police for his failure to vote in the 2019 Referendum. Tr. at 53:15-18. In so doing, the Cuban authorities continued their pattern of requiring Respondent to demonstrate his fealty to a regime he abhors. Such coercion is no less a form of persecution than being refused schooling, see, e.g., *Matter of Chen*, 20 I. & N. Dec. 16, 20 (BIA 1989) and *In Re S-A-*, 22 I. & N. Dec. 1328, 1329 (BIA 2000), or being singled out for military service, see *Canas-Segovia v. I.N.S.*, 970 F.2d 599, 601 (9th Cir. 1992) (discussing "possibility" that petitioners conscription against his will was "persecution based on a political opinion").

Third, when asked about his "problems" with the Government, Respondent testified that he also has "had problems at work," Tr. at 52:2-4. Unfortunately, the Immigration Judge did not inquire further, but the court nevertheless should have inferred from this testimony that the Cuban authorities had targeted Respondent's employment and livelihood as well.

[9] It is unclear from the record whether Petitioner is alluding to the same two incidents already described or additional harassment by the Cuban police.

Analyzed separately, Respondent's traumatizing experience in Cuba makes clear the error in the Immigration Judge's finding that Respondent hadn't suffered past persecution. Looked at as a whole, the record leaves little doubt that he had.

3. RESPONDENT WAS PERSECUTED FOR HIS REFUSAL TO SUPPORT CUBA'S REGIME AND HIS REFUSAL TO FORGO HIS DAUGHTER'S BIRTHDAY CELEBRATIONS ON A DAY COMMEMORATING THE DEATH OF FIDEL CASTRO

Because the Immigration Judge found that Respondent had not been persecuted for any reason, it only reached the question of whether Respondent was persecuted on account of political opinion, answering in the negative, when analyzing whether Respondent had a well-grounded fear of future persecution. I.J. at 5. As the record can only be read to infer political motivations by Respondent's persecutors in the Cuban government, this too is reversible error.

It is well-established that so long as one motive for persecutory conduct is one of the statutorily enumerated grounds, the requirements of 8 U.S.C. § 1158 have been satisfied. *Matter of Fuentes*, 19 I&N Dec. 658, 662 (BIA 1988). "It is recognized that some cases involve possible mixed motives for inflicting harm; therefore, an asylum applicant is not obliged to show conclusively why persecution has occurred or may occur." *Matter of E-P-*, 21 I&N Dec. 860, 861 (BIA 1997).

Furthermore, persecution for "'imputed' grounds (e.g., where one is erroneously thought to hold particular political opinions or mistakenly believed to be a member of a religious sect) can satisfy the 'refugee' definition." *In Re S-P-*, 21 I. & N. Dec. 486, 489 (BIA 1996).

At his hearing, Respondent offered two specific examples of politically motivated persecution, yet the Immigration Judge dismissed both in his analysis. I.J. at 5. First, the Immigration Judge explains away, without any factual or logical basis for doing so, Respondent's detention and beating by police as a "misunderstanding of thinking that [Respondent] was celebrating the death of Fidel Castro." To so conclude, the Immigration Judge must make two assumptions: (1) that Respondent's celebration of his daughter's birthday on that day was not perceived by the Cuban authorities as politically motivated and (2) that the event wasn't a pretext

for Cuban authorities to persecute Respondent for his existing political opinions. Neither assumption is supported by the record.

In fact, Respondent testifies, when describing the birthday incident, that "president of the CDR showed up and accused me of celebrating Fidel Castro's death. I then manifested myself against the government," TR at 50:22-24, which can only mean either that Respondent intended to protest or that the police believed him to have protested against the government, both of which evidence a clear political motivation. The Immigration Judge makes no effort to reconcile its finding with this undisputed testimony.

Finally, as mentioned above, the Immigration Judge does not even consider whether Respondent's "problems at work" were also motivated by an intent to persecute Respondent for his political views.

4. THE IMMIGRATION JUDGE MISAPPLIED THE BOARD'S TESTS FOR ANALYZING HIS WELL-FOUNDED FEAR OF PERSECUTION AND ELIGIBILITY FOR WITHHOLDING UNDER THE CONVENTION AGAINST TORTURE

Contrary to the Immigration Judge's decision, the facts establish that Respondent met his burden to demonstrate past persecution on the basis of a political opinion. Having cleared that threshold, the burden shifted "to the DHS to establish by a preponderance of the evidence either that there has been 'a fundamental change in circumstances such that the applicant no longer has a well-founded fear of persecution in [his or her] country of nationality,' or that the applicant could avoid future persecution 'by relocating to another part of [his or her] country of nationality …, and under all the circumstances, it would be reasonable to expect the applicant to do so.'" *Matter of D-I-M-*, 24 I. & N. Dec. 448, 450 (BIA 2008) (citing 8 C.F.R. § 1208.13).

Here, as DHS made no attempt to rebut the presumption of eligibility, the Immigration Judge should thereafter have found Respondent to have a well-founded fear of persecution pursuant to 8 C.F.R. § 1208.13. As the Immigration Judge did not, the Board should reverse its decision on those grounds alone. Similarly, DHS made no effort to rebut Respondent's evidence of the probability of torture if returned to Cuba, particularly the past torture of Respondent by the

Cuban authorities, which established his eligibility for withholding of removal pursuant to 8 C.F.R. § 208.16(c)(2).[10]

As additional grounds for reversal, the Immigration Judge also misapplied *Matter of Mogharrabi*, specifically the first, fourth, and fifth factors set out therein, in holding that past persecution aside, Respondent failed to show that he had a well-founded fear of persecution upon his return to Cuba. I.J. at 5.

As to the first and fifth factors relating to whether the applicant possesses a "belief or characteristic a persecutor seeks to overcome" and whether future persecution would be motivated by political opinion, for the reasons stated above, the Immigration Judge mischaracterized Respondent's detention and torture by Cuban authorities as a "misunderstanding" unrelated to Respondent's political views. I.J. at 5. The record reflects ample evidence that in fact, Respondent's persecutors were motivated by his political views.

As to the fourth factor, the Immigration Judge again assumes, contrary to the repeated mistreatment of Respondent in Cuba, that Respondent's persecutors would not have "any inclination to cause harm to the respondent upon his return to Cuba." I.J. at 5. DHS, however, offers no evidence to counter the reasonable assumption that the Respondent's past and future persecutors, which the Immigration Judge concedes would be aware of Respondent's political opinions and capable of future punishment, would not suddenly be disinclined to future harassment and torture of Respondent and his family.

VI.

CONCLUSION

For the above reasons, Respondent requests that the Immigration Judge's decision be reversed and his application for asylum be granted or, in the alternative, that the Board remand this matter for further proceedings before the Immigration Judge.

[10] The Immigration Judge's failure to consider "all evidence relevant to the possibility of future torture" is additional grounds for remand. See *Matter of J-E-*, 23 I. & N. Dec. 291, 291 (BIA 2002).

Dated: January 30, 2020

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By: _____

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PROOF OF SERVICE

On January 30, 2020, I, Yyyy Yyyyy, served a copy of the foregoing RESPONDENT'S BRIEF IN SUPPORT OF APPEAL AND MOTION TO REMAND and any attached pages to the Office of the Chief Counsel at the following address:

DHS Office of the Chief Counsel
1010 E. Whatley Rd.
Oakdale, LA 71463

via regular mail of U.S. Postal Service.

_____
Yyyy Yyyyy

January 30, 2020
Date