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NON-DETAINED

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS

In the Matter of	)	
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	)	
VIDES CASANOVA, Carlos Eugenio	)	A042 241 058
	)	
	)	
In Removal Proceedings	)	

DEPARTMENT OF HOMELAND SECURITY'S
SUPPLEMENTAL BRIEF ON APPEAL

The Department of Homeland Security (Department) seeks to supplement its Response Brief on Appeal (Jan. 30, 2013) (Response Brief). As the Department set forth therein, the Board of Immigration Appeals (Board) should affirm the Immigration Judge's findings that the respondent is removable as charged as an alien who, outside the United States, has committed, ordered, incited, assisted, or otherwise participated in the commission of torture and extrajudicial killings. The Department offers this supplemental brief for the sole purpose of further addressing the applicable standard of review. *See* Response Brief at 33-34.

The Immigration Judge's "findings of fact, including credibility determinations, are reviewed under the clearly erroneous standard." *Id.* at 33 (citing *Matter of R-S-H-*, 23 I&N Dec. 629, 637 (BIA 2003)). The Supreme Court discussed the clear error standard at length in *Anderson v. City of Bessemer City,* 470 U.S. 564, 575 (1985). "[A] trial court's choice between 'two permissible views of the evidence' is the very essence of the clear error standard of review." *United States v. Rodriguez De Varon,* 175 F.3d 930, 945 (11th Cir.1999) (en banc) (quoting *Anderson,* 470 U.S. at 574). *Accord I.L. v. Alabama*, --- F.3d ---, 2014 WL 92230 (11th Cir. Jan. 10, 2014). This standard governs both "[a] trial court's decision to credit the plausible testimony of one witness over another, 'each of whom has told a coherent and facially plausible story that is not contradicted by extrinsic evidence,'" *Hatt 65, LLC v. Kreitzberg,* 658 F.3d 1243, 1250 (11th Cir. 2011) (quoting *Anderson,* 470 U.S. at 575), as well as "when the [trial] court's findings do not rest on credibility determinations, but are based instead on physical or documentary evidence or inferences from other facts." 470 U.S. at 574.

A reasonable inference drawn by a trial court will be upheld under the clear error standard, "even if cause to disagree also exists." *Bryant v. Rich*, 530 F.3d 1368, 1378-379 (11th Cir. 2008) (citing *Anderson*). "Drawing inferences from direct and circumstantial evidence is a

routine and necessary task of any factfinder, and in the immigration context, the IJ is the factfinder." *Matter of D-R-*, 25 I&N Dec. 445, 454 (BIA 2011) (internal punctuation omitted).

The foregoing principles have specifically been applied in the contexts of assistance of persecution and assistance in extrajudicial killings. *United States v. Demjanjuk*, 367 F.3d 623, 629 (6th Cir. 2004) (quoting *Anderson,* 470 U.S. at 574) *cert. denied*, 543 U.S. 970; *Matter of D-R-*, 25 I&N Dec. at 453 (finding "[t]he Immigration Judge made reasonable inferences from the totality of the record" and "find[ing] no clear error" therein). Additionally, the Eleventh Circuit recently discussed the clear error standard in the immigration context. *Zhou Hua Zhu v. U.S. Atty. Gen.*, 703 F.3d 1303, 1310 (11th Cir. 2013). The court held that "predictions about the likelihood of future events" must be treated "as factual findings to be reviewed for clear error." *Id.* Accordingly, where the Immigration Judge in the instant case made findings about the likely effects of the respondent's actions and conduct, those findings must also be reviewed under the clear error standard.

Respectfully submitted this 17th day of January, 2014.

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CERTIFICATE OF SERVICE

On January 17, 2014, I sent via first class mail a complete copy of this document to the respondent's attorney at the following address:

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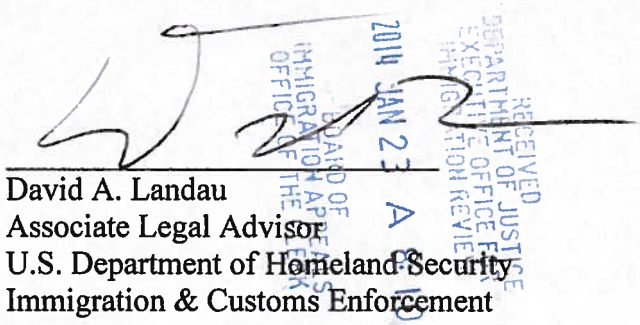
DEPARTMENT OF HOMELAND SECURITY'S
STATEMENT OF ADDITIONAL LEGAL AUTHORITIES

Pursuant to Chapter 8.7(d)(vi) of the Board of Immigration Appeals (Board) Practice Manual, the Department of Homeland Security (Department) brings the following additional authorities to the Board's attention:

1. *Perry v. New Hampshire*, 132 S. Ct. 716 (2012). This decision discusses the admissibility of eyewitness testimony in a criminal trial.
2. *U.S. v. Whatley*, 719 F.3d 1206, 1216-17 (11th Cir. 2013). This decision discusses, inter alia, the admissibility of eyewitness testimony in a criminal trial.
3. *United States v. Alabama Power Co.*, 730 F.3d 1278, 1282 (11th Cir. 2013). This decision discusses, inter alia, challenges to expert testimony.
4. *Doe v. Gonzales*, 484 F.3d 445 (7th Cir. 2007).

Whatley and *Alabama Power Co.* post-date the briefing to the Board in the instant proceedings. The Supreme Court's decision to hear *Perry* was described in the respondent's Post-Hearing Brief (Sept. 19, 2011) at pp. 10-11.

Respectfully submitted this 17th day of January, 2014.



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